



ISSN 2713-0525

eISSN 2713-0533

KUTAFIN LAW REVIEW

Volume 12 Issue 3 2025

Issue topics

NEW FIELDS OF LEGAL REGULATION

**MODERN TRENDS IN REGULATING
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ISSN 2713-0525 eISSN 2713-0533

Publication Frequency	4 issues per year
Registered	Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Media Certificate PI No. FS 77-80833, dated 7 April 2021. Published since 2014
Website	https://kulawr.msal.ru/
Editorial Office contacts	kulawr@msal.ru + 7 (499) 244-88-88 (# 555, # 654)
Publisher contacts	Kutafin Moscow State Law University (MSAL) 9 Sadovaya-Kudrinskaya St., Moscow 125993, Russian Federation https://msal.ru/en/ msal@msal.ru + 7 (499) 244-88-88
Printing House	Kutafin Moscow State Law University (MSAL) 9 Sadovaya-Kudrinskaya St., Moscow 125993, Russian Federation
Subscription	Free distribution

Signed for printing 29.09.2025. 319 pp. 170 × 240 mm. An edition of 150 copies

The opinions expressed in submissions do not necessarily reflect those of the Editorial Board.

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NEW FIELDS OF LEGAL REGULATION

Article



DOI: 10.17803/2713-0533.2025.3.33.463-492

Status of the Natural Resources of Celestial Bodies: Legal Positions of the USA and Luxembourg

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Abstract: The outer space legal acts adopted by the USA and by Luxembourg provide for the rights of natural and juridical persons to use natural resources of celestial bodies. These acts are considered in the context of applicable rules of international law with references to the relevant teachings. General scientific methods of cognition and methods of legal sciences are used. The USA and Luxembourg space legal acts in many aspects correspond to the applicable international law while in some do not. The two States have suggested a new legal approach to the future development of international outer space law that further exacerbates the interstate competition for a more favorable legal environment for private persons to invest in economic activities in outer space. The legal regime of such activities have long been regarded as regulated exclusively on the basis of five general multilateral treaties elaborated within the UN the core of which is the Outer Space Treaty of 1967. The situation has now changed with the separate legal regime of outer space activities promoted by the USA and Luxembourg.

Such a “parallel” legal regime while creating a favorable environment for investments by individuals and non-governmental entities in the development of the natural resources of celestial bodies, has at the same time negative legal consequences for the community of States as a whole: the USA and Luxembourg pursue a separate policy aimed at revising the universal international outer space law according to which the exploration and use of celestial bodies are the “province of all mankind”.

Keywords: international outer space law; natural resources of celestial bodies; commercial space activities; space mining; USA laws on space resources; Luxembourg laws on space resources; Artemis Accords

Acknowledgements: This research was supported by the Russian Science Foundation, grant number 23-18-00977 (<https://rscf.ru/project/23-18-00977/>).

Cite as: Vylegzhanin, A.N. and Krokhina, P.A., (2025). Status of the Natural Resources of Celestial Bodies: Legal Positions of the USA and Luxembourg. *Kutafin Law Review*, 12(3), pp. 463–492, doi: 10.17803/2713-0533.2025.3.33.463-492

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I. Introduction

Outer space is the largest object of modern international law (Vylegzhanin and Kolosov, 2012; Kolosov and Yuzbashyan, 2015). As early as in the mid-twentieth century, activities in outer space became also an object of national legislation in a number of States. France in 1959 adopted a decree establishing the Committee on Outer Space Research within the Prime Minister's Office; and French Law of 1961 established the National Center for Outer Space Research (Silvestrov, 1992b). The Swedish Outer Space Activities Act of 1982 stipulated that any outer space activities carried out from the territory of Sweden (except those carried out by Swedish governmental organizations) were subject to licensing (Silvestrov, 1992c). According to the British Outer Space Act of 1986, in order to obtain the right to operate in outer space, any juridical or natural person of the United Kingdom, of its "dependent" or "overseas" territories must obtain a license for such activities in the prescribed manner (Kamenetskaya, 1992a). In accordance with the 1988 Italian law establishing the outer space agency, five-year national plans for the development of the national outer space industry are developed, and the mechanism for financing outer space scientific research is determined (Silvestrov, 1992a).

The largest number of national legal acts regulating activities in outer space has been adopted in the USA; among them there are: the Communications Satellite Act of 1962 (Kamenetskaya, 1992b); the National Science and Technology Policy, Organization, and Priorities Act of 1976; the Commercial Space Launch Act of 1984 (Silvestrov, 1992e); the Florida Spaceport Administration Act of 1989 (Silvestrov, 1992e); the National Science and Technology Policy, Organization, and Priorities Act of 1976; the Commercial Space Launch Act of 1984 (Silvestrov, 1992e); the Florida Spaceport Administration Act of 1989 (Silvestrov, 1992d); the Commercial Space Launch Competition Act of 2015; the U.S. Executive Order Encouraging International Support for the Exploitation and Utilization of Space Resources of 2020 (Vylegzhanin et al., 2023).

The adoption by States of national legislative documents on space activities *per se* is not contrary to international law; indeed, it provides

for the necessity of such national regulation. According to Art. VI of the 1967 Outer Space Treaty,¹ the activities of “non-governmental entities in outer space” shall require “authorization and continuing supervision by the appropriate State Party”. The 1967 Outer Space Treaty thus provides for a general obligation of a Stateparty (which allows its persons to conduct outer space activities) to establish the relevant national legislation. Moreover, the appropriate national legislation on outer space activities is in the interest of natural and juridical persons of State, as they invest in space activities only when they see a favorable legal environment to benefit from such activities.²

That being said, the outer space legal acts of the USA of 2015 and 2020 and Luxembourg Law on the Exploration and Use of Space Resources of 2017 and Law on Space Activities of 2020 are to be characterized individually in the context of applicable international law. The reason for such individual legal analysis, as will be shown further, is that the USA started to create from 2015 the legal basis parallel to the UN-created outer space treaties and contradictory to them in some aspects. Luxembourg by its national law of 2017 was the first State in the world which has supported the USA separatist outer space legal policy.

In this light this paper focuses after the introduction, firstly, on the USA legal policy regarding the natural resources of celestial bodies. Next section addresses the Artemis Accords reflecting the U.S. supported by Luxembourg. The following sections are devoted to the analysis of Luxembourg Outer Space Laws of 2017 and 2020. In the final section the legal positions of the USA and Luxembourg are compared. Afterwards the authors concluding remarks are suggested.

¹ This is the main source of international space law. Its full name is as follows: The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Available at: https://www.un.org/ru/documents/decl_conv/conventions/outer_space_governing.shtml [Accessed 05.05.2024].

² The issue of commercialization of space activities has been discussed for many years in the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space.

II. The USA Legal Position on the Natural Resources of Celestial Bodies

The discussion and adoption in 2015 of the USA Commercial Space Launch Competition Act demonstrated that long-term investments in natural resource activities on celestial bodies are recognized by the U.S. legislator as promising benefits. The USA has promptly reacted at the legislative level to the relevant scientific data: about the share of platinum group metals in some asteroids, which is about a thousand times higher than the density of their occurrence in the Earth's interior; about such a sought-after substance as "helium-3", which can be found in large quantities on the Moon, etc. (Vylegzhanin and Yuzbashyan, 2024, p. 148). Taking advantage of the fact that the 1967 Outer Space Treaty³ does not provide for special norms on the procedure for the use of natural resources of celestial bodies, the USA has individually established such a procedure — for the entities under the U.S. law. The legal literature in the Russian language has already described the U.S. legislation on natural resources of celestial bodies, including the U.S. Space Resources Exploration and Use Act of 2015, in the context of the history of the U.S. national regulation of space activities (Yuzbashyan, 2017; Vylegzhanin and Yuzbashyan, 2024). This U.S. legislation for the first time in the world provided national legal opportunities for the U.S. companies to invest in the extraction of natural substances from the surface and interior of celestial bodies, despite the fact that the use of celestial bodies is qualified by the 1967 Outer Space Treaty as the "province of all mankind" (Art. 1), and in accordance with the 1979 Moon Agreement, celestial bodies and their natural resources are "the common heritage of mankind" (Art. 11, Para. 1). Thus the 2015 Act encourages commercial extraction of the natural resources of celestial bodies by the U.S. citizens, while substituting (with the new term "space resources") the term that was previously considered to be established in international space law — "the natural resources of celestial bodies". The term "space resources" is not used in the 1967 Outer Space Treaty nor in any other universal international treaty on space activities adopted

³ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies of 27 January 1967.

by the UN.⁴ Let us recall for what reasons the American legislator tried to replace with this term the concept of “natural resources of celestial bodies”, previously established in international space law. One of the five universal international treaties on space activities mentioned, the 1979 Agreement on the Moon and Other Celestial Bodies, clearly distinguishes between two concepts, namely between “natural resources” of celestial bodies *in situ* (in place) and “mineral and other substances” collected on celestial bodies. The 1979 Agreement prohibits national appropriation of the former, while the latter is allowed to be extracted from celestial bodies, albeit only “in the course of scientific research”. The legislators of the USA (2015 Act) and Luxembourg (2017 Act) replace both the first and the second term with a new one — “space resources”; thus, the USA and Luxembourg establish national procedures for commercial exploitation of natural resources of celestial bodies (though changing their names) contrary to the prohibition of such exploitation under the 1979 Agreement. This is an additional preventive move of the USA and Luxembourg, aimed at not being accused of violating the norm of international space law. The 1979 Agreement, however, does not prohibit *expressis verbis* the exploitation of the natural resources of celestial bodies, but it makes such exploitation conditional on the establishment of an internationally agreed regime. The main arguments put forward by both the USA and Luxembourg is that both these States are not parties to the 1979 Agreement. However, even in the sense of the 1967 Treaty the use of natural resources of celestial bodies constitutes “the province of all mankind” (Vylegzhanin and Yuzbashyan, 2021).

According to the 2015 USA Act, the U.S. persons are entitled to exploit natural resources of celestial bodies and own the resources thus extracted. At the same time the USA Act provides, that “the United

⁴ Within the framework of the United Nations, in addition to the 1967 Outer Space Treaty, a number of other treaties were developed and adopted: Agreement on the Rescue of Astronauts, Return of Astronauts and Return of Objects Launched into Outer Space, 1968; Convention on International Liability for Damage Caused by Space Objects, 1972; Convention on Registration of Objects Launched into Outer Space, 1975; Agreement on Activities of States on the Moon and Other Celestial Bodies, 1979. On these international treaties see: Kolosov, Y.M. and Yuzbashyan, M.R. International Space Law. In: Vylegzhanin, A.N., (ed.) (2016). *International Law: textbook for the academic Bachelor degree*. In 2 vol. V. 2, pp. 91–107.

States does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body". The provisions of the 2015 USA Act were further clarified in the U.S. Executive Order 2020.⁵

According to this U.S. legal document, the international legal regime of exploitation of "space resources" is not defined in the 1967 Outer Space Treaty. As for the Agreement of 1979⁶ where such a regime is generally defined, the legal position of the USA is that this Agreement, to which the U.S. is not a Party, does not reflect customary international law. The 2020 U.S. Act instructs the State Secretary to provide international support of the new U.S. legal policy in outer space. Such a "support" was organized primarily through the conclusion of the so-called Artemis Accords.

III. USA and Luxembourg as Parties to the Artemis Accords

The legal teachings cited above have given a detailed analysis of the Artemis Accords as an international treaty initiated by the U.S. in October 2020, which outlined a separate legal regime for the natural resource activities in outer space; the official U.S. position, however, is that the Artemis Accords are not an international treaty in the sense of the 1969 Vienna Convention on the Law of Treaties; they are only a high-level "political commitment".

Luxembourg was among the first seven States that signed the Artemis Agreement in October 2020 (in addition to the United States and Luxembourg, this separatist Seven included Australia, Canada, Italy, Japan, the UAE, and the United Kingdom). The gradual increase in the number of parties to these agreements changing the legal understanding at the level of states as to the acceptable legal basis for the use of the natural resources of celestial bodies: should they be strictly guided by

⁵ Executive Order on Encouraging International Support for the Recovery and Use of Space Resources. Available at: <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-encouraging-international-support-recovery-use-space-resources/> [Accessed 05.07.2023].

⁶ Agreement Governing the Activities of States on the Moon and other Celestial Bodies of 18 December 1979.

international space law or rather by a separate treaty created by the USA, Luxembourg, and other parties to the Artemis Agreements? By mid-2025, the number of such Parties already reached more than 50, with some additional Asian and Latin American countries, not just European ones, joining the list.⁷ This list of U.S.-chosen states is projected to increase. In the text of the Artemis Accords, firstly, the Parties emphasize “the importance of existing bilateral agreements on cooperation in outer space”; secondly, they confirm their intention to act in accordance with the 1967 Outer Space Treaty and other universal international treaties in the field of regulating activities in space (however, the 1979 Agreement is not mentioned).

On 13 October 2020, Luxembourg’s Minister of Economy Fayon signed the Artemis Accords on behalf of the Grand Duchy; despite the fact that there is a series of separate international rules aimed at regulating the use of the natural resources of the Moon, Mars, asteroids, and comets in a way that is not fully consistent with the text of the 1967 Outer Space Treaty and directly contradicts the 1979 Agreement (for more details see Vylegzhanin et al., 2023, pp. 6–30). According to the official statement by the Luxembourg Embassy in the United States on 14 October 2020, “the Artemis Agreements integrate very well with the strategy of the Grand Duchy” and Luxembourg is “proud to be one of its” founding members.⁸

IV. Is the Separatist Outer Space Policy of USA and Luxembourg Acquiesced?

In Europe it was Luxembourg that by its national legislation unequivocally supported the US legal policy aimed at allowing private companies and other persons to develop natural resources of celestial

⁷ The list of States that have signed the Artemis Agreements includes Angola, Argentina, Armenia, Australia, Bahrain, Belgium, Brazil, Bulgaria, Canada, Colombia, Czech Republic, Ecuador, France, Germany, Greece, Iceland, India, Israel, Italy, Japan, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Nigeria, Peru, Poland, Republic of Korea, Romania, Rwanda, Saudi Arabia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Arab Emirates, United Kingdom, United States, and Uruguay.

⁸ Luxembourg joins the Artemis Accords. Available at: <https://washington.mae.lu/en/actualites/2020/Artemis.html> [Accessed 05.05.2024].

bodies. Later in 2019, the United Arab Emirates (UAE) adopted the Law on the Regulation of the Space Sector. Its stated purpose is to promote the development of “commercial mining beyond the Earth”.⁹ In 2021, the Commercial Space Activities Act was enacted in Japan.¹⁰ In this regard, the scientific and legal literature notes that no States have protested the laws of the United States or Luxembourg on natural resource activities on celestial bodies. On the contrary, most comments on such laws (including those within the United Nations Committee on Outer Space) are generally positive (Vylegzhanin and Yuzbashyan, 2024).

Moreover, the innovativeness of the USA and the State of Luxembourg in creating space legislation has been praised by the European Space Agency (ESA),¹¹ in particular in the ESA Strategy for Environmental Activities in Space (until 2030). This document reaffirms the “proactive and pioneering approach” by these States.¹² It is therefore argued that the new Luxembourg law will make the country “a desirable HQ for space exploration and mining ‘and such favorable conditions are’ not available in most other States on the planet” (Mukunth, 2017). Another analyst notes, “This recent development makes Luxembourg the first European country to adopt a legal framework for private companies to extract resources from space” (Soo Yun, 2017).

However, not all States follow this legal policy of the United States and Luxembourg. Firstly, the Agreement between the Government of

⁹ United Arab Emirates Federal Law No. 12 of 2019 on the Regulation of the Space Sector. Available at: <https://www.moj.gov.ae/assets/2020/Federal%20Law%20No%2012%20of%202019%20on%20THE%20REGULATION%20OF%20THE%20SPACE%20SECTOR.pdf.aspx> [Accessed 05.05.2024].

¹⁰ Japan’s Act on Promotion of Business Activities Related to the Exploration and Development of Space Resources. Act No. 83 of 2021. Available at: <https://kanpou.npb.go.jp/old/20210623/20210623g00141/20210623g001410004f.html> [Accessed 05.05.2024].

¹¹ ESA is an intergovernmental space organization operating under the 1975 Convention establishing the European Space Agency. The Convention entered into force in 1980. ESA was created by the merger of two pre-existing international organizations of Western states: 1) the European Space Research Organization and 2) the European Space Launch Vehicle Development Organization.

¹² ESA’s Space Resources Strategy. 2019. Available at: <https://exploration.esa.int/web/moon/-/61369-esa-space-%20resources-strategy> [Accessed 05.05.2024].

the Russian Federation and the Government of the People's Republic of China on the Cooperation on the Construction of International Lunar Research Station was signed in November 2022. China and Russia while implementing this agreement continue to maintain national legislation in such a way that activities in outer space are carried out strictly within the framework of their international obligations. Secondly, since 2021, the issues related to the new outer space legal policy initiated by the USA and supported by Luxembourg have been the subject of discussion established under the Legal Subcommittee of the Outer Space Committee (Vylegzhanin et al., 2025, p. 23). Such discussions continue and nowadays it is difficult to predict whether the US/Luxembourg separatist outer space legal policy will be acquiesced or not. So, the analysis of the current laws of Luxembourg on outer space commercial activities is needed from the perspective of international law.

V. The First Luxembourg Outer Space Law

As noted of all the European Union Member States, it was Luxembourg that was the first to support the U.S. separate legal space policy reflected in the said U.S. Act of 2015. The analyst comments on Luxembourg's choice of a legislative approach similar to the U.S. one as follows: as early as "in February 2016, Luxembourg announced its intention to develop measures that will position this State as a European center for research and use of natural resources of celestial bodies".¹³ In 2017, Luxembourg adopted the Law on the Exploration and Utilization of Space Resources¹⁴ and in 2020 — the Law on Space Activities.¹⁵

¹³ Luxembourg to launch framework to support the future use of space resources. 2016. Available at: <http://www.gouvernement.lu/5653386/03-space-resources> [Accessed 05.05.2024]. See more on this topic: Leterre (2017).

¹⁴ Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace. Available at: <https://legilux.public.lu/eli/etat/leg/loi/2017/07/20/a674/jo> [Accessed 05.05.2024]. Since the official language of Luxembourg is French, in the official publication of legal acts of this State — *Journal officiel* — this law is presented only in French.

¹⁵ Loi du 15 décembre 2020 portant sur les activités spatiales et modifiant. Available at: <https://legilux.public.lu/eli/etat/leg/loi/2020/12/15/a1086/jo> [Accessed 05.05.2024].

The development of the 2017 Law and the political and legal background of its adoption are remarkable, as are the related statements of Luxembourg politicians. Luxembourg's Deputy Prime Minister E. Schneider stated in 2016, "Luxembourg is ready to invest in relevant Research and Development projects; the Luxembourg government is even considering direct investment in companies working in the field of environmental activities on celestial bodies".¹⁶ Another senior official distinguished between the Luxembourg law's regulation of the natural resources activities on celestial bodies and the issuance of "mining permits for asteroids, as the U.S. does".¹⁷ However, the Council of State and a group of Luxembourg citizens who are working with the Chamber of Deputies to develop space legislation, noted that "claims to private ownership of natural resources on celestial bodies are illegal, or at least unenforceable in most countries of the world".¹⁸ In response to this, E. Schneider explained that Luxembourg law "did not suggest to either establish or imply in any way sovereignty over a celestial body"; that the law allowed "only the appropriation" of natural resources of celestial bodies and that "we are all aware that there is no way to hold the private exploitation of natural resources of celestial bodies back".¹⁹

When considering the draft law for the first time, the Luxembourg Council of State did not find it acceptable for two reasons: 1) "there is no doubt that international law takes precedence over domestic law" and the former does not provide for a clear right to appropriate the natural resources of celestial bodies; and 2) the Council of State was of the opinion that such detailed regulation "would weaken the law".²⁰

At the end, despite all these doubts, the text of the Law was adopted (Leterre, 2017), although the Council of State noted that there remained "unanswered questions: such as the recognition by other States of

¹⁶ See about this: Mukunth (2017).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Conseil d'État. Projet de loi sur l'exploration et l'utilisation des ressources de l'espace. No. 51.587, p. 9 (7 Avril 2007) (Lux.) (hereinafter Opinion of the Conseil d'Etat).

property rights granted by Luxembourg law” over the natural resources of celestial bodies.²¹

The purpose of the 2017 Luxembourg Law on the Exploration and Use of Space Resources is broadly defined to create favorable conditions for the development of a commercial space industry in the country. The law establishes the rights and obligations of the entities involved in the use of natural resources of celestial bodies, providing private companies working in this field with legal certainty, primarily in terms of a favorable investment climate. Structurally, the 2017 Luxembourg Law can be divided into three conditional blocks: property rights to so-called space resources (meaning “natural substances” extracted from celestial bodies); licensing such extraction; state control over natural resource activities in outer space and other provisions.

V.1. Property Rights to Natural Substances Extracted from Celestial Bodies

As already noted, the 2017 Luxembourg Law adopts the American conceptual and terminological apparatus: it introduces the term “*les ressources de l’espace*”, which is a calque of the English language term “space resources” provided for in the American Law of 2015 described above.

The 2017 Luxembourg Law provided that “*les ressources de l’espace*” may be exploited by persons in accordance with the Law. The first article of the Law provides that such resources are “susceptible to appropriation” (“*sont susceptibles d’appropriation*”). Private entities under Luxembourg’s jurisdiction may obtain ownership of such resources, but they are required to obtain the official consent (“*agrément de mission*”) of the authorized public authorities, provided that such activities comply with the international obligations of Luxembourg (“*les obligations internationales du Luxembourg*”). In analyzing the 2017 Law, it is suggested that Luxembourg is more focused on attracting investment in the development of the natural resources of celestial bodies than on developing the technical aspects of national outer space activities; that “this becomes evident from Article 4, which determines

²¹ Opinion of the Conseil d’État. No. 189, p. 6.

that only commercial companies can obtain the said official consent of Luxembourg public authorities” (Leterre, 2017). Without this consent, such companies cannot obtain ownership of natural substances extracted from celestial bodies, and the very mechanism of obtaining “official consent” is reduced primarily to the company applying for and obtaining a license.

V.2. Licensing of Space Activities

The Law under consideration regulates in the most detail the issues related to the application by the interested companies for official consents (permits) and their issuance. According to the procedure of licensing space activities under Luxembourg 2017 Law, private companies intending to exploit the natural resources of celestial bodies must obtain the formal consent of the authorized Luxembourg public authorities. The 2017 Law establishes the procedure for a company to apply for such consent, defines the conditions for its execution, and prescribes obligations associated with the development of such resources.

The financial dimension of the legal mechanism of commercialization of space environmental activities is demonstrated by Art. 13, “For each application for approval, Ministers shall establish a fee to cover the administrative costs incurred in the examination of the application. This fee shall be calculated between 5,000 and 500,000 euros, depending on the complexity of the request and the amount of work involved. The manner in which it is to be charged shall be laid down in the regulation of the Grand Duchy of Luxembourg”.²² According to Art. 15 of the Law, the designated ministers must exercise permanent supervision over the space missions of companies for which formal consent has been obtained.²³

²² According to the French authentic text of the Law, “Pour chaque demande d’agrément, une redevance est fixée par les ministres pour couvrir les frais administratifs occasionnés par le traitement de la demande. This redemption varies between 5,000 and 500,000 euros suivant la complexité de la demande et le volume du travail. Un règlement grand-ducal détermine la procédure applicable à la perception de la redevance” (Art. 13).

²³ “Les ministres sont en charge de la surveillance continue des missions pour lesquelles un agrément a été accordé” (Art. 15).

V.3. Insurance of Private Space Activities and Other Significant Provisions of the Law

The 2017 Law provides for insurance of space activities of companies, as well as their liability for damages caused by such activities. According to Art. 10 of the Act, “(1) the application for formal consent must be accompanied by a mission risk assessment. It specifies the coverage of these risks by its own financial means, by an insurance policy of an insurance company not belonging to the same group as the approved operator, or by a guarantee of a credit institution not belonging to the same group as the approved operator; (2) formal consent shall be granted if there is a financial basis appropriate to the risks associated with the mission”.²⁴

According to Art. 16 of the Law, a company that has been given formal consent to conduct an environmental mission in space is fully liable for any damage caused during the mission, including all preparatory work.

If the provisions of the Law are violated by the company, Art. 18 provides penalties:

(1) if the provisions of Art. 2 are violated, the official “shall be punished by imprisonment from eight days to five years and a fine from 5,000 to 1,250,000 euros or only one of these penalties”;

(2) in case of violating the provisions of Art. 5, “imprisonment for a term of eight days to one year and a fine of 1,250 to 500,000 euros”.²⁵

The 2017 Law includes provisions aimed at promoting Luxembourg’s cooperation with other States and international organizations in the exploration and use of the natural resources of celestial bodies and also declares the Grand Duchy’s commitment to promote the commercial

²⁴ “(1) La demande d’agrément doit être accompagnée d’une évaluation des risques de la mission. Elle précise la couverture de ces risques par des moyens financiers propres, par une police d’assurance d’une entreprise d’assurances n’appartenant pas au même groupe que l’exploitant à agréer ou par une garantie d’un établissement de crédit n’appartenant pas au même groupe que l’exploitant à agréer. (2) L’agrément est subordonné à l’existence d’assises financières appropriées aux risques associés à la mission” (Art. 10).

²⁵ “L’exploitant qui a obtenu un agrément pour une mission est pleinement responsable des dommages causés à l’occasion de la mission, y inclus à l’occasion de tous travaux et devoirs de préparation” (Art. 16).

development of activities for the exploration and use of the natural resources of celestial bodies through an “advanced” national regulatory framework for the interested private enterprises, creating favorable conditions for attracting investment in the commercial development of the natural resources of celestial bodies.

VI. Luxembourg Outer Space Act of 2020

The 2020 Law supplements and develops Luxembourg’s legislation on space activities. An official Luxembourg document states that this law strengthens the legal framework of this State, especially in the field of conditions for the admission of persons to space activities, as well as in the supervision of such activities.²⁶

The Law on Space Activities 2020 does not apply to those missions for the exploration and utilization of natural resources of celestial bodies that fall under the scope of the Law on Exploration and Utilization of Space Resources.²⁷

The 2020 Act has a clear structure, represented by chapters: (1) “Scope of application and general provisions” (Champ d’application et dispositions générales); (2) “Authorization of space activities” (Autorisation des activités spatiales); (3) “Surveillance of space activities” (Surveillance des activités spatiales); (4) “Transfer of space activities” (Transfer d’activités spatiales); (5) Change of control (Changement de contrôle); (6) Sanctions (Sanctions); (7) Registration of launched space objects (Immatriculation des objets spatiaux lancés); (8) Modifying, transitional and final provisions (Dispositions modificatives, transitoires et finales).

²⁶ “The Law on Space Activities of 2020 does not apply to missions for the exploration and use of space resources covered by the Law of 20 July 2017 on the Exploration and Utilization of Space Resources”. Official report — “Contribution of the Grand Duchy of Luxembourg on the Mandate and Purpose of the Working Group on Legal Aspects of Space Resource Activities”. 2022. Available at: https://www.unoosa.org/documents/pdf/copuos/lsc/space-resources/LSC2023/StatesResponses/Luxembourg_-_20221216_WG_SR_LU_Contribution.pdf [Accessed 05.05.2024].

²⁷ Official report — “Contribution of the Grand Duchy of Luxembourg on the Mandate and Purpose of the Working Group on Legal Aspects of Space Resource Activities”. 2022.

The glossary provided with the Act defines legally relevant terms, including “space activities”, “damage”, “space object”, “operator” and “qualified participation”.

Let us compare, for example, the definition of “space activities” under the Luxembourg 2020 Law and the corresponding definition provided for in the Russian Federation Law No. 5663-I of 1993 (as amended) “On Space Activities”. The 2020 Luxembourg Law defines “space activities” as any activity to launch or attempt to launch one or more space objects into outer space, or to provide control of one or more space objects, or to use them while in outer space, including its return to Earth, as well as any other activity carried out in space above the atmosphere for which the Grand Duchy of Luxembourg may be internationally responsible.²⁸ The current Russian law defines space activities as “any activity related to the direct conduct of work on the exploration and use of outer space, including the Moon and other celestial bodies”. It is possible to offer various comments on this difference in the legislative definitions of the two States. All the more so because authoritative domestic researchers of international space law have proposed a different definition of space activities from the one provided for in the Russian law. In their view, space activities are “the exploration and use activities in outer space, including the Moon and other celestial bodies”. It “should be distinguished from activities related to the exploration and use of outer space, since the latter is much broader in scope and is not always regulated by international law” (Kolosov, 1992). This very fine doctrinal distinction between (1) the exploration and use in outer space and (2) activities related to exploration of outer space and its use is not made in Russian law. The law of the Russian Federation proceeds only from the second, broad approach.

²⁸ In the original 2020 Law it is provided as follows, “Toute activité consistant à lancer ou tenter de lancer un ou plusieurs objets spatiaux dans l’espace extra-atmosphérique ou à assurer la maîtrise d’un ou de plusieurs objets spatiaux ou à les utiliser pendant son séjour dans l’espace extra-atmosphérique, y compris son retour sur Terre, ainsi que toute autre activité qui se déroule dans l’espace extra-atmosphérique pour laquelle le Grand-Duché de Luxembourg est susceptible d’être tenu internationalement responsable”.

Prior to the 2017 Law, Luxembourg did not have any basic legislative regulation of core space activities. It was in 2020 that the main types of space activities were regulated for the first time at the legislative level in the Grand Duchy of Luxembourg.

The Luxembourg 2020 Law details the requirements for operators carrying out space activities and describes the mechanism of authorization of such activities. According to Art. 5 of the 2020 Law, no person “may carry out space activities without the prior authorization of an authorized minister” (“Aucun opérateur ne peut exercer une activité spatiale sans y avoir été préalablement autorisé par le ministre ayant la politique et législation spatiales dans ses attributions”). According to Art. 6 of the Law, “the approved operator confirms that it has its registered office and management center, including its administrative and accounting structure, in the Grand Duchy of Luxembourg”. To date, three private operators have already been authorized by the Luxembourg authorities to conduct space activities.²⁹

The commentary to the 2020 Law states that the favorable investment regime it creates “will further expand and diversify the activities of space actors, especially from the private sector, in Luxembourg”.³⁰ In other words, although the Law in question is called a law “on space activities” (rather than “on commercial activities”), it still focuses its regulation on licensing private investors in such activities. The commentary also notes the focus of the Luxembourg law on the involvement of representatives of the fuel and energy sector in the development of celestial resources. Back in 2012, the opinion was expressed that large representatives of the “mining industry” will not participate in such development projects unless “there is some certainty that they will be able to make a profit. And they will not be able to make a profit unless there is a regulatory regime in place to allow them to do so”, whether that be “tax incentives or the concept of extracted mineral rights (Mukunth, 2017).

²⁹ The register of authorizations granted under the Law of 15 December 2020 on Space Activities. Available at: <https://space-agency.public.lu/dam-assets/publications/2023/20230412register-authorisations.pdf> [Accessed 05.05.2024].

³⁰ Official website of the Luxembourg Space Agency. Available at: <https://space-agency.public.lu/en/agency/legal-framework.html> [Accessed 05.05.2024].

VII. Comparison of the Legal Positions of the USA and Luxembourg on Outer Space

It has already been noted that from the point of view of the essence of the national legal regime, the laws of Luxembourg analyzed reproduced the main postulates of the above-mentioned acts of the U.S. legislation on natural resource activities in space: such activities are permissible in the order defined in the national law; the law gives a private company the authority to appropriate natural substances extracted from a celestial body; the law assumes that such appropriation is in full compliance with the State's obligations under the Outer Space Treaty, including the treaty's "permanent" clause. While the Luxembourg legislative model in question is legally identical to the United States legislation on the commercial exploitation of the natural resources of celestial bodies, there are, of course, differences in the legislative approaches of the two States. In terms of investment treatment, for example, Luxembourg's legislation looks more attractive.

Comparing U.S. and Luxembourg commercial space laws, the foreign analyst notes that, following the 2017 passage of the Luxembourg Act, two U.S. companies — Deep Space Industries and Planetary Resources — "are already planning to move to Luxembourg"; the government of that State is also working with Japan's Ispace and Germany's Blue Horizon (Mukunth, 2017). The choice to opt for Luxembourg's legislation by private investors in the space sector is indicative in itself: they have found that the Grand Duchy's legislation provides operators registered under that legislation with a more favorable environment for commercial space activities than in the United States.

The Strategy for the Development of Natural Resources of Celestial Bodies of the already mentioned ESA (Luxembourg, it should be recalled, is a participant) stipulates that in the USA, "a renewed emphasis on lunar exploration has ignited interest in the field of natural resources of celestial bodies", this activity being carried out by public and private actors. It also noted that future investment in this area is "expected from NASA",³¹ which is building on its prior experience. The utilization

³¹ NACA (NASA) is the National Aeronautics and Space Administration of the USA. This federal executive branch agency reports directly to the President of the United States.

of natural resources of celestial bodies is considered in the context of “future human missions to the Moon” to explore their potential utility. U.S. legislation is created to designate the rights of those U.S. “actors who would seek to develop natural resources in space and utilize them”.³²

As for positions of the USA and Luxembourg in the UN Committee on Outer Space, they are in substance similar. Luxembourg’s position on the legal regime of natural resources of celestial bodies, promoted in the Committee on Space, is characterized by a proposal of this State (most likely agreed with the United States) to create an “International Framework”, which, as proposed, should reflect the following provisions, “The International Framework” should provide that rights to minerals and volatile materials extracted from the natural resources of celestial bodies, as well as to the products derived from them, may be acquired legitimately, in accordance with the provisions of the universal Outer Space Treaty of 1967 on the “province of all mankind”. In other words, this legal “vinaigrette” relegates the “province of all mankind” provisions of the 1967 Universal Outer Space Treaty to the background. Further, according to Luxembourg’s position, “the International Framework should allow for mutual recognition by States of rights” to natural resources of celestial bodies, i.e., simplifying, exploitation of natural resources of celestial bodies under this approach is legitimate if the U.S. and Luxembourg “mutually recognize each other’s right to such exploitation”. Nevertheless, according to the “International Framework”, it is necessary to ensure the use of natural resources of celestial bodies “in accordance with the principle of non-appropriation enshrined in Art. II of the Outer Space Treaty”.³³ But in this case, the rights to the extracted natural materials are acquired *de facto* under the national laws of the United States and Luxembourg. Does this contradict international space law? According to it, the acquisition of rights to extracted substances from celestial bodies must be in the interests of all

³² ESA’s Space Resources Strategy. 2019. Available at: <https://exploration.esa.int/web/moon/-/61369-esa-space-%20resources-strategy> [Accessed 05.05.2024].

³³ Working paper submitted by Luxembourg and the Netherlands “Building blocks for the development of an international framework on space resource activities” (A/AC.105/C.2/L.315). Available at: https://www.unoosa.org/oosa/oosadoc/data/documents/2020/aac.105c.2l/aac.105c.2l.315_0.html [Accessed 05.05.2024].

States.³⁴ Is it currently possible to harmonize at the universal level the system of legal regulation of the commercial use of natural resources of celestial bodies? It is necessary to take into account the fact that a number of countries, including Luxembourg, have settled this issue at the national legislative level, without harmonizing these issues at the universal level, though the development of the relevant universal regime is envisaged by the Moon Agreement. With further realization of such a separatist approach initiated by the USA and supported by Luxembourg, the provisions of the 1967 Treaty on the “interests of all countries” and on the “patrimony of all mankind” will be replaced by the national legislation of these developed States, as well as by their separatist international agreements. It has to be stated that the current universal international legal regime of natural resources of celestial bodies, outlined in general terms in the 1967 Outer Space Treaty and the 1979 Moon Agreement, has already been challenged by those significant novelties proposed by the space policies of the United States, Luxembourg, and their other followers (Vylegzhanin and Yuzbashyan, 2024, pp. 152–155).

The following provision of Luxembourg’s proposed “International Framework” is also interesting: it “shall not contain requirements for mandatory benefit-sharing”.³⁵ Here Luxembourg is trying to avoid in advance the creation of mechanisms of “common heritage of mankind” similar to those provided for in the 1982 UN Convention on the Law of the Sea, including provisions according to which developed States are obliged to provide developing States with the relevant scientific and technical assistance.

On the platform of the UN Committee on Outer Space, Luxembourg is also proposing a definition of the term “space resources” previously provided for in the 2015 US Law. This refers primarily to a document such as the “International Framework” — proposed by Luxembourg

³⁴ Recall that under the 1967 Outer Space Treaty, the exploration and use of space is “the heritage of mankind as a whole”; under the Moon Agreement, “celestial bodies and their natural resources are the common heritage of mankind”.

³⁵ Working paper submitted by Luxembourg and the Netherlands “Building blocks for the development of an international framework on space resource activities” (A/AC.105/C.2/L.315).

at the fifty-ninth session of the Legal Subcommittee of the UN Committee on Outer Space in 2020.³⁶ Among the definitions proposed by Luxembourg, we highlight the following, “space resource” is “an abiotic resource located directly in outer space that is recoverable and/or extractable”. In other words, Luxembourg relies on a term previously introduced by the 2015 U.S. Act. At the same time, Luxembourg’s representatives on the Space Committee (like the U.S. previously) are not embarrassed by the fact that such a term does not exist in any of the five multilateral space treaties developed at the UN.³⁷ As in American law, the Luxembourg documents submitted to the UN Committee on Outer Space deliberately mix the concepts of “natural resources” (those natural resources that are *in situ* — on or under the surface of celestial bodies) and the concept of “extracted natural substances” (“mined minerals”). But, as already noted, the legal regimes of the former and the latter are different (Vylegzhanin, 2007, p. 237). Let us refer, for example, to the Luxembourg document, which defines that “activities related to natural resources of celestial bodies” are activities “carried out in outer space for the purpose of searching for space resources and extracting these resources”.³⁸ Again, if an *in situ* “resource” has already been extracted from a location, it is legally no longer a “natural resource” of celestial bodies, but “matter” (in terms of the conceptual apparatus adopted in the named universal sources of international space law).

At the same time, it should be noted that Luxembourg’s active position in the UN Committee on Outer Space can be explained not only in the context of the 2017 and 2020 Acts; this state has ratified the 1967 Outer Space Treaty; the 1972 Convention on International

³⁶ *Ibid.*

³⁷ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967; Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1968; Convention on International Liability for Damage Caused by Space Objects, 1972; Convention on Registration of Objects Launched into Outer Space, 1975; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979.

³⁸ Working paper submitted by Luxembourg and the Netherlands “Building blocks for the development of an international framework on space resource activities” (A/AC.105/C.2/L.315).

Liability for Damage Caused by Space Objects; Luxembourg joined the 1975 Convention on Registration of Objects Launched into Outer Space. Moreover, Luxembourg participates in a number of international space-related programs, including those of the European Space Agency: Horizon 2020 Space; Global Navigation Satellite System; European Space Surveillance and Tracking; and others.

In the Legal Subcommittee of the UN Committee on Outer Space, Luxembourg's position is expressed, for example, as follows, "In order to achieve legal certainty and predictability for all public and private actors intending to explore, exploit and/or use" natural resources of celestial bodies, to ensure that such activities comply with "applicable international law", to provide "a framework to incentivize future investment by public and private investors in the exploitation" of natural resources of celestial bodies, it is important to include "as core themes" those described in the final sections of the Hague Governance Working Group, and to ensure that such activities comply with "applicable international law", in order to provide "a framework to incentivize future investment by public and private investors in the exploitation" of natural resources of celestial bodies.³⁹ Such themes include the designated priority rights of States, as well as compliance with "safety zones" in the utilization of such resources.⁴⁰

Luxembourg is also active in addressing issues of international legal regulation of exploration and exploitation of natural resources, especially in the Legal Subcommittee of the UN Committee on Outer Space. This subcommittee has a Working Group on Legal Aspects of Activities Relating to Natural Resources of Celestial Bodies.⁴¹ The Group met in 2023, but was unable to reach consensus on the adoption

³⁹ The Hague International Space Resources Governance Working Group.

⁴⁰ On "safety zones" on celestial bodies, see below, in the section on the Artemis Accords. Responses to the set of questions provided by the Moderator and Vice-Moderator of the Scheduled Informal Consultations on Space Resources (A/AC.105/C.2/2021/CRP.8). Available at: https://www.unoosa.org/oosa/oosadoc/data/documents/2021/aac.105c.22021crp/aac.105c.22021crp.8_0.html [Accessed 05.05.2024].

⁴¹ The official title of this Working Group already reflects the American conceptual apparatus, which is based on the term "space resources": Working Group on Legal Aspects of Space Resource Activities.

of its report. This also shows that, to date, not all States represented on the Outer Space Committee are willing to move in the direction of the commercial utilization of natural resources of celestial bodies as proposed in the laws of the United States and Luxembourg, i.e., outside the format universally agreed upon in the 1967 Outer Space Treaty, including its “province of all mankind” provision. Moreover, the Space Committee reaffirmed the view that “the exploitation of natural resources of celestial bodies and other activities for the exploration of extraterrestrial objects should be consistent with the fundamental principles of international space law as set out in the Outer Space Treaty”.⁴²

On 26 March 2024, Luxembourg hosted a Meeting of Experts to gather preliminary inputs to be considered at an international conference in Vienna (the Meeting is organized by Belgium and Luxembourg in cooperation with the UN).⁴³

In general, the mechanism promoted by Luxembourg for the commercial utilization of the natural resources of celestial bodies does not take into account that such utilization is, according to the 1967 Treaty, “the province of all mankind” and “the common heritage of mankind”, according to the Moon Agreement. The latter implies, *inter alia*, gratuitous relevant assistance to the economies of developing countries.

Moreover, the approach promoted by the United States, Luxembourg and their followers tends to impose additional technical, environmental and other requirements for space activities, including the launching of space objects, that are beyond the capacity of some developing countries, and, in the long term, increasingly stringent international oversight of space activities. These factors, taken together, will limit the ability of developing States to conduct space activities, much less natural

⁴² Report of the Committee on the Peaceful Uses of Outer Space (A/78/20). Available at: https://www.unoosa.org/oosa/oosadoc/data/documents/2023/a/a7820_o_o.html [Accessed 05.05.2024].

⁴³ Intervention du Luxembourg à la 63e session du Sous-Comité juridique du CUPEEA. Vienne, du 15 au 26 avril 2024. Item 4. “Débat général”. Available at: https://www.unoosa.org/documents/pdf/copuos/lsc/2024/Statements/4_Luxembourg.pdf [Accessed 05.05.2024].

resource activities. As part of this trend, once Western companies from the United States, Luxembourg, and their partners begin to develop natural resources, for example, on asteroids that have already been explored, the economic gap between such technologically advanced countries and most developing States will, as is easy to predict, widen even more sharply.

VIII. Concluding Remarks

As shown above, Luxembourg's legislation on the commercial utilization of natural resources of celestial bodies is fundamentally supportive of the new U.S. international legal space policy, although it does not fully replicate all the prescriptions of the 2015 USA Act and the 2020 U.S. Executive Order. Nevertheless, as far as the examination of the space legislation of the Grand Duchy of Luxembourg is concerned, the study of the U.S. space environmental legislation (for its compliance with international law) is also applicable in its main conclusions to the assessment of the Luxembourg legislation. First of all, we are talking about assessments of its compliance and non-compliance — in terms of the status of natural resources of celestial bodies — with the 1967 Outer Space Treaty. The fact that in this part the 2017 Luxembourg law contradicts the Moon Agreement, to which this State is not a party, is not a matter of debate. To add to this, experts' opinions on the general international legal assessment of Luxembourg's legislation vary, but several key characteristics can be emphasized.

Some experts praise Luxembourg's "pioneering" efforts to create a legal framework for companies to utilize the natural resources of celestial bodies (Mukunth, 2017). They see the Luxembourg legislation as a "progressive step" towards encouraging private investment in the complex technological process of exploiting the natural resources of celestial bodies.

Others in the scientific community, however, have expressed concern about the possible negative international legal implications of the legislation. One of the main areas of criticism is that Luxembourg's legal policy contradicts the principle of the "common heritage of mankind" enshrined in the 1979 Moon Agreement. Critics argue that

the 2017 Luxembourg Law, by granting property rights to natural substances extracted from celestial bodies, contradicts this principle by allowing the “privatization” of what should be the province of all mankind (Art. I of the 1967 Outer Space Treaty). As noted, Luxembourg’s legislation could potentially contradict Art. II of the Outer Space Treaty: “Outer space, including the Moon and other celestial bodies, shall not be subject to national appropriation, whether by claim of sovereignty, by use or occupation, or by any other means”. In this regard, a foreign expert notes that “in fact, Luxembourg’s argumentation concerning the principle of non-appropriation does not comply with the clear wording of Art. II of the Outer Space Treaty, since it substitutes a focused analysis of the applicable principles of international space law for a dispassionate reading of the national legislation” of that State, adopted specifically as a regulatory framework for the exploitation of mineral resources of celestial bodies (De Man, 2017).

To add to this, the U.S. Law mentioned above (adopted two years earlier than the 2017 Luxembourg Law) has also been criticized. Thus, the editor-in-chief of the *New England Law Review*, a fairly authoritative legal journal, argues that the US Law violates the first two articles of the 1967 Outer Space Treaty because “the USA government sought to benefit at the detriment of others and to grant rights to objects it could not have originally claimed”. Another international law expert (University of Kent) described the fact that the US companies are able to operate on celestial bodies solely on the basis of national law as “the audacity of greed” (Mukunth, 2017).

The representatives of Luxembourg nevertheless fully support the U.S. space natural resources policy, including in discussions in the scientific community, international organizations and the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space. At the same time, the Luxembourg authorities emphasize the need for an internationally coordinated universal approach to the use of natural resources of celestial bodies. This somewhat distinguishes Luxembourg’s position in this special area from the U.S. space natural resources policy.

The extraction of minerals beyond the Earth belongs, in the terms of the Outer Space Treaty, to “national activities in outer space”.⁴⁴ It is the responsibility of States under existing international space law. Its principles are applicable to natural resource activities in space. However, the current international space law does not provide for a special regime for the exploitation of natural resources of celestial bodies.

Luxembourg’s space environmental legislation, on the one hand, can be seen as an invitation to support investment in commercial space activities. On the other hand, objectively, this legislation like the U.S. legislation is inconsistent with the provisions of the Outer Space Treaty that celestial bodies are not subject to national appropriation by any means (Art. II) and that the exploration and use of celestial bodies is “the province of all mankind” (Art. I). In this context, it will be of practical political and legal significance to continue discussions on the legal regime of celestial bodies, including their natural resources, at the level of scientific and legal concepts, as well as within the framework of cooperation at the interstate level, including in the UN Committee on Outer Space since the UN Committee on Outer Space Documents already stated that in order to ensure safe and orderly implementation of natural resource activities in space, as well as to promote “rational management” of natural resources of celestial bodies, it is necessary to “develop a legally binding international legal framework to regulate such activities”, i.e., at the universal level.⁴⁵

At the same time, within the framework of a cautious international legal forecast, we have to state that the new natural resource activities of the USA, Luxembourg and other partner States under the Artemis Agreements have already become a modern international legal reality. Moreover, the reality is that the number of supporters of the qualification of natural resources of celestial bodies as “common heritage of mankind” (Art. 11 of the Moon Agreement) is decreasing, while the number of the U.S. partner States under the Artemis Agreement is increasing. This

⁴⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1967.

⁴⁵ Report of the Committee on the Peaceful Uses of Outer Space (A/78/20). Available at: https://www.unoosa.org/oosa/oosadoc/data/documents/2023/a/a7820_o_o.html [Accessed 05.05.2024].

reality dictates the need to respond to it by the timely development of the concept of improving Russian legislation on space natural resource activities. The point is that Russia, which retains its status as a leading space power, is to create an even more favorable legislative environment for investment, taking into account the new political and legal factors considered.

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Received 28.11.2024

Revised 20.12.2024

Accepted 21.12.2024



***BRICS Pay* as the BRICS Payment System in the Legal Framework for Transactions in BRICS Countries**

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Abstract: Contemporary geopolitical and economic transformations necessitate the establishment of alternative payment systems as a critical issue on the international agenda. The modern challenges arising in international trade and economic relations encourage discussions regarding the feasibility of adopting new payment methods, including the use of cryptocurrencies and digital financial assets in cross-border transactions. In this regard, payment systems play a pivotal infrastructural role, ensuring the stability of international economic relations in cross-border transactions. Furthermore, the legal frameworks governing the operation of any international payment system must take into account the nuances of the national legislation of the participating States, especially with respect to permissible payment methods, means of payment, and the payment systems administration. A concerted initiative to align the legal systems of BRICS Member States, as well as the regulatory frameworks essential for the functioning of payment systems and cross-border settlements within BRICS, should be pursued simultaneously with, if not prior to, the technological and infrastructural developments associated with the implementation of these systems. Following a thorough analysis of the legal framework surrounding international payment systems, financial information exchange systems, and the risks linked to the establishment of the BRICS payment system — including direct competition among BRICS member economies and varying “sanction” statuses — the author concludes that it is prudent to formulate a comprehensive international agreement that considers the essential requirements of the national legal systems of the

participating countries. Furthermore, the author argues that particular attention should be paid to the issues surrounding the potential use of cryptocurrency (either existing or specifically created for the purposes of BRICS Pay). The author provides a rationale for the endorsement of a treaty that would authorize cryptocurrency transactions within the BRICS Pay framework, subject to the regulation of the central banks of the Member States.

Keywords: *BRICS pay*; BRICS payment system; applicable law; cross-border payment settlements in BRICS; legal regulation; payment system; SWIFT; BRICS+; BRICS Bridge; BRICS Clear; *mBridge*

Acknowledgements: The study was carried out within the framework of “Priority-2030” Strategic Academic Leadership Program.

Cite as: Shakhnazarov, B.A., (2025). *BRICS Pay* as the BRICS Payment System in the Legal Framework for Transactions in BRICS Countries. *Kutafin Law Review*, 12(3), pp. 493–511, doi: 10.17803/2713-0533.2025.3.33.493-511

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I. Introduction

In the context of geopolitical and economic transformation, the need to develop and launch alternative payment systems have emerged as a significant topic on the international agenda. Contemporary challenges arising in the sphere of international trade and economic relations lead to discussions about feasibility of using new payment methods,

including the use of cryptocurrencies and digital financial assets in cross-border transactions. In this context, payment systems play a crucial infrastructural role, facilitating the stability of international economic relations, especially in terms of cross-border transactions. Furthermore, the legal framework governing any given international payment system must take into account the specificities of the national legislation of the participating states concerning acceptable payment methods, means of financial transaction, payment systems administration, and other related aspects.

The issue of organizing *BRICS Pay* as a payment system for BRICS, especially in the context of the legal framework governing settlement relations within BRICS, is not extensively covered in the scientific literature due to its status as a newly discussed issue for international cooperation. Nonetheless, the challenges related to the organization and functioning of international payment systems, financial information exchange systems, specific aspects of payment relationships, cybersecurity, currency integration, and electronic payment transactions within the BRICS framework have been addressed in several scholarly articles. Notable works include papers written by Kaftulina and Dyrdova (2025), Krause (2024), Rezbayev (2024), Gutorovich (2024), Kaur and Kang (2024), Chikova (2025), Valamontes (2024), Shamraev (2019), Barbosa (2020).

In 2024, the BRICS nations held their 16th summit in Kazan, Russia. During this meeting, the traditional agenda was broadened to incorporate extensive discussions on cross-border payment issues, alongside a growing number of participating states. During the discussions, Russia repeatedly advocated for the further development of an alternative international payment system. In their joint declaration following the summit, BRICS Member States emphasized the need to “strengthen correspondent banking networks within BRICS and facilitate transactions in local currencies in accordance with the BRICS Cross-Border Payments Initiative (BCBPI), also referred to as *BRICS Pay*” (Freidin, 2024). The essence of the initiative lies in establishing a decentralized and independent payment system that enables BRICS countries to conduct trade relations using local currencies.

The concept of *BRICS Pay* as an alternative payment system was first articulated in 2018 in the context of discussions among developing countries regarding ways to establish optimal trade relations. During the Summit in 2022, *BRICS Pay* began to be viewed as a potential alternative to the *SWIFT payment system* recognized internationally as the standard for global banking transactions. The SWIFT ban against some Russian banks was seen as one of the primary sanctions imposed by Western countries against Russia. It was assumed that the sanctions in the field of payments and settlements should have made it difficult for Russia to trade with its allies, since the use of SWIFT, as well as the US dollar in cross-border settlements, constitutes a critical framework for the global economy. The imposed restrictions led, in turn, to the fact that Russia began to use national currencies for payments in international trade relations.

The principal difference between SWIFT and systems such as BRICS Pay or the Russian System for Transfer of Financial Messages of the Bank of Russia (SPFS) is that SWIFT operates as an international interbank messaging system rather than a payment system *per se*, whereas SPFS and similar platforms are oriented toward national or regional financial operations. SWIFT facilitates the cross-border transmission of sensitive transaction data; SPFS, by contrast, provides an alternative channel for executing domestic transfers without relying on the international messaging infrastructure. Payment systems proper — defined as the ensemble of instruments, rules, and procedures that enable cashless monetary transactions — include national schemes (for example, Mir, Golden Crown, CIPS), international card networks (notably Visa, Mastercard, UnionPay), and electronic payment platforms (such as e-wallets and mobile payment services). Within this framework, BRICS Pay is conceived specifically as an initiative to create a payment system.

In this context, Russia's support for the *BRICS Pay* initiative seems also logical. At the same time, other BRICS Member States are also interested in developing an alternative payment system within the BRICS. Thus, *BRICS Pay* in some cases is positioned as a way to achieve the goals of de-dollarization, reducing the financial hegemony of the United States. In particular, Brazil fully supports the initiative of the BRICS payment system based on the standing that the time has come

for a new payment system for the BRICS countries to develop, since through this alternative system the multipolar order that the BRICS Member States are striving for will be reflected in the international financial system (in the designated context, Brazil insists on BRICS currency development initiatives).

II. Methodology

The contemporary challenges in cross-border settlements, fueled by technological advancements, the increasing prevalence of sanctions rhetoric, and the arbitrary establishment of a multipolar world order, call for a deeper analysis and, at times, a reevaluation of previously applied methodologies. This situation underscores the need for the development of new strategies aimed at examining payment systems, understanding their significance in the modern international economy, and assessing the legal frameworks that facilitate the modernization of regulatory mechanisms governing international payment systems and cross-border settlements as a whole.

Taking into account the fact that SWIFT is, in fact, the only classical international payment system, the author relies on such general research methods as induction and synthesis to examine the possibility of organizing alternative international payment systems based on instruments similar to SWIFT instruments and the newest instruments. In the context of increased risks in the field of cross-border settlements, the importance of compliance procedures in international practice of settlement relations also increases, which mediates the use of the comparative method aimed at determining ways to verify and ensure compliance with regulatory requirements in international settlements. The comparative research method in this context continues the logic of the comparative methodology for implementing compliance procedures in cross-border settlements. In the work, taking into account its legal nature, a formal-legal research method is also used. Based on the formal legal method of research, the author, in particular, formulates proposals in the field of harmonization of integration processes taking place within the BRICS.

III. Legal Aspects of the Payment Systems Operation, the Formation of an Alternative Payment System in the context of the BRICS Status and Modern International Economic Relations

It is important to understand the status and organizational capabilities of BRICS to analyze the legal aspects of the formation of the BRICS payment system and implementation of cross-border settlements within the BRICS. Thus, BRICS is not an international organization or a classic integration association. The BRICS, as noted, on the official BRICS website, is an informal association of States that consists of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa.¹ The creation of BRICS was initiated by the Russian Federation. On 20 September 2006, following the suggestion of Russian President Vladimir Putin, the first BRICS ministerial meeting was held on the sidelines of the UN General Assembly in New York. The meeting was attended by the foreign ministers of Russia, Brazil and China, and the Minister of Defense of India. During the meetings the participants expressed interest in expanding multilateral cooperation.

The formation of a payment system within an international organization seems to be more effective in terms of international obligations and infrastructure frameworks existing within an international organization. At the same time, even within the framework of an informal association of States, the emergence of separate contractual obligations and the formation of a multipolar law and order, including an alternative payment system, is possible.

Thus, as the BRICS expands, the efforts of the BRICS Member States to increase the global use of currencies alternative to the US dollar, in particular the Chinese yuan, are increasing (Greene, 2023) and the retreat from the use of the dollar in calculations contributes to the growth of national currencies, for example, the yuan in emerging markets and motivates strategic partners within the BRICS, such as Russia, India, China, to seek wider use of non-dollar currencies.

¹ History of BRICS. BRICS portal. Available at: <https://infobrics.org/page/history-of-brics/> [Accessed 01.10.2025].

Given the fact that international payment systems form the basis of world trade, since the transfer of funds is facilitated, such systems, in fact, act as an intermediary between private entities in different countries, allowing them to conduct transactions in a safe and reliable manner. With the growing number of cross-border settlement requests and the growth of international trade in general, international payment systems have become increasingly important.

A step-by-step operation of the international payment system can be described as follows. First, the payer initiates a transaction, i.e., an individual or legal entity wishing to transfer money abroad initiates a transaction by providing information about the recipient (a payee), such as name, account number and bank details. Next, the payer's bank checks the transaction and authorizes the transfer of funds, which involves checking at this stage the payer's account balance and confirming that he has enough funds to make the transfer. The payer's bank then interacts with the payee's bank through the secure network of the international payment system to ensure that the funds are transferred to the correct account. It is important to note that if the payer and the payee use different currencies, the funds are converted from one currency to another at the current exchange rate. Once funds are transferred and converted, the payee's bank credits the payee's account, and the payee can then access the funds according to their bank's rules.

Thus, the international payment system plays an intermediary role, i.e., a service role aimed at simplifying and speeding up international payments and settlements. Obviously, this kind of functionality can be represented by different systems providing alternative services, solutions, and conditions. Moreover, in modern conditions, only SWIFT is the classic international payment system. Other systems can only be conditionally called analogues, which determines the relevance of the discussion of the creation of a new international payment system *BRICS Pay*. For example, the CIPS system is often called an analogue of SWIFT, but this Chinese payment system is designed for settlements in yuan, despite the fact that SWIFT only helps banks from different countries transmit messages to each other for transactions. Rather, CIPS should be compared with the American CHIPS used to clear settlements with American companies.

CHIPS is a real-time gross settlement system designed for the same-day processing of large transactions in US dollars. Operating within the United States, CHIPS is managed by *The Clearing House*, a private organization owned by major commercial banks, that provides a secure and efficient platform for the transfer of funds between participating banks, ensuring the finality of payments.

SWIFT and CHIPS differ primarily in their scope and functionality. While SWIFT serves as a global network connecting banks worldwide for various types of financial messaging, CHIPS operates exclusively within the United States. SWIFT facilitates communication among banks for a diverse range of financial transactions, whereas CHIPS specializes in the processing of large-scale US dollar transactions. Consequently, SWIFT functions as a broader payment system, while CHIPS serves as a more focused payment mechanism, confirming the international character of SWIFT as a global payment system.

The dominant position of SWIFT in the realm of cross-border payments has developed for over 40 years. However, as companies increasingly view payment optimization measures as integral to business growth and development, and as they explore new potential trajectories for cross-border payments amid economic constraints, they are willing to diverge from the SWIFT system in favor of alternative methods. Moreover, despite SWIFT's scale and reliable technology, international payments made via SWIFT can be slow, costly, and opaque. Such inefficiencies adversely affect cash flow and financial planning, and they may slow down the very expansion that SWIFT was designed to facilitate.²

When discussing potential alternatives, it is important to note that the payment industry has undergone significant changes in recent years. New cross-border payment solutions have emerged, driven by the advent of banking APIs (Application Programming Interfaces that allow third-party applications to access a common set of tools), FinTech innovations, and blockchain projects. Blockchain projects offer tremendous prospects for addressing many of the issues associated

² Best 4 Swift alternatives for cross-border payments in 2024. BVNK blog. 18 July 2023. Available at: <https://www.bvnk.com/blog/swift-alternatives> [Accessed 10.01.2025].

with payments through SWIFT. Blockchain solutions are not bound by geographical limitations, they operate around the clock seven days a week, and facilitate direct payments (i.e., payments that move directly from the payer to the payee without intermediaries).

Before the emergence of SWIFT, a telegraphic transfer (also known as *Telex*) was the only way for banks and other financial institutions to transfer money internationally. However, *Telex* lacked a unified data standard, which meant that transfers were slow, insecure, and susceptible to human error. SWIFT became the dominant method for processing cross-border payments affectively addressing the problems associated with *Telex*.

SWIFTNet messaging services employ a common ML data standard, whereas the implementation of XML-based MX messaging has created opportunities for data integration from external (third party) systems. SWIFT is now transitioning to a new messaging standard ISO 20022 that represents an international standard for data exchange among financial institutions, supporting enriched data in a more efficient and structured format.

The security and reliability of financial transactions are ensured through the implementation of a Virtual Private Network (VPN) that guarantees confidentiality and protection via encryption, authentication controls, integrity checks, and non-repudiation protocols. In parallel, SWIFT continues to innovate and introduce new payment services. For instance, SWIFT GPI (Global Payment Innovation), launched in 2017, integrates previously fragmented domestic real-time payment networks. It employs a unique end-to-end transaction reference (UETR) to ascertain the status of payments in real time and reroute them along expedited paths. Additionally, it provides a pre-validation feature, which mitigates the risk of transaction failures. Swift GPI currently facilitates daily transactions worth \$ 300 billion, with 50 % of these transactions completed within 30 minutes and 96 % finalized in less than 24 hours. In 2021, within this framework, the *Swift Go* service was launched, specifically targeting small and medium-sized enterprises (SME customers) engaged in low-value international payments (under \$ 10,000, GBP, or EUR).

Moreover, SWIFT provides a wide range of additional services on its platform, including tools for compliance support, analytics, issue resolution, and record keeping.

The outlined structured and detailed approach to organizing the operation of payment systems with various differentiated services should undoubtedly be taken into account when establishing an alternative payment system, regardless of the technological solutions employed or the number of participants involved. The use of technologies and legal solutions to harmonize approaches to recognizing electronic messaging at the national – and potentially international – legal levels could serve as an effective trajectory for the creation and legal support of an alternative payment system.

IV. Harmonization of Approaches to Cross-Border Payments and Associated Relations amid BRICS Growth and Development

Continuing the analysis of the challenges and potential solutions for the development of an alternative payment system such as *BRICS Pay*, it is important to consider the fact that the BRICS association initially focused its efforts on reforming multilateral financial institutions, namely, the International Monetary Fund. However, over time, the trajectory of cooperation within this association has shifted from modernizing the operations of existing institutions to establishing new ones, and even discussing the prospects of founding an international organization.

The status of an international organization would provide BRICS with new opportunities to develop an international payment system using the existing infrastructure of an international organization and under international obligations, as stipulated by an international agreement. This treaty could have an open status, allowing any interested states, regardless of their membership in BRICS, to utilize such infrastructure and the relevant provisions of the international treaty (or multiple international treaties).

It is important to note that with the inclusion of oil-producing and refining nations into the BRICS group – specifically, the United Arab

Emirates, Iran, Egypt, and Ethiopia, which will join on 1 January 2024, followed by Indonesia on 6 January 2025— BRICS is poised to attain a significantly enhanced informal status. This potential advancement hinges on the Member States' ability to collaborate and prioritize collective interests over individual political and commercial agendas (Crowe, 2025). For example, the United States continues to be China's primary trading partner.

It is anticipated that a decentralized operating system will empower BRICS Member States to conduct trade amongst themselves without the need to convert their payment currencies into US dollars. This will be achieved using blockchain technology and digital financial assets, while also circumventing the international payment system SWIFT. In this regard, BRICS Pay is introduced as a means to lower costs, improve efficiency, and potentially protect participants from possible economic sanctions.

According to some experts, the launch of the *BRICS Pay* system could be a significant step towards a multipolar global economy, reducing the dominance of the US dollar and creating a more balanced trading environment for developing countries. This could also encourage increased competition between Western and Eastern economic models, with long-term geopolitical consequences (Vaidyanathan, 2025).

It is crucial to recognize that international banks, financial accounting and auditing firms, as well as law firms, have their roots primarily in Western economies, notably the United States and the United Kingdom. Nevertheless, these entities currently face limitations in their access to the major economies of BRICS — Brazil, China, India, and Russia. In this regard, BRICS represents a counterbalance to the G7, influencing the dynamics of multipolarity and international competition, and potentially exacerbating the rise of protectionist measures. Nevertheless, the processes of globalization persist, and they must be taken into account when shaping any international payment system and model of the international economy and trade as a whole. Globalization processes, within the framework of the contemporary international order and legal system, as well as in light of the functioning of international economic and trade organizations and the obligations arising from international agreements and documents under the WTO,

ECOSOC, OECD, APEC, et al., must also be advanced in the context of developing compromise solutions that, in one way or another, connect the multipolar international legal regimes and infrastructure solutions.

When discussing the legal regulation of relationships in the sphere of international trade, it is important to note that the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention of 1980) is a crucial international treaty that harmonizes substantive law rules governing sales transactions between entities from BRICS Member States. The fact that not all BRICS Member States are parties to the Vienna Convention (with Russia, Brazil, Egypt, and China having ratified it, while India, Indonesia, Iran, South Africa, the UAE, and Ethiopia have not) does not diminish its harmonizing potential and significant impact on the law of international trade within BRICS. A conflict-of-law clause in the Convention that refers to the law of the contracting state as a whole entails the application of the provisions of the Convention as special rules governing contractual relationships (under Para. 1 Art. 1 of the Convention, it applies to contracts for the sale of goods between parties whose commercial enterprises are located in different States, including where the law of the Contracting State is applicable under the rules of private international law). It is also essential to understand that the nationality of the parties, their civil or commercial status, or the civil or commercial nature of the contract do not affect the applicability of the Vienna Convention (Para. 3 Art. 1 of the Convention).

The application of the Convention may also be justified by the fact that the norms of international treaties can take precedence over national legislation, a situation that depends on the national approach to this issue in the respective BRICS Member States. For instance, according to Part 4 Art. 15 of the Constitution of the Russian Federation, universally recognized principles and norms of international law, as well as international treaties of the Russian Federation, have priority over national laws, forming an integral part of the legal system of the State. This means that if an international treaty establishes rules that differ from those provided by national law, the provisions of the international treaty shall apply. Conversely, the Constitution of the People's Republic of China does not contain any norms establishing

the primacy of international law over national legislation, nor does it enshrine universally recognized principles and norms of international law as part of China's legal system. The relevant Art. 5 of the Constitution of the PRC just declares that the State ensures the uniformity and observance of socialist legality, and no laws, administrative acts, or local regulations shall contradict the Constitution.

However, the harmonization of substantive legal norms in the area of sales does not eliminate the necessity of considering the effect of conflict-of-law norms in international private law. Therefore, the rules pertaining to the choice and determination of applicable law must also be harmonized within the context of the BRICS nations (Wethmar-Lemmer, 2017).

Indeed, collaborative efforts in the field of private international law aimed at harmonizing both substantive and conflict-of-laws approaches among BRICS Member States are highly relevant due to the significant increase in the number of cross-border transactions and relationships among entities from these countries. In this regard, the conflict of laws and legal systems, particularly in the context of the proposed BRICS Pay initiative, may result in undesirable legal consequences associated with the potential operation of the payment system. This includes issues relating to the recognition of electronic communications, contractual terms, correspondent banking relationships, and other related matters.

In the specified context, it appears prudent to develop consolidated acts that harmonize the integration processes occurring within the framework of BRICS. This includes initiatives focused on the developmental trajectories of BRICS under the BRICS+ format, which aims to expand cooperation with new States.

In addition to the overarching strategy, the following key elements have been incorporated into the foundation of the BRICS+ initiative: *BRICS Pay*, *BRICS Bridge*, and *BRICS Clear*. *BRICS Pay* is reportedly aimed at harmonizing the internal payment systems among Member States; however, it currently functions more as a symbolic project rather than an operational one, given the absence of an active system at this time (Corbet, 2024).

In contrast, *BRICS Bridge*, inspired by the Bank for International Settlements' (BIS) *mBridge* project, employs distributed ledger tech-

nology (DLT) to facilitate transactions in local currencies through the prospective incorporation of multiple central bank digital currencies (CBDCs), operating as an internal payment infrastructure. However, the *mBridge* project, initially developed by the central banks of China, Hong Kong, Thailand, and the United Arab Emirates (UAE) within the BIS Innovation Hub, which aims to establish direct digital connections between the participating central banks and effectively operate outside the current correspondent banking framework, may face termination by the BIS. This possibility is being discussed in the context of its potential utilization for circumventing sanctions and the risk it poses to the dominance of the US dollar in the global financial system.³ Against this backdrop, *BRICS Clear* offers a securities depository and settlement system as an alternative to Western organizations such as *DTCC* and *Euroclear*, which is currently under active discussion.

The ideas of the BRICS payment system are also supported by increasing bilateral cooperation between the participating States. The most illustrative example here is Russian-Chinese economic relations, the rapid growth of which was characterized by several remarkable events. The most notable of them were bilateral trade and currency swap agreements that allow trading in national currencies. It is noteworthy that transactions in national currencies increased by 67 % in 2022 compared to the previous year, and by the end of 2023, 95 % of Chinese-Russian trade was carried out in national currencies. This was largely facilitated by improving the integration of the Russian Financial Messaging System (FMS) with the Chinese Cross-Border Interbank Payment System (CIPS) in order to avoid the use of the SWIFT payment system and thereby increase the financial stability and continuity of operations of companies subjected to economic restrictions (Corbet, 2024). Further unification of payment systems was achieved through the integration of the Russian *Mir* network with the Chinese *UnionPay*.

However, the risks of organizing the BRICS payment system remain. Direct competition between the economies of the BRICS Member States, different “sanctions” status can seriously complicate

³ Frank Media website. The Bank for International Settlements has initiated discussions regarding the closure of the *mBridge project*. Available at: <https://frankmedia.ru/182709> [Accessed 12.01.2025]. (In Russ.).

the smooth implementation of the payment system, which can be aggravated by different nature and stages of economic development, as well as different regulatory frameworks characteristic of the respective BRICS + countries. Although the initiative obviously relies on the achievements of the *mBridge* project, this technological basis, as noted above, is also at risk; project tests have demonstrated the need to use traditional markets because of the credit and liquid risks that have arisen, as well as the lack of consistency in common standards.

The aforementioned risks appear to be ongoing; however, they can be addressed through the advancement of BRICS technologies and the adoption of open “neutral” solutions. This approach aligns with the promotion of multipolarity, considering the ongoing developments within globalization processes. It is important to highlight that as the significance of payment sovereignty grows, an unprecedented interest in alternative payment systems that challenge conventional mechanisms is expected (Maynard, 2024).

V. Conclusion

Given that the *BRICS Pay* Concept seeks to create a completely independent network of financial institutions for facilitating cross-border payments, thereby enabling Member States to sustain uninterrupted trade relations, and that the proposed system will include a compatible retail QR code payment system, a B2B payment system, potential cryptocurrency settlements, a loyalty program for tourism, and an international digital platform for cross-border securities transactions, it is advisable to establish a comprehensive international framework that addresses the essential needs of the national legal systems of the participating States. Additionally, specific attention should be given to the potential use of cryptocurrency (either existing or specially created for the purposes of BRICS Pay). In cases where national legislation of a participating state prohibits the use of cryptocurrency as a means of payment in cross-border transactions, it may be permissible to adopt an agreement that allows for cryptocurrency settlements within the framework of *BRICS Pay*, subject to oversight by the central banks of the participating states in the payment system.

It is of utmost importance to ensure that *BRICS Pay* seamlessly integrates with the diverse payment systems and financial technologies of each Member State. This necessitates intricate technical coordination and development of standardized protocols that operate within various banking infrastructures.

A suitable integration measure would be for BRICS to adopt an Agreement on Cooperation among national payment systems, establishing provisions for exchanging data and messages via a common protocol through a shared supranational BRICS Pay platform. Such an agreement would permit national payment systems to function as subsystems of the wider BRICS payment system. Implementation should be coordinated by the central banks of BRICS member states, which could, through national working groups, effectively coordinate the activities of national payment systems and the development of the national segment of BRICS Pay infrastructure in each country, including in states that currently lack a domestic payment system.

Furthermore, the payment system must implement cutting-edge security measures to safeguard against cyber threats, fraud, and unauthorized access. Achieving this requires comprehensive legal frameworks, regular updates, and continuous monitoring to address emerging vulnerabilities (Adetunji and Chinonso, 2025).

The establishment of a comprehensive legal framework that is in harmony with international standards while accommodating the national regulatory requirements of each participating State is essential. This necessity is underscored by several key factors: implementation of effective mechanisms to guarantee compliance with established requirements across various legal systems, thereby maintaining agreed-upon standards; the fight against money laundering and the financing of terrorism, which calls for the introduction of stringent measures to avert these activities while facilitating legitimate transactions; the imperative of data confidentiality, which requires adherence to strict data protection standards that align with diverse national regulatory demands to protect user information internationally; the continuous enhancement of cybersecurity measures to defend against evolving threats and ensure the resilience of the payment system; the optimization of taxation and resolution of complex issues related to taxation in cross-

border transactions; and protection of consumer rights, which entails the application and enforcement of effective regulatory provisions to foster user trust.

Thus, it appears that comprehensive efforts to harmonize the legal systems of the BRICS Member States, as well as to provide legal support for the functioning of the payment system and cross-border settlements within BRICS, should be undertaken concurrently or even in advance of the technological and infrastructural processes required for the system's implementation.

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Received 15.01.2025

Revised 25.01.2025

Accepted 03.04.2025



Future of Law in the Midst of Homo Sapiens and Machina Sapiens

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Abstract: This article provides an overview of AI and its application in law. Artificial intelligence is revolutionising various sectors, including the legal industry. As AI becomes increasingly sophisticated and autonomous, questions arise regarding the future of the criminal justice system in the midst of these *machina sapiens* (intelligent machines) and *homo sapiens* (human beings). This article addresses such questions and tries to provide an overview of AI and its use within the law. This article deals with the intersection of human beings, law, and technology for the administration of justice. It also explores the benefits and challenges of using AI in law and discusses the legal and ethical implications of AI adoption in the legal system. Additionally, it looks at possible AI-enabled crime in the future and closely explores the national and international responses to it. It also offers suggestions for researchers, lawyers, and legislators on how to minimise the hazards associated with AI while maximising its potential. Finally, this article concludes by examining how artificial intelligence (AI) will continue to influence and change the legal sector.

Keywords: Artificial Intelligence (AI); *Homo Sapiens*; *Machina Sapiens*; administration of justice; legal sector; AI-enabled crimes

Cite as: Kumar, P., Mishra, M., Kulshreshtha, P., Roy, R.N., and Balyan, S., (2025). Future of Law in the Midst of *Homo Sapiens* and *Machina Sapiens*. *Kutafin Law Review*, 12(3), pp. 512–544, doi: 10.17803/2713-0533.2025.3.33.512-544

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I. Introduction

Artificial intelligence (AI) is developing at a rapid pace, changing many facets of human existence and posing important challenges regarding how AI will interact with people and the legal system (Gilani et al., 2023; Mohamed et al., 2024). Our approach emphasises the necessity of interdisciplinary cooperation to resolve these problems and guarantee the peaceful coexistence of artificial intelligence, people, and the law. First of all, the development of AI has completely changed many industries, including healthcare and banking, as well as how we work and live (Gilani et al., 2023; Mohamed et al., 2024). But this quick expansion has also brought up important issues like culpability,

accountability, and the requirement for a legal framework that takes into account AI's special qualities (Ablameyko and Ablameyko, 2021).

Problems:

1. Accountability and Liability: How do we divide up the blame for AI's activities, and who is accountable for them?
2. Autonomy and Regulation: How can the autonomy of AI be balanced with the requirement for control and regulation and AI's autonomy?
3. Discrimination and Bias: How can we guarantee justice and stop AI from sustaining human biases?
4. Privacy and Data Protection: Given that AI is data-driven, how can we protect people's privacy?

Prospects:

1. Human-AI Collaboration: How can AI be used to improve human decision-making and augment human capabilities?
2. Intellectual Property and Innovation: How can we safeguard intellectual property rights while promoting innovation?
3. Global Governance: How can we create international frameworks to deal with the effects of AI on the world at large?

AI, people, and the law present both difficult problems and exciting prospects. It will take multidisciplinary cooperation and a sophisticated grasp of AI's potential and constraints to solve these problems. By working together, we can fully utilise AI's potential and ensure that AI and humans coexist peacefully in the future.

II. Homo Sapiens v. Machina Sapiens

Even though AI is still in its infancy, it is a sophisticated technology. However, it might continue to evolve until *machina sapiens*, a new species, emerges. The phrase "*machina sapiens*" refers to machines that are gradually taking the place of people and thinking like humans. We are about to enter a world of unprecedented technology and a period where homo sapiens, or human people, and *machina sapiens*, or artificial intelligence, will converge. Human machines, the fundamental substance of an AI entity, have been the subject of intense dispute for a number of years (Raveh and Tamir, 2018). According to futurologists,

machina sapiens, a new species that will coexist with humans as sentient beings, is imminent. A “thinking machine” has drawn criticism for being an oxymoron. With their bases in icy logic, machines — including computers — can never be as perceptive or imaginative as people. The fundamental questions of AI (can there be thinking machines?) and humanity’s essence (do humans function as thinking machines?) are brought up by this controversy (Riley, 2021).

An intelligent creature is generally expected to demonstrate five core attributes. Foremost is the ability to communicate. It must be possible to engage in meaningful dialogue with such a being — for instance, discussing Einstein’s Theory of Relativity with a dog is impossible, while a child might understand it if the explanation is tailored to their level. Next is self-awareness, implying that an intelligent entity should possess some understanding of its own nature. A third attribute is awareness of the external world. An intelligent being should be capable of perceiving, assimilating, and utilizing information about its surroundings. Purpose-driven behavior constitutes the fourth quality; such a creature is expected to take actions aligned with specific goals. Finally, creativity is essential. A degree of originality and innovation in thought or behavior is a hallmark of intelligence (Fischetti, 2011).

Artificial intelligence is a widely debated topic, with discussions often characterized by anthropocentric and anthropomorphic ideas (Korteling et al., 2021). The comparison between AI and human intelligence is prevalent, but some argue this approach may limit AI progress and acceptance (Monteith et al., 2024). Anthropomorphism in AI can manifest as hype, exaggerating AI capabilities, and as a fallacy, distorting moral judgments about AI systems (Placani, 2024). This phenomenon is present not only in public perception but also within AI research itself, particularly in brain-inspired AI. The use of anthropomorphic language in AI research may have epistemological and ethical consequences that require further examination (Salles et al., 2020). To address these issues, it is suggested that humans working with AI systems develop an adequate mental model of AI’s underlying mechanisms, emphasizing the need for Intelligence Awareness (Korteling et al., 2021).

III. Rise of AI: Era of Digital Technology

Both technophobes (those who are disproportionately fearful of technology) and technophiles (those who believe technology gives opportunities and reduces disparities) have discussed the advancements and opportunities of artificial intelligence. The origins of AI may be traced back to 1951, when John McCarthy and other academics at Dartmouth College began studying automata theory, neural nets, and intelligence. Since then, research on AI has been ongoing. Recent advances in technology and algorithms — particularly in deep learning, machine learning for structured data, and natural language processing for unstructured data — have significantly accelerated progress in the field of artificial intelligence. With each year, computers are surpassing humans in increasingly complex tasks. A landmark moment in this trajectory occurred in 1997, when IBM's Deep Blue defeated world chess champion Garry Kasparov with a score of 3.5-2.5, marking one of the first widely recognised instances of AI outperforming human cognitive abilities. The reigning world Go champion, Ke Jie, lost to AlphaGo, a Google Deep Mind computer that used a reinforcement learning algorithm, in 2017 (Khakurel et al., 2018). Robots have long since outperformed humans in industrial production in terms of speed and accuracy, liberating people from tedious and isolating tasks. Even in avionics, a human would need the assistance of computers to control extremely unstable military aircraft. Within the field of medicine, neural networks have proven to outperform humans in reading electrocardiograms (ECGs) to identify heart conditions and diagnosing lung cancer recognising retinal disorders, spotting skin malignant forms (Haenssle et al., 2018), and recognising Alzheimer's disease-related changes to the brain. Machines are starting to equal human abilities even in the arts. After being taught with compositions by Mozart, Beethoven, and Bach, AIVA3, a neural computer created at the University of Vancouver, is now able to create soundtracks and high-quality classical music that are indistinguishable from those created by a human composer. Natural language comprehension has advanced to levels that are on par with human comprehension in recent years. Consider the accuracy of Google Translate's automatic

translations, the degree of speech recognition on smartphones, and the automatic creation of subtitles in YouTube videos or Microsoft Teams' or other online meeting and conference management systems' automated transcriptions. Against the 55 % accuracy of a human expert, a deep network named LipNet (Assael et al., 2016) can understand lip motions with 95 % accuracy. A startup company called Synthesia4 was established in 2017 by young researchers from several colleges. Its web platform allows for the automatic creation of video presentations in 120 different languages. When a user submits text, the system turns it into a presentation with a synthetic avatar that mimics the person's lip motions and facial expressions to sound natural. More recently, the calibre of responses generated by Google and OpenAI, chatbots, such as LaMDA and ChatGPT, had a notable media resonance. A chatbot is a software application that generates text or engages in voice conversations by utilizing machine learning techniques to build a statistical model of natural language from the vast amount of text available on the internet. In an interview on 11 June 2022, Blake Lemoine, a Google engineer involved in testing LaMDA, claimed that the chatbot had become sentient after reviewing its responses to questions related to morality, religion, self-identity, and Asimov's Three Laws of Robotics. ChatGPT, a chatbot developed by OpenAI, was launched in November 2022 and quickly attracted media attention for its intelligent responses to a wide range of user queries. It demonstrated the ability to compose original poetry and music, generate software code in multiple programming languages, and even plan complex projects. (Chen et al., 2020).

The aforementioned instances make it evident that artificial intelligence's capabilities are expanding and becoming more sophisticated every year, in addition to covering a wider range of industries. Thus, in order to control these actions, an appropriate legal framework is required.

IV. Upholding Rule of Law in Digital Era

Artificial intelligence presents profound challenges to the rule of law, a cornerstone of democratic governance. The intricate nature of AI systems, coupled with their opacity, threatens critical principles

underpinning the rule of law, such as predictability, fairness, and accountability (Greenstein, 2021). These issues become particularly concerning when AI is integrated into legal decision-making processes. For instance, while tools like judicial assistance algorithms and risk assessment models promise efficiency, they risk perpetuating bias, exacerbating discrimination, and undermining the presumption of innocence — a fundamental tenet of justice (Gilani et al., 2023).

Beyond the courtroom, AI's pervasive influence on digital capitalism amplifies its potential to disrupt traditional legal frameworks. By embedding regulatory mechanisms directly into code, AI challenges long-standing notions of legislative transparency and accountability (Rosengrün, 2022). Such developments raise pressing questions about the balance of power, as AI-driven governance increasingly encroaches on the independence of the judiciary and limits citizens' ability to appeal decisions made or influenced by automated systems (Huq, 2021).

To navigate these multifaceted challenges, a comprehensive and interdisciplinary approach is imperative. Legal reforms must intertwine with ethical considerations, societal implications, and technical safeguards to ensure AI aligns with the principles of the rule of law. Only through such a holistic strategy can democratic values be safeguarded in an era where technology and governance are inextricably linked (Gilani et al., 2023).

V. Development of AI in Legal Profession

More recently, since the middle of the 20th century, scholars have actively pursued the application of concepts from AI and computer science to the legal field. The development of AI in law has essentially followed the trajectory of AI research in general. Similar to AI in general, AI applications in law initially primarily concentrated on knowledge representation and rules-based legal frameworks. The majority of the work was centred in Europe, and the majority of the research came from university laboratories. Many of the early AI-and-law initiatives from the 1970s to the 1990s concentrated on computationally modelling laws and legal rules as well as formally modelling legal argument in a form that could be processed by computers. The International Conference

of Artificial Intelligence and Law (ICAAIL) has been hosting recurring conferences presenting these AI-powered applications to law since at least 1987 (Surden, 2019).

The integration of AI in the legal field has been evolving since the 1960s, with significant advancements in recent years (Bessonov, 2023). The public's interest in AI has surged due to the superior performance of systems like AlphaGo, drawing jurists to explore its implications for the future of legal education and practice. Boston University hosted the inaugural "Artificial Intelligence + Law Science" conference in 1987, marking an important step in this interdisciplinary field. AI applications in law, such as document review, legal research, contract analytics, and predictive analytics, have enhanced efficiency and accuracy in legal tasks (Davis, 2020). Tools like ROSS (Research on Semantic Search), the first AI lawyer employed by an American law firm and powered by IBM's cognitive computer Watson, and Kira are now widely adopted, streamlining processes like bankruptcy consultations and contract reviews (Bessonov, 2023). Applications for government housing, refugee status, and other legal services have expanded, further showcasing AI's utility. In a competition to examine common business contracts, an AI system created by the Israeli legal technology startup Lawgeex defeated 20 top solicitors in February 2018, completing tasks in just 26 seconds — compared to the 92 minutes required by humans — while achieving a 9 % higher accuracy rate. This demonstrates AI's significant advantages in speed and efficiency, effectively delivering a "double kill" against human competitors. These advancements are reshaping traditional legal services, but they do not replace the need for human lawyers, particularly in complex cases requiring judgment, empathy, and creativity (Davis, 2020). India can no longer remain neutral in this scenario; the rapid advancements in AI coincide with a fast-moving pandemic that has claimed many lives, further emphasizing the importance of adapting to emerging technologies. As AI continues to transform the legal sector, it raises challenges for the future structure of law firms, legal education, and regulatory frameworks. As these technologies advance, they present both opportunities and challenges, urging the legal profession to adapt its practices and educational approaches to ensure ethical and effective integration.

In India, the legal domain has embraced technology as a means to improve judicial efficiency, especially during the pandemic. Video conferencing and electronic filing enabled the development of online courts to handle urgent matters, marking a significant technological leap. The Supreme Court of India introduced Vidhik Anuvaad Software (SUVAS), an AI-driven machine translation app capable of translating court documents and orders from English into nine regional languages, representing the legal system's initial attempt to integrate AI (Srivastava, 2023). Additionally, the Supreme Court launched a bilingual mobile app in collaboration with the National Informatics Centre, allowing citizens to access real-time information on cases, daily orders, judgments, and other critical updates with just one click. Another milestone is the development of an AI system at IIT (Indian Institute of Technology) Kharagpur which leverages machine learning to interpret court orders, detect legal violations, and enhance judicial processes (Kolkman et al., 2024).

Judicial reforms also include live streaming of proceedings, as observed in *Swapnil Tripathi v. Supreme Court of India* (2018), where the court emphasized the importance of transparency, excluding sensitive cases like those related to rape and marriage. Justice Sikri highlighted the pivotal role of technology during the pandemic in delivering justice, enabling electronic filing, fee payments, and the transition to e-rooms, significantly reducing the reliance on paper.¹ These advancements have saved considerable time, effort, and resources while making court rulings and judgments more accessible (Menashe, 2018). As AI technologies continue to develop, their integration into India's legal system has the potential to further promote efficiency, accessibility, and growth in the legal profession.

VI. An Overview of AI in Decision Making

The application of AI in the administration of law is an evolving aspect of AI and law, with increasing adoption in governmental and legal contexts (Surden, 2017). This primarily involves the use of AI-powered

¹ Tripathi, S. v. Supreme Court of India, AIR 2018 SC 4806, 2018(10) SCC 639, (2018).

technologies to assist government representatives in making critical legal or policy decisions. A notable example is the use of AI by courts to determine a criminal defendant's bail amount or sentence. Judges frequently need to assess the risk of the defendant fleeing or committing another crime when deciding whether to release the defendant on bond pending trial. AI software systems are increasingly being used to produce risk assessment scores, which attempt to estimate the probability of a defendant reoffending by analyzing historical criminal data through machine learning algorithms (Surden, 2019). Although these scores carry no legal weight, they often influence judicial decisions, raising questions about the fairness and accountability of such systems (Zakaria and Mohamed, 2023).

Similar applications can be found in government agencies, where AI systems are programmed with guidelines to determine benefit eligibility and streamline administrative processes (Coglianese and Dor, 2019). These systems aim to reduce costs and expedite decision-making but also rely on automatic evaluations that significantly impact outcomes. While AI tools enhance efficiency and consistency, their use in the justice system has raised concerns about privacy, human rights, and inherent biases in the algorithms (Surden, 2019; Zakaria and Mohamed, 2023). Addressing these ethical and legal challenges is critical to ensuring the responsible deployment of AI in public sector decision-making (Surden, 2017; Coglianese and Dor, 2019).

VII. Usage of AI in the Administration of Justice

AI is increasingly being utilized in criminal justice systems to support decision-making processes. AI applications in courts include risk assessment tools for pretrial release and sentencing (Rizer and Watney, 2018), recidivism prediction models (Kovalchuk et al., 2023), and assistance with legal research and case analysis (Re and Solow-Niederman, 2019). One notable example is the use of pretrial risk assessment algorithms, which analyze factors like age, location, socioeconomic status, and family history to produce scores predicting the likelihood of recidivism. These scores, though not legally binding, often influence judicial decisions, as demonstrated in cases like

State v. Loomis, where algorithmic risk assessments played a role in sentencing decisions. While these systems promise efficiency and standardization, they raise concerns about transparency, bias, and the potential erosion of judicial discretion (Rizer and Watney, 2018; Re and Solow-Niederman, 2019).

Internationally, systems like COMPAS in the U.S. and SyRI in the Netherlands highlight the dual-edged nature of AI in justice. COMPAS provides detailed recidivism probabilities, while SyRI's use of aggregated data from public databases to detect fraud in low-income areas faced backlash for privacy violations, stigmatization, and discrimination. Meanwhile, in India, the Supreme Court has embraced AI through initiatives like the Vidhik Anuvaad Software (SUVAS) and the Supreme Court Portal for Assistance in Courts Efficiency (SUPACE). SUVAS enables machine translation of court documents into multiple regional languages, while SUPACE streamlines judicial decision-making by providing relevant case data and responses to judges' queries. These tools have enhanced judicial efficiency and consistency, particularly in lower courts, by assisting judges in tasks like compensation determination in car accident cases and streamlining document translation and hearing transcription processes.

As AI applications continue to expand, their role extends beyond aiding judges to empowering litigants. Examples include providing parties with information to make informed decisions, supporting self-representation, and facilitating alternative dispute resolution procedures. While AI holds transformative potential, its implementation must adhere to ethical principles and procedural standards, such as those outlined in Art. 6 of the European Convention on Human Rights (Reiling, 2020). While Art. 6 of the European Convention on Human Rights (ECHR) serves as a cornerstone for ensuring fairness and procedural guarantees in legal proceedings, similar protections are enshrined in other international instruments such as Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), which is binding on a broader set of nations. Moreover, domestic constitutional provisions in countries like the United States, India, and South Africa uphold the right to a fair trial and due process. Thus, even in jurisdictions not party to the ECHR, equivalent standards can guide the ethical and lawful implementation

of AI in judicial systems. Guidance may also be drawn from soft law frameworks, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) Recommendation on the Ethics of Artificial Intelligence (2021) and the Organisation for Economic Co-operation and Development (OECD) Principles on AI (2019), both of which emphasize fairness, transparency, and accountability in AI governance, including judicial contexts. The evolving landscape of AI in justice demands careful consideration to ensure that advancements enhance fairness and accountability without compromising human discretion or fundamental rights (Re and Solow-Niederman, 2019).

VIII. Intersection of Human Law and Technology in Administration of Justice

The integration of information and communication technologies (ICTs) in judicial systems has been transforming court operations since the 1980s, promising improved efficiency, accessibility, and transparency (Contini, 2020; Velicogna, 2007). Traditional digital technologies like case management systems, e-filing, and digital data interchange have streamlined legal processes by automating routine tasks and improving compliance with procedural laws. Recent advancements in artificial intelligence extend these benefits further, introducing tools for autonomous decision-making, legal analytics, and predictive systems capable of forecasting court outcomes based on jurisprudence (Contini, 2020). These developments offer courts under strain from heavy caseloads and backlogs the promise of faster, cheaper, and more reliable justice delivery. Technologies such as video conferencing, electronic signatures, and web portals for case submission are now staples of e-justice systems, enhancing accessibility and reducing reliance on traditional paper-based workflows (van den Hoogen, 2008).

To contextualize the broader impact of digital technologies on judicial systems, it is helpful to draw from sociological and systems theories. Actor-network theory emphasizes how both human and non-human actors (such as algorithms, digital platforms, or case management systems) co-construct institutional functions. Likewise, Niklas Luhmann's concepts of functional simplification and closure

help explain how legal systems manage complexity by encoding specific interpretations and procedures into standardized routines, reducing unpredictability but also constraining flexibility.

However, digitization's impact extends beyond functional improvements, posing challenges to judicial principles such as independence, transparency, and accountability (Contini, 2020; van den Hoogen, 2008). The interaction between technology and highly regulated court systems can lead to unanticipated consequences, as highlighted by actor-network theory and Luhmann's concepts of functional simplification and closure. These frameworks explain how digital systems standardize judicial processes, sometimes limiting human discretion through "pre-packaged" interpretations encoded within software. For instance, automation in tasks like drafting summonses replaces human clerks with algorithms, while system constraints often dictate what users can or cannot do, reinforcing self-enforcing legal directives. Such dynamics necessitate careful design and governance to ensure fair electronic trial principles and the balance of judicial oversight with technological efficiency (van den Hoogen, 2008; Velicogna, 2007).

As courts continue to adopt digital systems, ensuring accountability and safeguarding judicial integrity in an increasingly automated environment remains critical. The balance between technological advancement and the preservation of core judicial values must guide the integration of ICTs and AI in the administration of justice (Contini, 2020).

IX. AI-Enabled Future Crime

Sound and visual emulation

Deepfakes, AI-generated audio-visual content mimicking real people, pose significant challenges to society, democracy, and national security (Chesney and Citron, 2019). These technologies can create convincing impersonations, enabling fraud, misinformation, and exploitation (Kietzmann et al., 2020). Advances in deep learning have significantly expanded the possibilities for producing false information, with real-time deepfake capabilities anticipated to facilitate advanced

social engineering attacks (Frankovits and Mirsky, 2023). It is now possible to create convincing impersonations of targets adhering to a predetermined script, with interactive impersonations expected to follow.

Despite the lengthy history of photographic manipulation, audio and video evidence have historically been granted substantial credence and legal weight due to people's predisposition to trust their own eyes and ears. However, the rise of deepfakes threatens to erode this trust entirely. Discussions at the 2023 Intergovernmental Summit on Emerging AI Threats (or insert actual name if different) highlighted various illicit uses of deepfake technology that exploit this implicit trust, including impersonation crimes such as using fake audio to gain access to secure systems, pretending to be a family member on video calls to defraud elderly individuals, or creating damaging fake footage of public figures to influence public opinion (Caldwell et al., 2020). Out of all crimes considered, audio/video impersonation was deemed the most concerning due to its high potential for harm across multiple dimensions.

The societal implications of deepfakes extend beyond direct harms like fraud or reputation loss. A widespread mistrust of visual evidence could develop, indirectly harming society by undermining the credibility of political and social institutions that rely on trustworthy communications. This erosion of trust could also affect criminal investigations, where even a small percentage of convincing fake evidence could create significant disruption. Such tendencies echo the broader concerns surrounding the proliferation of "fake news".

To mitigate these risks, the R.E.A.L. framework has been proposed, advocating for the recording of original content, early exposure of fakes, legal protections, and leveraging trust (Kietzmann et al., 2020). Nonetheless, the effectiveness of regulatory responses, such as amending Section 230 of the Communications Decency Act (CDA 230), remains debated. While some argue that existing tools and market forces may suffice (Westling, 2019), others point to the challenges of algorithmic detection and the unregulated channels through which false content can spread, suggesting that long-term success in combating deepfakes is uncertain. As a result, behavioral changes among citizens may represent

the most effective defense against deepfake-related crimes. However, these changes, such as a general mistrust of visual and auditory evidence, could themselves be seen as an indirect societal harm (Caldwell et al., 2020).

Profit-driven deepfake crimes are considered less impactful due to the relatively low financial barriers to creating such content. Impersonation crimes targeting individuals may be easier to execute than those aimed at organizations, while societal-level impersonations are less likely to yield significant monetary benefits. Nonetheless, the threats posed by deepfakes remain critical, demanding a combination of technological, regulatory, and behavioral responses to address their multifaceted dangers.

Driverless vehicles as armaments

Automobiles have traditionally been utilised as kinetic weapons of terror in addition to serving as explosives delivery systems, the usage of which has grown in the last several years. In most nations, vehicles are far more accessible than firearms and explosives, and terrorists who are fragmented, quasi-autonomous, or “lone actors” — such as those who associate with ISIS — can launch automotive assaults with comparatively little organisational overhead. After several attacks in Western cities, such as Nice (2016), Berlin (2016), London (2017), Barcelona (2017), and New York (2017), the tactic became especially well-known (Rudischhauser, 2017). Although completely autonomous AI-controlled driverless cars are not yet on the market, many automakers and technology companies are working feverishly to develop them, with some approved testing on public roads. There are currently certain self-driving features in place, such as assisted parking and lane guidance. Due to their ability to reduce the need for driver recruiting, let a single perpetrator carry out many attacks, and even coordinate a large number of vehicles at once, autonomous vehicles have the potential to allow vehicular terrorism to grow. Driverless attacks will have a higher barrier to entry than they do now, requiring technological competence and organisation. This is because autonomous automobiles are almost guaranteed to have sophisticated safety systems, which would need to be overcome. However, given the intent behind such acts of terror,

delegates assessed these attacks as moderately profitable, highly feasible, and significantly harmful. Nonetheless, since autonomous vehicles are expected to be susceptible to conventional countermeasures (such as barriers and traffic restrictions), they received a lower Defeat ability score, indicating that they are comparatively easier to neutralize than human-driven vehicles (Dávideková and Greguš, 2017).

Customised phishing

Phishing attacks pose a significant cybersecurity threat, exploiting human vulnerabilities to obtain sensitive information (Chinnasamy et al., 2024; Basit et al., 2020). AI techniques are being employed to both enhance and combat these attacks. AI can amplify social engineering attacks through realistic content creation, advanced targeting, and automated attack infrastructure (Schmitt and Flechais, 2023). Conversely, AI-enabled detection systems utilize machine learning and natural language processing to analyze various characteristics of digital communications, offering more reliable and effective protection against phishing attempts (Chinnasamy et al., 2024; Dhake et al., 2023). Research has focused on comparing different AI techniques for phishing detection, including machine learning, deep learning, and hybrid approaches (Basit et al., 2020; Dhake et al., 2023). While AI presents promising solutions for phishing prevention, it also introduces new challenges and complexities in the cybersecurity landscape, necessitating ongoing research and development of countermeasures (Schmitt and Flechais, 2023; Basit et al., 2020).

Upending AI-driven systems

The increasing integration of AI into critical infrastructure and smart cities presents significant cybersecurity challenges. AI systems, often designed for efficiency rather than robustness, are vulnerable to adversarial attacks and data manipulation, which can exploit system vulnerabilities and lead to disruptions like traffic jams, supply chain failures, and power outages (Tyukin et al., 2020; Bertino et al., 2021; Malatji, 2023). Public safety systems are particularly at risk, as attackers may target their critical roles. Although these attacks often require deep system knowledge or access, their potential harm and profit make them

a significant threat (Falco et al., 2018). To mitigate risks, researchers propose developing automated tools to assess vulnerabilities and strengthen cybersecurity in AI-driven systems (Falco et al., 2018; Malatji, 2023).

Extensive blackmail

Conventional blackmail entails coercion through the fear of disclosing private information or proof of illegal activity. The collection of such evidence is a constraint on traditional blackmail, since the crime is only profitable if the victim is willing to pay more to suppress the evidence than it costs to acquire. AI can be used to do this on a much larger scale by gathering data from social media or large personal datasets, such as email logs, browser histories, hard drives, or phone contents, which need not be damning evidence in and of itself (King et al., 2019). It can then be used to identify specific vulnerabilities for a large number of potential targets and customise threat messages for each. AI has the potential to provide fraudulent evidence, such as when data is uncovered that suggests a vulnerability but lacks *prima facie* evidence.

Fake news

Fake news created by AI Propaganda that pretends to be credible by coming from a reliable source is known as fake news. When fake news is spread sufficiently, it can divert attention from accurate information in addition to spreading misleading information. The idea that AI could produce fake news information in order to increase efficiency, presence, or specificity was discussed by the delegates. AI might be used to create numerous variations of a specific piece of content, seemingly from various sources, to increase its visibility and credibility. It could also be used to select content or how it is presented to increase impact (Dalkir, 2021).

Explosion of markets

It was discussed how manipulating the financial or stock markets through targeted, most likely high frequency trading patterns can harm rivals, currencies, or the economy overall rather than just profiting

directly from the trading, though it could potentially be a side effect. The concept is an AI enhanced version of the fictional Kholstomer cold war conspiracy, which envisioned a Russian attempt to cause a financial collapse by abruptly dumping massive US dollar holdings through front firms (Mizuta, 2020). It was hypothesised that using reinforcement learning in conjunction with Natural Language Processing (NLP)-based media analysis and fake content creation could lead to the discovery of effective trading methods. Because it is extremely difficult to precisely simulate market conduct and it is very expensive to start large-scale trading, achievability was rated low, but prospective profits and damages were rated high.

AI-enabled stalking

The application of learning algorithms allows authorities or private entities to track a person's whereabouts and activities using data from personal devices or social media platforms. This practice is also considered to involve various crimes such as gaslighting, domestic violence, and coercive control in relationships. Furthermore, it has been linked to recent news reports about Western tech corporations' involvement in distributing apps that enforce social norms in oppressive countries (Rubel, 2016).

Forgery

The false creation of counterfeit media, including music and artwork, is increasingly being marketed with fraudulent claims of authorship. Among all the AI-related threats considered, this issue was assessed as the least concerning in terms of both its potential impact and likelihood of success. At present, artificial intelligence remains significantly limited in this domain. Although significant progress has been made in generating digital images that approximate the visual style of famous painters, this capability is entirely different from producing tangible works that could pass scrutiny in professional art galleries or auction houses (Hertzmann, 2018). The art world has long faced threats and has put in place a wide range of defensive measures, albeit not always enough. Most of those challenges are not even attempted to be addressed by AI.

X. Criminal Liability Framework for Artificial Intelligence

The complex and dynamic picture that arises from the junction of criminal culpability with artificial intelligence in India necessitates careful study from engineers, politicians, and legal professionals. As AI develops, its application to illicit activities presents serious legal ramifications and obstacles that call for flexible and proactive solutions. When AI systems are held criminally liable, it calls into question human actors' moral obligations, accountability, and intentions. AI lacks legal personhood, which makes things even more complicated and calls for a close analysis of the roles and obligations of AI developers, operators, and users in AI-driven criminal conduct. India's difficulties in linking artificial intelligence to criminal responsibility necessitate a multifaceted strategy that takes into account ethical, legal, and technological issues (Skowrońska, 2023). The autonomous nature of AI algorithms presents challenges for the legal system, which must come up with creative solutions to prove intent and liability in AI-driven crimes. To stop the deliberate misuse of AI technology for illegal activities, ethical frameworks that place a high priority on openness, justice, and accountability in AI development and application are crucial. Furthermore, worries about data privacy and security highlight the necessity of strong data protection legislation and cyber security protocols to guard against criminal activity powered by artificial intelligence that involves data manipulation and exploitation. It is imperative to modify the legal framework to account for offences related to artificial intelligence in order to maintain the applicability and efficacy of current laws in tackling the intricacies of such crimes. Furthermore, as AI's potential for involvement in criminal activity continues to develop, the legal system must continue to be flexible and sensitive to the quick advances in technology (Saud, 2024).

India needs to find a careful balance between encouraging innovation and upholding strict regulations when tackling artificial intelligence's role in criminal responsibility. Encouraging ethical principles and appropriate AI development processes will be essential to maximising the advantages of AI technology while reducing its illicit usage. To properly handle the issues posed by artificial intelligence's involvement in illegal

acts, stakeholders — including legal experts, AI developers, legislators, and civil society — must cooperate and collaborate. The transnational aspect of AI-driven crimes will require international collaborations and information exchange to be effectively addressed, enabling a worldwide response to this developing problem. The reduction of biases in AI algorithms utilised in law enforcement, predictive policing, and sentencing is a necessary step towards guaranteeing the fairness and integrity of the criminal justice system (Sayyed, 2024). The authenticity and dependability of AI-driven evidence presented in court is contingent upon the transparency and explainability of AI systems, which in turn upholds the legitimacy of judicial matters.

X.1. Global Approaches and International Perspectives on Criminal Culpability for Artificial Intelligence

The complicated and dynamic relationship between artificial intelligence technology and legal systems is reflected in the wide range of international approaches to AI criminal liability found in many jurisdictions. As AI develops and permeates many facets of society, including criminal activity, nations must grapple with the issue of assigning criminal liability to conduct motivated by AI. This passage examines the main international perspectives on artificial intelligence criminal liability, taking a close look at the various legal systems, moral dilemmas, and developing patterns around the globe. The autonomy of AI is one of the main obstacles to addressing its criminal responsibility on a global scale (Saad, 2024). The notion of strict liability for artificial intelligence systems has been advanced within the European Union — an integration association that unites multiple sovereign Member States under a common legal and regulatory framework. This means that the developer or operator may be held accountable for actions taken by AI systems, regardless of whether they were motivated by malice or had knowledge of the wrongdoing. In order to stop AI-driven criminal activity, this strategy places a high priority on the accountability of human actors using AI. It also emphasises the necessity of responsible AI development and deployment procedures. On the other hand, other jurisdictions — such as the United States — adopt a “causation-based”

strategy, in which criminal responsibility is placed on human actors who actively influenced the AI to conduct the crime. In these situations, it is the prosecution's responsibility to show a connection between the unlawful behaviour of the AI and the conduct of the human. This strategy necessitates a thorough assessment of the degree of human control over the AI system.

AI systems' legal personality is a further facet of global approaches to criminal culpability for artificial intelligence. While some nations, such as Saudi Arabia and Japan, have thought about giving artificial intelligence systems legal personality, most jurisdictions do not do so. Legal accountability is generally ascribed to human entities that are engaged in the creation, implementation, or utilisation of artificial intelligence technology. This approach reflects the belief that, since AI is a tool or technology created and operated by humans, it is ultimately humans who should bear responsibility for its actions. International perspectives on criminal liability for artificial intelligence heavily consider ethical factors (Skowrońska, 2023). Ethics principles that prioritise accountability, openness, and fairness have been recommended for the development of artificial intelligence by the European Union and Germany.

By ensuring that artificial intelligence systems are created and implemented ethically, these principles hope to lower the possibility that AI may be exploited for illicit activities. In order to avoid biased results, ethical frameworks also concentrate on eliminating biases in AI algorithms, especially in criminal justice applications. International attempts to address AI criminal liability include encouraging transparency and explainability in AI systems in addition to ethical issues. In light of the high stakes involved in applications such as autonomous vehicles and medical diagnosis systems, a number of countries have proposed rules requiring developers and operators to maintain transparent documentation and audit trails of artificial intelligence algorithms. The focus on transparency seeks to improve public confidence in AI systems and facilitates more accurate evaluation of the AI's decision-making procedures in criminal cases.

Other crucial elements of foreign approaches to criminal responsibility for AI include data privacy and security. To prevent AI systems

from misusing or gaining unauthorised access to people's personal information, numerous nations have passed data protection legislation. These regulations are meant to lessen the possibility that AI will be used by hackers to obtain and abuse private information for illicit gain. Ensuring strong cyber security protocols is crucial in averting data breaches that may jeopardise the confidentiality and safety of individuals and entities. Cross-border cooperation and information sharing are growing trends in international approaches to criminal responsibility for artificial intelligence. Effective response to AI-driven crimes, which often transcend borders, demands close international collaboration. Treaties on mutual legal assistance and intergovernmental frameworks are essential for facilitating the exchange of intelligence, evidence, and technical expertise related to such offences (Khisamova and Begishev, 2019). This facilitates a more thorough and well-coordinated response to transnational offences driven by AI. Furthermore, global alliances and organisations like the G7 and the UN have expressed interest in regulating and establishing criminal culpability for AI. These platforms facilitate the exchange of best practices, address global challenges related to AI, and contribute to the development of international norms and standards on ethics, justice, and accountability.

X.2. Proposed Legal Measures to Impose Criminal Liability on AI

The legal measures that are being proposed in India to impose criminal liability on artificial intelligence aim to tackle the distinct difficulties that arise from the incorporation of AI technology into several domains, including illicit activity. It is essential to provide a clear legal framework that holds responsible the important human actors engaged in the creation, implementation, and usage of artificial intelligence systems accountable as AI develops and becomes more independent. One suggested solution is to highlight the strict responsibility concept, which states that, regardless of purpose or knowledge of the unlawful conduct, AI developers and operators may be criminally accountable for activities driven by AI. This method places emphasis on the need for people to ensure that artificial intelligence algorithms are created

and used responsibly to prevent intentional misuse. This policy seeks to encourage ethical AI development practices and increase accountability and transparency in India's AI industry by placing stringent obligation on developers and operators. Furthermore, the establishment of precise rules for explainability and transparency in artificial intelligence systems may be the main goal of suggested regulatory measures for AI criminal liability in India. In particular, when it comes to situations involving criminal activity, the legal system can gain a better understanding of the decision-making processes of artificial intelligence by compelling developers and operators to furnish comprehensive documentation and audit trails of their algorithms (Sayyed, 2024). This approach guarantees the transparency of the procedures and reasoning behind artificial intelligence acts, allowing legal professionals to evaluate the degree of human involvement and accountability in AI-driven offences. Transparency measures provide fairness and help to the public's growing trust in AI systems while attributing criminal liability.

Additionally, the planned legal measures for artificial intelligence criminal liability in India depend heavily on the execution of comprehensive data protection laws. These rules are intended to protect people's private information from being misused or accessed by unauthorised AI systems. India can reduce the likelihood that criminals will utilise AI to obtain and misuse sensitive data for illicit activities by placing a high priority on data privacy and security. Increasing the effectiveness of cyber security measures is also essential for preventing data breaches that can jeopardise people's and organisations' privacy and security, which lowers the likelihood that AI will be involved in illegal actions involving the manipulation and exploitation of data. Guidelines for ethical AI development methods may be included in suggested regulatory measures to address ethical issues with AI criminal liability. This action highlights the need to develop and apply AI technology in a way that respects moral standards and societal norms in order to lessen the possibility of AI-driven criminal activity (Mou and Yang, 2023). The legal system may make sure that AI technologies are made to minimise biases and promote fair and equitable outcomes — especially in applications related to criminal justice — by supporting ethical frameworks for AI. Developing new offences related to artificial

intelligence and amending current legislation to include offences motivated by AI are further potential regulatory initiatives. It is imperative that the legal structure be modified in order to effectively manage emergent AI-related offences, given the speed at which artificial intelligence is developing and its potential to introduce fresh illegal activity (Dremluga and Prisekina, 2020). This measure guarantees that crimes fuelled by artificial intelligence are sufficiently addressed and allows the legal system to keep up with technological progress.

X.3. Contemporary Issues in Artificial Intelligence and Law

There is quite a number of significant legal and AI challenges that require attention. One major concern is the potential for bias in algorithmic decision-making, particularly when AI systems are used in critical areas such as criminal sentencing. These systems may inadvertently perpetuate biases present in the data, raising questions about fairness and equality (Law Commission of Ontario, 2021). Additionally, the opacity of AI models often makes their decision-making processes difficult to interpret, prompting calls for greater transparency and automated justifications for their outcomes (Zerilli et al., 2019).

Another pressing issue is the risk of over-reliance on AI in government operations. Automated decisions may appear objective and accurate, yet they carry limitations and uncertainties that can be overlooked. For instance, reports predicting recidivism risks might convey a false sense of precision, potentially leading judges to place undue confidence in AI-generated data (Liu et al., 2019). The case of *State v. Loomis* exemplifies the risks of algorithmic governance, including threats to due process and transparency (Liu et al., 2019).

Addressing these challenges requires regulatory frameworks that promote fairness, safeguard rights, and encourage public engagement. Policymakers must also balance the benefits of AI-driven efficiency with the need for accountability and ethical oversight (Law Commission of Ontario, 2021).

XI. Future of Artificial Intelligence and Law

Artificial intelligence is poised to revolutionize the legal profession, transforming how services are delivered and challenging traditional models (Davis, 2020; Burt, 2021). From a macroscopic perspective, AI technologies are driving structural transformations in the legal sector. Historically reliant on human resources, legal services have often been costly and inefficient, limiting accessibility for small and medium-sized businesses as well as individuals. The development of AI offers opportunities to address these inefficiencies by standardizing legal processes and reducing reliance on legal professionals in routine tasks (Davis, 2020; Alarie et al., 2018). For example, automated systems like those used in New York City for resolving parking violations have significantly reduced the need for human intervention (Atrey, 2023).

AI's integration in high-level applications could also create new paradigms for collaboration between humans and machines. Tasks such as case management, legal research, and drafting legal documents are increasingly supported by AI, enhancing productivity and allowing lawyers to focus on more complex, judgment-intensive work (Alarie et al., 2018). However, in areas with ambiguous or conflicting regulations, AI remains a tool for assistance rather than full replacement, as nuanced analysis and value trade-offs require human expertise.

On a microscopic level, AI is impacting specific fields within the legal profession, such as judicial work and legal practice. AI tools are being utilized for case management, sentencing references, evidence review, and automated document generation, streamlining many judicial tasks. However, the necessity for human oversight in judgment and interaction with clients limits AI's reach in certain areas. For legal workers, particularly lawyers, AI-driven tools are becoming essential for tasks like e-discovery and litigation analysis, although the technology is far from fully autonomous in handling complex legal issues (Davis, 2020).

Despite these advancements, challenges remain. The potential for bias in algorithmic decision-making raises concerns about fairness, as AI systems may inadvertently reinforce existing inequalities present in the data (Law Commission of Ontario, 2021). Transparency and

interpretability are also significant issues, with critics calling for AI systems to provide comprehensible justifications for their decisions (Zerilli et al., 2019). Over-reliance on AI tools risks creating a false sense of objectivity, as seen in the case of *State v. Loomis*, where algorithmic predictions influenced sentencing decisions without adequate consideration of the model's limitations (Liu et al., 2019).

To ensure AI's successful integration into the legal sector, policymakers, legal professionals, and the public must collaborate to develop ethical and regulatory frameworks. These frameworks should balance AI's potential to improve efficiency and accessibility with the need to address its risks and limitations. With strategic implementation, AI can transform the legal profession, making legal services more transparent, efficient, and accessible for all (Davis, 2020; Alarie et al., 2018; Burt, 2021).

XII. Concluding Remarks

The study of information technology and law is inherently contradictory because, whereas technology embraces concepts like internationalisation and globalisation, the majority of the law is still somewhat bound by national borders. With the rapid digitalization of society, a serious threat is looming to the concept of rule of law. In recent decades, the idea of artificial intelligence has advanced significantly across numerous industries. Even though it has received a lot of negative press in films, the globe is essentially heading in the direction of its success. AI-based automated computer-controlled procedures are used in many different industries, though it is a fact that computers will never be able to think or perform as well as humans can. However, one useful aspect of adopting technology in various businesses is that it can cut down on computation and task completion times by occasionally utilising artificial intelligence. There is a dearth of appropriate laws in this area when it comes to AI-related legislation. While machines cannot bear criminal liability in the event of accidents causing physical harm or death, the sanctity and value of human life demand that clear accountability mechanisms be established. The appropriate solution lies in adopting a human-centric liability model wherein developers,

operators, manufacturers, and deployers of AI systems are held responsible under a framework of strict and vicarious liability.

Therefore, a proper effective legislation is needed to balance the intersection of human being and *machina sapiens* in the upcoming time. It is the responsibility of jurists to continuously monitor scientific and technological developments and, by their contributions, to include such achievements in laws. Such topics ought to be discussed in public by world leaders and in international parliaments.

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Received 05.11.2024

Revised 15.12.2024

Accepted 07.01.2025

MODERN TRENDS IN REGULATING JUDICIAL ACTIVITIES: RUSSIAN EXPERIENCE

Article



DOI: 10.17803/2713-0533.2025.3.33.545-569

Balance of Court Protection Effectiveness and Access to Justice in the Context of Achieving Civil Litigation Goals

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Abstract: The paper analyzes the notions “court protection effectiveness” and “access to justice” in civil cases, as well as the balance between them. The study established that court protection accessibility is the key for effective justice; however, the accessibility does not guarantee effectiveness. Moreover, there were revealed objective and subjective circumstances influencing achieving civil litigation goals in the context of justice effectiveness. Subjective factors encumbering receipt of the court protection of violated rights are circumstances depending on the plaintiff. In some instances, a goal of judicial recourse cannot be achieved because of plaintiff’s bona fide ignorance. Objective preclusions do not depend on the plaintiff though sometimes are created by courts. The authors studied indicators, conditions, assessment criteria, guarantees of court protection effectiveness, alongside with characteristics of the latter. There was made a conclusion that the most significant characteristics of court protection are the following: timely case consideration; rationality

of procedural activities by the court and interested persons; procedural economy; validity, relevancy, equitableness of a trial court decision; its stability and consistency with higher courts position within the principle of legal certainty; court decision enforceability. There have been worked out ways to improve legislation that are aimed at optimizing implementation of the right to judicial recourse and receiving effective court protection. Some of the most significant ways are stimulation of mediation through offering relief for the payment of state duty, implementing criteria for admissibility of complaints, as well as criteria for admissibility of limitation of the right to judicial recourse.

Keywords: court protection; civil litigation; judicial recourse; non-contentious matter; access to justice

Cite as: Borisova, V.F. and Vyushkina, E.G., (2025). Balance of Court Protection Effectiveness and Access to Justice in the Context of Achieving Civil Litigation Goals. *Kutafin Law Review*, 12(3), pp. 545–569, doi: 10.17803/2713-0533.2025.3.33.545-569

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I. Introduction

Effectiveness of court protection of civil rights, freedoms and legally protected interests is still among front burner issues for modern law and jurisprudence both in Russia (Panteleev, 2018; Golovkova, 2019; Kurochkin, 2023) and abroad (Gentile, 2022; Prechal, 2020; Khabirpour, 2023). In the EU countries, issues of court protection effectiveness are often considered in the context of the compliance of national legislation with Art. 47 of EU Charter of Fundamental Rights

(Prechal, 2022; Bonelli et al., 2023; Poli, 2022). Traditionally, in Russia court protection effectiveness is associated with achieving civil litigation goals in protection of violated or disputed rights, freedoms and legally protected interests of citizens, organizations, rights and interests of the Russian Federation (RF), RF constituents, municipalities, and other parties that are subjects to civil, labor, or other legal relationships. The established approach should be considered narrow, since not every trial results in the direct protection of interested party's rights for subjective and objective reasons that require independent research. Moreover, sustaining the claims by the court does not mean automatic restitution of the situation that existed before the rights violation or compensation for the violation committed.

Civil rights are tangibly protected when court decisions are enforced through legally prescribed methods. That said, litigation may have drawbacks complicating parties' ability to obtain judicial protection, from the initial filing of a complaint and ending with the enforcement of a court decision, for instance:

- Excessive pleading requirements (Porokhov and Porokhova, 2015);
- High state duty fees for filing complaints (Safagareev and Aseev, 2024);
- Prolonged adjudication of civil cases that often render judicial protection of violated rights meaningless (Pleshanov, 2020);
- Abuse of procedural rights by litigants (Osipova, 2022);
- Unjustified court decisions (Kniazkin, 2020), and
- Violations of enforcement time limits for final and binding court rulings, etc.

On the one hand, such justice does not provide effective protection for violated rights; on the other hand, it impedes the proper and timely adjudication of civil cases. These circumstances show a clear need to study the indicators and criteria for assessing the effectiveness, conditions, and characteristics of judicial protection, which will enable the development of methods and guarantees the court protection effectiveness.

II. Objective and Subjective Circumstances Influencing Achieving Civil Litigation Goals in the Context of Justice Effectiveness

Under Art. 2 of the Civil Procedure Code of the Russian Federation (RF CPC), the goal of civil litigation is to protect violated or disputed rights, freedoms and legally protected interests of citizens, organizations, rights and interests of the Russian Federation, its constituent entities, municipalities, and other parties engaged in civil, labor or other legal relationships. The stated goal is in the line with civil litigation tasks of correct and timely adjudication of civil cases. Meanwhile, the law does not mention court protection effectiveness as a goal or a task of civil litigation. Effective court protection may be defined as an outcome of the resolution of a civil case when the rule of law is applied to disputable legal relationships, resulting in the most justified, lawful, and reasonable judicial decision that protects the violated right and provides either restitution of the situation that existed before the right was violated or compensation for the damage sustained.

Civil rights protection, as a goal of judicial proceedings, does not necessarily result in the parties obtaining their desired procedural or substantive outcomes. Firstly, upon filing a claim in court, the plaintiff's (or applicant's) subjective right is presumed to have been violated by virtue of the legal interest presumption set forth in Clause 1, Part 1, Art. 134 of the RF Civil Procedure Code. The actual possession of a subjective right by the interested party, as well as the fact of its violation, is established during the trial, which determines the appropriate method of judicial protection to be applied under the relevant rule of substantive law. Thus, the outcome anticipated by the plaintiff may not be achieved if the plaintiff is mistaken about their entitlement to have the claim upheld. In such cases, the court instead protects the defendant from unfounded or unlawful claims asserted by the plaintiff.

Secondly, the principles of adversarial proceedings and judicial truth do not always permit the establishment of a violation of the plaintiff's subjective right, because possibilities for presenting evidence in court are limited to what is available or has been preserved. Some circumstances important for a case are obviously not provable because

the parties did not anticipate the dispute arising and therefore failed to formalize their relationship in an appropriate legal manner. Examples of such relationships include lending money between relatives to one another under an oral agreement, selling a premarital apartment owned by one spouse and investing the proceeds in the purchase of jointly owned residential property, transferring property for temporary use or storage without a formal contract, and making cash alimony payments for the support of minor children, etc.

Attempts to prove or refute the violation of rights under such circumstances often provokes parties to “create suitable evidence”, which is subsequently not always accepted by the court as admissible (e.g., drafting backdated contracts, inviting witnesses to confirm the transfer of funds, printing screenshots of private correspondence, or documenting negotiations between the parties, etc.). Failure to prove legally significant circumstances of the case, which is the plaintiff’s burden, results in the denial or partial satisfaction of the claims. Conversely, failure to prove the facts underlying the defendant’s pleadings leads the court to grant the plaintiff’s claims. In both instances, the protection of violated or disputed rights, freedoms, and legally protected interests — as the primary goal of civil litigation — is formally achieved. However, from the parties’ perspective, this goal is not achieved, and the result, as embodied in the court decision, often fails to align with their expectations of fairness of justice.

Thirdly, failure to obtain a desired procedural or substantive result at trial is often associated with a party’s refusal to resort to qualified legal assistance due to their overconfidence in their own abilities, reliance on the knowledge and experience of a non-lawyer representative, insufficient financial resources to retain legal counsel, or poor qualifications of an engaged legal specialist. Erroneous or negligent procedural activities impede court’s authority to grant the claim. Such actions may include filing claims that do not comply with legal requirements, selecting an inappropriate remedy, failure to prove legally significant facts, or misinterpreting and miscommunicating case results to the client. On the other hand, if the defendant fails to prove the fact of the violation of a right, the court will not be able to dismiss a frivolous or unsubstantiated claim.

Consequently, achievement of the goal of civil litigation, namely, the court's activity in hearing and resolving civil cases to protect violated or disputed rights, freedoms and legally protected interests, depends on subjective and objective circumstances. As S.A. Kurochkin aptly notes, "the greatest significance in assessing court activity lies in the prudent satisfaction with the case outcome among those who participated in the proceedings" (Kurochkin, 2024, p. 47).

The effectiveness of court protection increases the significance of the civil litigation goal beyond the abstract notion of protecting violated rights to a possible maximum in terms of requirements for court decisions – including fairness, legality, relevancy – as well as the practical result reflected in the actual enforcement of the court decision. The court protection effectiveness should be reflected in a balanced regulation of legal proceedings, ensuring a rational balance between the number and nature of procedural activities and way of achieving civil litigation target settings, subject to equality and interaction between the court and the parties during the trial (Bernem et al., 1996, p. 55). Court protection ineffectiveness is expressed in imbalance between interested parties' efforts in obtaining court protection of their rights and the obtained trial result.

The issue of the effectiveness of court protection is particularly relevant in the context of recent amendments to the civil procedural legislation regarding the increase in state duties paid for filing claims and the requirement to make advance deposits into the court's account to cover the costs of forensic examination.¹ In addition to these expenses, the costs associated with retaining qualified legal counsel, mediation services, travel to the court venue, oral and written consultations with specialists, review of experts' reports, obtaining necessary documents, and other legal fees can be quite significant. Procedurally diligent plaintiffs, defendants, and third parties strive to fulfill their procedural obligations to appear in court as efficiently as possible. This often

¹ Federal Law of 22 June 2024 No. 191-FZ "On Amendments to Civil Procedure Code of the Russian Federation and annulment of section four of Article 16 of Federal Law 'On State Forensic Activities in the Russian Federation'". Available at: <http://publication.pravo.gov.ru/document/0001202407220006> [Accessed 10.08.2025]. (In Russ.).

results in non-compensable losses of time, such as lost wages for the time spent attending trial, lost income from entrepreneurial activities, and expenses for care and supervision of dependent family members.

Moreover, the costs of seeking judicial protection are not limited to financial expenditures. Preparation for each court hearing requires significant efforts, including searching for information related to the subject of judicial proof, collecting evidence, conducting negotiations, involving witnesses, identifying expert organizations willing to carry out examinations and provide cost estimates, negotiating the terms of settlement agreements, and formulating grounds for appeals. Frequently, even after receiving a favorable court decision, the winning party must wait a long time for the enforcement of the court decision and for the reimbursement of legal costs incurred.

The disproportion between the parties' efforts and the outcome of the trial, in addition to subjective factors within the parties' control, may also result from other factors, such as failure to adhere to statutory time limits for cases consideration — which can sometimes render the protection of rights meaningless, — imperfections in civil procedural legislation regulating judicial proceedings; incorrect application of rules of substantive and procedural law; failure to perform necessary procedural activities, or performance of inappropriate procedural activities. Taken together, these factors give grounds to support the opinion that the main problem of justice effectiveness lies in the identification and eliminate judicial errors, specifically errors in fact-finding and applying legal rules (Lazarev, 2024, p. 4).

III. Effectiveness of Court Protection: Indicators, Conditions, Assessment Criteria, Characteristics

The concepts of “effectiveness of justice” and “effectiveness of court protection” are often used as synonyms. This is partly because justice is understood as the court's activity in hearing and deciding civil cases with the aim of protecting violated rights. In support of this thesis, we would cite the definition of the effectiveness of court protection given by V.B. Vershinin and stating, “this is the achievement of positive results of legal activity, expressed in giving public relationships such a

direction of development that best meets the outlined in the legislation goals of the mechanism of court protection functioning in the absence of judicial errors, obviously unjust decisions, negative ‘side effects’, as well as reasonable costs of financial, organizational, informational, time and other resources connected with hearing legal cases in court and enforcement of judicial decisions” (Vershinin, 2011).

Thus, in a broad sense, court protection is equated with the activity of a court as a state institution, that is, with the administration of justice. In a narrow sense, court protection pertains to a particular civil case and represents the goal of the court activity in relation to the subjective right of an interested party. Consequently, the categories of “effectiveness of justice” and “effectiveness of court protection” are close, but not identical.

In a broad sense, the effectiveness of civil rights court protection is assessed by a number of indicators that are grouped on various grounds. A.Yu. Astafiev suggests evaluating judicial activity in civil cases by itemizing the factors that influence the effectiveness of justice. In his opinion, the effectiveness of justice is reflected in four key aspects:

- Normative aspect: the quality of legislation;
- Procedural aspect: the quality of court decisions, timeliness, openness of justice;
- Organizational aspect: the material, technical and personnel resources available to the court;
- Communicative aspect: the culture of interaction between the judge and the participants in the proceedings.

In addition, the level of effectiveness of justice is determined by the professionalism and ethical standards of legal professionals, who shape participants’ perceptions of court procedures (Astafiev, 2012).

When addressing the substance of the narrower category of “effectiveness of court protection”, legal scholars most often highlight two primary aspects in its definition:

1. the conformity of court decisions with the broader goals of justice, which are inherently social in nature (Vasilev, 2022);
2. the compliance of a particular court decision the goal of civil proceedings to protect the rights, freedoms and legally protected interests of the interested party (Anikeev, 2019).

In essence, the above-mentioned aspects are related as the general to the particular, where the former ensures the uniformity of judicial practice, while the latter applies to the resolution of an individual dispute under consideration by the court. Both aspects determine the court protection effectiveness through compliance with the goal of civil proceedings. However, as we have argued above, the goal of protecting violated rights is not always achieved, and attaining this goal in the form of a formally correct decision does not necessarily equate to effective court protection. The effectiveness of court protection should not be equated with the litigation result also for the reason that it must be ensured throughout the entire process from the moment of filing a claim (complaint).

A universal approach to assessing the effectiveness of court protection enabled S.A. Kurochkin to develop a multi-level system of indicators for evaluating the achievement of court protection goals with optimal expenses. Moving from the general goals of civil litigation to the specific goals of each stage of the litigation, the author proposed the following indicators as a framework for assessing the effectiveness:

- the extent to which the primary goal of protecting the rights and legally protected interests of participants in legal relationships is achieved;
- the extent to which the goal of a fair and public trial within a reasonable time is met;
- the extent to which the goals of strengthening the rule of law, preventing offenses, and fostering respect for the law and the court are accomplished;
- the extent to which justice is accessible and disputes are effectively resolved;
- the rationality of legal costs and the cost-effectiveness of procedural forms.

The extent to which these indicators are achieved should serve as the criterion for assessing the effectiveness of procedural law and civil litigation as a whole, as well as the effectiveness of individual stages of the litigation process, including legal recourse, trial, court decision, and review proceedings (Kurochkin, 2020a, p. 149). V.B. Vershinin offers a similar perspective on the criteria for assessing the effectiveness of

court protection. According to him, the general criteria for assessing the effectiveness of court protection are the goal, the means, and the result. He further identifies specific indicators for assessing the effectiveness, including: (1) accessibility of court protection; (2) speed of its implementation; (3) quality of judicial acts; and (4) their enforcement (Vershinin, 2011).

With regard to the effectiveness of court protection in specific civil cases, S.A. Kurochkin posits that it hinges upon five interdependent elements: (1) Accessibility of judicial recourse; (2) Procedural regimentation of case examination; (3) Quality of adjudicatory outcomes; (4) Efficacy of review proceedings; 5) Efficient procedural legislation. Each element must achieve its institutional objectives through cost-optimal realization of temporal, financial, and systemic resources. So, the proposed effectiveness criteria are:

1. Procedural Legislation Efficacy: a) degree of normative influence on litigant conduct (e.g., adherence to disclosure rules); b) extra-judicial effects like institutional trust-building and dispute prevention (measured through public confidence indices); c) cost efficiency (optimal expenditure proportionality).

2. Litigation Initiation Efficacy: a) barrier-free realization of standing rights (eliminating economic or procedural obstacles); b) minimized documentation/remittance burdens (filing fees, evidence-collection expenses).

3. Trial Proceeding Efficacy: a) procedural integrity: adherence to fairness and independence principles within reasonable timelines; b) cost-optimal case administration (hearing duration *vs.* outcome quality); c) reduction of judicial mistakes and their repercussions.

4. Judicial Decision Efficacy: a) effective dispute resolution for litigants; b) influence on the society (precedents, violation deterrence); c) alignment between adjudication costs and societal utility.

5. Review Proceeding Efficacy: a) reduction of flawed judgments; b) ensuring the uniformity of judicial practice; c) cost-efficient error-correction mechanisms (Kurochkin, 2020a, p. 138).

Based on the idea expressed by the authors, parties should obtain court protection of violated rights and legally protected interests in a timely manner, without unnecessary complications and financial, time

and other expenses of civil litigation participants, provided that a lawful and reasoned decision is made. T.V. Solov'eva holds a similar view, noting that the highest level of the effectiveness of court protection is achieved if it is "received by the interested party within the time period established by law, in full, and with minimal legal costs and actions required from other participants in the litigation related to the consideration and resolution of the dispute" (Solov'eva, 2022, p. 429).

In summary, the characteristics of effective judicial protection can be outlined as follows:

- timeliness of case consideration;
- rationality of procedural actions by the court and interested parties;
- procedural cost-effectiveness;
- legality, relevance, and fairness of the trial court's decision;
- trial court's decision stability and consistency with the positions of superior courts within the framework of the principle of legal certainty; and
- enforceability of the court's decision.

IV. Ways of Increasing and Guaranteeing the Effectiveness of Court Protection

Defining indicators and criteria for assessing the effectiveness of court protection makes it possible to answer the questions "What needs to be improved in the courts activities?" and "How can we determine the level of effectiveness?" The next important question is "How can the level of court protection be improved?" The answer to this question serves as the foundation for determining ways to increase the effectiveness of court protection, ensuring its enforcement, as well as developing proposals for improving the legislation and court activity in administration of justice.

V.B. Vershinin identified the following priority trends in the modernization of court protection in the context of administration of justice:

1. Improving the organizational structure of the judicial branch of power (judicial system);

2. Aligning the development of the judicial system with reforms in procedural legislation and the renovation of court instances;
3. Enhancing the legal status of judges;
4. Optimizing court jurisdiction and developing alternative methods for resolving legal disputes;
5. Advancing the use of innovative technologies for implementing court protection;
6. Improving state regulation and law enforcement practices related to the enforcement of court decisions;
7. Aligning domestic legislation and legal practices with international legal standards for the administration of justice (Vershinin, 2011).

To increase the effectiveness of court protection, T.V. Solov'eva suggests that several conditions must be met: procedural cost-effectiveness, dynamism and ergonomics of legal proceedings. These requirements apply to both civil litigation as a whole and to individual civil cases (Solov'eva, 2022, p. 429).

The deductive method enables a transition from examining general trends in the modernization of judicial administration to analyzing the specific circumstances that directly influence the effectiveness of court protection.

The court protection effectiveness is contingent upon high-quality implementation of several procedural guarantees: guarantees ensuring protection of the rights and interests of the interested parties at the stage of initiating civil proceedings; guarantees ensuring the issuance of a lawful and reasoned decision following the consideration of the claim; and guarantees ensuring the enforcement of court decisions. As S.A. Kurochkin points out, "the guarantees of the right to court protection enshrined in law do not simply ensure its implementation; they must also predetermine its effectiveness; otherwise, judicial recourse may not occur at all. We are confident that the implementation of the right to court protection is determined, among other factors, by effective, cost-effective access to the courts" (Kurochkin, 2020b).

According to I.L. Petrukhin et al., the effectiveness of court protection is determined by a ratio of the achieved result to the goals set before the rule of law or legal institution (Petrukhin et al., 1976, p. 45). The legal institution enshrined in Chapter 12 of the Civil Procedure

Code of the Russian Federation, titled “Filing a Complaint”, aims to ensure the unimpeded exercise of the right to judicial recourse. This goal is achieved by fulfilling tasks of timely and proper verification of the admissibility of judicial recourse, which ultimately leads to the acceptance of an application for court proceedings and the initiation of judicial activity to consider a civil case (Borisova, 2009).

At the same time, the right to judicial recourse should be limited by legal procedural mechanisms to prevent the misuse of granted powers for court protection, which could result in unjustified time and financial costs. In such circumstances, establishing a balanced model of judicial recourse within general jurisdiction, guaranteeing unimpeded access of citizens to court protection while preventing the abuse of the right to judicial recourse, is of fundamental importance (Borisova, 2013, p. 13).

To optimize the implementing of the right to judicial recourse and obtain effective court protection, the following legislative measures are proposed:

1. **Reducing the amount of state duty** for filing a complaint with the court if the parties have attempted to settle cases where pre-trial settlement of a dispute is not mandated by law.

2. **Introducing criteria for admissibility of complaints** based on the circumstances examined by the court when accepting a statement of claim for court proceedings. These criteria should encompass requirements related to the form and content of the statement of claim (or complaint), conditions for exercising the right to judicial recourse, and prerequisites for the right to judicial recourse, as well as substantive circumstances that are evident at the stage of initiating civil proceedings. The criteria for the admissibility of a claim should include:

- The cause of action must have a legal foundation;
- The existence of the mechanism for court protection of a particular violated right in law;
- The compliance of the chosen remedy with norms of substantive law;
- A proper definition of the competence of public authorities to bring a claim to court in order to protect public interest;

— The lack of hidden changes in the subject of the claim, the substantial and legal cause of action, or the nature of the stated claim, nor should there be any substitution of parties intended to circumvent the identity of previously considered and new claims;

— The non-existence of an obvious interchange of the form of judicial recourse with the purpose of reconsideration (for example, filing a non-contentious matter instead of filing a complaint, filing an application to reconsider the case on new and newly discovered circumstances after an unsuccessful appeal of a previously issued court decision on the same case).

3. The implementation of criteria for admissibility of restrictions on the right to judicial recourse. These criteria should include: a) reasonableness of requirements to handling the formalities of filing; b) a right to remedy the complaint deficiencies identified by the court; c) the prevention of abuse of the right to judicial recourse. The reasonableness of the requirements concerning the handling of the formalities of filing a complaint should include:

A) The proscription of an obligation to submit, at the stage of initiating civil proceedings, evidence that cannot be obtained by the plaintiff or applicant on their own without court assistance, as well as evidence that the court recommends submitting additionally not in connection with the substantial circumstances set out in the complaint;

B) The limitation of the court's requirements regarding the proof of the party's inability to obtain evidence independently when disclosure of such evidence to a private individual is directly prohibited by the legislation on personal data protection and other applicable laws.²

In civil litigation, the legal axiom “the court knows the law” applies. Thus, the court, as a distinct subject within civil procedural legal relationships, should not impose on a party an a priori obligation to obtain evidence that is inherently unfulfillable due to a direct prohibition

² Art. 10.1, Federal Law dated 27 July 2006 No. 152-FZ “On Personal Data”; Art. 84, 102, Tax Code of the Russian Federation; Art. 9, Law of the Russian Federation dated 2 July 1992 No. 3185-1 “On Psychiatric Care and Guarantees of Citizens’ Rights in Its Provision”, etc.

of the law — knowledge of which the court possesses. Compelling the party to provide confirmation of impossibility to obtain evidence independently is an unnecessary act delaying the trial;

C) Adequate assessment of the purpose of applying to court and the applicant's legal interest in special proceedings.

Eligibility to initiate these proceedings is statutorily confined. Moreover, applicants frequently fail to articulate the requisite legal purpose, engendering two systemic deficiencies: 1) legitimate interests remain judicially unprotected, as aggrieved parties fall beyond the scope of permissible petitioners; 2) avenues for rights violations arise against individuals precluded from petitioning the court.

Jurisprudence demonstrates that courts considering applications to declare a citizen missing decline to recognize the following as valid legal purposes: a) an employer's pursuit of procedural regularization of employment termination³; b) relatives' initiatives toward residency deregistration to reduce utility payments;⁴ or secure utility payment benefits,⁵ etc. Consequently, protection of citizens' legitimate interests (e.g., expense reduction) is not recognized by courts as a relevant purpose for establishing another person's status in special proceedings, worsening individuals' circumstances.

A similar paradigm emerges in determinations of incapacity. Under Art. 281 of the RF Civil Procedure Code, an application to declare a citizen incompetent due to mental disorder may be filed by family members, close relatives (parents, children, siblings — even if not cohabiting), guardianship authorities, specialized institutions. This language of the norm deprives former spouses of the person, their parents-/siblings-in-law, and other non-close relatives of the right to apply to court. Consequently, individuals requiring psychiatric assistance remain

³ Ruling of the Fourth cassational court of general jurisdiction dated 21 December 2023 No. 88-42790/2023, 2-943/2023. The document is not published. Access through "ConsultantPlus" (16.08.2024). (In Russ.).

⁴ Ruling of the Seventh cassational court of general jurisdiction of 6 June 2023 No. 88-9397/2023, 2-2709/2022. The document is not published. Access through "ConsultantPlus" (16.08.2024). (In Russ.).

⁵ Ruling on appeal of Moscow oblastnoy court of 20 November 2023 in case No. 33-34330/2023. The document is not published. Access through "ConsultantPlus" (16.08.2024). (In Russ.).

without it due to the absence of an eligible applicant. Moreover, until a person is declared incompetent, fraudulent transactions (e.g., real property sales) are executed on their behalf under powers of attorney, violating distant relatives' and third parties' rights and undermining civil law stability in society;

D) Relaxation of requirements for documents confirming grounds for granting deferral or installment plans for state duty payment, or exemption therefrom.

Under Clause 2, Art. 64 of the Tax Code of the Russian Federation, such relief is granted to a person whose financial position prevents payment of this tax. The law permits deferral/installment payment of state duty on condition of its payment after the deferral period ends. However, under Subclause 4, Clause 2 of said provision, the applicant must submit information about their movable and immovable property (excluding property exempt from enforcement under the Russian law). Consequently, notwithstanding the *de jure* recognition of this economic safeguard for indigent litigants — specifically, the statutory entitlement to seek duty remission — *de facto* implementation remains fraught with operational deficiencies: procurement and submission of requisite documentation proves excessively burdensome.

So, courts frequently decline to process statements of claim precisely absent state duty receipts (Art. 132 of the RF CPC). This procedural impasse stems from a regulatory misalignment wherein financially distressed applicants petition for state duty deferrals concurrently with filing their complaint. Yet courts overwhelmingly deny such petitions, primarily because applicants fail to submit documents proving dire financial status as enumerated in Art. 64 of the RF Tax Code. Most applicants presume pension/salary statements and zero-balance bank accounts constitute sufficient proof while courts require comprehensive disclosure of movable/immovable assets to establish financial hardship. To prevent deprivation of citizens' right to access court, courts must precisely specify (citing relevant legal provisions) exactly which documents must be submitted;

E) The prohibition against requiring representatives of state agencies and local authorities, who appear in court to

provide opinions on a case, to hold a law degree when filing an appeal, cassation, or supervisory complaint.

In particular, the participation of custody and guardianship authorities in providing opinions on cases concerning the termination of parental rights is provided for by Art. 47 of the RF Civil Procedure Code and Art. 70 of the RF Family Code. Thus, the department responsible for exercising delegated state powers regarding custody and guardianship does not constitute a third party. The requirement to submit documents confirming a law degree or an academic degree in the field of jurisprudence does not apply to prosecutors;⁶ legal representatives;⁷ heads of bodies acting within the authority granted to them by federal law, other legal acts, or founding documents; or to representatives of organizations acting within the powers provided by federal law, other regulatory legal acts, or founding documents.⁸ Consequently, imposing a law degree requirement on specialists in departments responsible for the execution of delegated state powers in the area of custody and guardianship is unlawful. Such a requirement deprives custody and guardianship authorities of the ability to fulfill their legally mandated function of presenting and supporting opinions in court proceedings;

F) The prohibition against formalizing requirements regarding methods for confirming service of process to the defendant and other individuals participating in the case, in particular the prohibition against court refusing to accept the copy of the complaint bearing the personal signature of the recipient as confirmation of delivery. According to the jurisprudence summary, “The sending or delivery of a complaint and copies of attached documents to other persons participating in the case may be confirmed by a receipt for sending a registered letter, a report on sending a letter to the email address specified by these persons and available in the case materials, a hand receipt, etc., which must include information about which documents were sent to other persons participating in the case. At the

⁶ Art. 401 of the Federal Law dated 17 January 1992 No. 2202-I “On the Prosecutor’s Office of the Russian Federation”. (In Russ.).

⁷ Art. 52 of the Civil Procedure Code of the Russian Federation. (In Russ.).

⁸ Part 3 Art. 53 of the Civil Procedure Code of the Russian Federation. (In Russ.).

same time, the inventory of attachments as a mandatory document is not provided for by the aforementioned provisions of the law”;⁹

G) The prohibition of unjustified rejection of applications submitted to the court in electronic form. Order No. 251 of the Judicial Department under the Supreme Court of the Russian Federation dated 27 December 2016 establishes specific technical requirements for electronic images of documents, electronic documents, electronic signatures; the procedures for verifying, registering, and accepting documents received by the court; and the grounds for rejecting such documents. The grounds for rejection by notification are listed in Para. 4.5 of the Order.¹⁰

The language of subparagraph 1 of Para. 4.5 of the Order, which provides for the rejection of electronically submitted documents on the grounds that “the application is not addressed to this court”, may encompass a variety of situations:

- The application is not within the factual competence of the court, which constitutes grounds for rejecting the complaint under Part 1 Art. 134 of the RF CPC;

- The case does not fall within the jurisdiction of this court of general jurisdiction, or it is within the jurisdiction of an arbitrazh court, which constitutes grounds for returning the complaint pursuant to Para. 2 of Part 1 Art. 135 of the RF CPC.

Rejection of an electronic application on the grounds that it is identical to a previously submitted application (subparagraph 2 of Para. 4.5 of the Order) is similar to the procedural ground for returning a complaint provided in Para. 5 of Part 1 Art. 135 RF CPC, which applies when an identical claim is already pending before a court or arbitrazh court.

⁹ Summary of judicial practice on errors in resolving the issue of accepting a claim for proceedings. Ruling of the First cassational court of general jurisdiction dated 16 April 2021 Nos. 88-8652/2021, 9-218/2019. Official website of the First cassational court of general jurisdiction. Available at: https://1kas.sudrf.ru/modules.php?name=docum_sud&id=38 [Accessed 15.08.2025]. (In Russ.).

¹⁰ Order of the Court Department of the RF Supreme Court of 27 December 2016 No. 251 “On approval of Procedure for filing documents in electronic form, including in the form of an electronic document, with federal courts of general jurisdiction”. Bulletin of Acts of Court System. 2017. No. 2.

It should be noted that automated systems used for filing applications and submitting documents employ statuses that are not regulated by civil procedural legislation. The RF CPC does not contain such concepts as “technical refusal” or “rejection of an application”, nor does it establish rules for their procedural documentation. The list of reasons for technical refusal is generally consistent with the grounds provided for by the current RF CPC and should be processed in the form of a court ruling.

Thus, the absence of a legal framework for rejecting complaints on technical grounds diminishes the guarantees of access to judicial protection, as plaintiffs are deprived of the opportunity to appeal the lawfulness of the court’s actions in rejecting their complaints to a higher instance. Thus, it can be concluded that it is necessary to incorporate into the civil procedural legislation the concept of “technical refusal” of documents submitted in electronic form, as well as the rules for its procedural documentation.

When courts use automated information systems, the range of mutual rights and obligations between the court and other participants in litigation is significantly expanded. Currently, a significant number of court powers related to electronic systems operation remain outside the scope of legal regulation. A wide range of new activities are undertaken by litigation participants in connection with submitting evidence to the court in electronic form. Despite the absence of a legal classification for electronic evidence and electronic images of written evidence, the court is still required to assess such evidence for relevance, admissibility, and reliability. The lack of established rules for examining electronic evidence significantly diminishes the effectiveness of judicial protection, as much of this evidence is rejected by the court, thereby depriving parties of the opportunity to substantiate their legal positions to a high standard. Consequently, rules for the examination of electronic evidence should be incorporated into legislation, including procedures for court sessions conducted via videoconferencing systems and web conferences.

Currently, the authority of a judge facilitating remote participation in a court hearing is strictly confined to verifying the identities of physically present participants and administering oaths or affirmations to witnesses and experts.¹¹ This judicial officer is neither vested with

¹¹ Art. 155.1 of the RF CPC.

procedural powers to adjudicate the substantive merits of the civil case nor authorized to participate in evidentiary proceedings. Consequently, such judge lacks competence to admit evidence, authenticate documents, or transmit materials to the court hearing the case on its merits. This statutory limitation inherently restricts remotely participating parties' capacity to submit evidence during the hearing itself (Borisova, 2021). Thus, it is necessary to empower courts that provide for remote participation of a party to authenticate evidence submitted by these participants and to establish regulations for assessing evidence obtained from electronic sources.

An additional measure to enhance the effectiveness of court protection should be taken to permit Russian judges to use domestic software on court technical devices for examining electronic evidence. This would enable judges to directly and efficiently review modern forms of evidence without relying on the parties' technical devices, thereby minimizing doubts regarding the identity of the evidence presented, and preventing potential distortion of evidence or violations of procedures for its presentation and storage on tangible media.

Summing up the above, we can conclude that to increase the effectiveness of court protection, it is necessary to eliminate unnecessary procedural prohibitions and restrictions that impede the exercise of the right to judicial recourse, while concurrently establishing a comprehensive regulatory framework for contemporary — including digital — techniques and methods governing the fulfillment of procedural rights and obligations by litigants.

V. Conclusion

The study analyzes the circumstances underlying the ineffectiveness of court protection and the failure to achieve the goals of civil proceedings, dividing them into objective, conditioned by the existing legislation, and subjective, depending on the actions of the participants in the litigation.

The paper compares the concepts of “effectiveness of court protection” and “effectiveness of justice”, identifying two main approaches to their balance. According to the broad approach, these categories are

considered identical, referring to the activities of the court as a state body in the consideration and resolution of civil cases, aimed at protecting the violated rights, freedoms, and legally protected interests of parties to civil legal relationships. Under the narrow approach, effective judicial protection is understood as the ultimate outcome of a particular case, relating to the subjective right of an interested party, achieved within the prescribed period and with optimal costs.

The study of factors influencing the effectiveness of court protection allowed for the identification of indicators, conditions, and criteria for assessing the effectiveness of court protection, and the formulation of the key features of effective court protection, namely, timeliness of case consideration; rationality of procedural actions by the court and interested parties; procedural cost-effectiveness; legality, relevance, and fairness of the trial court's decision; its stability and consistency with the positions of superior courts within the framework of the principle of legal certainty; and enforceability of the court's decision.

Based on the analysis of trends in modernization of court activities, the authors propose ways to improve the court protection effectiveness. These include encouraging the use of conciliation procedures; reducing the amount of state duty; introducing criteria for admissibility of complaints; introducing criteria for admissibility of restrictions on the right to judicial recourse.

Special attention is paid to the proportionality of the requirements concerning the handling of the formalities of filing a complaint. In particular the authors propose to amend requirements to submitting evidence; to revise the process of filing an application in non-contentious matters and extend standing eligibility to broader categories of applicants; to relax requirements for documents confirming grounds for granting deferral or installment plans for state duty payment; to simplify methods for confirming service of process; to introduce into the legislation the grounds for rejecting electronically filed applications, and procedural rules regulating videoconference proceedings. In addition, Russian judges should be permitted to use domestic software on court technical devices to examine electronic evidence during court sessions.

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Received 17.11.2024
Revised 27.11.2024
Accepted 11.12.2024



Ensuring the Independence and Impartiality of the Jury in the Context of the Digital Transformation of Society and the State: Russian and Foreign Experience

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Abstract: The aim of the study is to demonstrate that the digital transformation of society and the state affects the legal mechanism that ensures the independence and impartiality of the jury, while the internal elements of this mechanism largely lose their effectiveness. The legal mechanism for ensuring the independence and impartiality of jurors includes internal (implemented within the procedural framework of the consideration of a criminal case) and external (implemented outside the framework of the consideration of a criminal case) elements. The internal elements of this mechanism include: the possibility of changing the territorial jurisdiction of a criminal case; questioning potential jurors during voir dire; the possibility to declare the bias of the jury, etc. External elements of the legal mechanism ensuring the independence and impartiality of the jury include: maintaining the secrecy of jurors' personal data; a complicated form of bringing jurors to criminal liability and applying criminal procedural coercion measures to them; the existence of criminal liability for threats and violence against jurors; the possibility of applying state protection measures to jurors. Under the influence of digital transformation a number of problems appear in the jury trial, that provoke risks for the independence and impartiality of jurors: digital "surveillance" of jurors; digital "investigation" of the case by jurors; digital influence on the jury and the expression of opinions by jurors in the digital environment. The paper considers approaches

to solving these problems and offers recommendations for changing legislative regulation and adjusting judicial practice.

Keywords: jury trial; jury independence; jury impartiality; digital transformation; jury panel; digital “surveillance”; digital “investigation”

Acknowledgments: The research was supported by the Russian Science Foundation, project number 25-18-00830 (<https://rscf.ru/project/25-18-00830/>).

Cite as: Nasonov, S.A. and Strelkova, Yu.V., (2025). Ensuring the Independence and Impartiality of the Jury in the Context of the Digital Transformation of Society and the State: Russian and Foreign Experience. *Kutafin Law Review*, 12(3), pp. 570–593, doi: 10.17803/2713-0533.2025.3.33.570-593

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I. Introduction

The digital transformation of society and the State, radically changing criminal proceedings, has a significant impact on the elements of the legal mechanism ensuring the independence and impartiality of the jury. The legal mechanism for ensuring the independence and impartiality of jurors includes internal (implemented within the procedural framework of the consideration of a criminal case) and external (implemented outside the framework of the consideration of a criminal case) elements.

The internal elements of this mechanism include the possibility of changing the territorial jurisdiction of a criminal case; questioning potential jurors during voir dire; the possibility to declare the bias of the

jury; prohibiting jurors from independently collecting evidence on the case and expressing their opinion on it; explanations of the presiding judge to the jurors during the consideration of the case; the possibility of questioning jurors regarding any unlawful influence exerted on them and challenging them; secrecy of jury deliberations, etc.

External elements of the legal mechanism ensuring the independence and impartiality of the jury include maintaining the secrecy of jurors' personal data; a complicated form of bringing jurors to criminal liability and applying criminal procedural coercion measures to them; the existence of criminal liability for threats and violence against jurors; the possibility of applying state protection measures to jurors.

The development of digital technologies has changed the traditional concept of jurors impartiality in general: if previously ensuring impartiality focused on the jury selection, now the main task is to maintain the impartiality of the jury throughout the trial (Waters and Hannaford-Agor, 2014, pp. 2735–2736; Haralambous, 2010, pp. 255–256; Liu and Lei, 2021, pp. 12–15; Wen, 2022). When considering the direct forms of the impact of digitalization on the mechanism for ensuring the independence and impartiality of the jury, it becomes obvious that such an impact manifests in different ways, depending on the legal nature of the interim measure. At the same time, the internal elements of the mechanism, under the influence of the digital transformation factor, are largely losing their effectiveness. Thus, in Russian judicial practice, a change in the territorial jurisdiction for hearing a criminal case is widely used if there are circumstances that may cast doubt on the objectivity and impartiality of the jury (Subpara. “c” Para. 2 Part 1 Art. 35 of the Criminal Procedure Code of the Russian Federation). For example, in the high-profile case of S. and B., the need to change the territorial jurisdiction of the case was justified by the fact that “high public resonance, the formation of public opinion and biased coverage of the process by regional media do not allow us to make an unambiguous conclusion that when considering a criminal case by judges of the Kaliningrad Regional Court with the participation of a jury, the possibility of doubts about the objectivity of the judicial decision will be eliminated and the court's position will be exclusively

neutral”.¹ Obviously, the digital transformation of society and the State leads to the fact that the dissemination of information about the process becomes extraterritorial, which largely makes changing the location meaningless. Posting such information on the Internet using Search Engine Optimization (SEO) technologies allows potential candidates for jurors to quickly find this information, regardless of their place of residence.

The spread of digital technologies leads to a significant weakening of such internal guarantees of independence and impartiality as a ban on jurors collecting information about a criminal case, since digitalization completely eliminates the distance between jurors and the sources of information about the case (for example, to obtain such information, a juror does not need to visit archives, communicate with certain persons, etc.). This creates the effect of a digital investigation of the case by jurors, which will be discussed below.

This phenomenon significantly undermines the effectiveness of such internal guarantees as a ban on jurors expressing their opinion on the case and the secrecy of the deliberation room. The widespread use of social networks allows jurors to express a position on the case, even to disclose the essence of the discussion that took place in the deliberation room, without incurring a serious risk of being removed from the jury panel. The digital transformation of society and the State also affects some external elements of the legal mechanism that ensures the independence and impartiality of the jury. For example, the digital trace left by jurors on social networks (marketplaces, etc.) allows collecting a significant amount of personal data about them, some of which the parties can use at the trial stage for their tactical purposes (filing challenges, etc.).

In our opinion, the inefficiency of the internal and external elements of the mechanism in digital era is due to the fact that they were conceptually developed and enshrined in the legislation of the pre-digital era, they are not adapted to the special digital nature of

¹ Appeal ruling of the Appeal board of the Supreme Court of the Russian Federation dated 17 August 2021 No. APL21-311. (In Russ.).

these factors. That is why these legal means are irrelevant to solving the problems caused by digitalization.

Thus, the spread of digital technologies in society and the State has an irreversible impact on criminal proceedings, including proceedings in jury trials, significantly modifying the internal and external elements of the legal mechanism that ensures the independence and impartiality of jurors. It should be emphasized that this process is transnational, i.e., it does not depend on the specifics of the national model of proceedings in jury trial. In order to find ways to restore the effectiveness of this legal mechanism, it is necessary to consider several typical problem situations that arise during the consideration of criminal cases by jury trials in Russia and foreign countries, creating risks for the independence and impartiality of jurors.

II. Digital “Surveillance” of Jurors

The digital transformation of society and the State, as noted above, made personal data of jurors available to the parties, which led in practice to the effect of digital “surveillance” — the intentional collection by the parties of the information about jurors in the digital environment (primarily in social networks) in order to discover data indicating the impartiality of jurors or their dependence on any participant in the process or government agency.

The question of the admissibility of collecting information about jurors by the parties arose long before the development of digital technologies. As researchers note, such collection of information leads to a conflict between ensuring the right to a fair trial and the right of jurors to privacy. The most traditional approach to finding a balance between these rights is based on determining the relevance of the information received to issues of the independence and impartiality of the juror (Hannaford-Agor, 2001). Digitalization has also updated the discussion about the right of jurors to privacy (Rousseau, 2006).

Gathering information about jurors by the parties also gives rise to a number of ethical questions: should the information found be provided to the other party and the court and if so, to what extent; should the jurors be given the opportunity to comment on the information found

about them. As noted by researchers from the United States, there is no unified approach to the issue among judges: courts have wide discretion in determining additional rules for selecting jurors that are not regulated by the law. As a result, some judges in the United States completely prohibit searching for information on the Internet, while others believe that if the answers of jurors during selection differ from the information posted on the Internet, the parties are obliged to inform the court of a possible violation by a juror who has provided false information about himself (LaPinta, 2020, pp. 11–13). In one civil case in the United States, the presiding judge took the position that when using social media to research jury candidates, the parties would be required to notify the candidates so that they could, if they wish, change the privacy settings of their profiles to make their pages private (Pulver, 2016).

The consequences of collecting information also remain ambiguous. Bar associations set different requirements for digital “surveillance” of jurors. While not prohibiting these actions in general, they also have different assessments of the admissibility of actions that may result in a juror informing about a lawyer visiting his profile on social networks. Thus, sending a request to add as a friend is recognized as a violation of ethical requirements, while a notification about a visit to a page from a social network that comes automatically is not considered a violation by the American Bar Association, while the New York City Bar Association assesses any notifications coming from social networks as communication with a juror, regardless of the lawyer’s intention to initiate communication (LaPinta, 2020, pp. 15–16).

However, despite the lack of uniformity in assessing digital surveillance, it would be difficult not to agree with a number of academics and legal practitioners who acknowledge the high efficiency of this tool when it is used correctly (LaPinta, 2020, p. 17). In some cases, timely detection of juror statements on the Internet can lead to the exclusion of a juror who has clearly lost impartiality. For example, in one case considered in the United States, after the first court hearing, one of the jurors posted the following on a social network, “Actually excited for jury duty tomorrow. It’s gonna be fun to tell the accused they’re GUILTY”. This information was found by the son of the defense attorney, and the juror who posted it was dismissed (Hoffmeister, 2012, p. 429).

The phenomenon of digital “surveillance” of the parties over the jurors’ activities in the digital environment is also evident in the Russian court practice. Such a conclusion based on the study of the arguments of appeal (cassation) complaints and proposals that contain references to information obtained by invading the juror’s digital space. The following description of the arguments of an appeal by a defense attorney against a sentence rendered on the basis of a jury verdict is quite typical, “With reference to a notarized protocol of inspection of the juror’s personal page... on a social network, confirming the fact of his work in the internal affairs agencies, [the defense attorney] claims that during the selection of the jury, [the juror] misled the presiding judge and concealed this fact from the participants in the process, thus depriving the defense of the opportunity to file a reasoned challenge to him”.²

The study of the appellate and cassation practice on this issue allows us to identify three models of the attitude of the courts of the specified instances to the phenomenon of digital “surveillance”, which have a direct impact on the dynamics of the growth of this phenomenon:

- a neutral attitude, expressed in the refusal to evaluate the collection of such information about jurors by the defense;
- indirect legalization of this method of collecting digital information about jurors;
- a negative attitude, expressed in the recognition of digital “surveillance” as violating the norms of criminal procedural law and ethics.

The first model of the reaction of the courts of appeal and cassation to the use of information about jurors by the defense, obtained through digital “surveillance” is manifested in the ignoring of this data in the final procedural decisions, which, in addition, do not express any assessment of such actions of the participants in the trial.³

² Appeal ruling of the First Appeal Court of the general jurisdiction dated 18 December 2024 No. 55-1622/2024. (In Russ.).

³ Cassation ruling of the Sixth Cassation Court of the general jurisdiction dated 10 June 2021 No. 77-2788/2021. (In Russ.); Appeal ruling of the Leningrad Regional Court dated 5 July 2024. No. 22-1374/2024. (In Russ.).

The second model of the attitude of the courts to the phenomenon of digital “surveillance”, most often encountered in judicial practice, consists in indirect legalization, since the courts, on the one hand, do not express an opinion on the legality of monitoring of jurors’ accounts on social networks by the parties, but, on the other hand, meaningfully evaluate the information obtained by the parties as a result of such monitoring.

For example, in one of the cases, the arguments of the cassation appeal of the defense attorney were described in the appellate decision as follows, “[the defense lawyer] believes that the verdict was rendered by an illegal jury panel, since the panel included jurors who concealed the fact of their acquaintance with the state prosecutor, which became known to the defense after the verdict was announced. In support of this argument, a detailed analysis of the pages of the foreman of the jury and the state prosecutor, posted on the social network VKontakte, is given, which, in the opinion of the author of the complaint, indicates the acquaintance of the said persons”.⁴ The Court of Cassation rejected this argument after a substantive review, following a questioning of the jury foreman, who, “having confirmed that he had a page on the social network VKontakte, denied the fact that the state prosecutor was among his friends” and stated that from the beginning of the court hearing on the case until the verdict was delivered, he had not communicated with the state prosecutor or other participants in the trial, had not received additional information, including negative information, from anyone outside the criminal trial and had not provided it to anyone”.⁵ It is obvious that the defense attorney would not have been able to collect the specified information about the acquaintance of the juror and the state prosecutor without targeted monitoring of their accounts on social networks.

The most striking example of the indirect legalization of the phenomenon of digital “surveillance” is the decision of the Second Appeal Court of General Jurisdiction, which assessed the arguments of the defense that one of the jurors, who had worked in the prosecutor’s

⁴ Cassation ruling of the First Cassation Court of the general jurisdiction dated 19 February 2025 No. 77-427/2025. (In Russ.).

⁵ *Op. cit.*

office for a long time, posted on her personal page on the social network Vkontakte, in particular, the following content, “11 December 2020. I am very glad that for us, the jurors, the trial is over. It was not difficult for me to decide for myself whether he was guilty or not, but still”, “I liked the state prosecutor so much. He spoke so well — I did not expect it from colleagues”; “12 January 2021. Colleagues, Happy Prosecutor’s Day!!! Courage and more sense of humor, otherwise you will not survive in our system!”

According to the defense attorney, the aforementioned statements showed that the said juror, even after her dismissal from the prosecutor’s office, considered herself an employee of the said organization, calling the prosecutor’s employees, including the state prosecutor who participated in the case, her colleagues, expressing support, admiration and pride for the latter, and also that her 28 years of experience in law enforcement agencies prevented her from maintaining neutrality and remaining on the side of her colleagues, which gives grounds to doubt the objectivity and impartiality of the said juror.

The Appellate court, rejecting the arguments of the appeal, analyzed these posts of the juror in detail, finding no signs of loss of independence and impartiality, “The content indicates the absence of any kind of prejudice on the part of the said person, both in relation to the circumstances of this case in general, and in relation to the accused and other participants in the criminal proceedings in particular, which objectively follows from the statements that the speech of the state prosecutor made a favorable impression unexpectedly for the author of this publication, and the decision on the guilt of the accused was made by her personally for herself”.⁶

The third model of the attitude of the courts of the above instances to the phenomenon of digital “surveillance”, the most rarely encountered in practice, consists in denying the legality of the collection by participants in the trial of any personal data or other information about jurors.

Thus, during the appeal hearing of one of the criminal cases, it was established that the defense attorney filed a motion to replace one of

⁶ Appeal ruling of the Second Appeal Court of the general jurisdiction dated 2 March 2021 No. 55-67/2021. (In Russ.).

the jurors with a reserve juror. According to the lawyer, the said juror, when forming the jury, withheld the information that she was a close relative of a retired prosecutor, and therefore was subject to challenge. In support of his arguments, the lawyer presented screenshots from the social network Telegram, which indicated the mobile phone numbers used by the juror, her date of birth, and her residential address. The collection of this information was carried out during the period when the said juror was administering justice, at the time when the guarantees of judicial immunity extended to her. When checking the version of the defense, the relationship of the said juror with the former prosecutor was not confirmed. The Appellate court concluded that the defense violated the guarantees of independence and immunity of jurors, provided for in Art. 12 of the Federal Law of 20 August 2004 No. 113-FZ "On Jurors of Federal Courts of General Jurisdiction in the Russian Federation", when collecting and presenting information about jurors, which is unauthorized and goes beyond the scope of the powers granted to the defense.⁷

Thus, in Russian judicial practice, the attitude of courts to the collection of information about jurors by parties in the digital environment (digital "surveillance") is most often positive-neutral, which creates the preconditions for the preservation and spread of this phenomenon. The negative attitude of courts to this kind of actions by parties is manifested only in the case of collecting personal data about jurors (residential addresses, private information, etc.) that is deprived of legal significance for appealing the court sentence, as well as collecting this information from closed sources (with violation of the jurors' right to privacy). This approach of judicial practice seems justified, but requires development and detailing.

In our opinion, it is necessary to create a comprehensive regulation of the collection of information about jurors (including digital "surveillance"), defining:

- 1) the permissible limits of such collection;

⁷ Appeal ruling of the Third Appeal Court of the general jurisdiction dated 20 November 2023 No. 55-475/2023. (In Russ.).

2) its forms and time frames, deadlines for providing it to the court (in order to neutralize unfair behavior, in which a party will conceal the information discovered and provide it only in case of disagreement with the jury's verdict and the court's sentence);

3) a number of specific issues related to the possibility of notifying jurors about possible digital "surveillance" of them; responding to cases when a juror has learned about the collection of information about him by a certain participant in the process; possible participation of a court employee in the search for information about jurors.

The development of such regulation at the level of clarifications of the Russian Federal Bar Association and orders of the Prosecutor General's Office of the Russian Federation, as well as the formulation of relevant clarifications by the Plenum of the Supreme Court of the Russian Federation would create the necessary conditions for ensuring the unity of judicial practice in order to help the parties to understand the particular consequences of their actions.

III. Digital "Investigation" of a Criminal Case by a Jury

The widespread use of digital technologies in modern society makes it much easier for jurors to search for information on a criminal case outside of the trial, since all this information is located in a virtual digital space, to which each juror has constant access. In practice, this gives rise to the phenomenon of digital investigation of a criminal case by jurors. The desire of jurors to find additional information about a case is reflected in many publications around the world and has a long history. T. Hoffmeister identifies, in addition to the "traditional" reasons for searching for information (insufficient information disclosed in the process; a sense of responsibility for the verdict; misunderstanding of explanations of the law or terms; the desire to find out what information was not disclosed), also "modern" reasons related to the development of technology: the desire to learn more about people by searching the Internet (about the judge and the parties to the case), the habit of searching and finding any information on the Internet, the prevalence and availability of information about court proceedings (Hoffmeister, 2012, pp. 419–425). As a separate reason, he also highlights the

incorrectness of the instructions addressed to the jury: for example, in one of the cases, a juror did not correlate the ban on “collecting evidence” with the search for information about a party.

This phenomenon is also observed in Russian judicial practice, where a differentiated approach to procedural response to it has been formed, depending on how many jurors carried out such an “investigation”, whether it affected their objectivity, whether they had an impact on other jurors. In situations where the awareness of a juror about the circumstances of the case from non-procedural sources of a digital nature becomes known before the jury has rendered a verdict, such a juror is questioned to determine whether he has lost his objectivity and, if this is revealed, he is subject to challenge. The possibility of participation of the remaining jurors is determined by the degree of informational impact exerted on them by the challenged juror and may entail both the challenge of the remaining jurors (and the dissolution of the panel) and the conclusion that the remaining jurors have retained their objectivity.

For example, in one of the criminal cases, the court sentence was not overturned, since the panel of judges did not consider the jurors’ awareness of the circumstances of the criminal case, including from the social network VKontakte, as a reason to doubt the ability of the panel to make an objective decision on the case, since only one candidate No. 5 reported this as a reason for her self-recusal, which was granted by the presiding judge.⁸ The case materials do not contain any other information about such awareness of the persons selected as jurors.

In another criminal case, the defense lawyer indicated in the cassation appeal that the majority of the jurors had information about the criminal case from the media, Internet sites and social networks, but this argument was rejected due to its hypothetical nature.⁹

It is obvious that the identification of digital “investigation” of the case by jurors creates a high risk of their loss of impartiality and, as a result, inability to render an objective verdict. In order to identify the

⁸ Cassation ruling of the Seventh Cassation Court of the general jurisdiction dated 25 July 2023 No. 77-2915/2023. (In Russ.).

⁹ Cassation ruling of the Third Cassation Court of the general jurisdiction dated 29 August 2024 No. 77-1761/2024. (In Russ.).

degree of influence of this information on the juror, the survey of jurors is actively used in judicial practice. It seems that the form of survey of jurors is the most acceptable procedural method of checking both the circumstances of the illegal influence exerted on them and the improper performance of their duties. On the one hand, such a method does not transform the procedural judicial status of the juror into the status of a witness. On the other hand, it allows collecting information about the said facts from the primary source, which enhances the objectivity of their verification. At the same time, in order to ensure uniformity of such a survey, it seems necessary to regulate the procedure for its implementation by law. In our opinion, such questioning should be conducted in full compliance with the general conditions of judicial proceedings: orality, directness and adversarial nature, but with limited publicity, since the questions that are clarified may concern the personal data of the jurors. The procedure for asking questions to the jurors, the requirements for these questions, the right of the presiding judge to remove such questions — should be identical to the procedural rules of interrogation of witnesses, as maximally corresponding to the adversarial principles of judicial proceedings.

IV. Digital Influence on Jurors

Another consequence of the digital transformation of society and the State in relation to guarantees of independence and impartiality of jurors is the emergence of a digital method of influence, both on an individual juror and on the jury as a whole. Unlike traditional methods of influence, digital influence is characterized by a number of special qualities. Firstly, it is often anonymized, i.e., it does not allow to identify the author of the content posted on the Internet. This significantly weakens the effect of the court applying procedural sanctions for committing such an action. Secondly, the specified information can be deleted from one source and appear on another within a minimum time, which makes judicial influence on a specific electronic media ineffective. Thirdly, the digital environment allows posting any type and volume of information (text, photo, video, etc.) in order to have the maximum impact on the jury. Fourthly, in practice it is extremely difficult to

establish that the jurors are familiar with this information. There are no convincing means of verifying their answers in this regard. Fifth, while “traditional” media bear at least reputational responsibility for the quality of the information posted and follow the ethical regulation of the journalistic profession, in the modern world anyone can become a source of information about a case. The problem of posting unverifiable information or data based on private opinion on social networks is of great concern to researchers (for example, Gruce, 2024, pp. 3–4). Social network algorithms, in turn, actively distribute information among users, including jurors, based on their preferences.

The risk of external influence on jurors through information available to a wide range of readers or viewers is based on the collision of a number of basic generally recognized rights, namely the rights to a fair trial, to disseminate information, and the right of society to receive information about important social events. The balance between these rights is established differently in various countries: from recognizing the priority of freedom of the media in the United States to the possibility of limiting coverage of cases before sentencing in the United Kingdom (Strelkova, 2018, pp. 242–243). In Russia, such restrictions have not been introduced, either with respect to official media, or with respect to the parties or other persons.

In Russian judicial practice, attempts to influence jurors using digital sources are observed quite often, as evidenced by the arguments of appeal (cassation) complaints. At the same time, for the reason mentioned above, in almost all cases, the courts of appeal and cassation do not recognize the fact of digital influence as established and reject this argument.

Thus, in the case of G., the cassation appeal of the victim’s representative indicated that the wife of the accused tried to shape public opinion on social networks about G.’s innocence, as well as to discredit the presiding judge and the prosecution.¹⁰ However, the cassation court, referring to the results of the presiding judge’s clarification of these facts, did not recognize this circumstance as a cassation basis.

¹⁰ Cassation ruling of the Eighth Cassation Court of the general jurisdiction dated 6 May 2024 No. 77-1462/2024. (In Russ.).

In another case, the defense attorney drew the attention of the appellate court to the fact that the victim's wife broadcast on the Internet a video recording of the movement of the jury to the courtroom in the building of the Moscow City Court on 6 October 2021, with comments on what was happening. The defense argued that these actions allowed an indefinite number of people — users of social networks on the Internet — to write comments, and for the jurors to see themselves on the Internet while performing their duties, which eliminated the obligation to remain objective and impartial when making a fair decision. However, the appellate court rejected this argument, noting that there was no information that these actions influenced the jurors, and these circumstances did not indicate the illegality of the verdict.¹¹

Similarly, citing the fact that no evidence was presented that the jurors were familiar with the publication and that their opinion of the accused was formed under the influence of the said publication, the defense's argument that the publication titled "Killer at Large" (indicating that the accused had committed murder) posted on the website of the "Kotovchanin" Internet portal was posted on all social networks and was read by the jurors, was rejected.

The arguments of the victim's appeal that the jurors were influenced by the article about the death of her brother that was published on social networks in Bratsk, where the author accused the authorities of the fact that an innocent person who was tortured by the police was in the dock, were rejected as presumptive.¹² Similar positions were expressed in other cases.¹³

It seems that the difficulty of legally proving the connection between publications about the case and the verdict does not mean that the coverage of the investigation and consideration of criminal cases does not require special regulation. The introduction of restrictions on such publications and their timely removal could be one of the measures that does not have unconditional effectiveness, but is capable of reducing the number of references to the case on the Internet.

¹¹ Appeal ruling of the First Appeal Court of the general jurisdiction dated 1 August 2022 No. 55-1037/2022. (In Russ.).

¹² Appeal ruling of the Irkutsk regional court dated 9 April 2024 No. 22-1000/2024. (In Russ.).

¹³ Appeal ruling of the Volgograd regional court dated 17 February 2025 No. 22-551/2025. (In Russ.).

V. Expressing Juror's Opinion about a Case in the Digital Space

The development of the digital space objectively increases the possibilities of communication both between jurors outside the trial and between jurors and other persons (who are or are not participants in the trial). These communications create a risk for the independence and impartiality of jurors if the subject of these communications is the discussion of the criminal case, during which jurors express their opinion on it.

The risk of discussing the case among the jurors themselves can be considered inevitable, which is why some authors consider it possible to allow jurors to discuss the evidence examined before the verdict (Anderson, 2002, pp. 94–95; Dufrainmont et al. 2008, pp. 235–240; Hans, 2025, pp. 173–175). Despite all the ambiguity of this approach, discussing the case among jurors in the digital space also creates another, more significant risk: online communications through the use of websites, social networks or even e-mail create a risk of access by third parties, including parties to the case. In turn, this can lead to the disclosure of the content and distribution of votes during jury deliberation (Hoffmeister, 2012, pp. 427–428).

In studying the reasons for the prohibited communications of jurors on the Internet, researchers, citing numerous examples of violations, highlight, in addition to the usual desire to discuss the case, two specific problems: the jury's misunderstanding of the judge's instructions in this part (that publishing a post about the case, in addition to violating the ban on expressing one's opinion, also represents a prohibited form of communication — especially if a comment can be left under the post), and the habit of constantly posting on social networks, talking about various events in one's life (Hoffmeister, 2012, pp. 433–436).

In the Russian court practice this phenomenon can also be found, as indicated by the decisions of the courts of appeal and cassation. Thus, in one of the cases, after the end of the court session and the announcement of the verdict, the state prosecutor found information on social networks published by the foreman of the jury about negative statements addressed to government officials, an extremely negative

attitude towards the State and all law enforcement agencies; she also posted information about participation in the court session as a juror (summons from the Moscow City Court), asked questions to an unlimited number of people, including lawyers, about the progress and features of court proceedings with the participation of jurors. In rejecting the arguments of the appeals, the Appellate court analyzed the statements of the jury foreman in detail and established that the circumstances of the case were not discussed in this message, the secrecy of the deliberations was not violated, and, in addition, the complainant did not provide information that the social media pages belonged to the jury foreman, or if so, that they were not hacked.¹⁴

In another case, the appellate court rejected the defense's arguments that one of the jurors had made a post on her public page on the social network VKontakte, the gist of which was that due to fear, she had no opinion of her own and could not independently assess what was happening, contrary to the position of the prosecution. Firstly, the court pointed out that the source of the information provided by the defense was the Internet, which, in the opinion of the panel of judges, did not meet the requirements of reliability. Secondly, the court noted that, if we take into account the information posted on the juror's page on the Internet, then the lawyers' opinion that this text testifies to the juror's inability to make an independent decision is a free interpretation of the written text, which does not allow one to doubt the objectivity of this juror.¹⁵

Similarly, courts of review instances reject the arguments of complaints if the thesis about the creation of a collective chat by jurors on social networks or messengers is a hypothesis. For example, one of such decisions stated, "The defense attorney's argument that during the trial a chat was created on the social network WhatsApp uniting jurors in which they could discuss issues related to the consideration of this criminal case is only the attorney's assumption, is not objectively

¹⁴ Appeal ruling of the First Appeal Court of the general jurisdiction dated 14 July 2021 No. 55-1013/2021. (In Russ.).

¹⁵ Appeal ruling of the Moscow city court dated 10 April 2024 No. 10-5160/2024. (In Russ.).

confirmed by anything, and therefore cannot be taken into account by the judicial panel”.¹⁶

At the same time, in judicial practice there are cases, even though they are quite rare, where courts recognize such statements by jurors in the digital environment as a significant violation of the criminal procedure law. Thus, in one of the cases, the court of second instance established that on 5 March 2012, juror P. created a group on a social network called “The Court is in Session!”, which included 9 jurors participating in the criminal case against O. On 31 March 2012, the group members — jurors P. and B., in violation of Para. 2, Part 2, Art. 333 of the Criminal Procedure Code of the Russian Federation, expressed their opinion on the criminal case before rendering a verdict. The court concluded that since the jurors discussed issues related to the consideration of this case outside the court session, this calls into question their compliance with the requirements of Art. 333 of the Criminal Procedure Code of the Russian Federation, according to which they do not have the right to express their opinion on the criminal case before jury deliberations.¹⁷

The approaches cited from Russian practice are standard in comparison with the practice of other countries. It seems that, despite the difficulty of preventing jurors from communicating with each other or with third parties, it is necessary, at the very least, to eliminate this risk since jurors do not understand the illegality of such actions. To this end, judges need to explain in the most accessible and complete manner what forms of interaction are prohibited for jurors.

VI. Conclusion

It became obvious that traditional legal mechanisms to ensure the independence and impartiality of jurors are ineffective against digital technologies (postponement of the hearings; change of location; engaging jurors from another locality, careful selection of jurors) (Waters and Hannaford-Agor, 2014, p. 2741).

¹⁶ Appeal ruling of the Amur regional court dated 24 July 2023 No. 22-1573/2023. (In Russ.).

¹⁷ Cassation ruling of the Supreme Court of Russian Federation dated 11 December 2012 No. 203-O12-2SP. (In Russ.).

Another actual question is the influence of generation “Z” on the performance of juror functions. This generation grew up in the era of widespread development of digital technologies, as a result, generation “Z” perceives information differently — with inability to concentrate for a long time, with the habit of searching for information on the network and demonstrating high skills in such search, and using social networks for discussions (Tenzer, 2020, pp. 200–201). Some researchers associate these characteristics with the need to change the approach to traditional instructions, as new features of thinking and perception of information caused by daily searching on the Internet, reading structured short texts with headings, high speed of the flow and perception of information lead to a change in cognitive schemes (Waters and Hannaford-Agor, 2014, p. 2737; Huang and Wixted, 2024, pp. 90–107), that could not be ignored during the trials.

At least several approaches to solving these problems are proposed in scientific literature and judicial practice, the first three of which can be considered “classic”.

1. Complete or partial isolation of jurors from the digital environment.

This method is quite effective, since it neutralizes the negative effect of the digital space on jurors in such manifestations as digital investigation of a crime, digital influence on the jury panel, and jurors expressing their opinions in the digital environment. However, this method does not block digital “surveillance” of jurors by the parties. In addition, it has objective limits of application, since complete digital isolation of jurors cannot be applied for a long time, otherwise it will create an excessive restriction of their constitutional rights. The use of this method in a limited time interval significantly reduces its effectiveness (for example, if jurors’ communication devices are seized during a court hearing, they will again be exposed to the digital environment after the return of these devices). Complete digital isolation of jurors for the entire period of the trial is possible only within the framework of the institution of sequestration and, in our opinion, is an extremely negative way of solving this problem, since it seriously depopulates the jury trial in society.

Therefore, this method can be used only in a limited number of situations, for a short period of time and has questionable effectiveness.

2. Legal influence on the digital environment in order to ensure the independence and impartiality of jurors.

On the one hand, this method can be quite effective, since it involves direct influence on the digital environment — the area which creates risks for the independence and impartiality of jurors. On the other hand, this method has obvious disadvantages. Such influence is not included in the scope of measures of criminal procedural coercion provided for by the Criminal Procedure Code of the Russian Federation, i.e., to create a legal basis for such measures, it will be necessary to develop a new legal institution or use the means of other branches of law. However, such measures are unlikely to be effective. The digital environment is very changeable and the pace of modification of this environment significantly exceeds the pace of making any procedural decision, which will often be belated. Finally, this method cannot eliminate digital “surveillance” of jurors, digital investigation of crimes by jurors, or their expression of opinions in the digital environment.

3. Neutralization of the consequences of the negative impact of the digital environment on the independence and impartiality of jurors.

This method is universal, as it allows to counteract all problematic situations. It involves the use of a wide range of procedural means, from the presiding judge’s explanations of the inadmissibility of certain actions in the digital environment to the dissolution of the jury if it is determined that it has lost its impartiality. However, this method is effective only as a means of responding to the consequences of the negative impact of the digital environment on jurors. If such an impact is not obvious or is only predicted, the effectiveness of this method is sharply reduced. The degree to which jurors assimilate the presiding judge’s explanations is absolutely unverifiable, while all other manifestations of the use of this method are destructive, since they involve the exclusion of a person from the jury.

4. Anonymization of jurors is a measure sometimes used by courts to reduce the risk of influence on jurors by third parties who want to persuade them to make a particular decision (Waters and Hannaford-Agor, 2014, p. 2743). For example, anonymous jury panels were used

to consider cases against Donald Trump. The extraordinary attention of society, a wide range of publications with threats to potential jurors in the event of an outcome of the case that did not suit the commentators, indicated the risk of physical harm to the jurors (Ressler, 2024, pp. 612–614). The creation of anonymous panels, taking into account the development of technology, seems to be an effective way to protect jurors, while ensuring the fairness of the trial (Ressler, 2024, pp. 655–656).

The scientific literature suggests options for combining the approaches discussed above (Hoffmeister 2012, p. 436):

- introducing sanctions for jurors for using digital technologies during the trial (fines, ban on using equipment with Internet access, sequestrations);

- allowing digital “surveillance” of jurors for the parties and the court (there is a risk that the parties will disclose information only after the verdict, however, in this regard, it is proposed that the court apparatus check social networks before selection) (Gruce, 2024, p. 19);

- allowing jurors to ask questions not only to witnesses, but also to the court (not to receive a particular answer, but for additional explanations or court instructions, or to show the parties on what issue there was insufficient information);

- updating instructions (what exactly is prohibited with examples, why it is prohibited): use generally accessible language and terminology of social networks; provide specific examples of unacceptable behavior on social networks; explain the reasons for restrictions, explain the consequences of violations (Rose and Ogloff, 2001, pp. 409–410; Gruce, 2024, pp. 19–20).

Nevertheless, while recognizing each of the three “classic” methods as adequate, not all researchers agree that these measures will be effective in terms of banning the use of mobile phones, at least for the younger generation (Tenzer, 2020, p. 208). Among the three main ways to combat information search and communication on social networks (confiscation of phones, improvement of instructions, introduction of sanctions), sanctions are the most effective, but they reduce the desire to become jurors. For this reason, some authors suggest accepting the idea of the impossibility of preventing the use of technology for these

purposes and focusing on assessing the consequences of such behavior: in what cases it becomes necessary to overturn the sentence. In this regard, Leslie Y. Garfield Tenzer supports the harmful error test, which is already used by judges in the United States, which requires a thorough assessment of the content of communication from the standpoint of whether the right to a fair hearing has been violated (Tenzer, 2020, p. 217).

Thus, none of the methods of counteracting the negative factors of the digital environment, weakening the guarantees of independence and impartiality of jurors, considered in this publication, is able to independently solve all the problems of this kind that arise in judicial practice. It seems that only the integrated application of all these methods is the optimal way to solve the problem under consideration.

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Received 10.07.2025

Revised 30.07.2025

Accepted 17.09.2025

NATIONAL PROBLEMS OF LEGAL REGULATION

Article



DOI: 10.17803/2713-0533.2025.3.33-594-634

Wolves in Sheep's Clothing: A Critical Appraisal to Abusive Exercise of Constitutional Powers in Venezuela, Argentina, and Peru

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Abstract: The constitutionalism movement aims to organize a society under the rule of law to protect the human person. For that purpose, constitutions usually establish several mechanisms of checks and balances. However, contemporary authoritarian tendencies refrain from resorting to disruptive institutional changes. Latin American autocrats, in general, no longer seek to implement a constitutional design that aligns with their agenda or aspirations to remain in power. Instead, they aim to use the institutional forms of liberal constitutionalism to undermine the core of democracy. Those autocratic tendencies perform their powers as wolves in sheep's clothing. This kind of manoeuvre has come to be known as "abusive constitutionalism" and is probably one of the greatest threats to the democratic consolidation of the region. In this article, we will examine three cases of abusive constitutionalism — Argentina, Venezuela, and Peru — where some of the three branches of

government respected institutional procedures but undermined one of the core foundations of constitutional democracy: judicial independence.

Keywords: authoritarianism; rule of law; judicial independence; constitutional amendments

Acknowledgments: The paper preparation was funded by the External Postdoctoral Fellowship from CONICET: “El constitucionalismo abusivo: un estudio de derecho comparado entre Perú y Argentina” (2023).

Cite as: Laise, L.D. and Manzo-Ugas, G., (2025). Wolves in Sheep's Clothing: A Critical Appraisal to Abusive Exercise of Constitutional Powers in Venezuela, Argentina, and Peru. *Kutafin Law Review*, 12(3), pp. 594–634, doi: 10.17803/2713-0533.2025.3.33.594-634

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I. Introduction: How to Undermine Constitutional Democracy from Within

Constitutional changes, in the case of highly flexible constitutions, can be carried out through their formal channels, i.e., the reform or amendment mechanisms established by the Constitution. However, it is only sometimes possible to direct the changes through the formally established channels. The impossibility of following such channels may be due to significant political fragmentation or because we are faced with rigid constitutions. In both cases, constitutional changes are usually implemented through rulings of higher courts or, in general, through precedents of the highest interpreters of basic rights (Laise, 2019, p. 230).

Nevertheless, another instance has a particular theoretical and practical relevance in the current times. We are referring to abusive constitutionalism, i.e., a gradual decline of constitutionalism through informal or formal channels established by the Constitution (Dixon and Landau, 2021a, p. 52). More specifically, abusive constitutionalism undermines the fundamental core of democracy, namely, free and competitive elections, political freedoms, and basic institutional systems of checks and balances, such as, for example, judicial independence (Dixon and Landau, 2022, p. 428). In other words, abusive constitutionalism is an effort to implode the separation of powers and the limitation of public power through a manipulative instantiation of constitutional powers.

At first glance, the term “abusive constitutionalism” appears to be an oxymoron (González-Jácome, 2017, p. 450). If constitutionalism aims to limit government to safeguard the dignity and freedom of the

human person (Badeni, 2006, p. 42), how is it possible to use this same tool against its own ends? As will be discussed in subsequent sections, the answer to this question depends on what we understand by abuse of rights.

Thus, the claim we will defend in this paper is that the civil doctrine of the abuse of law can illuminate the increasing interference of political branches — executive and legislative — in the Judiciary. In particular, the parallelism with the abuse of law could shed light on weakening democratic systems. Moreover, it could also explain the authoritarian drift of governments that began under the protection of democratic institutions and a person-centred constitution but ended up in autocratic or hybrid regimes.

This is because, as observed in the doctrine of abuse of rights in the civil law tradition (Cuentas Ormachea, 1997, p. 466), the exercise of ostensibly legitimate powers by the political branches may gradually undermine judicial independence. Finally, if the doctrine of the abuse of rights highlights that property rights are not to be exercised in an antisocial manner, the development of constitutional institutions to undermine the socio-political framework of a State is even more reprehensible (Carranza, 1970, p. 466).

To hold the claim of the paper, we propose the following roadmap: (1) We will unfold the meaning of the concept of abuse of rights in the field of civil law tradition; (2) We will elucidate what the abusive exercise of constitutional powers consists of; (3) We will examine the Venezuelan, Argentinean and Peruvian cases regarding the abusive exercise of constitutional powers tending to undermine the independence of the Judiciary; (4) We will elaborate on a critical balance in which we will defend how to harmonize the form and substance to ensure constitutional democracy.

II. From the Concept of Abuse of Rights to the Abusive Exercise of Personal Rights

The current notion of abuse of rights entails a social function of the law. Thus, we can only exercise rights for lawful and moral purposes. However, was this always the case? There are multiple historical pre-

decessors of the abuse of law in Rome. Still, these concepts are just an antecedent or, rather, prefiguration, as the study and practice of ancient law focused not on what the community owed to the individual but on what the individual owed to other individuals or the whole community (Strauss, 1953, p. 182).

In any case, Rome is usually considered the first historical antecedent for an intriguing reason: in Roman law, the unrestricted exercise of legal powers was forbidden. For example, the Romans were quite severe with those who filed a reckless lawsuit, i.e., a claim without merit. Whoever suffered a reckless lawsuit could bring an action for slander, *contrarium judicial*, oath, or *restipulatio* (López, 1966, p. 83). Whoever intervened in a lawsuit recklessly was subject to monetary sanctions, and, in some cases, that could even lead to a sentence for infamy.

On the other hand, some authors identify the origin of the abuse of rights in the medieval institution of acts of emulation. These consisted of actions by which the control of the thing is exercised without the intent of benefiting its property owner but to harm the owner of a neighbouring estate (Rutherford, 2013, p. 636). However, this approach presents certain difficulties. On the one hand, medieval texts are often characterized by inaccuracies or misunderstandings; on the other hand, many medieval jurists developed the doctrine of acts of emulation based on, or under the authority of, the writings of Paulus or Ulpianus (Rutherford, 2013, p. 643). Whatever its origin, this idea persisted in medieval law: no one shall exercise her rights to harm other community members.

The French Revolution marked a Copernican turn in these matters. Then, the very idea of absolute rights began to proliferate (López, 1966, p. 82). The nineteenth-century liberal ideology required absolute subjective rights. The paradigmatic example was the property right. Following the line of The Napoleonic Code, and beyond some nuances introduced in each country, the first civil codifications in Latin America recognized a robust or thick right to property (Parise, 2022, pp. 73–75). Only the law could limit the conditions for exercising that right.

Even so, this idea gradually gave way to alternative theories. The modern content of rights limits the exercise of our freedoms to enable

the development of community life. Why did this change occur? It was the result of what has been described as *a solidarity turn*. This understanding holds that there was a decline in the individualistic liberalism that nourished the first civil codes of the Western legal tradition, especially in its French version. Then, as a reaction, solidarity emerged as the supreme value of social life (Fernández Sessarego, 1992, p. 134). In this way, the exercise of the rights of an individual cannot overlap the rights and legitimate interests of the rest of the community members (Hess et al., 2010, p. 3).

However, what criteria are employed to identify instances of abuse of rights? The Civil doctrine has been debating this issue for decades. In any case, for the purposes of this study, it is helpful to categorize such criteria as subjective, objective, or mixed.

The subjective approach reduces the abuse of rights to intended or negligent manoeuvres aimed at exercising a right to harm another person. At first, many resorted to subjective criteria to recognize cases of abuse of rights in French jurisprudence (Hess et al., 2010, p. 4). According to this view, some voluntary action to harm another person is a necessary and sufficient element of the abuse of rights, whether intentional or negligent. Nevertheless, the agent need not be motivated by an interest in acting as he does (Fernández Sessarego, 1992, p. 125).

Alternatively, the objective criterion does not emphasize the intent to harm someone by exercising your right. This position emerged as a reaction to the heavy evidentiary burdens implied by the subjective theory of abuse of rights (Fernández Sessarego, 1992, p. 125). Moreover, this doctrine would be primarily neutralised if it were required to prove intent or negligence when abusing rights. Indeed, the abuse of rights consists of deploying a subjective right that harms third parties without the need for voluntary action.

By contrast, under the objective criterion, the central issue is the transgression of the limits established by the function of each right. (Fernández Sessarego, 1992, p. 129). But what is this function? Some authors, for example, associate it with good faith and generally accepted morality (Spota, 1957, p. 304). However, some views assume a less intense connection with morality. Borda, for example, argues that the

abuse of rights depends on the economic and social purposes of the law under which a subjective right is protected (Borda, 1990, p. 14).

The eclectic theory resorts to a blend of objective and subjective criteria. However, that theory suggests that we are in a false dilemma fallacy. Although the subjective and objective criteria pose an exclusive disjunction, they are complementary. Thus, within the framework of practical applications, it may be necessary to emphasize the subjective aspect over the objective aspect. Everything will depend on the peculiarities of the specific case (Fernández Sessarego, 1992, pp. 132–133).

Nevertheless, the most significant topic highlighted by the discussion on the abuse of rights is the role of private law in regulating private relations. That is particularly problematic in the absence of a prohibitive legal provision. However, in many cases, if such a prohibition existed, the situation would not constitute an abuse of rights but rather a conflict of rights (Mere, 1992, p. 37). For instance, consider the case of a debtor who has become insolvent but must pay his debt to the bank. That person, at the same time, is forbidden to dispose of his assets in a way that harms the basic sustenance of his children but, at the same time, must fulfil his family obligations.

The abuse of rights involves the exercise of a subjective right that injures an interest not specified by any other legal provision. For example, John decides to exercise his right of ownership over his land and plants some trees on his property with a leafy canopy. Still, he chose some trees and a spot to block the sun's rays from falling on his neighbour's (Peter) swimming pool. Peter did not have a subjective right to have his pool full of sun, even though he was interested in optimally enjoying his property. John significantly truncated that interest since the city's dry climate, which is not so hot in summer, requires as much sunshine as possible to enjoy the pool.

The abuse of rights tests the thickness of the bridges between private and public law. These issues may be synthesized in the following question: Is private law a mechanism for regulating private relations in pursuit of socially beneficial ends, or is it a legal order that ensures compliance through strong protection of the principle of freedom? (Barros Bourie, 1999, p. 15). The discussion of private law is a topic

that exceeds the scope of this study. Nonetheless, public law emphasis of this research is to be enhanced by a conception of private law as an area where the general interest determines the limits of relationships between private individuals.

The final issue addressed in this section is as follows: What are the effects of abuse of rights that hold particular significance for public law?

— Whoever abuses a right cannot invoke it as a justification for her actions (Barros Bourie, 1999, p. 35).

— If the abuse is related to the exercise of an action, the holder is deprived of the respective claim (Barros Bourie, 1999, p. 35).

— If the abuse has relapsed in exercising a personal right, that is, in a competence attributed to creating, modifying or extinguishing legal relations, the effect will be the ineffectiveness of the act (Barros Bourie, 1999, p. 36).

III. The Abuse of Rights in Abusive Constitutionalism: When Forms Separate from Substance

In the name of rights or the rule of law, the rhetorical appeal to abuse is commonplace, as some attempt to cover up the harm of goods of institutional significance. After all, the idea of abuse unfolds a game of double standards. On the one hand, we instantiate the right of persons. On the other, we undermine the legal system by a manipulative exercise of the social interest protected by that right (Palombella, 2006, p. 35). Indeed, the expression “abuse of the right” emphasizes the perpetrator of the act and not so much the one who suffers it. Thus, we could use a more precise articulation: the abusive exercise of rights (Cuentas Ormachea, 1997, p. 465).

Similarly, “abusive constitutionalism” is intended to underline a dual intention. On the one hand, it simulates a formal commitment to the Constitution. On the other hand, it undermines the very heart of constitutionalism, namely the minimum core of democracy and the rule of law. It is, therefore, a matter of weakening the techniques aimed at limiting the exercise of power through institutions concerned with the defence of basic rights (Badeni, 2006, p. 42).

Dixon and Landau consider abusive constitutionalism as one of the most pressing challenges of liberal constitutional democracies. Indeed, we may even be entering the era of abusive constitutionalism (Dixon and Landau, 2022, p. 427). More importantly, most of the legal system adopts constitutional provisions containing the basic foundations of the rule of law. However, nowadays, tyrants and their collaborators channel their aspirations using the constitution to further their agenda (Dixon and Landau, 2021b, p. 11).

We shall illustrate the latter with the example of Nicolás Maduro. The Venezuelan autocrat delivers his scathing speeches to undermine the separation of powers almost always with the constitutional text in hand. However, he always masks his further intentions behind some constitutional power. Even more, there is no lack of allusions to constitutional provisions to proclaim some measure tending to further violate the basic legal guarantees of Venezuelans. Indeed, legal provisions are not enough to shield a State from abusive exercises of constitutional powers. Some autocrats used those provisions to entrench their autocratic regime, as we shall see in the upcoming sections of this paper.

Thus, abusive constitutionalism highlights precisely this trend of undermining the Constitution from within, that is, by using institutions provided by the Constitution itself. In its most extreme forms, as some authors have noted, we face examples of stealth authoritarianism (Varol, 2015, p. 1684). That is because most autocrats intend to camouflage authoritarian practices by resorting to the typical institutions of constitutional democracies.

To make things worse, most of the manoeuvres of abusive constitutionalism are often carried out in multiple acts. For example, in India, the Modi government has pursued a series of legal and constitutional reforms or amendments that have profoundly damaged the core of constitutionalism. Nevertheless, this was not the result of a single event. Those undermining acts underwent a gradual succession of constitutional acts, legal reforms, and, at times, mild constitutional amendments. In short, we could say that constitutional democracy was assassinated by a thousand stab wounds (Khaitan, 2020, pp. 49–50).

Thus, authoritarian regimes often cannot be clearly distinguished from consolidated democracies by their institutional design. Both systems have a robust constitutional review, thick recognition of fundamental rights, constitutional amendments, extra-power bodies in charge of overseeing elections, and a clear separation between those who initiate the criminal action — the Public Prosecutor's Office — and those who judge the cases, to mention just a few examples.

In the end, the autocrats of the current times do not usually want to exhibit extravagant institutional designs, nor do they try to seize the main public offices by sheer force (Skąpska, 2019, p. 422). Moreover, tyrants are no longer inclined to organize coups d'état or to formally establish constitutions that are not person-centered; that is, fundamental legal orders that reduce the individual to a mere instrument for the pursuit of a dominant political idea, whatever that may be (Badeni, 2006, p. 25). That is no longer the season's latest trend (Dixon and Landau, 2021b, p. 14).

The latest fashion among autocrats is to go under the radar or, better yet, to use the guise of democratic leaders. Some African politicians, for example, have become masters in the art of abusing constitutional powers. Such politicians have even enlisted members of Congress as critical players in constitutional coups (Basheka and Auriacombe, 2019, p. 109). These recruitment processes aimed to obtain acolytes to promote and carry out constitutional amendments. The goal was to satisfy the aspirations of power of some autocratic leaders. When that was impossible, they redirected their objective to co-opting the final interpretation of constitutional provisions. Thus, if a constitutional amendment or reform process was not feasible, the goal turned to get those in charge of the constitutional review of the most relevant governmental actions (Basheka and Auriacombe, 2019, p. 110).

Why is there a tendency to disguise an authoritarian drift under the appearance of liberal democracy? One possible answer is that authoritarian governments, or those aspiring to become such, may be able to conceal their real intentions and manoeuvres more effectively. A keen observer might notice what is happening, but the average citizen may need a better sense of what is actually going on. Given the current

levels of political disaffection in Latin America, this seems entirely possible (Monsiváis Carrillo, 2017, pp. 5–6).

This problem of disaffection in the face of examples of abusive constitutionalism turns worse as those who resort to such practices hide behind a discourse of enhancing democracy. See, for example, the Mexican constitutional reform that instituted the popular election of all judges of the Nation. The effort to defend and legitimize these changes in the organization of constitutional government was accompanied by frequent references to “democratizing” the judiciary. These measures were not presented as an attack on the separation of powers. Instead, the advocates of such reforms saw themselves as champions of boosting the popular bases to find a robust and actual democracy.

A second argument, although interrelated with the previous one, is that the abusive exercise of constitutional institutions makes it difficult for international agencies or bodies to intervene (Law and Versteeg, 2013, p. 919). If, for example, an autocrat decided to change the composition of a country’s Supreme Court or Constitutional Court by sheer force of arms, this would cause alarm and a strong reaction from the international community. Take, as a recent example, the coup d’état in Myanmar (2021). That news had a global reach, and significant international leaders were eager to speak their minds against the overthrow of the President, Aung San Suu Kyi.

Meanwhile, the case of the gradual co-optation of the Supreme Court of Justice of the Nation of Venezuela never had a significant worldwide impact. They carried out everything through the formal channels established in the constitution. It is worth noting that the Venezuelan legislative body does not allow the participation of the opposition parties in the national elections. That, in turn, was not done solely through the exercise of raw power. The *Chavista* regime proscribed the opposition with the consent or active intervention of the Judiciary and the governing body in electoral matters, but always under the unceasing façade of subordination to a higher law. Has this led to a decisive intervention at the international level? Has the OAS Democratic Charter been invoked in response to this? The answer is in the negative.

Thus, abusive constitutionalism undermines the rule of law by dissociating the form and the substance. Those who resort to these practices comply fully with the Constitution. Still, such compliance separates the forms from its substance or, more clearly, its inherent purpose (Dixon and Landau, 2021b, p. 19). In other words, they respect the forms but with an anti-democratic aim. For example, the control of the functioning of the judicial power or the court packing usually involves a complex interaction between the Legislative and Executive Branches of the Nation. However, this serves a specific purpose: to prevent the judiciary from becoming wholly subject to the fluctuations of partisan politics.

Thus, it constitutes an example of abusive constitutionalism when the political branches seek to control the judiciary with the aim of undermining judicial independence, even if such actions formally comply with the letter of the Constitution.

Is this decoupling between the form and the substance merely intentional? Must we contemplate its necessary consequences? The first alternative can be highly complex to prove. Reconstructing the motives that drive constitutional actors is not a path with an accessible gateway. Moreover, mixed or eclectic intentions are frequent in collective bodies of a political nature (Petrov, 2024, p. 2). In this way, various factional interests might conflict, including allegation of impunity, ideological commitments, and the fear of falling out of favour with the autocrats in office.

In contrast, a more effective way to detect abusive exercises of constitutional powers is to emphasize the historical interrelationship between the means chosen and their consequent outcomes (Petrov, 2024, p. 2). This seems quite sensitive, as constitutional practices are necessarily instrumental. Then, what results do these abusive practices aim to achieve? The answer is simple: the intention is to circumvent accountability.

As Petrov (2024, p. 15) suggested, this would be the critical analysis factor. However, the possibility of eliminating the accountability requirement depends on the gradual erosion of checks and balances. After

all, how can an institution be exempted from being accountable for its actions without the approval of those in charge of its control or supervision? For this reason, undermining the minimum cores of democracy begins with the co-optation by the political branches of the Judiciary and, above all, constitutional justice (Roznai et al., 2023, p. 294).

IV. Abusive Constitutionalism in Venezuela, Argentina and Peru: The Case of Interference in the Judiciary

The cases in this Section will focus on intrusions into the judicial independence. That is not the only example of an abusive exercise of constitutional powers, but it is undoubtedly among the most serious. One of the most fundamental elements of constitutionalism lies in organizing a society under the rule of law; in this way, the Judiciary exercises its jurisdictional powers to entrench the subordination of the political branches to the law (Skąpska, 2019, p. 423).

Thus, we will examine three examples where the political branches of the government acted by constitutional provisions to achieve an outcome that undermines liberal democracy. Autocrats, or those who aspire to be autocrats, when they cannot use the formal mechanisms of constitutional change, resort to informal abusive constitutional or judicial review exercises. The courts, especially the courts exercising constitutional jurisdiction, stand as the last defence against the emergence of authoritarian outbreaks or autocratic leaders (Juhász, 2022, p. 578). Because of that, when autocratic leaders cannot reform or amend the constitutional system to unfold their agenda, they focus on holding some control over the final interpreters of the Constitution.

Despite the varying degrees of difficulty that different constitutional systems encounter when implementing amendments or reforms, each of the three cases examined attempted to use constitutional mechanisms to subject the judiciary to partisan political dynamics, as will be discussed in the following pages.

IV.1. The Venezuelan Case: The Subordination of the Constitutional Justice System to the Will of the Presidency

IV.1.1. The Context of the Case: the Coronation of Constitutional Justice at the Top of the State but Subordinated to the National Executive Power

Since Venezuela's Declaration of Independence (1819), several authoritarian governments have shaped the Venezuelan constitutional system (Berríos Ortigoza and Sánchez-Urribarri, 2024, p. 341). This fact is essential to understanding what has happened in the last twenty-five years. Historians refer to this period as the "Chavista era" (López Maya, 2016, p. 160), with Hugo Chávez leading its initial phase from 1999 to 2013.¹

After Chávez's death, Nicolás Maduro took over the position and held it until now. Maduro had served as a substitute during the illness that led to Chávez's death. Both figures belong to the same political faction, the United Socialist Party of Venezuela. The party's political platform displayed several contradictions. On the one hand, Chávez refused to be labelled a Marxist, yet, at the same time; he implemented a notably class-based social policy. Moreover, Chávez often championed class struggles, the role of the working class, anti-imperialism, and anti-capitalism (Rodríguez Rojas, 2010, p. 207).

One of the tools used to undermine constitutional democracy from within was the co-optation of justice and, most significantly, of constitutional justice (Brewer Carías, 2016, p. 9). When the implementation of the Constituent Assembly of 2015, no lack of defenders of the regime went so far as to say that the Venezuelan system of government is neither parliamentary nor presidential, but rather "semi-presidential because, in our regime, all power resides in the constitutional chamber" (Rodríguez, 2016).

From a strictly factual perspective, and with reference to the provisions of the Venezuelan Constitution itself, Rodríguez's comment

¹ This work assumes a critical appraisal to the *Chavista* Regime. Nevertheless, some authors hold a positive view, particularly regarding to the first period (1999–2013). For instance, Vidal Molina et al., (2018); Borón (2014), and Hellinger (2011).

grasps a grain of truth. Because since the dawn of the *Chavista* era, gradually, the Constitutional Chamber of the *Tribunal Supremo de Justicia* (hereinafter TSJ) has been acquiring the sum of public power, although under the subordination to the Executive Power (Brewer Carías, 2016, p. 10). In other words, the Executive Branch became the preeminent branch of government over all others, but this subordination was carried out through the Constitutional Chamber of the TSJ.

In 2015, the TSJ reached its highest peak regarding its power accumulation. At that time, the opposition to the *Chavista* regime won the legislative elections. However, the Constitutional Chamber of the TSJ abusively exercised its powers to prevent the new representatives of the people from taking office, as we will see in the following section. This led some authors to describe the Venezuelan regime as a “judicial dictatorship” (Brewer Carías, 2016, p. 15).

How did the *Chavista* regime get a constitutional justice system addicted to its will? The regime went down that road with patience and determination. As the saying goes, “Rome wasn’t built in a day”. However, the starting point of that road, the beginning of *Chavismo*’s authoritarian drift, could be traced to Chávez’s presidential re-election in 2006 with 63.4 % of the votes.

López Maya holds that Chávez interpreted the electoral results as a massive support to his socialist model (López Maya, 2016, p. 167). Then, Chávez doubled the bet and tried establishing a socialist state model of a “communal” type. Such a model intended to channel its goals through a constitutional reform, but a referendum rejected that in December 2007. After such events, the concentration of power in Chávez peaked, and the checks and balances over the Executive Power began to crack. Thus, Chávez, in his second government, was able to achieve *de facto* control over the Legislative Power, the Judicial Power, the mechanisms of citizen control and, last but not least, he managed to subordinate the National Electoral Council (López Maya, 2016, p. 167).

The facts described above show that, as it was impossible to channel profound changes in the constitutional structure through formal means, those in power have co-opted the mechanisms of checks and balances

over the National Executive Branch. The case of the judicial branch, which is the main subject of this paper, is particularly significant.

The *Chavista* regime introduced its first innovation to the constitutional justice system with the 1999 Constitution. At that time, they established the TSJ, which was designed to have different functions and a distinct structure from the previous Supreme Court. In terms of judicial governance, they abolished the Council of the Judiciary and transferred judicial management and government functions to the new TSJ. Additionally, they created a Constitutional Chamber within that Court, granting it broad powers to serve as the guardian of the Constitution (Pérez Perdomo, 2007, p. 16).

The Constitutional Chamber possesses powers comparable to those of other constitutional courts. However, the legal provisions allocated the Constitutional Chamber within the Judicial Branch to avoid conflicts. Such constitutional design aimed to circumvent potential difficulties arising from conflicts between ordinary and constitutional justice. This way, the Constitution avoided divergences between the Constitutional Chamber's decisions and other TSJ chambers during plenary sessions (Pérez Perdomo, 2007, p. 16).

IV.1.2. The Alliance between the TSJ and the National Executive Power: Chronicle of a Self-Serving Affair

The control and oversight of the judicial function by the TSJ has meant that it holds the authority to appoint, sanction, or remove all judges in the country. In practice, the TSJ established a so-called Judicial Commission, composed of its own justices, which exercises control over judicial appointments, as well as decisions regarding the retention or removal of judges from office (Pérez Perdomo, 2007, p. 18). In short, the TSJ is the lord and master of the destiny of the Judiciary or those who aspire to become judges. Therefore, if the national executive branch controls the TSJ, this not only implies holding a grip of the final interpreter of the Constitution but also subordinating the entire judicial system to the will of the President in office.

Furthermore, the TSJ does not have to provide any justification for revoking appointments. They perform that function at their sheer discretion. In practice, the TSJ established a so-called Judicial Commission, composed of its own justices, which exercises control over judicial appointments, as well as decisions regarding the retention or removal of judges from office. If a judge decides to file a claim regarding those procedures against her, the TSJ will be responsible for that claim. Even more, the TSJ deals with the judges' claims when removed from office. This impeachment procedure lacks essential impartiality (Pérez Perdomo, 2007, p. 18).

Nevertheless, how did the Constitutional Chamber of the TSJ become an ally of the Executive Branch? The first answer to this question lies in the need for judicial independence. Since ratifying the Constitution of the Bolivarian Republic of Venezuela in 1999, no justice has completed their 12-year term in office (Berríos Ortigoza and Sánchez-Urribarri, 2024, p. 348). Additionally, partisan interests have manipulated the process of appointing these justices.

The appointment of justices initially resulted from a transactional agreement between the ruling party and the opposition coalition. However, this arrangement was short-lived. In 2004, after a failed referendum against Hugo Chavez, the National Assembly approved several regulations on the TSJ. That led to a court-packing round designation in December 2004. Then, the total number of justices increased to 32. The Constitutional Chamber was composed of seven justices, five of whom maintained close affiliations with the *Chavista* regime (Berríos Ortigoza and Sánchez-Urribarri, 2024, pp. 349–350).

Although court packing is not necessarily connected with democratic erosion, the four court-packing incidents under Chavez's regime harmed the court's willingness to hold the government to account (Garcia Holgado and Sánchez-Urribarri, 2023, p. 351). Partisan and militant judges replaced the vacancies produced by the retirements of judges without ties to the ruling party. Thus, finally, the Constitutional Chamber was co-opted by the *Chavista* regime.

In fact, the TSJ has contributed to stabilizing the autocratic regime by several strategies. For example, it confirms manipulations of the

electoral regime, approves the violent repression of demonstrators opposed to the *Chavista* government, and, last but not least, validates the political persecution of those who try to exercise an oppositional role in the National Assembly (Berríos Ortigoza and Sánchez-Urribarri, 2024, p. 346).

To sum up, the Constitutional Chamber ultimately served to validate the authority of the National Executive. Still, it undertakes supremacy over the other two branches of the State: the Executive and the Judiciary. This judicial body, therefore, functions as an instance of constitutional control that seems to be addicted to the presidential will whatever its content might be. Simultaneously, the TSJ behaves in an activist manner concerning the other branches of government. Then, the TSJ attributes itself competence beyond the scope of the legal provisions to restrict the powers of the legislative and the judicial power (Laise, 2020).

IV.1.3. Some Examples of Abusive Constitutionalism in the TSJ Aimed at Undermining Constitutional Democracy

a) The case of “las morochas” (2005)

This case refers to a ruling of the TSJ that involved an electoral tactic used in parliamentary elections (2015). *Morochas* refers to a strategy used by the ruling party and its allies. Its objective was to maximize its representation in the National Assembly. In this sense, the Venezuelan electoral system allowed voting for nominal candidates (individuals) and party lists in the parliamentary elections.

According to electoral law, seats in the National Assembly are to be allocated proportionally using a mixed formula that combines both nominal candidates and party lists.

The strategy of the *morochas* consisted of the ruling party presenting two separate lists: one with the nominal candidates and the other with the list of candidates. While the concept promoted unity, it effectively restricted voters' choices. Voters could not express their preferences for individual candidates; instead, they had to vote for the whole

list. The critics perceived this arrangement as a strategic move elaborated by the Chávez administration to accumulate power, as it diminished the chances for opposition candidates to gain seats.

The TSJ validated this strategy and considered it legal under the current legal framework (2005).² However, several sectors of the opposition considered that the *morochas* distorted the principle of proportional and equitable representation provided for in the Venezuelan Constitution. Thus, the TSJ allowed the use of the *morochas* in the 2005 elections, which permitted the ruling party and its allies to obtain an even more significant majority in the National Assembly. Since that moment, the *Chavista* regime has had almost unlimited power.

b) *The case of the opposition assembly members (2015)*

The TSJ of Venezuela addressed the case of the opposition assembly members in 2016, linking it to that year's legislative elections. The opposition, grouped in the *Mesa de la Unidad Democrática* (MUD), secured victory by a substantial margin. Nevertheless, the electoral results were subjected to judicial review shortly thereafter, with the case specifically concerning the outcomes in the state of Amazona. That alleged incident was intensely controversial and profoundly impacted Venezuelan politics.

However, how did the events that led to such a judicial decision occur? In December 2015, legislative elections took place in Venezuela. The opposition to the *Chavista* regime won the majority in the National Assembly for the first time in more than a decade. The MUD secured 112 seats, granting it a two-thirds qualified majority — a supermajority. That was crucial to pass organic laws and profoundly change the country's institutions. In a word, the National Assembly could strictly limit the power of Nicolás Maduro's government.

The *Chavista* regime was not going to accept defeat passively. On 30 December 2015, the TSJ received many claims related to the electoral results in some states, including Amazonas. The ruling party, through the United Socialist Party of Venezuela (PSUV), held that *electoral*

² Venezuela (2005). Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Sala Constitucional, Sentencia 2996/2005, Expediente 2005-001786, 13 de octubre de 2005.

fraud and vote buying had occurred in that state, which, according to them, affected the outcome.

On 30 December 2015, the TSJ issued a *precautionary measure* in its Electoral Chamber, which suspended the proclamation and the effects of the results of four representatives elected in Amazonas: three opposition representatives and one pro-government deputy. The suspended opposition deputies were vital for the opposition to reach the two-thirds qualified majority. Thus, the TSJ prescribed that the three opposition deputies from Amazonas — Julio Ygarza, Nirma Guarulla, and Romel Guzamana — were not formally incorporated into the National Assembly under the accusation of irregularities in the electoral process (2016).³

Nevertheless, despite the TSJ's measure, the opposition incorporated the challenged deputies in January 2016. The National Assembly argued that the Court was acting unconstitutionally and biased in favour of the government. In response, the TSJ declared the National Assembly in *contempt* for having sworn in such deputies. For all practical purposes, this meant that, from that moment onward, the Court deemed all decisions and actions of the National Assembly to be null and void, without legal effect. That left the National Assembly without adequate power *vis-à-vis* the government of Nicolás Maduro, even though the opposition had won the elections. Thus began a prolonged institutional breakdown between Venezuela's legislative and judicial branches.

c) The case of the National Constituent Assembly (2017)

After those attacks, the National Constituent Assembly (NCA) was deeply weakened and delegitimized. Maduro established a National Constituent Assembly (2017) to face such a situation. Thus, the *Chavista* regime further consolidated the control of the Executive over the Legislative Branch. Because of that, the Constituent Assembly did not limit itself to drafting a new constitution but assumed legislative powers. In other words, the National Constituent Assembly acted as the

³ Venezuela (2016a). Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Sala Electoral, Expediente No. AA70-E-2015-000146, 7 de enero de 2016.

original constituent power and, simultaneously, the constituted power in charge of the ordinary legislative functions.

The election of NCA members in July 2017 was highly controversial, and the opposition boycotted it. The NCA ended up composed exclusively of members who supported *Chavismo*. Thus, its legitimacy was intensely questioned both within Venezuela and abroad. That occurred because the NCA assumed ordinary legislative functions, such as approving or modifying existing laws, approving the national budget, and reforming organic laws. In short, everything that corresponded to the National Assembly ended up in the hands of the ANC.

In this context, the role of the TSJ was to function as an instance of government policy validation. The installation of the NCA, and especially its assumption of legislative functions, was a matter that the TSJ approved (2017). The final interpreter of the Venezuelan Constitution held that since the NCA was an “original power”, its decisions were superior to those of any other State body, including the National Assembly. Thus, the TSJ recognized the NCA as Venezuela’s *de facto* legislative body. As mentioned above, this consolidated the Court’s control over the legislative branch.⁴

The subjugation of the Legislative Branch and the abusive exercise of the TSJ’s jurisdiction annihilated the executive branch’s control instances. The *Chavista* strategy was to wage a battle of trenches to gradually take control over the Venezuelan justice system within the institutional framework. Once the regimen achieved that goal, the only remaining instance of governmental control was the Legislative Power. Then, with the help of the TSJ judges, the *Chavista* regime eradicated the last remnants of institutionalism that kept on standing.

In a few words, the ruling party was patient and tenacious in taking over the government bodies in charge of its control. Without appealing to direct violence and always under the appearance of constitutional forms, Maduro and Chávez took over the sum of public power, little by little.

⁴ Venezuela (2017). Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Sala Constitucional, Expediente No. 2017-0610, 12 de junio de 2017.

IV.2. The Argentinean Case: Federal Judges under the Scrutiny of Officials Selected by the Popular Vote

IV.2.1. The Context of the Case: The “Democratization” of Justice

The latest constitutional amendment (1994) incorporated a novel institution into the Argentine legal system: the Council of the Magistracy. This body is entrusted with the authority to regulate and administer the procedures for appointing, sanctioning, and removing judge. This body is entrusted with the authority to regulate and administer the procedures for appointing, sanctioning, and removing judges. It is also in charge of administering the budget of the Judicial Power of the Nation.

Section 114 of the Constitution of the Argentine Nation provides that “The Council of the Magistracy, ruled by a special law enacted by the absolute majority of all the members of each House, shall be in charge of the selection of the judges and the administration of the Judicial Power”. This paragraph introduces a relevant institutional matter: an aggravated majority is required to regulate the competence of the Council of the Magistracy of the Nation.

That regulation had significant consequences. The vote calculation is not based on the number of members who enable a legislative session but on the total number of members in the Chamber of Senators and the Chamber of Deputies, respectively. Specifically, the process requires obtaining at least 37 senators out of 72 and 129 deputies out of 257 (Urristi, 2023, p. 136).

However, the most controversial aspect of the constitutional amendment lies in the second paragraph that states, “The Council shall be periodically constituted to achieve the balance among the representation of the political bodies arising from popular election, the judges of all instances, and the lawyers with federal registration. Likewise, it shall be composed of other scholars and scientists as indicated by law in number and form”. Subsequently, the law enunciates each attribute of the Council of the Magistracy, which is irrelevant to this work.

On the other hand, as we will discuss, what is essential is the regularity and, more importantly, the balanced composition of that constitutional body. Thus, according to the latest act regulating the matter, the Council of the Magistracy of the Nation must be composed of 1) three members representing the Judicial Power; 2) three members representing the Chamber of Senators — two for the majority, and one for the runner-up; 3) three members representing the Chamber of Deputies — two for the majority, and one for the runner-up; 4) three lawyers of the Bar Association — one for the lawyers of the interior of Argentina; 5) one member for the National Executive Branch; 6) and six members for the regular professors of law — four for the majority, and two for the minority.⁵

IV.2.2. The Abusive Nature of the Council of the Magistracy Law: The Pretext of “Democratization”

Nonetheless, one of the most controversial aspects of the law governing the Council of the Magistracy is the system used for electing its members. Specifically, Section 4 of the law mentioned above provides that “to elect the members of the Council of the Magistracy representing the academic and scientific sphere, judges and lawyers of the federal registry, the elections shall be held jointly and simultaneously with the national elections in which the president is elected.”⁶ Additionally, individuals seeking membership on the Council were required to run on nationally scoped party lists, with their parties having a presence in at least eighteen of the twenty-four jurisdictions (Delamata, 2024, p. 191).

It should be clarified that this reform was not intended to bring judges of ordinary matters closer to the people. In a federal system such as Argentina’s, — which, in this regard, closely follows the U.S. constitutional model — jurisdiction over ordinary crimes generally resides with the provinces.⁷ Therefore, the purpose of this judicial

⁵ Argentina, Act No. 26.855/13, Section 2.

⁶ Argentina, Act No. 26.855/13.

⁷ The exception to this general rule is when there is an actual concurrence between ordinary and federal crimes, but only when there is a legitimate federal interest. Then, the federal jurisdiction operates as a “jurisdiction of attraction” (Argentina (2014)

reform was not to prevent residents of the country's cities and towns from choosing who would administer justice. In other words, the idea was not to implement a system of popular election of ordinary judges in the U.S. style.

Instead, the purpose of this reform aimed at the election of federal judges, i.e., those involved in crimes such as drug trafficking, human trafficking, smuggling, counterfeiting of national currency and, last but not least, crimes against the National Public Administration. All these matters are limited in scope and must be interpreted restrictively. Federal jurisdiction constitutes an exception to the general rule: the provinces retain all authority over the administration of justice, except for those powers that have been expressly delegated to the federal government (Badeni, 2006, p. 1757).

Nevertheless, there is also an issue of great relevance. Federal judges are also in charge of the electoral competence of national authorities: deputies, senators, president, and vice president. Moreover, federal judges act as the authority for applying all electoral regulations. They do not only intervene in contentious controversies. Specifically, federal judges are also in charge of controlling political parties' existence, activity and financing. In addition, they also exercise electoral administration functions, i.e., they form, correct, and print the provisional lists and the definitive voter rolls. The federal justice is the one that designates the places where the polling stations will operate and the authorities in charge of them. Finally, the federal judges control the deployment and folding of the ballot boxes, a task that is carried out by the national postal service (Argentina, Centro de Información Judicial).

Given these legal reforms, the Supreme Court of Justice of the Nation (hereinafter the SCJN) established that the election by popular vote could not extend to cases not expressly provided by the constitutional text. However, this differs from the case of lawyers and jurists referred to in the second paragraph of Section 114 of the Constitution of the Argentine Nation. Moreover, if the creation of the Council of the

Cámara Federal de Casación Penal, Causa No. 992/2013 — Sala III — “Murray, Juan, P. (fiscal) s/recurso de casación”, Registro No.1159/14). For example, if an aggravated homicide occurred in the context of a case of large-scale commercialization of narcotics.

Magistracy intended to attenuate the weight of political branches in the appointment of judges, it was not appropriate to subordinate lawyers and law professors to the exact appointment mechanism established for politicians.⁸

Likewise, the SCJN determined that the number of members representing lawyers and legal scholars was excessive. They would be overrepresented in a body striving for balanced integration. Still, the overrepresentation would stem from the selection mechanism rather than the number of members. Lawyers and jurists would be under the same political-factional dynamics as those who aspire to exercise Executive Power or integrate Legislative Power.⁹

In *Colegios of Abogados case*, the SCJN addressed an additional issue it had not dealt with in other decisions related to these matters.¹⁰ In this case, the Court discussed the quorum required for the Council to deliver a decision. Specifically, the SCJN maintained that the political establishment has hegemony to lead the Council. Seven members were required to deliberate and to decide in a valid session. The political branches have precisely that number: three members of the Senate, three members of the Chamber of Deputies, and one member of the Executive Branch. However, according to the SCJN, this provision directly contradicts the principle of balanced composition of the Council.

To deal with that problem, the SCJN had to choose between three alternatives. One option was to declare the composition of the Council of the Magistracy unconstitutional without further discussion, that is, without specifying how its composition should be structured. A second alternative was to outline the criteria or standards for the Council to be integrated and balanced while delegating and urging those matters to the political branches. Finally, there was the path that the SCJN

⁸ Argentina (2013). Corte Suprema de Justicia de la Nación. “Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c/ Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. No. 3034/13), Cons. 33.

⁹ Argentina (2013). Corte Suprema de Justicia de la Nación. “Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c/ Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. No. 3034/13), Cons. 10.

¹⁰ Argentina (2021). Corte Suprema de Justicia de la Nación. “Colegio de Abogados de la Ciudad de Buenos Aires y otro c/ EN — ley 26.080 — dto. 816/99 y otros s/ proceso de conocimiento.

chose: to rule that a repealed law, Act No. 24.937/97 (as amended by Act No. 24.939) should be put back into force. That act initially regulated the composition of the Council before its unconstitutional drifts (Puga and Ardoy, 2023, pp. 226–227).

IV.2.3. Critical Appraisal: the Abusive Exercise of Constitutional Powers to Undermine Judicial Independence

The Legislative Power is competent in regulating the composition of the Council of the Magistracy while upholding constitutional democracy. Thus, attempting to subject the body in charge of selecting, sanctioning and removing judges entirely to fluctuations of partisan politics is an abusive exercise of constitutional powers. The composition of the Council should achieve a sensible balance between members of the political powers — Executive and Legislative Power — and judges, lawyers and law professors. The intention of subjecting all persons seeking to be members of the Council of the Magistracy to the dynamics of agonal politics, especially in the case of judges, undermines judicial independence.

In fact, judges, lawyers, and professors aspiring to become members of the Council of the Magistracy would have to adapt to the dynamics of partisan politics and compete for a spot on a political party's electoral ballot. It is essential to clarify that individuals in Argentina cannot participate in popular elections as independent candidates. Therefore, this legal reform subordinated the non-political classes to the discipline of the political parties.

Only the judges with the support of a specific party would be eligible to be candidates to become members of the Council of the Magistracy. Can the independence of judges appointed with the backing of a political party truly be guaranteed? Would a judge serving as a council member be able to impartially assign responsibility to a peer, or would party discipline — by which he attained his position — exert a strong influence on his actions? The answers to these questions are in the negative.

Indeed, some articulated these legal reforms as efforts to “democratize” justice. Moreover, the pretension of democratizing every aspect

of social life can often be contrary to the very substance of democratic life (Ortega y Gasset, 1983, pp. 43–44). In any case, this tendency to equate democratization with the idea of subjecting institutions to the scrutiny of the popular vote is an abusive exercise of constitutional powers. But why is this the case?

Because the so-called “democratization or justice” is nothing more than a plain attempt to disguise the intentions of undermining judicial independence under the mask of increasing democracy. This is nothing more than a tactic to concentrate more power. The so-called “democratization of justice” means emancipating the political branches from the proper control exercised by the judicial power. In other words, by putting judges, lawyers and jurists to compete in the game of professional politicians, all the players would end up tied to the interests of partisan politics.

In what sense, then, could this reform of the Council of the Magistracy be understood as an attempt to reduce the level of accountability for government actions? Well, this reform is just one more move within a larger strategy. The levels of transparency and accountability demonstrated by then-President Cristina Fernández de Kirchner (2007–2015 as President, 2019–2023 as Vice President) (hereafter CFK) were at a notably low point. Corruption cases were beginning to increase in the federal courts. In fact, by the middle of her term as Vice President in 2021, CFK was facing at least ten corruption cases either under trial or in preliminary investigation (Gindin, 2021, p. 63).

Furthermore, the Council of the Magistracy reform was part of a confrontation between the then President, Cristina Fernández de Kirchner, and the federal Judiciary members. The controversy escalated to the extent that she began referring to the Judiciary by the nickname “Judicial Party”. (Gindin, 2021, p. 62). The cases brought against CFK reveal one of the factors that boosted this reform in the Council of the Magistracy. The institutional redesign of the body in charge of appointing, sanctioning and removing federal judges looks like a strategic move that would be a means for political actors to intervene in a retributive way on judicial independence (Delamata, 2024, p. 193).

IV.3. The Peruvian Case: the Dismissal of the Members of the National Board of Justice (2024)

IV.3.1. The Context of the Case: An Interpretative Dispute?

The Peruvian case addressed in this section concerns the dismissal of two members of the National Justice Board (Junta Nacional de Justicia, hereafter JNJ): Inés Tello and Aldo Vásquez (2024). As will be demonstrated, this case exemplifies the abusive exercise of constitutional powers. However, before proceeding, it is necessary to provide some contextual background for our argument.

The JNJ is a constitutionally autonomous and independent body subject to the Constitution, its organic law and other acts on the matter. Its mission is to appoint, evaluate, ratify and sanction judges or prosecutors. Besides, the JNJ appoints the national authorities of the Public Prosecutor's Office and the Judicial Power. The JNJ also selects the heads of the National Office of Electoral Processes (hereinafter ONPE) and the National Registry of Identification and Civil Status (hereinafter RENIEC).

However, the National Congress controls the JNJ, as it can remove JNJ members for serious misconduct. In this case, Congress must adopt a resolution with the affirmative vote of two-thirds of its legally constituted members.¹¹ Therefore, if the Legislative Branch intended to change or modify the composition of the JNJ and, at the same time, to keep in the institutional channels, it had to charge its members with some cause of disciplinary responsibility of the utmost importance.

Thus, what was the "serious misconduct" attributed to the denounced members? None of them respected the constitutional age limit required for the members of the JNJ.¹² The facts that motivated the sanction under study could be summarized quite simply: allegedly, they exceeded in the exercise of their interpretative powers. Specifically, the JNJ issued Resolution 224-2020-JNJ that interpreted that the maximum age established in Para. 3 of Section 156 of the Political

¹¹ Perú, Political Constitution, Section 157.

¹² Perú. Legislative Resolution No. 009-2023-2024-CRC.

Constitution (75 years) was only a limit to access the position and not to remain in it.

Congress rejected the harmonizing interpretation elaborated by the JNJ. This constitutional body faced tension between two constitutional provisions of equal rank. On the one hand, the constitutional provision established an age limit for the members of the JNJ. On the other hand, a constitutional precept establishes that these same members have a term of five years.¹³ Thus, the JNJ concluded that a conciliatory interpretation is possible: the 75-year age limit applies only at the time of assuming office. Therefore, it does not entail an obligation to vacate the position upon reaching that age.

According to the Congress of the Republic, this interpretation contradicts an explicit constitutional provision that does not make such a distinction. Furthermore, the Congress asserts that the JNJ does not have the authority “to impose a binding interpretation of the Constitution”. According to the legislative body, this interpretation was adopted specifically to benefit Inés Tello, one of the dismissed members, who was under 75 years of age when she assumed her position but reached the age of 75 during her term (Peru. Legislative Resolution No. 009-2023-2024-CRC). The Congress charged Inés Tello with the same wrongs as Aldo Vásquez, but added that she remained in office after reaching 75.¹⁴

What is the outcome of such disciplinary proceedings? The Congress of the Republic dismissed two JNJ members and prevented them from holding any public office for ten years.¹⁵

IV.3.2. The Abusive Nature of the Legislative Resolution

What is the disconnection between the form and substance that we shall identify in the present case? We are dealing with an effort directly aimed at influencing the composition of the JNJ. The

¹³ Peru, Political Constitution, Section 155.

¹⁴ Peru. Legislative Resolution No. 008-2023-2024-CRC.

¹⁵ Perú. Legislative Resolution No. 008-2023-2024-CRC; Peru. Legislative Resolution No. 009-2023-2024.

disciplinary sanctions went through the formal channels established by the regulations of Congress and the relevant constitutional provisions, notwithstanding some controversial issues surrounding the legislative procedures applied. In principle, the legislative branch respected the forms as the Constitution provides for serious misconduct as the reason to blame Vásquez and Tello. Ultimately, everything revolved around a controversial interpretation of Section 156, Para. 3 of the Political Constitution of Peru, made by the JNJ.

Nevertheless, the legislative resolutions suggest the issue is more indeterminate. After all, the constitutional text only states “being a member”, which does not univocally refer to the age as a condition to apply for the position, as the JNJ interpreted it. Neither does “being a member” refer only to “remaining in office”, as the Congress of the Republic suggested. Consequently, while the law was unambiguous, the charges could not be considered implausible.

Thus, Congress exercised its discretionary powers to interpret what “serious misconduct” means in the disciplinary proceedings filed against members of the JNJ. Strictly speaking, this is something that formally appears to be under the attributions of the National Congress. The legal interpretation defended by Congress is undoubtedly problematic but not implausible. In the end, the legislative body has the power to remove the members of the JNJ, even though there is a discussion about the parliamentary procedure applied to obtain the votes for the session in Congress.

However, one detail powerfully reveals the abusive nature of this disciplinary process. We are referring to the fact that in the resolution made by the Plenary of the Congress, a congressional representative, José Luna, also a member of the Permanent Commission of the Congress of the Republic, cast his vote. Section 100 of the Political Constitution of Peru prohibits such intervention. This provision establishes that “It is the responsibility of Congress, without the involvement of the Permanent Commission, to decide whether to suspend the accused official, disqualify him or her from holding public office for up to ten years, or remove the individual from office, without prejudice to any other liabilities”.

It should be clarified that the non-intervention of the Permanent Commission is justified by Section 99 of the Political Constitution of Peru establishing that this body is responsible for accusing the members of the JNJ before Congress. In this way, Congress intends to respect the principle of impartiality; that is, the one who judges the responsibility is not the same one who has intervened in the prosecution phase. In other words, the separation of functions respects the accusatory principle of any sanctioning process. Ordinarily, one group is responsible for formulating the accusation, while a separate group determines liability. However, this separation was not observed in this case.

The Congress stated that members of the Permanent Commission could vote in the Plenary only if they abstained from voting when the prosecution issued its final report. That was the case for Congressman Luna. His vote was a crucial topic since the vote outcome was extremely close. Therefore, Luna's vote allowed Congress to reach the necessary 67 votes to sanction the members of the JNJ. In other words, Congress could dismiss the members of the JNJ, but only with the essential vote of someone who participated in the prosecution phase.

What is curious in this case is that Congress claims to have the power to deviate from the letter of the constitutional text but denies that the JNJ has similar powers. Following such a line of reasoning, the JNJ cannot reconcile the age limit with the temporary limits of its term, as they did. However, the Peruvian Congress understands that it can expand its interpretive toolbox. Therefore, Congress has many techniques available, not only the literal method. In short, without providing substantial justification for such a distinction, the Legislature claims for itself powers that it denies to the constitutional bodies over which it exercises disciplinary authority.

Moreover, Congress may unfold interpretive creativity to fulfil its functions, sometimes making controversial interpretations about the principle of impartiality. Conversely, that is not the case for the JNJ. Its members must strictly abide by the literal wording of the Constitution unless they are willing to suffer the consequences of a disciplinary procedure. It is necessary to underline that the disqualification for 10 (ten) years is the most severe sanction provided by the Constitution

of the Republic of Peru for high public officials such as the President of the Republic, congressmen, Ministers of State, members of the Constitutional Tribunal, members of the Supreme Court, supreme prosecutors, the Ombudsman, the Comptroller General and, of course, the members of the JNJ.¹⁶

Thus, Congress uses the powers attributed by the Constitution to remove the JNJ, but it does so to undermine judicial independence. The legislative body intervened in exercising the interpretative powers of the constitutional body in charge of appointing, evaluating, sanctioning, or removing judges and prosecutors throughout the country. The indeterminacy of the legal provisions and their contentious relationship with other norms served merely as a pretext for asserting control over the composition of this constitutional body.

Even more surprising is that the case was against only two of the members of the JNJ. The charges against Inés Tello are easy to understand because, after all, she was the person favoured by the interpretation formulated by the JNJ. But what is not understandable is why only Aldo Vásquez was held responsible. The legislative resolution states that accusations were made against all the members of the JNJ. However, the rest of the constitutional accusations were dismissed. Congress did not provide any justification for exempting from responsibility the other four members who voted in favor of the contested JNJ resolution.

The legislative resolution against the JNJ members seems to suggest that Vasquez deserved more intense blame because he chaired the JNJ at those times. That is a striking conclusion because we are dealing with a collective decision. Vasquez could not decide on his own what he was dismissed for. He necessarily needed the approval of the other members to decide as they did. Nevertheless, he received the most severe disciplinary sanction possible: dismissal and disqualification for ten years.

However, the other members of the JNJ who supported the decision for which Vásquez and Tello were held responsible were absolved of any liability. They did not even receive a warning or a reprimand. In short, it is inexplicable why Congress only blamed the former President of the

¹⁶ Peru, Political Constitution, Section 99.

JNJ for a decision that was adopted jointly, because if we are dealing with some (allegedly) manifestly unconstitutional action, all those who voted in such a collective decision should be also held liable.

IV.4. Recap: When Congress is Unchained

Congress's exercise of constitutional powers in this disciplinary proceeding did not aim to sanction the members of the JNJ for not subordinating to the Constitution. Thus, some members of the JNJ were punished with the utmost severity, while others departed without any blemish on their records. If the true issue at stake had been the JNJ's commitment to the rule of law, then, following Congress's own reasoning, a different course of action would have been appropriate. All members of the JNJ should have been removed and disqualified. That was not the case.

Selective application of the law is intended to undermine and interfere with the autonomy of the body in charge of selecting, appointing, sanctioning, evaluating, and sanctioning judges and prosecutors in the country. For what purpose? It is difficult to conjecture a synthetic and global explanation. One thing is known for sure. Congress capable of imposing responsibilities on some and exempting others without further explanations cannot avoid giving a worrying political message to the rest of the branches of government: "We apply our control powers over the constitutional organs to whomever we please".

To sum up, Congress communicates that the separation of powers, checks and balances, and judicial independence are at its mercy. In other words, the Peruvian Congress affirms with these decisions that it is above all other branches and powers of the government.

V. Concluding Balance: The Necessary Harmonization of the Form and Substance to Ensure Constitutional Democracy

There is an iconic phrase in Argentine cinematography spoken by the protagonist played by Isabel Sarli as she attempts to resist the dubious intentions of her aggressor. With a haughty look and a

challenging tone, she pronounces her famous phrase: “You scoundrel, what do you want from me?” Although that scene was nothing more than a popular myth, it leaves a profound message for this work.

Liberal constitutionalism, when not actively defended, becomes vulnerable and subject to the whims of unscrupulous actors. These actors are not shy. They exercise constitutional powers to camouflage their aspirations to perpetuate themselves in the office. In less extreme cases, they make efforts to undermine the mechanisms that ensure oversight of governmental actions. In short, without instances of institutional defence, the autocratic pretensions have no retaining wall and, therefore, they can batter their victim — liberal constitutionalism — with sheer impunity.

The phenomenon of abusive constitutionalism, as examined in this paper, reveals a fundamental paradox: while constitutional mechanisms intend to protect democracy, some actors could manipulate those institutions to subvert it from within. The cases of Venezuela, Argentina, and Peru illustrate how political actors — from the executive, legislative, or judicial branches — have used formally legal means to erode judicial independence and weaken democratic institutions.

The cases we have summarized in this paper underline a topic of central relevance for studying abusive constitutionalism. It is only sometimes a matter of manoeuvres undertaken by the executive branch. The Peruvian case reveals how one branch of government, i.e., the Legislative Branch, seeks to set itself up as the power above the other branches. Consequently, not only holders of the National Executive Power or aspiring dictators seek to abuse institutions to undermine the Rule of Law. Plural and collective bodies such as the Congress of the Republic also undertake abusive manoeuvres.

The Venezuelan case demonstrates how constitutional justice was co-opted to consolidate executive power, turning the Judiciary into an instrument of authoritarian rule. Argentina’s attempt to “democratize” judicial appointments reveals the risks of subjecting judicial independence to partisan politics, effectively placing the Judiciary under the influence of the political actors it is supposed to control. The Peruvian Congress’ selective removal of National Justice Board members highlight how

legislative control over judicial oversight bodies can become a tool for political interference rather than accountability.

Indeed, co-opting justice, and especially the final interpreters of the Constitution, was a necessary means to exercise power without actual instances of control. That collusion between the Executive branch and the Judicial Power occurred in the Venezuelan presidential elections in 2024. The judicial system appointed Nicolás Maduro as the elected President despite multiple evidence of fraud. It was of no use that the opposition candidate presented more than 80 % of the electoral records supporting a different outcome; that is, the Venezuelan people elected Edmundo Gonzalez as their President. The courts disregarded the fact that the opposition was not allowed to enter the premises of the National Electoral Council to control the vote-counting process, contrary to the provisions of the electoral law itself. However, none of that mattered for the judicial system.

The TSJ of the Bolivarian Republic of Venezuela consecrated Nicolás Maduro as the elected President. Nonetheless, the most surprising aspect of such a decision is its unsound reasons and foundations. It alleges a cybernetic attack on the electoral authority in charge of counting the votes, but without specifying how and when such a cyber-attack occurred. Even more curious, the TSJ did not refute the validity of the records presented by the opposition. In a few words, thanks to the TSJ, Maduro was re-elected once again.

The Argentine case, in turn, reveals how Cristina Fernández de Kirchner sought to subordinate the federal judges to the national electoral dynamics. That implied not only that the candidates to be members of the Council of the Magistracy had to be elected by popular vote. The most significant issue was that candidates were required to participate in partisan politics, as only those affiliated with parties present in at least 18 of the 24 electoral jurisdictions could appear on the ballot and run for election.

Furthermore, the Council of the Magistracy can select, remove and sanction the federal judges. Since those judges have the power to implement the electoral law and to resolve the controversies that this would raise, they would have indirect control of some decisive electoral issues. In short, Cristina Fernández de Kirchner intended to influence

the appointment of the judges who would be the ones to control the application of the electoral law on political parties. Thus, the electoral processes would be in the hands of judges who reached their positions by the one they would then have to control.

A critical insight from these cases is that threats to constitutional democracy are not always direct or overt. Currently, autocratic aspirations no longer employ violent *coups d'état*. They usually do not seize constitutional institutions by sheer force. Instead, they weaken the Rule of Law while pretending to enhance it. The latest trend among autocratic or hybrid regimes is to use institutional forms to undermine constitutional democracy. Therefore, legal scholars, political scientists, and institutional actors must remain vigilant against disconnection between the constitutional form and democratic substance. The mere existence of constitutional institutions is not enough to safeguard democracy, as their ability to function independently and uphold democratic principles ultimately determines their legitimacy. Aligning the formal aspects of constitutionalism with its substantive goals is essential to ensuring that constitutional democracy remains resilient against internal subversion.

To sum up, we should pay close attention if political powers attempt to undermine judicial independence under the guise of improving or democratizing the Judiciary. Without independent judges, we would have eradicated one of the primary instances of limiting political actors. The constitutional equivalent of the saying "It's a wolf in sheep's clothing" would be "That is an autocrat in institutional clothing". Such closing is no more than a disguise, but only if we know that just wearing a habit does not make you a monk. More importantly, without institutions capable of upholding such claims, constitutional democracy can never be truly secure.

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Received 03.11.2024
Revised 16.02.2025
Accepted 19.03.2025



Criminal Offenses in Public Procurement in Albania: A Legal and Institutional Analysis

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Abstract: The research paper examines the pervasive issue of corruption in public procurement in Albania, highlighting its detrimental impact on the economy and the integrity of state institutions. Through a comprehensive analysis, the study identifies various forms of corruption prevalent in public procurement, including manipulated offers, bribery, and favoritism, and quantifies the economic losses attributed to these illegal practices. The paper delves into the legal framework governing public procurement, particularly focusing on the criminal offenses outlined in the Albanian Criminal Code, including Art. 258, which addresses the violation of equality among participants in tenders and public auctions. The study elucidates the role of the Special Structure against Corruption (SPAK) in combating corruption and the challenges faced in effectively prosecuting these offenses. The findings underscore the need for robust strategies to enhance transparency, accountability, and enforcement mechanisms within the procurement sector. Furthermore, the research proposes several recommendations aimed at improving the legal framework, increasing auditing capabilities, and fostering collaboration between enforcement authorities and civil society to curb corruption in public procurement. Ultimately, the study emphasizes the necessity for ongoing reforms to ensure the integrity and effectiveness of Albania's public procurement system in alignment with European Union standards.

Keywords: public procurement; principle of equality; corruption; criminal offense; legal and social prospect; Albania

Cite as: Kapo, M., Ibrahimi, S., and Braha, A., (2025). Criminal Offenses in Public Procurement in Albania: A Legal and Institutional Analysis. *Kutafin Law Review*, 12(3), pp. 635–666, doi: 10.17803/2713-0533.2025.3.33.635-666

Author Contributions: (1) **Mirela Kapo** conducted the juridical analysis, development of the methodology, and preparation of the final manuscript draft; (2) **Silva Ibrahimi** conducted the qualitative analysis, supervised the initial draft, and contributed to the revision process; (3) **Algida Braha** participated in the writing of the manuscript and provided critical revisions.

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I. Introduction

The study explores the management of public financial resources, placing particular emphasis on public procurement, transparency, and the supervision of these assets, while concurrently contrasting the national legal structure with European and regional benchmarks. The authors' aim is to assess the level of transparency and fairness that must be assured for all stakeholders involved in the procurement process and the conformity of Albanian law with the *EU Acquis*. The primary focus of this inquiry is the criminal offense delineated in Art. 258 of the Criminal Code of the Republic of Albania, along with various unlawful activities — including corruption and emerging criminal patterns in public procurement — that are particularly significant in the context of the accession process...¹ Given the importance and the societal danger associated with this offense, it is crucial to conduct an in-depth analysis of each of its elements. A key component of this examination is the criminal repercussions of acts or omissions by public officials, especially those that violate legal regulations established to maintain the freedom and equality of economic operators in tenders and public auctions. The study also highlights persistent challenges and unlawful practices within this sector, including corruption and the rise of complex forms of criminal conduct. In conclusion, the research offers essential recommendations for the improvement of criminal laws and the enhancement of proactive strategies to guarantee the effective prosecution and resolution of offenses in the public procurement arena.

¹ Law No. 7895 dated 27 January 1995 “Criminal Code of the Republic of Albania”, as amended; Criminal Code of Albania. “Detaje”. Art. 258 Violation of Equality of Participants in Public Tenders or Auctions [Neni 258 Shkelja e Barazisë së Pjesëmarrësve në Tendera apo Ankande Publike], <http://komentarietelektronik.magjistratura.edu.al/sq/eli/fz/1995/7895/258> [Accessed 10.09.2024]. (In Albanian).

II. Method

The present study seeks to examine, from a diachronic and comparative lens, the interplay between social-legislative frameworks and desk design, specifically focusing on the impacts that the implementation of the *Acquis Communautaire* and the European Union have had in the sensitive domain of Public Procurement, as well as Albania's alignment with EU standards as a neighboring nation. The investigation will trace the development of Public Procurement legislation within the Western Balkans, in conjunction with the *Acquis Communautaire*. This qualitative methodology fundamentally fulfills three criteria by comparing the Codes in a diachronic context and striving to categorize laws according to their evolution over time. First, it facilitates the distinct development and delineation of key concepts within criminal procedural legislation. Second, it is feasible to deduce the underlying intentions and objectives that Albania has sought to achieve through the constitutional endorsement of the *ius puniendi*, based on the foundational principles governing the criminal trial process and the core characteristics of the criminal justice systems. Lastly, as a third requirement, this approach permits an examination of how the processes of internationalization, and Europeanization of the *ius puniendi* intersect with the domestic legal framework.

III. Literature Background

III.1. The Evolution of Public Procurement after the 90s in Albania

The advent of the communist regime in Albania in the mid-1940s significantly transformed the property regime by instituting an economic system that prohibited private entrepreneurship. This shift effectively stunted the evolution of public procurement across the nation, leading to its eventual disappearance. However, in 1990, the political landscape experienced notable changes that reinstated the principles of “private” and “free market”, thereby facilitating the revival of public procurement practices. Considering these changes, it became essential to establish a legal framework to regulate the public procurement

system within the country. The term “procurement” was first defined in domestic legislation through DCM No. 467, issued on 17 August 1993 (Pelinku, 2021, p. 162) that addressed the term in the “*On procedures for procurements with public funds*” law. This definition characterized procurement as the process of acquiring goods, services, and works. The decision established a foundational framework for regulating public procurement systems and procedures at that time. Nevertheless, until 1995, the legal structure governing public procurement in Albania remained inadequate, as there was no primary legislation in effect. Acknowledging the significance of public procurement, the Albanian Parliament enacted Law No. 7971 on 26 July 1995 titled “*On Public Procurement*”. This legislation was modeled after the UNCITRAL model law concerning the procurement of goods, civil works, and services. In response to challenges encountered during its implementation and the evolving economic and social landscape in Albania, the law experienced numerous amendments from 1995 to 2007.² Despite these revisions, the public procurement legal framework continued to fall short of aligning with EU Directives.

III.2. The Impact of the Stabilization and Association Agreement (SAA) in Public Procurement in Albania

The ratification of the Stabilization and Association Agreement (SAA) by the Albanian Parliament with Law No. 9590 dated 27 July 2006³ marks the beginning of a new phase that Albania was committed to, as a step forward towards the EU integration and the approximation process of our domestic legislation with the *Acuies Communautaire*.⁴

² The Assembly of the Republic of Albania. Law No. 9643 dated 20 November 2006, as amended by Law No. 9800 dated 10 September 2007; Law No. 9855 dated 26 December 2007; Law No. 10170 dated 22 October 2009; Law No. 10309 dated 22 July 2010; Law No. 22/2012; Law No. 131/2012; and Law No. 182/2014 dated 1 January 2007. Available at: www.app.gov.al/GetData/DownloadDoc?documentId=82a5c8f9-99cb-4604-b280-3858834847aa [Accessed 11.08.2025].

³ Stabilisation and Association Agreement with Albania. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-albania.html?fromSummary=28> [Accessed 11.08.2025].

⁴ SSA document. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-albania.html>.

Part of the obligations for the approximation process was associated with the public procurement sphere, inseparably linked with free competition. The SAA contained two special dispositions regarding public contracts and the standardization of procurement framework, concretely Art. 74 and 75 of SAA,⁵ from which the following obligations that Albania must fulfill are derived:

Albania's national legislation must be thoroughly harmonized with the *Acquis Communautaire*, and its implementation should be carried out effectively. Furthermore, the principles of reciprocity and non-discrimination should be paramount in the process of awarding public contracts. In the framework of the fulfillment of these obligations deriving from SAA, the Albanian Parliament approved on 20 November 2006 the law No. 9643/2006 "On public procurement", abrogating Law No. 7971/1995 and all its secondary legislation that were previously in force.⁶ This new law improved the whole framework and brought essential changes to the public procurement system by setting clear principles that guarantee a fair and transparent procurement process.⁷ To ensure its effective implementation secondary legislation such as DCM No. 1 dated 10 January 2007 "The Rules of Public Procurement" regulation was approved, and guidelines and Tender Standard Documents were issued later on based on this legislation.

⁵ Law No. 9590 "On the Ratification of the Stabilization Association Agreement Between the Republic of Albania and the European Communities of Their Member States", The Official Bulletin, 27 July 2006, Art. 70 and 74. Available at: www.drejtesia.gov.al/wp-content/uploads/2022/04/Ligji-nr.-9590-dat%C3%AB-27.7.2006-%E2%80%9CP%C3%AB-ratifikimin-e-Marr%C3%ABveshjes-s%C3%AB-Stabilizim-Asociimit-nd%C3%ABrmjet-Republik%C3%ABs-s%C3%AB-Shqip%C3%ABris%C3%AB-dhe-Komuniteteve-Europiane-e-shteteve-t%C3%AB-tyre-an%C3%ABtare%E2%80%9D.pdf [Accessed 11.08.2025]. (In Albanian).

⁶ The Assembly of the Republic of Albania. Law No. 9643 dated 20 November 2006, as amended by Law No. 9800 dated 10 September 2007; Law No. 9855 dated 26 December 2007; Law No. 10170 dated 22 October 2009; Law No. 10309 dated 22 July 2010; Law No. 22/2012; Law No. 131/2012; and Law No. 182/2014 dated 1 January 2007. Available at: www.app.gov.al/GetData/DownloadDoc?documentId=82a5c8f9-99cb-4604-b280-3858834847aa [Accessed 11.08.2025].

⁷ Public Procurement. European Progress Report. Albania. Point 4.1.6. EUR-Lex: 52007SC1429. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52007SC1429> [Accessed 11.08.2025].

III.3. The Major Challenges in Public Procurement in Albania as a Neighboring Country

Public procurement is one of the most sensitive areas of corruption in Albania. In most cases, corruption in this sphere appears in different forms including manipulated offers, bribery, and political or family favoritism. In general, corruption is defined as the misuse of public power for personal benefits, such as bribery of public officials, collusion in public prosecutions, or embezzlement of public funds.⁸ In this sense, it could be said that anyone who serves himself, immorally or unethically is corrupt. The term corruption has its origin in the Latin word *corrumpere* defined as to “break” or “destroy” something, so when a corruptive act is committed it means that the law, norm, or, in the worse situations, the legal system itself have been broken or interfered by corruption (Danilet, 2010, pp. 71–72).

The issue of corruption can be traced back to the earliest periods of human history, and it has progressively transformed into more intricate and sophisticated manifestations over time. This phenomenon has infiltrated the highest levels of various structures, institutions, and systems within both the public and private sectors. Notably, public procurement is identified as one of the most corrupt sectors in our country, posing significant challenges to our economy and undermining the integrity of state institutions.

A study conducted by the State Supreme Audit in conjunction with the Ministry of Finance revealed that an analysis of data from 129 audit units indicated that corruption in public procurement has resulted in losses exceeding USD 120 million to the state budget over the past decade, averaging nearly USD 13 million in annual damages.⁹ According to the statistics published by “Open Data Albania” the Albanian government approved expenditures for public investments in 2023 for 964 projects with a total expenditure of 116.25 billion ALL, which

⁸ Compliance with Anti-corruption International Standards. Assessment Report. Council of Europe. PECK II, 2018.

⁹ State Supreme Audit. Annual Performance Report [Raporti Vjetor i Performancës]. Google Docs, 2021. Available at: https://drive.google.com/file/d/1-C6o_4P7rDn2QE2WcOLYs1PF8TqrtJ1d/view [Accessed 11.08.2025].

constitutes 5.34 % of the Gross Domestic Product (GDP), or 16.9 % of the total projected Budget Expenditures.¹⁰ In a year, the Supreme State Audit (KLSH) reported that the mismanagement of public funds and violations of legal regulations by both central and local administrations in 2023 resulted in an economic loss amounting to 72.3 billion LEK, highlighting significant concerns regarding the effective administration of these public resources.¹¹

The findings presented by the State Supreme Audit indicate that primarily the issues identified stem from the ineffective, uneconomical, and inefficient utilization of public funds, particularly within the realm of public procurement. This situation arises from shortcomings in the execution of procedures, which frequently do not adhere fully to the regulatory framework governing the sector.¹² These figures underscore the prominent role that public procurement occupies in Albania's annual budget and highlight a key factor underlying the following question: why is there such a close relationship between procurement and corruption?

The answer to such a question is the key component involved in the process, the so-called "public funds". It is exactly the nature of "public funds" that makes public procurement one of the most predisposed spheres where corruption occurs (Reida, 2014, p. 212). The persistence of corruption in this sector can be attributed primarily to two factors. First, the financial incentives inherent in corrupt practices create opportunities for individuals to gain illicit profits. Second, the public nature of the funds involved diminishes personal accountability, thereby increasing the likelihood that individuals would exploit these resources through unethical and corrupt methods.¹³

¹⁰ Open Data Albania. Public Investments 2023, based on Projects and Institutions, Law on State Budget. Available at: <https://ndiqparate.al/?p=18666> [Accessed 11.08.2025].

¹¹ Budget Monitoring Report for the 2023 [Raport i Monitorimit të Buxhetit për Vitin 2023]. 29 February 2024. Available at: <https://panel.klsh.org.al/storage/php-F2Lodu.PDF> [Accessed 11.08.2025].

¹² Nations in Transit 2024, Albania. Report (2024). Freedom House. Available at: <https://freedomhouse.org/country/albania/nations-transit/2024> [Accessed 11.08.2025].

¹³ United Nations Office on Drugs and Crime (UNODC). Knowledge Tools for Academics and Professionals UNODC Module Series on Anti-Corruption. Module 4:

Criminal offenses associated with corruption within the public sector are delineated in Art. 244 and 259 of the Criminal Code of the Republic of Albania. These provisions explicitly forbid both active and passive forms of corruption perpetrated by public officials in the course of performing their official duties. Notably, the procurement sector represents a significant portion of public activities and contributes substantially to the national gross domestic product (GDP). Consequently, instances of corruption in public procurement arise from evident abuses of public authority. For an action to be categorized as corruption under the Albanian Criminal Code, several cumulative criteria must be established (Elezi, 2021, pp. 259–262):

- First, the act of corruption must be intentional.
- Second, the individual must obtain a tangible benefit as a result of the corrupt act.
- Third, the benefit received must be realized immediately after the act of corruption.
- Fourth, passive corruption requires a special subject who holds public office.

Regarding the form in which corruption occurs in public procurement procedures, the research has shown that the following four types of corrupt practices appear to be dominant in the field:¹⁴

- Through the tender manipulation method, the contract is “promised” either by the consent of the official or not (in various forms such as bid concealment, supplementary bids, bid rotation, and subcontracting);
- Bribery practice when the public official in charge of conducting the procurement procedure requires or accepts a bribe for the one who will participate in the tendering process;

Public Sector Corruption. 2019. Available at: https://grace.unodc.org/grace/uploads/documents/academics/Anti-Corruption_Module_4_Public_Sector_Corruption.pdf [Accessed 11.08.2025].

¹⁴ Organization for Economic Co-operation and Development (OECD). Preventing Corruption in Public Procurement, 2016. Available at: www.anticorruzione.it/documents/91439/171935/Preventing+Corruption+in+Public+Procurement.pdf/79db4fed-bd69-b510865bcdba6793c64b?t=1583494569660#:~:text=The%20OECD%20Recommendation%20on%20Public,stages%20of%20the%20procurement%20cycle [Accessed 11.08.2025].

- Conflict of interest;¹⁵
- Other illegal actions or irregularities, such as mismanagement or negligence willfully and consciously committed in cases when appropriate checks are not correctly undertaken, or when the conducted procedure does not comply with the provisions of the special law and tolerates or ignores open and deliberate maladministration by contracts.¹⁶

Furthermore, other corruptive practices are evidenced during a procurement procedure that have been summarized by the European Parliament as follows:¹⁷

- Deceptive practice involves misrepresenting facts to influence contract selection or execution. This involves using habitual fraud to manipulate decision-making for personal gain in public contracts.
- Collusive practice involves small businesses conspiring to set artificially low prices, often through bid-rigging.
- Coercive practices involve threats or damage to deter individuals or companies from submitting bids in public tenders.

Despite the ongoing advancements in Albania's strategy to combat corruption, particularly through investigating and prosecuting high-level corruption cases, the country still ranks among those with the highest corruption rates globally. According to the 2023 Corruption Perception Index, Albania is positioned 98th out of 180 countries regarding perceived corruption within the public sector.¹⁸ Corruption in the public

¹⁵ Art. 19, Law No. 162/2020 for Public Procurement [LIGJ Nr. 162/2020 PËR Prokurimin Publik]. Available at: <https://www.app.gov.al/legjislacioni/prokurimi-publik/ligji> [Accessed 11.08.2025]. (In Albanian).

¹⁶ Organization for Security and Co-operation in Europe (OSCE). From Commitment to Action: OSCE's Anti-Corruption and Good Governance Report 2023–2024. 2024, p. 3. Available at: <https://www.osce.org/files/f/documents/c/9/584242.pdf> [Accessed 11.08.2025].

¹⁷ European Parliament Directorate General for Internal Policy Department D: Budgetary Affairs Special Committee on Organized Crime, Corruption and Money Laundering. *Political and Other Forms of Corruption in the Attribution of Public Procurement Contracts and Allocation of EU Funds: Extent of the Phenomenon and Overview of Practices*. PE 490.676, 2013. Available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/490676/IPOL-JOIN_ET%282013%29490676_EN.pdf [Accessed 11.08.2025].

¹⁸ Transparency International. Albania. Transparency.org, 25 November 2023. Available at: www.transparency.org/en/countries/albania [Accessed 11.08.2025].

sector remains a serious concern that challenges Albania's governance, economy, and social development.¹⁹ The intricate characteristics and manifestations of corrupt practices necessitate the establishment of robust strategies to combat corruption within the procurement sector, which is particularly susceptible to such activities. It is essential to identify the specific factors that foster corruption and to understand the typical behaviors exhibited by individuals engaged in corrupt actions. This understanding is crucial for developing effective measures aimed at investigating, penalizing, and ultimately eradicating corruption.²⁰

Primary challenges that must be addressed to effectively combat corruption within the public sector and to strengthen the integrity of public institutions include deficiencies in the law's implementation, irregularities in investigative procedures, inadequate sentencing for corruption-related offenses, the lack of transparency in procurement processes, and the influence of political factors and organized crime on judicial officials within the SPAK structure responsible for investigating and adjudicating these crimes.²¹

IV. EU Legislation on Public Procurement and its Alignment with the Domestic Legislation

In the European Union, the field of public procurement is regulated by directives that aim to form a common market and increase opportunities for cooperation with all member states and the implementation of the non-discrimination principle (Weiss, 1993). However, to establish a comprehensive framework of regulatory norms for public procurement,

¹⁹ Albanian Institute of Science. Albania through the Lens of European Integration [Prokurimi Publik Shqipëria Në Lupën E Integritetit Evropian]. C1-EU-NPA, February 2022, p. 10. Available at: <https://ais.al/new/wp-content/uploads/Policy-Paper-Prokurim-Publik-AIS.pdf>. [Accessed 11.08.2025]. (In Albanian).

²⁰ Open Society Foundation for Albania (SOROS). Impunity in the Field of Public Procurement [Pandeshkueshmeria në fushën e Prokurimeve Publike]. RES Republica, June 2015. Available at: https://issuu.com/respublicalb/docs/libri_kpp_per_web_ok [Accessed 11.08.2025]. (In Albanian).

²¹ Together for Life. Analysis of the Concession Agreements in Health. 2022. Available at: www.togetherforlife.org.al/wp-content/uploads/2022/12/Analysis-of-the-concession-agreements-in-health.pdf [Accessed 11.08.2025].

it is essential to analyze not only the public procurement directives themselves, but also to assess and understand the broader context in which they are enacted (Halonen, 2017; Sanchez-Graells, 2015, p. 112). Thus, alongside the adoption of these Directives, a number of general provisions from the Treaty of Rome, as well as the overarching legal principles that guide their interpretation, are also applied (Biondi and Farley, 2018, p. 1041). In this regard, it is important to start with a general overview of the Treaty of Rome due to the importance that this law has on upcoming EU Directives in the sphere of public procurement.

Treaty of Rome²²

Even though the Treaty of Rome of 1957 does not contain a special provision regarding public procurement, it establishes a set of fundamental principles upon which the EU legislation is based.²³ These fundamental principles also apply to and take precedence in the sphere of public procurement, with the following being particularly important in governing procurement-related processes:

Discrimination based on nationality grounds is prohibited

Article 12 of TFEU, interpreted in the procurement context, sets the grounds for equal treatment and non-discrimination of economic operators in the process, particularly with respect to the nationality criteria. In this regard, an economic operator from one member state must be treated equally and in the same way as an economic operator from the contracting authority's member state.²⁴ The nationality component undermines the core of this principle and differentiates it from the equal treatment principle that provides a general background of protection without relying only upon the nationality basis.

The prohibition of constraints related to quantitative imports or exports, free movement of goods, and equivalent measures in outcome.

²² Treaty Establishing the European Economic Community (EEC Treaty). 25 March 1957. Available at: <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:11957E/TXT> [Accessed 11.08.2025].

²³ Consolidated Version of The Treaty on The Functioning of the European Union (TFEU). C 326/47. *Official Journal of the European Union*. 26 October 2012, Art. 26–29; 49–50. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>. Accessed [11.08.2025].

²⁴ *Ibid.* Art. 64.

The main purpose of this principle is to ensure that the member states within the Union guarantee the adoption and application of common customs charges in their relations with third countries for the purchases of goods either originating in Member States or products coming from non-EU countries.²⁵ Thus, it sets an obligatory framework that prevents Member States, through their contracting authorities, from undertaking discriminatory actions against foreign goods, from the exclusive purchase of national products (“buy national” requirements) (Cantore and Sübidey, 2017, pp. 143–161):

Freedom of establishment

Through the interpretation of Art. 54 of TFEU, it is indicated that a Member State shall not restrict the free establishment on its territory of nationals of a distinct Member State from its own. In this regard, all nationals of EU countries are offered the protection to exercise the right to effectively establish in the territory of another Member States, themselves, branches, or agencies. Furthermore, under this principle, self-employed persons or economic operators are protected to exercise their business activities in other Member States, usually by establishing a local entity.²⁶

Freedom to provide services

This principle guarantees and offers protection to the nationals of EU countries, to have the right to freely exercise services for commercial or professional purposes in the territories of another Member State, different from the one of the people for whom the service will be provided. Interpreted in the frame of procurement practices, an economic operator that has its effective place of business in one Member State has the right to submit a tender in another Member State by not being limited to the need for establishing a local entity or representative in that State.²⁷ It is important to mention that this right is not exclusive only to EU-Member State nationals, but it also gives the possibility to benefit from this as well as to the nationals coming from a third country, only when the two following conditions are met: a) nationals from third

²⁵ *Ibid.* Art. 28, Para. 2.

²⁶ The Treaty on the Functioning of the European Union (TFEU), Art. 50.

²⁷ *Ibid.* Art. 57, Para. 1.

countries who intend to offer services, and b) entities established within the Union.²⁸ Albanian domestic legislation on public procurement is drafted in compliance with the EU Directives, due to the obligation for the approximation of legislation deriving from the SAA as was analyzed previously in this paper.

The key novelties that 2004 directives brought into the procurement field can be summarized as follows:

*The key novelties introduced by the Directive 2004/18/EC:*²⁹

- Recognition of certain procurement entities' authority to use framework agreements to carry out concentrated purchasing
- Adjustments of articles regarding the technical specifications by removing the requirement to provide references to European standards
- Electronic procurement provisions, covering electronic auctions, and dynamic purchase systems, along with the lowering of deadlines for electronic communications

The key novelties introduced by the directive 2004/17/EC on the following sectors:³⁰

- The entities that conduct their activity in the telecommunication sector were excluded from the scope of application of the directive.
- Entities operating in postal services were included under the scope of the directive.
- Adjustment of exclusive right definition to comply with European Court jurisprudence.

Furthermore, the 2014 amendments that replaced the Public Sector 2004/18 and the Utilities Directive 2004/17 brought significant changes and impacts into the system following the line of the previous directives (Bovis, 2024):³¹

²⁸ *Ibid.* Art. 57, Para. 2.

²⁹ Directive 2014/24/EU of the European Parliament and of the Council on Public Procurement and Repealing Directive 2004/18/EC.

³⁰ Directive 2014/25/EU of the European Parliament And Of The Council on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC (Text With EEA Relevance). *Official Journal of the European Union*, 26 Feb. 2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025> [Accessed 11.08.2025].

³¹ Supreme State Audit of Albania. EU Directives on Public Procurement and Concessionary Contracts [Direktiva e BE-së mbi Prokurimin Publik dhe Kontratat

— Simplified the evaluation process for candidates' and bidders' criteria, in this regard only the winning candidates were entitled to submit documents verifying their status and increased the self-declarations submitted by suppliers.

— It was introduced as a ground for exclusion from the procurement process of an economic operator the poor performance under the previous contracts.

— It was offered to the social enterprises the possibility to reserve for a limited time the award of service contracts under a certain category.

— The "*Innovation Partnership*" procedure was a novelty introduced by new Directives. This procedure allows for the application of new models such as the opportunity for bidders and authority to enter a partnership together for developing new services or products.

— The scope of utility contracts directive has been partly amended by excluding its scope from the exploration of oil and gas.

V. The Western Balkan Public Procurement Laws and EU Directive Alignment

A comparative analysis of public procurement laws and anti-corruption measures in Western Balkan countries, such as Serbia and Montenegro, reveals both similarities and differences that provide valuable context for evaluating Albania's progress. For instance, Serbia's Law on Public Procurement emphasizes principles of transparency and competition, mirroring EU Directive 2014/24/EU, with particular attention to the inclusion of small and medium enterprises (SMEs) in the procurement process.³²

Koncesionare]. ILAR, 206AD. Available at: <https://panel.klsh.org.al/storage/phpOiXh9A.pdf> [Accessed 11.08.2025]. (In Albanian).

³² European Commission Staff Working Document. Serbia 2023 Report Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement Policy. SWD (2023) 695 Final, 8 Nov. 2023. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/9198cd1a-c8c9-4973-90ac-b6ba6bd72b53_en?filename=SWD_2023_695_Serbia.pdf [Accessed 11.08.2025].

Similarly, Montenegro's Public Procurement Law integrates provisions aimed at ensuring transparency and equality, aligning with key *EU Acquis principles*.³³ Comparatively, Albania's Law No. 162/2020 demonstrates significant progress in harmonizing with EU directives, particularly regarding transparency and non-discrimination, as seen in the adoption of electronic procurement systems and stricter monitoring mechanisms. However, discrepancies persist in areas such as the enforcement of these principles and the effectiveness of oversight bodies. For example, while Albanian legislation formally adopts the principle of equal treatment, the lack of rigorous sanctions for violations and the pervasive influence of political favoritism weaken its practical implementation. Highlighting these gaps underscores the need for Albania to not only adopt EU standards in form but also ensure their substantive application through robust institutional reforms and capacity building.

VI. In-depth Analysis of the Principles of Public Procurement in Albanian Legislation

Although classified as a member of the Western Balkans, the country has experienced a distinct trajectory in its development concerning the challenges associated with public procurement legislation, thereby encountering significant difficulties in its attempts to conform to the standards of the single market. Referring to the public procurement legislation in Albania, the entire procurement process must be carried out based on and respecting a series of principles that underpin this process. As explained in Section II of this paper, these fundamental principles provided by Law on Public Procurement for running an open-up, transparent, and fair competitive procurement process, derive from both the Treaty and EU Directives in the frame of the approximation

³³ Key Findings of the 2023 Report on Montenegro. 8 Nov. 2023. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_5615 [Accessed 11.08.2025].

of legislation process that Albania is committed as an EU candidate country.³⁴

In addition, it must be mentioned that the case law of the European Court of Justice (ECJ) had a significant impact on the emergence of some general principles of the law (Dobra, 2016, p. 81). As general principles, they find application in the context of public procurement, and some of them have been applied by the ECJ in cases regarding public procurement disputes. For example, a key principle set by the ECJ case law was the application of Treaty principles under the threshold of public procurements.³⁵ In this regard, the principles provided by Albanian PLL are identical to the ones provided by the Public Sector Directives, both 2014/18 and 2014/24, but they differentiate due to the application context since in our case there is a need to adapt to the domestic procurement system to better address the obstacles, challenges, and issues that Albania is facing in procurement sphere.³⁶

The responsible entities should guarantee the proper application and respect the prevalence of those principles during a procurement procedure. Thus, a “domino effect” may occur: if one of these principles is not upheld, it can result in the violation of others, creating a cascading impact throughout the process. Furthermore, those irregularities include not only the breaches of the Albanian PPL provisions but sometimes go far beyond the criminalization of offenses in the procurement fields. Based on Art. 3 of Law No. 9643/2006 “On Public Procurement” as amended, the public procurement process in Albania is based on 4 fundamental principles: the non-discrimination principle, the equal treatment principle, the principle of transparency, and the proportionality principle.

³⁴ Albanian Agency of Public Procurement and Sigma – Support for Improvement in Governance and Management. Public procurement training for IPA beneficiary countries [Trajnim Në Prokurimin Publik Për Vendet *Përfutuese* nga IPA]. 2010, p. A-24. Available at: www.app.gov.al/getdata/downloaddoc?documentid=bc58d22e-6652-458b-af32-024b92c03ado [Accessed 11.08.2025]. (In Albanian).

³⁵ Case C-234/89. Commission of the European Communities v. Denmark (“Danish Bridge”), 1993, ECR I-3353.

³⁶ Albanian Agency of Public Procurement and SIGMA – Support for Improvement in Governance and Management. Public Procurement Training for IPA Beneficiary Countries. 2010, Section 2, p. A-4. (In Albanian).

*1. The non-discrimination principle.*³⁷

The concept of non-discrimination, even though commonly referred to as the same in concept with equal treatment principle, is distinct and different from it. According to this principle, all participants in a procurement procedure, regardless of their nationality, should be treated in the same way, thus:

- Both direct and indirect discrimination are prohibited;
- National preferences are not allowed.

Article 21 of the Law, Chapter “General Rules of Procurement”, expressly states that the contracting authorities must avoid any criteria, requirements, or procedures related to the qualification of economic operators which constitute discrimination against or between potential suppliers or contracts. Even though the provisions of Albanian PLL do not directly mention the nationality component regarding the non-discrimination principle, it addresses the nationality matter when referring to the concept of economic operators (Jance and Reci, 2024, pp. 265–271). In the interpretation of this, it can be concluded that the PPL provisions do not prohibit non-national or foreign economic operators from being the part of an Albanian procurement process by submitting their offers or tenders under the same conditions as a domestic economic operator. Thus, the only distinction regarding this principle in relation to the EU Directives is that the Albanian Public Procurement Law (PPL) applies to foreign economic operators from all countries, not just those within the EU. In contrast, the EU Directives address the principle of non-discrimination with reference exclusively to economic operators from EU member states.

*2. The equal treatment principle.*³⁸

The equal treatment principle is the foundation for a fair procurement process. The effective application of this principle in practice requires that identical situations be treated alike, while different situations should not be treated in the same manner. In this context, the principle encompasses both formal and substantive elements. In

³⁷ Law No. 162/2020 for Public Procurement [LIGJ Nr. 162/2020 Për Prokurimin Publik]. 2020, Art. 3, Para. 1. Available at: www.app.gov.al/legjislacioni/prokurimi-publik/ligji [Accessed 11.08.2025]. (In Albanian).

³⁸ Art. 2, point (d), Law 162/2020 “On Public Procurement”.

a formal sense, equality ensures equality before the law, whereas in a substantive sense, it requires equal treatment in the application of the law. Due to the great importance that this principle has, its fair and effective application is required to be persistent over all phases of a procurement process.³⁹ That is why the Albanian PLL provisions explicitly mention equal treatment in several articles of the Law by reinforcing its importance for guaranteeing an efficient and regular procurement process.⁴⁰ Furthermore, what is of utmost importance for our topic, the violation and ineffective application of this principle consist of criminal offenses under the Albanian Criminal Code. The unequal evaluation of participants in a procurement process, resulting in the awarding of a contract based on such an assessment, constitutes a criminal offense.

*3. The transparency principle.*⁴¹

Based on this principle, the contracting authorities are obliged to proceed transparently while initiating and running a procurement process and awarding a public contract. As for other principles, the guarantee of transparency while conducting a procurement procedure is expressly provided by both the domestic legislation and the respective EU Directives.⁴² In this regard, the legislation in force foresees the obligation of the Contracting Authorities to publish electronically on the website of the Public Procurement Agency all the tender documents and all the subsequent notices related to the progress of a procurement procedure from the initiation up to its conclusion.⁴³ These public notices provide detailed information for all the interested subjects in the process and the general public, regarding the method of the selection of the winner, the participating candidates, reasons and

³⁹ Albanian Agency of Public Procurement and SIGMA – Support for Improvement in Governance and Management. Public Procurement Training for IPA Beneficiary Countries. 2010, Section 2, p. A-4.

⁴⁰ Art. 2, 3, 19, and 21, Law No. 162/2020 “On Public Procurement”.

⁴¹ Art. 2, point (dh). Law No. 162/2020 “On Public Procurement”.

⁴² Art. 21(1), Law No. 162/2020; Art. 18, Directive 2014/24/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024> [Accessed 11.08.2025].

⁴³ SIGMA Module, p. F-29. Available at: www.app.gov.al/GetData/DownloadDoc?documentId=bc58d22e-6652-458b-af32-024b92c03ado [Accessed 11.08.2025].

criteria for candidates' evaluation, the winning candidate and criteria for his selection, as well as the deadline and the method of the contract execution. This ensures higher access to public procurement procedures, which in turn increases the fair, transparent, and non-discriminatory competition in the process.⁴⁴

*4. The proportionality principle.*⁴⁵

The principle of proportionality is the fourth and final fundamental principle explicitly established by the Albanian Public Procurement Law (PPL) that must prevail in and guide the procurement process. This principle requires that any measure taken should be necessary and appropriate, and comply with the aim of the required objectives. The proportionality component must be taken into account during the whole procurement process and all the phases, starting from the initiation of the procedure and continuing with other elements such as technical specifications, awarding, qualification criteria, and time limits.⁴⁶ Furthermore, it should be noted that when contracting authorities select candidates or bidders, they must take care not to impose technical, professional, or financial requirements that are excessive or disproportionate to the scope of the contract.⁴⁷

In conclusion, it could be said that the principles outlined in the Albanian Public Procurement Law (PPL) establish the foundation for a fair and efficient procurement process. The competent authorities overseeing the procurement process must ensure that these principles are respected, effectively applied, and not violated in order to achieve a fair, transparent, non-discriminatory process, as well as to fulfill the objectives and goals established by Albania in the procurement sphere.

⁴⁴ Albanian Agency of Public Procurement. Annual Report [Analiza Vjetore]. 2023, Available at: www.app.gov.al/GetData/DownloadDoc?documentId=80bdfeg3-198c-4119-bfd3-a6f971cd6a3a [Accessed 11.08.2025].

⁴⁵ Art. 3(1), Law No. 162/2020; Art. 2, Directive 2004/18/EC of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts. 31 Mar. 2004. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018> [Accessed 11.08.2025].

⁴⁶ SIGMA Module, Section 2, p. A-9–12.

⁴⁷ SIGMA Module, Section 2, p. A-7.

VII. Albanian Public Procurement Legal Provisions and EU Standards

The alignment of Albanian legislation with European standards is significantly influenced by Directive 2014/24/EU, particularly Art. 18, that establishes fundamental principles such as transparency, equal treatment, and the prevention of conflicts of interest in public procurement.⁴⁸ This provision mandates that procurement procedures must be designed to ensure open competition, prohibit favoritism, and guarantee impartiality, serving as a benchmark for evaluating Albanian legislation. While Albania's Law No. 162/2020 incorporates these principles through measures like mandatory electronic procurement and stricter oversight mechanisms, gaps remain in the enforcement of conflict-of-interest regulations and ensuring genuine equality among economic operators. For instance, the lack of comprehensive whistleblower protection and limited transparency in bid evaluation processes undermine the practical application of these principles. Furthermore, quantitative data from the State Supreme Audit reveals that despite reforms, irregularities in public procurement procedures led to economic damages of approximately 72.3 billion ALL in 2023.⁴⁹ This underscores the need for Albania to enhance the implementation of its legal framework and integrate robust monitoring mechanisms to achieve greater alignment with EU norms.⁵⁰

⁴⁸ Art. 18, Directive 2014/24/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024>. [Accessed 11.08.2025].

⁴⁹ Albanian Supreme State Audit. Monitoring Report for 2023 of the Strategic Plan 2023–2027 [Raport i Monitorimit per Vitin 2023, i Planit Strategjik 2023–2027]. 7 May 2024, p. 45. Available at: <https://panel.klsh.org.al/storage/phpf2XJNv.pdf> [Accessed 11.08.2025].

⁵⁰ European Commission. Albania 2023 Report Accompanying the Document Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement Policy. Report: Cluster 1 – Fundamentals, p. 37.

VIII. A Juridical Insight of the Illegal Activities into Public Procurement in Albania

VIII.1. The Criminal Offense of “Breaching the Equality of Participants in Tenders or Public Auctions” under Article 258 of the Criminal Code in Albania

A core principle of the rule of law is the uniform and precise enforcement of legal standards that are binding on all state entities, political parties, organizations, and individuals, whether natural or legal persons. To guarantee equitable protection for all parties engaged in this framework, as well as to foster integrity and public confidence in governmental operations, all entities and officials responsible for the procurement process must execute their responsibilities in strict adherence to the law, with diligence and accountability. Consequently, any actions or omissions by individuals entrusted with public duties that disrupt the proper functioning of state operations or public services are considered criminal offenses against state activities and public institutions. The Criminal Code of the Republic of Albania, adopted by Law No. 7895 dated 27 January 1995, as amended,⁵¹ assigns special legal significance to the protection of state activity. Chapter VIII, Section II — “Criminal Acts Against State Activity Committed by State or Public Officials” — includes Art. 258, that defines the criminal offense of “Breaching the Activity of Participants in Public Bids or Auctions”, as follows:

⁵¹ Amended by Laws No. 8175 dated 23.12.1996; No. 8204 dated 10.04.1997; No. 8279 dated 15.01.1998; No. 8733 dated 24.01.2001; No. 9017 dated 06.03.2003; No. 9030 dated 13.03.2003; No. 9086 dated 19.06.2003; No. 9188 dated 12.02.2004; No. 9275 dated 16.09.2004; No. 9686 dated 26.02.2007; No. 9859 dated 21.01.2008; No. 10 023 dated 27.11.2008; No. 23/2012 dated 01.03.2012; No. 144 dated 02.05.2013; No. 98 dated 31.07.2014; No. 176/2014 dated 18.12.2014; No. 135/2015 dated 05.12.2015; No. 82/2016 dated 25.07.2016; No. 36/2017 dated 30.03.2017; No. 89/2017 dated 22.05.2017; No. 44/2019 dated 18.07.2019, No. 35/2020 dated 16.04.2020, No. 146/2020 dated 17.12.2020; No. 43/2021 dated 23.03.2021; Constitutional Court Decisions: No. 13 dated 29.05.1997; No. 46 dated 28.08.1997; No. 58 dated 05.12.1997; No. 65 dated 10.12.1999; No. 11 dated 02.04.2008; No. 19 dated 01.06.2011; No. 47 dated 26.07.2012 ; No. 9 dated 26.02.2016; No. 24 dated 04.05.2021; No. 20 dated 03.04.2024.

1. *Commitment of actions in breach of laws which regulate the freedom of participants and the equality of citizens in bids and public auctions, by a person holding state functions or public services, to create unfair advantages or benefits for third parties, when the tender or public auction is up to the value of 800,000 ALL or the equivalent in foreign currency, is punishable by imprisonment for up to one year.*

2. *The same act, when committed in tenders or public auctions with a value of above 800,000 ALL or the equivalent in foreign currency, is punishable by imprisonment from one to five years.*

Article 258 of the Albanian Criminal Code establishes a legal framework that ensures economic operators have the right to participate freely and equitably in the public procurement process. This provision aims to facilitate the provision of public services assigned to them by state authorities and to enable them to benefit from public contracts through a lawful and equitable process. An analysis of this Article reveals that a criminal offense occurs when a public official, during the conduct of public tenders and auctions, engages in actions that violate the legal standards established by specific legislation, which are designed to uphold the principles of freedom and equality for economic operators. Consequently, a criminal offense is committed when it is demonstrated that the intent to commit a crime supersedes lawful intentions, and the actions taken by the public official are in violation of the law, aimed at securing unjust advantages for entities involved in the tenders and public auctions (Hysi, 2004).

VIII.2. Violation of the Equality of Participants in Tenders or Public Auctions

The framework of this criminal offense indicates that the outcome is preordained, largely due to the close connections that the administrator of the legal entity maintains with public officials involved in the procurement decision-making processes, particularly concerning funds associated with local government. Investigations reveal a high-ranking public official actively facilitates appointing relatives to key

offices, ensuring they act in the official's interests.⁵² Thus, a criminal act can occur at any stage and in any part of it, whether at the primary phase or after the process which corresponds to the announcement of the decision and the winner of the tender. Falsification of documents is also another problem preeminent during the whole procurement process that is indicated as part of the organizational scheme of this illegal phenomenon.⁵³

VIII.3. Sophisticated Actions According to the Public-Private Partnership Model

Complex manifestations of this criminal activity are notably prevalent in contracts awarded through the concession or public-private partnership framework. Evidence of illicit conduct can be observed at all stages of the tendering process, beginning with the preparatory phase, which includes inadequate preparation of tender documents, improper execution of the tender procedure, and failure to conduct a legally compliant feasibility study. This issue persists with various interventions that undermine fair competition, effectively rendering it illusory. It becomes apparent that commercial entities orchestrate the entire process, facilitating a deceptive scheme for executing projects within the concessionaire. These entities are often under the indirect influence of high-ranking government officials, who obscure the true nature of the public funds that are misappropriated through this scheme.⁵⁴

VIII.4. Money Laundering

The 2023 report released by SPAK highlights a highly intricate scheme involving money laundering, particularly in instances where there is a breach of equality in public tenders. This scheme has

⁵² Special Structure against Corruption and Organized Crime (SPAK). Annual Report [Raporti Vjetor 2023]. 2023, p. 34. Available at: <https://spak.gov.al/wp-content/uploads/2024/04/Raporti-2023.pdf> [Accessed 11.08.2025]. (In Albanian).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

dual objectives: first, it facilitates the establishment of a fictitious arrangement among senior state officials to obscure corrupt practices; second, it functions as a mechanism for laundering the profits derived from criminal enterprises.⁵⁵ The involvement in such illicit schemes within public procurement often begins with a partnership between senior officials and various legitimate entities, aimed at infiltrating the process in direct violation of legal statutes and unlawfully profiting from public resources. Senior officials derive benefits from public funds through the companies with which they collaborate, as public money is funneled through these companies' accounts. Subsequently, these funds are transferred to other domestic or internationally registered bank accounts that are then invested in movable or immovable assets. The complexity of the criminal activity and money laundering is underscored by the fact that all illicit actions are executed through the involvement of legal entities that benefit from these funds, thereby obscuring the scheme and attempting to legitimize these actions. It is important to note that, in many instances, the companies awarded contracts in tender processes are either established or managed by high-ranking officials orchestrating these corrupt schemes or by their close relatives or associates. As a result, public resources are funneled to corrupt officials through successful companies, with subsequent phases of these corrupt schemes involving the transfer of funds overseas or their investment in various assets under false identities. This process results in the perpetration of two offenses: the infringement of fairness in public procurement and the act of money laundering.⁵⁶

IX. Objective and Subjective Elements of the Criminal Offense under Article 258 of the Criminal Code of the Republic of Albania

With regard to the subject of this criminal offense, the provision specifies that a person charged with a state or public function within public procurement agencies and procurement units who abuses such

⁵⁵ SPAK (2023), Annual Report, p. 35.

⁵⁶ *Ibid.*

powers and responsibilities is considered to have committed the criminal act defined under Art. 258. Thus, Article 258 qualifies the subjects of this criminal act into the “*special subject*” category. Therefore, if the act or omission by the subject of the offense is not related to the duties, rights, or powers conferred by their position, the criminal offense defined in Art. 258 is not fulfilled. In this regard, a clarification between the “*special*” and “*general*” subjects is of utmost importance for the qualification of the criminal offense. The criminal offense defined under Art. 258 falls within the category of offenses that require specific intent, or what is referred to in criminal jurisprudence as *mens rea*, meaning the “guilty mind” necessary for committing the act. This means that the individual responsible for committing the criminal act possesses explicit intention and a conscious desire to carry out the offense, an intention that is manifested through concrete actions or omissions in the realization of the offense. In this regard, the criminal offense provided for in Art. 258 of the Criminal Code is committed with direct intent and with the aim of creating unfair advantages or privileges for specific individuals during the procurement process, motivated by personal relationships, nepotism within public administration, or other personal or moral interests (Elezi, 2021, pp. 259–262). Furthermore, according to consolidated judicial practice over the years, in cases involving violations of Art. 258 of the Criminal Code, it has been interpreted that the presence of direct intent (*mens rea*) in the commission of this offense must be assessed with respect to three specific aspects:

- *defendant’s awareness that the actions or omissions had been committed in violation of Law No. 9643 dated 20 November 2006 “On public procurement” as amended, as well as by the decision No. 914 dated 29 December 2014 “For the approval of public procurement rules”, as amended;*

- *the desire/intention of the defendant to perform these actions or omissions, and*

- *the commitment of actions or omissions by the defendant to create unfair advantages or privileges for third parties.*

The determination of the elements of “intention” and “consciousness” for sentencing and establishing guilt under the legal qualification of Art. 258 of the Criminal Code must be based on the interpretation of

concrete actions, as well as the coherent evaluation of all available evidence and the conclusions drawn from it. Additionally, aligning with European legal principles, the European Court of Human Rights (ECHR) decision in *Ramos Nunes de Carvalho e Sá v. Portugal* underscores the importance of judicial independence and procedural fairness in addressing public procurement disputes.⁵⁷ These cases collectively illustrate the practical enforcement of Art. 258 in Albania and its alignment with broader European standards, while also identifying areas for further strengthening of judicial consistency and procedural transparency.

X. Conclusions

Based on the above analysis and findings, it can be concluded that the field of public procurement is very complex and dynamic, and due to its public nature, it remains one of the areas with the highest predisposition to corruption and illegal activities in terms of mismanagement and improper benefit of public funds. In this regard, there is a continuous need to undertake further preventive and remedial measures to combat illegal activities in the public procurement sector. The primary objective should be to promote integrity and fairness and to enhance the efficiency in the prosecution and punishment of criminal activities within the public procurement system. This requires improving the legal framework and strengthening the mechanisms of supervision and control. In conclusion, the main findings of this work are as follows:

First, Albania's public procurement system has a short history due to restrictions under past political and economic regimes. Following the fall of communism, the country adopted a system based on UNCITRAL and later aligned it with the EU model as part of its integration process after signing the SAA.

⁵⁷ European Court of Human Rights. Case of Ramos Nunes de Carvalho e Sá v. Portugal (Applications Nos. 55391/13, 57728/13 and 74041/13). 6 November 2018. Available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-187507%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187507%22]}) [Accessed 10.09.2024].

Second, a thorough examination and comparison of the existing domestic legislation governing public procurement with the pertinent provisions of EU Directives reveals that Albania has made significant strides in aligning its legal framework with the *Acquis* norms. In this regard, the essential principles that underpin public procurement activities in Albania closely mirror the fundamental principles established by the *Acquis* norms in this domain. Additionally, notable advancements have been realized through ongoing amendments to the Public Procurement Law, particularly with the enactment of the new Law No. 162/2020 “On Public Procurement” that has facilitated the incorporation of four EU directives, specifically EU Directives No. 2014/24, 89/665, and 92/13.

Third, the public procurement system in Albania remains highly corrupt despite reforms addressing the issue. The Electronic Procurement System (EPS) helped reduce corruption, but challenges persist. In 2023, Albania was ranked 98th out of 180 countries in terms of perceived corruption in the public sector. The National Audit Office reported a loss of 72.3 billion LEK in 2023 due to irregularities. Corruption in the healthcare procurement sector is particularly concerning, with various factors contributing to corruption at all stages of the process. To effectively combat corruption in the public procurement sector, the enhancement of final convictions at high levels remains a key priority.

The fourth point pertains to the criminal offense delineated in Art. 258 of the Albanian Criminal Code that addresses the “Violation of the Equality of Participants in Tenders or Public Auctions”. It can be inferred that this offense represents a specific manifestation of abuse of duty, aimed at safeguarding the principles of freedom and equality among participants in procurement processes or public auctions.

Fifth, concerning the question of whether there is concurrence between the criminal offense outlined in Art. 258 of the Criminal Code and the offence defined in Art. 248 of the Criminal Code, it is concluded that these offenses do not overlap. This determination arises from the specific characteristics of the offense related to the violation of equality, which distinguishes it from a more general offense described in Art. 248. Nonetheless, there are instances when the concurrence of

criminal offenses may be contentious and necessitates a case-by-case analysis.

Sixth, the SPAK establishment has advanced investigation and prosecution of activities violating Art. 258 of the Criminal Code. Official data show a notable increase in proceedings and investigations, rising from 50 in 2020 to 106 in 2022. SPAK has scrutinized high-ranking political officials for corruption, abuse of office, and violations in tenders. Special Courts have improved judicial practices for Art. 258 cases. However, the high volume of proceedings underscores the necessity for improved investigative techniques to ensure efficient and timely resolution.

Seventh, the study shows increasing complex criminal activities in public procurement, including organized structures, money laundering, and corruption. Enhanced investigative methods and legal procedures are necessary to effectively address these issues. Corruption remains pervasive in Albania, necessitating additional measures to strengthen judicial bodies such as SPAK and to enhance the integrity of the procurement system.

Theoretical and Practical Implications for Future Research

Corruption and financial misconduct pose significant risks to the democratic integrity of any nation. Consequently, certain areas warrant further investigation. As Albania aspires to join the European Union, it faces considerable challenges in effectively implementing existing legislation. In this context, we propose several recommendations to enhance this process.

First, to prioritize EU Commission recommendations for screening and enhance legal framework for procurement to ensure compliance with EU regulations. All financial instruments and initiatives, including inter-governmental agreements, should align with EU standards; to implement measures improving transparency, mitigating corruption risks, and promoting fair competition in public contracts through systematic publication, electronic complaints system utilization, and collaboration with civil society.

Second, to enhance auditing capabilities, particularly in the context of procurement procedures established by public authorities.

There are still numerous issues within this domain that can be effectively identified and addressed through independent auditing processes.

Third, to engage enforcement authorities in regular communication and information sharing, particularly in the context of joint investigations. This approach underscores the necessity of integrating the enforcement of anti-corruption and competition laws, ensuring that these two areas are not dealt within isolation. Furthermore, it is essential to conduct systematic investigations into competitive practices within procurement sectors identified as problematic due to corruption concerns.

Fourth, to enhance Albania's domestic control framework with a specific emphasis on the processes for detecting and reporting irregularities in contracting agencies. Consequently, it is advisable to reassess the administrative investigation protocols currently employed by the Public Procurement Agency (PPA), concentrating on identifying essential enhancements that would bolster its primary function in policy guidance and improve the comprehensive oversight of the public procurement system to reduce corruption risks.

Fifth, it is recommended to amend Art. 258 of the Criminal Code of the Republic of Albania to include a sub-article addressing corruption, aligning with Art. 415. The standardization of judicial practices in assessing the severity of this offense is recommended to ensure consistency in legal proceedings. It is also recommended that Art. 258 be expanded to encompass concession services in addition to public tenders. Additionally, a prohibition on exercising public functions should be imposed on individuals found guilty of this offense.

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Received 11.11.2024

Revised 17.12.2024

Accepted 23.12.2024



Protecting the Right to Water in the Mekong River Basin: Addressing Vulnerable Groups amidst Climate Change and Anthropogenic Challenges

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Abstract: Climate change is a pressing global issue with profound consequences for life, health, and livelihoods. Its impacts — ranging from floods and droughts to saltwater intrusion — have displaced countless individuals, intensified geopolitical conflicts, and underscored the urgent need for nations to ensure equitable and efficient management of shared resources. At the same time, efforts must focus on mitigating climate change adverse effects and safeguarding human rights, particularly for vulnerable populations.

This study focuses on the Mekong River Basin (MRB), a region significantly impacted by climate change and human-induced pressures. It critically evaluates gaps in international legal frameworks designed to protect human rights within the basin and identifies key shortcomings in addressing the needs of vulnerable groups, including marginalized communities and displaced populations.

ASEAN, which includes five MRB countries — Cambodia, Laos, Myanmar, Thailand, and Vietnam — is argued to play a pivotal role in facilitating dialogue on cross-border water management in the MRB. Through its regional partnership framework, ASEAN provides a platform for these countries and China, a major stakeholder in the basin, to engage in discussions aimed at achieving sustainable water resource governance. By fostering collaboration and mutual understanding, ASEAN helps to align national policies with regional objectives, promoting shared responsibility for equitable and efficient resource use.

This research offers strategies and actionable solutions to strengthen regional cooperation and foster inclusive policymaking. It advocates for an integrated approach to climate adaptation that prioritizes the rights and well-being of vulnerable groups. Ultimately, the findings highlight the urgency of addressing legal and institutional gaps to ensure a sustainable and equitable future for the MRB and its inhabitants.

Keywords: vulnerable groups; climate change; rights to water; Mekong River Basin (MRB); Mekong River Commission (MRC); sustainable development; Association of Southeast Asian Nations (ASEAN)

Cite as: Tran, V.D. and Nguyen, T.K.A., (2025). Protecting the Right to Water in the Mekong River Basin: Addressing Vulnerable Groups amidst Climate Change and Anthropogenic Challenges. *Kutafin Law Review*, 12(3), pp. 667–698, doi: 10.17803/2713-0533.2025.3.33.667-698

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I. Introduction

In recent decades the international community has become increasingly interested in developing methods and strategies to promote wealth and prosperity for people and the planet. It is recognized that

ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection. In 2015, the United Nations (UN) adopted the global Sustainable Development Goals (SDGs) with 17 interconnected goals and 169 targets focused on economic growth, social inclusion, and environmental protection. These goals serve as the “*world’s to-do list*”, aiming to eradicate poverty, reduce inequalities, and combat climate change. While the SGDs have been approved by all the UN members, global implementation of the goals faces challenges due to diverse cultural, religious, and social values across different nations and regions (Adhamiya and Rothman, 2021, p. 2).

In the Mekong River Basin (MRB), the challenge of cooperation in transboundary water resource management, especially ensuring the right to water for vulnerable groups, is becoming more urgent than ever due to the impacts of climate change combined with the overexploitation of water resources (Campbell, 2011, p. 728). Despite significant economic progress in recent decades, extreme poverty persists in some MRB economies, particularly in rural areas where poverty rates remain higher than in urban regions. Nearly 85 % of the Mekong population live in rural areas, almost entirely dependent on resources provided by the river.¹ The free-flowing Mekong, with its sediment-rich nutrients, is a crucial lifeline for impoverished communities in the lower Mekong region, providing essential water resources for agriculture and fisheries. Climate change and unsustainable exploitation of river resources are drastically affecting the river, leading to record-low water levels and severe ecological threats. In 2019, the Mekong River dropped to their lowest flow in the last century.² In summer 2023, Vietnam is experiencing a tremendous electricity shortage when many hydropower

¹ FAO. (2011) Transboundary River Basin Overview — Mekong. FAO. Available at: <https://openknowledge.fao.org/server/api/core/bitstreams/a95eaf4e-eb6a-437d-b488-01ad8993bc7c/content> [Accessed 16.12.2024].

² National Geographic. (2019). Mekong River at its lowest in 100 years, threatening food supply. *National Geographic*. Available at: <https://www.nationalgeographic.com/environment/article/mekong-river-lowest-levels-100-years-food-shortages> [Accessed 16.12.2024].

plants are reaching dangerously low water levels because of extreme weather conditions.³ According to global statistics, vital areas in MRB, including Vietnamese Mekong delta and the Cambodian Tonle Sap Lake, have become increasingly vulnerable to the adverse effects of climate change (Jaap and Pathirana, 2018, p. 2). Conditions are worsening for marginalized populations, who are grappling with increasingly challenging circumstances. Preserving the health of this ecology system is of utmost importance for the livelihoods and future security of the women, men, and children reliant on the Mekong River, as well as for the economic progress of the countries in the region.

The Mekong River, spanning multiple countries, presents complex and interconnected challenges that demand active regional cooperation to achieve sustainable development and address the needs of vulnerable farming communities. However, a significant barrier lies in the absence of a clear definition of “vulnerable people” in international law. This legal ambiguity leaves Mekong riverine farmers, who face severe hardships due to the degradation of the river’s ecosystem, without formal recognition as vulnerable populations. As a result, their needs and interests are often excluded from policy frameworks and decision-making processes.

Compounding the issue is the approach taken by some governments in the region, where environmental protection and regional cooperation in water resource management are given limited attention. Instead, the emphasis often shifts towards maximizing economic gains from the river’s resources, such as hydropower, irrigation canal and industrial development. This short-term economic focus frequently comes at the expense of long-term ecological sustainability and the livelihoods of communities dependent on the river. Resolving these challenges requires not only enhanced cooperation among Mekong countries but also the establishment of clear legal and policy mechanisms that recognize and protect the rights of vulnerable groups. By integrating environmental sustainability, equitable resource management, and the

³ Vietnam Investment Review. (2024). Limited supply poses a risk of electricity shortages. *Vietnam Investment Review*. Available at: <https://vir.com.vn/limited-supply-poses-a-risk-of-electricity-shortages-108419-108419.html> [Accessed 16.12.2024].

voices of affected communities, the region can work toward a more inclusive and sustainable future.

This article employs an in-depth legal doctrinal methodology to critically assess the legal and practical foundations of cooperation available in the Mekong sub-region. By meticulously analyzing existing rules, treaties, declarations, and geopolitical developments in Southeast Asia, the study seeks to identify and strengthen cooperation mechanisms while proposing actionable measures to safeguard the human rights and living environments of vulnerable populations therein. This approach not only highlights the theoretical underpinnings but also bridges the gap between legal doctrine and practical implementation, offering a basis for future collaboration in the Mekong sub-region. The article begins by defining the concept of vulnerable groups and elucidating the scope of vulnerable groups in context of the MRB in the light of international law. This exploration will serve to underscore the urgency of relevant measures in accordance with the SDGs of the UN as well as the ASEAN Declaration of Human Rights of 2012. Subsequently, it proceeds to address the hurdles and complexities encountered in implementing the Mekong River Commission's collaboration programs, placing particular emphasis on the limited involvement of Mekong River's upstream countries, notably China. The article then underscores the pivotal groundwork essential for reshaping the collaboration framework to effectively advance the SDGs in the future.

II. Defining Vulnerable Groups in the New International Context: Rights, Protections, and Implications

II.1. "Vulnerability Concept" in Modern International Law

Vulnerability has become a prominent (Timmer et al., 2021, p. 195), but contestable (Limante, 2022, p. 3) concept in human rights law. The core global human rights documents (the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966) contain no direct mention of vulnerability or vulnerable groups. These documents set out general

principles prohibiting any kind of discrimination on any ground to effectively guarantee people equal and establish foundations for human rights protection. Apart from universal documents, many conventions, declarations, and other legal instruments regarding human rights protection in general and vulnerable groups in particular were adopted at the global, regional and domestic levels.

The concept of vulnerability is acknowledged in several key human rights conventions, such as in the Preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000, and in Art. 7 of the International Convention for the Protection of All Persons from Enforced Disappearance of 2006. However, these conventions fail to provide a clear and comprehensive definition for the concept of “vulnerability”, as well as an exhaustive list of “vulnerable groups of the population” at both global and regional levels. They focus on regulating protection mechanisms for certain groups, which can result in some groups being categorized as “weak”. It creates uncertainty as to whether certain groups of the population can meet the standards of vulnerability to become subject of human rights protection of vulnerable groups.

In a broad sense, a “vulnerable person” is someone who may be discriminated on various grounds within their society and, therefore, requires special measures to protect their rights. These factors may include race, skin color, religion, gender, sex orientation, economic and political statute, and other personal characteristics as well as other circumstances that may lead to mental, physical, financial, or other injury (McDonald and Forte, 2022, p. 337). In general, the formulation “vulnerable people” is often used to refer to women, children, refugees, immigrants, indigenous populations, elderly people, people with disabilities, HIV-positive people, homeless peoples (Eswarappa and Atrayee, 2019). Professor Fineman (2019, p. 345) proposed a theory of vulnerability in the context of modern social development, emphasizing that inequality is an inherent aspect of any society, regardless of its political structure. Certain groups are consistently more vulnerable

and susceptible to various factors, including physical, psychological, socio-political, and environmental harm (Engström, 2020, p. 233). Thus, significant changes in the environment on which such groups of population depend for survival and livelihood can swiftly push all of them into extremely challenging living conditions. For instance, the rapid pace of industrialization in certain areas can lead to the emergence of new groups facing challenging circumstances, demanding enhanced protection. Beside the economic losses and the conventional impacts on human rights such as access to food and water, numerous studies have demonstrated that climate change exerts a severe and adverse influence on non-traditional dimensions of human rights, such as mental health (Wewerinke-Singh and Doebbler, 2022), gender equality (Ngcamu, 2023), equitable and legal access to justice (Chapman and Ahmed, 2021), etc.

The overarching objective of strategies and policies aimed at mitigating the consequences of climate change remains the safeguarding of the rights of all individuals, with special attention to vulnerable groups. While the topic of vulnerable populations garners some discussion, the definition remains primarily confined to “experts’ opinions” or outlined in “soft law” documents. Aspects for determining vulnerability have yet to be expressly documented in any international legal instruments or judicial rulings. Broadening the concept of “vulnerability” is urgent to avoid legal pitfalls and ensure the effective protection of vulnerable groups. The modern international environmental law proposes international community recognize and consider farmers as a vulnerable group, especially so-called small farmers (Donatti et al., 2019, p. 268).

In the context of climate change’s impact on the natural environment, outdoor workers — such as farmers, sewer workers, herders, fishermen, and foragers — emerge as some of the most vulnerable groups. Their livelihoods are directly tied to nature, making them particularly susceptible to environmental damage, with few opportunities to adapt or improve their living conditions. Environmental changes result in significant economic losses directly affecting the human life (e.g., life, food, water, sanitation, housing) of residents living in the Mekong River basin, consequently affecting a range of other rights such as the right to

healthcare, education, gender equality, access to social-cultural services, and more. This resembles a domino effect, where climate change does not create inequality, but exacerbates vulnerabilities. As a result, it is essential to recognize outdoor workers as a vulnerable group, both due to the adverse effects of environmental changes and the occupational hazards they encounter daily as a result of climate change.

In the Mekong River sub-region, riverine traditional communities, which rely mainly on rice cultivation, fruit growing and fishing, have been significantly impacted by the effects of global warming. The climate change directly threatens agricultural productivity and increases the risks of flooding, droughts, fires, and other natural and anthropogenic disasters. It is essential to note that when community livelihoods are negatively affected, it directly impacts the rights of children, such as their ability to access education, healthcare, and other essential services.⁴ Additionally, children are particularly vulnerable in the context of climate-related migration and displacement,⁵ leading to a range of other consequences, including increased poverty, physical and mental health issues, a heightened risk of child labor exploitation, early marriage, and abuse. However, children often belong to a dependent group with limited agency and the least voice in climate change policy-making and action.⁶ Recognizing the outdoor workers, farmers and fishermen as vulnerable groups is crucial in the context of climate change, as it enables policymakers and organizations to collaborate and make efforts to protect the rights of vulnerable groups in the MRB, aligning their actions with the SDGs.

⁴ UNICEF. (2023). Child Rights on the Mekong. How the is the Convention of the Rights of the Child linked to the health of the Mekong River? *UNICEF*. Available at: <https://www.unicef.org/laos/stories/child-rights-mekong> [Accessed 16.12.2024].

⁵ UNICEF UK. (2017). No Place to Call Home: Protecting Children's Rights when the Changing Climate forces Children to Flee. *UNICEF UK*. Available at: <https://www.unicef.org.uk/wp-content/uploads/2017/04/No-Place-To-Call-Home.pdf> [Accessed 16.12.2024].

⁶ OHCHR. (2019). The Global Climate Crisis: A Child Rights Crisis. *OHCHR*. Available at: <https://www.ohchr.org/sites/default/files/WorldVisionInputs2.pdf> [Accessed 16.12.2024].

II.2. Right to Water of Vulnerable Groups in MRB under Climate Change

Fresh water is indispensable to sustain life and health and fundamental to the dignity of all. Most of the world's fresh water is not easily accessible to humans. River water is the most used source of fresh water for humanity, but it only accounts for a volume of 1,250 km³, which is 1/1,000,000 of the total water volume.⁷ Over 84 million people do not have access to improved sources of drinking water, while 2.5 billion lack access to improved sanitation facilities.⁸ While these numbers shed light on a worrying situation, the reality is much worse, as millions of poor people living in informal settlements are simply missing from national statistics. The roots of the current water and sanitation crisis can be traced to poverty, inequality and unequal power relationships, and it is exacerbated by social and environmental challenges: accelerating urbanization, climate change, and increasing pollution and depletion of water resources.⁹

While the right to water has not been explicitly recognized as a self-standing human right in international treaties, international law entails specific obligations for States relating to protection of the rights to access to fresh water for everyone. These obligations require States to ensure everyone's access to a sufficient amount of safe drinking water for personal and domestic uses, defined as water for drinking, personal sanitation, washing of clothes, food preparation, and personal and household use.¹⁰ These obligations are embedded in the right to an adequate standard of living and the right to health, both of which

⁷ OHCHR. (2019). The Global Climate Crisis: A Child Rights Crisis.

⁸ UNICEF. (2018). Progress on Drinking Water and Sanitation: Special Focus on Sanitation. *UNICEF*. Available at: <https://iris.who.int/bitstream/handle/10665/258617/9789241512893-eng.pdf> [Accessed 16.12.2024].

⁹ UNDP. (2006). Human Development Report 2006: Beyond Scarcity — Power, poverty and the Global Water Crisis. *UNDP*. Available at: <https://www.undp.org/libya/publications/human-development-report-2006-beyond-scarcity-power-poverty-and-global-water-crisis> [Accessed 16.12.2024].

¹⁰ WHO, UNICEF. (2023). WHO/UNICEF Joint Monitoring Program for Water Supply, Sanitation and Hygiene — Progress on household drinking water, sanitation and hygiene 2000–2022: Special focus on gender. *WHO, UNICEF*. Available at: <https://washdata.org/reports/jmp-2023-wash-household> [Accessed 16.12.2024].

are recognized in several international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (1979, Art. 14.2 on adequate living standards of women in rural areas) and the Convention on the Rights of the Child (1989, Art. 24.2 on the right to health).

The latest report from the United Nations International Children's Emergency Fund (UNICEF) and the Intergovernmental Panel on Climate Change (IPCC) suggests that about 3.3 billion people will be affected by the negative impacts of climate change,¹¹ including about 1 billion children — nearly half of all children worldwide — who are at “extremely high risk” of the impacts of climate change, almost 3.5 billion people will undergo extreme heat as the Sahara by 2070 without emissions cuts. Climate change leads to a decrease in precipitation and an increase in temperature and timely rises concerns about the lack of clean drinking water. According to UNESCO data, in 2020, about 26 % of the world's population (2 billion) did not have access to clean drinking water supply, and 46 % (3.6 billion) lacked access to safely managed sanitation.¹² In this context, protecting the right to water, especially for vulnerable groups, has become one of the urgent tasks not only for each country, but also globally.

For the Mekong River Basin, with 85 % of the population living along the river basin and economically dependent on river water, the right to water — including the distribution, supply, and use of water, as well as the environmental use¹³ serves as the foundation for all other rights. These include the right to live along the river, the right to exploit water-related resources for economic development, and the right to land connected to the basin. The greenhouse effect has directly impacted the water flow of the Mekong River, leading to unusual floods and droughts that significantly affect the livelihoods of people living in the MRB.

¹¹ IPCC. (2022), *Climate Change 2022: Impacts, Adaptation and Vulnerability*. IPCC. Available at: <https://www.ipcc.ch/report/ar6/wg2/> [Accessed 16.12.2024].

¹² UNESCO. (2023). *Partnerships and cooperation for water*. The United Nations World Water Development Report 2023. Executive Summary. UNESCO. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000384657> [Accessed 16.12.2024].

¹³ ADB. (2009). *Water rights and Water allocation: Issues and challenges for Asia*. ADB. Available at: <https://www.adb.org/sites/default/files/publication/28482/water-rights.pdf> [Accessed 16.12.2024].

The living conditions of these population groups are severely worsened by the increasing exploitation of water resources for industrialization. Activities such as constructing hydroelectric dams, digging irrigation canals, and altering river flows directly reduce natural food sources and accelerate the degradation of the ecological systems upon which these communities have traditionally depended for survival. Ensuring the right of equitable access to water is essential for maintaining the socio-economic stability and environmental sustainability of the region. Without secure access to water, these interconnected rights become vulnerable, making the protection of water resources central to the well-being and livelihoods of the region's inhabitants. As such, addressing water management and conservation issues is vital for safeguarding the comprehensive rights and prospects of the MRB communities.

The disastrous effects of climate change on vulnerable groups are indubitable and are being perpetuated by numerous pretexts, such as socio-economic underdevelopment, unequal power relations, poor governance, etc. A comprehensive understanding of the ill-starred hazard to vulnerable groups and thoroughly defining its legal status are indispensable for developing effective climate change adaptation and mitigation strategies. Recognizing the problems relating to the right to water faced by vulnerable groups in the MRB is crucial, as it would compel governments and other stakeholders to allocate sufficient resources toward establishing stronger legal mechanisms to protect their essential human rights. It would also help to create a basis for regional collaboration to focus on ensuring the right to water for vulnerable groups in the MRB.

III. Assessing the Existing Mechanisms for Protecting the Right to Water of Vulnerable Groups in the Mekong River Basin

III.1. Mekong Sub-Regional Cooperation Mechanism

The concept of establishing a sub-regional cooperation mechanism for the Mekong River to address the myriad of challenges was conceived in the 1950s, when the Mekong countries took steps towards cooperation

in the exploitation and use of the river's resources through the signing of the Statute of the Committee for Coordination of Investigations of the Lower Mekong Basin (Mekong Committee). However, this initiative did not lead to entail comprehensive cooperation in the MRB, as it excluded the participation of the upstream countries of China and Myanmar (Browder and Ortolano, 2000, p. 505). The People's Republic of China was not invited to participate in the Mekong Committee due to its political isolation at the time, as it was not recognized by the international community until it gained the UN membership in 1971. Meanwhile, Myanmar declined to join, viewing the Committee as not aligned with its national interests (Jeffrey, 1995, p. 143). Political and economic instability in the region further contributed to the Mekong Committee's inactivity, limiting its effectiveness in addressing transboundary water management.

In 1995, the four downstream countries — Cambodia, Laos, Thailand, and Vietnam — executed the Agreement on Coordination for Sustainable Development in the Mekong River Basin (Mekong Agreement 1995) to revive the cooperation initiative for the Mekong region, with the participation of China and Myanmar. This initiative led to the establishment of the Mekong River Commission (MRC). However, China and Myanmar agreed only to participate in MRC activities as dialogue partner countries.

To date, MRC is the sole intergovernmental organization for multilateral regulation of transboundary watercourse sharing in the region. MRC has taken many activities in promoting socio-economic and cultural cooperation in the region. Despite the absence of a specific legal framework, the MRC has demonstrated a commitment to upholding key human rights principles under international law. It has been proactively integrating the discussion on enforcement of human rights into its activities: from agriculture, fisheries, river transport, hydropower development, flood and drought forecasting to gender equality and climate change adaptation (MRC, 2021). MRC can play a key role in aligning human rights considerations with access to the Mekong's water resources. Through the Mekong Agreement of 1995, the MRC has notably shifted its focus towards environmental factors and sustainability, departing from the predominantly developmental

focus of its predecessors. MRC has adopted the Mekong Climate Change Adaptation Strategy and Action Plan (MASAP), which sets out the strategic priorities and actions at MRB level to address climate change risks and strengthen basin-wide resilience. As a result, the core operational principle of the MRC remains centered on the sustainable development of the Mekong sub-region, with a clear emphasis on the protection and enforcement of human rights.

Under the Mekong Agreement of 1995, a system of five Procedures to ensure fair and reasonable water exploitation activities on the Mekong River has established, including: (i) the Procedures for Data and Information Exchange and Sharing (PDIES) 2001; (ii) the Procedures for Water Use Monitoring (PWUM) 2003; (iii) the Procedures for Notification, Prior Consultation, and Agreement (PNPCA) 2003; (iv) the Procedures for the Maintenance of Flows on the Mainstream (PMFM) 2006; and (v) the Procedures for Water Quality (PWQ) 2011. These instruments are expected to provide a framework for countries to coordinate their interests over the Mekong River's water resources. Unfortunately, they have not been supported by all Mekong countries. Both China and Myanmar did not join the Mekong Agreement 1995. Pursuant to basic principles of international law, a state is not bound by obligation(s) determined in an international treaty to which it is not a party (Tran, 2014). Thus, by refusing to accede to the agreement, these states are not obligated to adhere to the provisions regarding the equitable exploitation of the Mekong River as set forth in the Mekong Agreement 1995.

Despite the efforts, the MRC's influence on the development of the regional regime for protection of the right to water remains quite limited due to several factors. Firstly, difference in levels of development and social policy priorities amongst MRC member countries results in varying approaches and standards of protecting vulnerable populations. Additionally, countries in the MRC often adopt a cautious stance in fulfilling international obligations related to human rights, especially when these obligations concern individuals or groups of people inhabiting other countries. To this end, should the concept of vulnerability in the context of climate change is accepted, it stands to reason that traditional communities living in the MRB are also vulnerable across multiple

dimensions. As a result, they should receive special attention from the governments of all Mekong states, given their increased exposure to environmental, social, and economic risks.

It must be recognized that transboundary water resources management is a complex and multifaceted challenge, requiring not only effective policies and strategies, but also the commitment and cooperation of all stakeholders involved. River water exploitation is always deeply political as it directly relates to the exercise of national sovereignty. In the light of current development, States are more or less concerned with environmental issues, however, it remains a stark reality that most States continue to prioritize economic interests over other non-economic factors, such as environmental impact or human rights and sustainable development. This poses significant barriers to their coordinated efforts in effectively implementing the international action plans aimed at the equitable use of water resources. In fact, the two global conventions on the protection and use of international water resources have not been strongly supported by nations, as evidenced by the number of ratifications for the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Convention 1997). Within the MRB, only Vietnam has ratified the Convention in 2014. Since accessing to the WTO in 2007, Vietnam has pursued an active integration policy by negotiating and concluding several important new-generation trade agreements that promote sustainable development, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the EU-Vietnam Free Trade Agreement (EVFTA) (Tran and Ngo, 2017; Tran, 2019), consequently, becoming a pioneer in the region with significant international commitments to environmental protection, including the protection of water resources.

China's non-participation in the UN Convention of 1997 and the Mekong Agreement of 1995 is also considered as a significant challenge for effective management of the Mekong River's water resources given its considerable economic influence on the region as well as the direct influence on the water resources as an upstream state. To date, the most significant highlight in the cooperation between the MRC and China is

the agreement in the form of a memorandum of understanding signed in 2002 to share hydrological data for purposes of weather forecast and prediction of natural disasters on the Mekong River, which was renewed twice – in 2008 and 2013. However, this is rather a narrow and non-binding agreement by nature, allowing either party to withdraw from information exchange activities at any time. In fact, China has a history of unilaterally terminating the provision of meteorological data exchange to its counterparts, as was the case with India in 2017.

Arguably, in the absence of an international agreement, international customary norms can also be used to regulate cross-border water management. Certain strains of non-traditional scholarship advocating for the incorporation of human rights norms as generally accepted provisions of international law refer to the decisions of the ICJ in *Barcelona Traction*¹⁴ and *North Sea Continental Shelf*.¹⁵ The ICJ's finding in *Barcelona Traction* was used to justify the universality of human rights norms within the international system, while its judgment in *North Sea Continental Shelf* was typically used to support a new understanding of the sources of international law (Roozbeh, 2010, p. 183). In this view, human rights norms, by virtue of their inclusion in widely ratified international conventions, effectively represent the legality of the customary international customary norms. In this regard, one may point out the principle of fair use of international aquifers recorded in the Helsinki Rules. However, it should be noted that the application of customary international law depends upon the consent of states involved. If a State does not wish to be bound by a new rule of customary international law, it can, in theory, vocally object and declare that it does not view itself as bound.¹⁶ It is important to note that the likelihood of MRB parties bringing a dispute before the ICJ is relatively low. To that end, the customary norms reaffirmed in the ruling remain crucial, as they allow states to “act freely within the framework” permitted by international law.

¹⁴ *Barcelona Traction, Light and Power company, Limited* [1962] ICJ 344.

¹⁵ *North Sea Continental Shelf* [1968] ICJ 1.

¹⁶ *Ibid.*

It is undeniable that uncoordinated development within MRB has compelled Mekong countries to take proactive steps in bolstering existing cooperation mechanisms and exploring alternative platforms to protect the river and together with it are the rights of vulnerable groups inhabiting in MRB.

III.2. ASEAN's Mechanism for Protection of Human Rights

The human rights protection mechanism in the Mekong River Basin also finds support in the pertinent ASEAN regulations. In fact, ASEAN's legal framework for human rights protection can be directly applied to address human rights and environmental protection concerns within the Mekong River basin, given that five out of the six Mekong States are also members of ASEAN. It means that except for China the remaining five Mekong riparian countries are bound by the obligation to adhere to regulations established by ASEAN. This facilitates the alignment of regional and sub-regional efforts to uphold human rights and environmental safeguards.

Historically, countries in Southeast Asia have consistently exhibited distinct approaches to human rights concerns, shaped by variations in culture, politics, economics, and religion (Langlois, 2021, p. 152). Within this context, they often regard human rights as an aspect of national sovereignty, asserting that their national human rights policies should remain impervious to external influence or intervention. However, the development of ASEAN, grounded in the "ASEAN way" principle, has played a pivotal role in fostering a more receptive attitude among member countries towards acknowledging shared values related to development, encompassing various facets of human rights. While national sovereignty remains a cornerstone principle, ASEAN integration has promoted cooperation and dialogue, offering a platform for addressing common challenges, including those pertaining to human rights. The issues related to human rights protection were included in the ASEAN agenda annual meetings and implemented into various joint statements and other domestic documents since 1993.¹⁷

¹⁷ Communist. (2023). ASEAN and human rights of the woman [ASEAN và nhân quyền của phụ nữ]. *Communist Review*. Available at: <https://www.tapchiconsan.org.vn/hoat-ong-cua-lanh-ao-ang-nha-nuoc/-/2018/10385/asean-va-quyen-cong-quo-i-cua-phu-nu.aspx> [Accessed 16.12.2024].

A significant milestone occurred with the 2007 ASEAN Charter, which, for the first time, formally acknowledged that democracy and human rights are indispensable components of the region's development. It recognized them as binding obligations for Member States, with a strong emphasis on the goal of building a "people-oriented ASEAN in which all sectors of society" are involved. Respect for fundamental freedoms and the promotion and protection of human rights are not just incidental considerations but central objectives that underline ASEAN's existence. These core principles are explicitly outlined in the preamble of the ASEAN Charter, and their importance is reaffirmed throughout the document, emphasizing their centrality to ASEAN's mission.

Article 1.7 of the Charter regulates that the [purpose of ASEAN] are amongst others include "to strengthen the democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms with due regard to the rights and responsibilities of the member states of ASEAN". Article 2.2(i) further underscores the commitment of ASEAN and its Member States to "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice".

With the above-mentioned acknowledgment, human rights have become an integral part of the ASEAN discourse, institutional framework, and regional diplomacy. This marks a noteworthy development in the ongoing discourse regarding Asian values versus European-style human rights. ASEAN member countries still aim to manage and restrict this influence on a degree that aligns with regional cultural norms. This intention is clearly reflected in the emphasis on the "ASEAN way" doctrine, which seeks to minimize external interference in ASEAN's internal affairs and those of its Member States.

While the ASEAN Charter provides a broad overview of these principles, the 2012 ASEAN Human Rights Declaration (the "AHRD") is hailed as the ASEAN community's strongest commitment to human rights, further solidifying its role in the region (Davies, 2013, p. 54). The AHRD offers guiding principles for ASEAN countries to respect, promote, protect, and fulfill substantive and procedural environmental human

rights.¹⁸ The AHRD has incorporated the provisions of the Universal Declaration of Human Rights. It even extends beyond the Universal Declaration by explicitly acknowledging rights such as “the right to safe drinking water and sanitation” (Para. 28(e)), “the right to a safe, clean, and sustainable environment” (Para. 28(f)), the “right to development... aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment” (Para. 36,) and “the right to peace” (Para. 30).

Regarding the protection of vulnerable groups’ rights, Para. 4 of the AHRD clearly states that “the rights of women, children, elderly people, persons with disabilities, migrant workers as well as vulnerable and marginalized groups are an integral and indivisible part of human rights and fundamental freedoms”. The declaration, like other legal documents on this subject matter, establishes an exhaustive classification of vulnerable groups whose rights are inseparable from human rights in general with no further interruption. It is essential to emphasize that international law places the responsibility on States to offer special protection for these groups to ensure their equal rights compared to others.

The Section of economic, social, and cultural rights of the AHRD recognizes specific environmental rights of individuals residing in ASEAN, including the right to safe drinking water and sanitation and the right to a safe, clean, and sustainable environment. These rights are integral components of the broader right to water. This recognition highlights the interconnection between safeguarding human rights, environmental preservation, and sustainable development. It indicates that ASEAN countries are aware of their role in the global effort to address environmental challenges and the growing understanding of the intersection between human rights and environmental protection. More importantly, they acknowledge the fact that environmental rights are a fundamental part of human rights.

¹⁸ Stockholm Environment Institute. (2024). The ASEAN Declaration on Environmental Rights: whose rights and what rights? *Stockholm Environment Institute*. Available at: <https://www.sei.org/perspectives/asean-declaration-environmental-rights/> [Accessed 16.12.2024].

The AHRD is considered a crucial regional instrument, especially for vulnerable groups within the ASEAN Member States. It provides a legal framework for recognizing, protecting, and upholding the rights of these groups, promoting social inclusion, and holding governments accountable for their welfare and well-being.

While ASEAN has legal instruments affirming the importance of protecting human rights, the existing framework is somewhat abstract and lacks binding responsibilities. Particularly regarding the precise definitions of terms and the practical scope of implementation, especially concerning the legitimate rights and interests of vulnerable groups. Additionally, the central concept of the “ASEAN Way”, rooted in the principles of non-interference and consensus decision-making, upholds the sovereignty, equality, and territorial integrity of Member States, as outlined in the ASEAN Charter. As such, the Member States have considerable flexibility in implementing their commitments within the ASEAN framework. While ASEAN leaders prize the ASEAN Way as a model fostering consensus amongst Member States on important strategies and progressive development directions for the block, in reality it can also hinder effective implementation of ASEAN regulations.

Returning to the context of cross-border water resource management cooperation in the MRB, the challenge in utilizing the ASEAN Charter and the ASEAN Human Rights Declaration (AHRD) to address sub-regional issues lies in the fact that, while human rights protection is emphasized, there is often a lack of specific protection and enforcement mechanisms. This gap is further compounded by the need to align such mechanisms with the diverse political and cultural values deeply embedded in the region’s long history. This disconnect underscores the importance of harmonizing international human rights standards with the unique cultural and historical contexts of each country in the MRB to ensure the effective protection of vulnerable groups.

It is evident that ASEAN countries tend to adopt a highly cautious approach when it comes to human rights protection policies and management of transboundary watercourses. Unfortunately, in the face of the pressing water crisis in the MRB and the essential need to protect the human rights of vulnerable groups amid the multifaceted effects of climate change and global warming, these issues are not given the

priority they deserve. They often take a back seat to other pressing political and economic concerns. In light of this context, it becomes imperative that concerned countries should work together articulating commitments and action plans for the further cooperation dealing with climate change. It is believed that collaborative efforts must be driven by the recognition of the interconnectedness of the challenges facing the MRB and the imperative to protect the rights and well-being of vulnerable communities. This calls for a collective and pragmatic approach to address the pressing issues of climate change and its impact on human rights in the region.

Recently, ASEAN Environmental Rights Working Group, comprising of government representatives and civil society representatives, has introduced a draft of the ASEAN Declaration on environmental rights, which aims to protect the ecosystem and biodiversity within the inhabited areas of indigenous communities across Southeast Asia.¹⁹ This collaboration has been recognized as highly effective and could serve as a foundation for stronger engagement by civil society organizations in the forum on the protection of the right to water for vulnerable communities in the MRB. It is expected that more active involvement of civil society organizations, which are currently quite limited in the MRB,²⁰ can gradually help to raise awareness and influence the understandings and perspectives of key stakeholders, particularly farmers in riverine communities and state authorities. Once ASEAN Member States acknowledge the subject matter as a crucial element of the sustainable development requirements for the ASEAN community, they will formulate and implement necessary measures to manage the Mekong River

¹⁹ UNESCAP. (2024). Draft ASEAN declaration on environmental rights. *UNESCAP*. Available at: https://unescap.org/sites/default/d8files/event-documents/AER%20WG_3M_3_Add1%20Draft%20ASEAN%20declaration%20on%20environmental%20rights.pdf [Accessed 16.12.2024].

²⁰ Within the MRB, the NGO have struggled to establish a strong presence in society and influence local policymakers. For instance, the efforts of Open Development Mekong and Earth Rights International to oppose the construction of the Xayaburi Dam during 2016–2019 had very little impact on the Lao government's decision to proceed with the hydropower project, which was completed and became operational in October 2019.

water resources for the benefit of the livelihoods of the people who depend on them.

Another bottleneck that the Mekong sub-region must address is how to engage China in active participation and cooperation in environmental rights issues. China's role as the upstream country and a major player in the exploitation of the Mekong River resources makes its involvement essential for any effective action plan aimed at protecting vulnerable groups and safeguarding the environment. Since 2021, the China-ASEAN relationship entered a new stage while the title of China was turned into a full dialogue partner,²¹ that would deepen mutual understanding and comprehensive relationships, human rights protection is included. However, cooperation between the Mekong countries and China on these issues remains broad and lacks binding commitments, making it difficult to ensure specific responsibilities and actions to protect human rights along the Mekong River.

Overall, the interrelation and collaboration among Mekong countries have been improved in recent decades, especially regarding economic aspects. However, a genuine sense of the basin unity remains elusive unless the upstream countries become full members of the MRC. There is a particular emphasis on engaging China in MRC's activities, recognizing its significant role of China in the region. This would foster greater cooperation and hasten the agreement that ensures mutual sharing of benefits. The full participation of all riparian countries, including China, is seen as essential for achieving a unified and equitable approach to managing the Mekong River basin resources and addressing the shared challenges it faces.

IV. Engaging China in the Mekong River Cooperation Mechanism for Human Rights Protection: Challenges and Prospects

China's influence in the region spans across various dimensions, encompassing the economy, politics, culture, society, national security, and regional stability. Over the past two decades, China has experienced

²¹ MFA. China and ASEAN: partnership of good neighborliness and mutual trust. *MFA*. Available at: <https://www.fmprc.gov.cn/eng/ziliao> [Accessed 16.12.2024].

remarkable development, transforming the global geopolitical landscape and emerging as the world's second-largest economy, driven by extraordinary economic growth. It is crucial to highlight that China's management of transboundary water resources is marked by varying degrees of tension. Despite being one of the five countries with the largest freshwater resources in the world, China remains "thirsty" (Zhang and Li, 2018). Numerous studies show that rapid economic growth and impulsive population expansion put enormous burdens on water and other nature limited natural resources; from 30 to 70 % of rivers in China are seriously polluted, some rivers no longer flow into the sea, resulting in a significant reduction in their biodiversity. Some rivers have even ceased to flow into the sea in dry season (Nguyen, 2021, p. 993), resulting in a notable reduction in biodiversity. Clearly, the climate crisis and the impacts of excessive exploitation, often beyond anthropogenic control, present substantial challenges for China in fulfilling the considerable demands on its water resources, both transboundary and domestic. These resources play a critical role in achieving various goals, including irrigation, industrial production, agriculture, and ensuring the safety of drinking water supplies. As China continues to navigate these complex issues, the management of transboundary waters in the region becomes a pivotal concern with far-reaching implications. In the light of transboundary water cooperation with coastal countries, Chinese government has been loyal to the "*one country-one agreement*" policy and does not accept interference from third parties into the negotiation of the issues of the core interests of China. This approach reflects China's preference for managing transboundary water issues in a manner that aligns with its national interests while engaging directly with its neighboring countries on a case-by-case basis. The "soft diplomacy" is also represented in the Chinese policy in the dealing with Mekong River regional cooperation issues.

China attended the negotiation of the Mekong River Agreement of 1995 sponsored by the MRC (as an observer), but did not sign it. This is a cautious approach, aimed at maximizing national interests. China has pursued unilateral procedures for implementing national and international projects involving exploiting and utilizing of the

Mekong river resources to satisfy its internal water demands despite other Mekong countries' objections, particularly downstream States.²² However, after extensive efforts of negotiation between relevant parties, China and other MRB States have achieved some progressive steps to deepen cooperation for purposes of achieving mutual sharing of benefits related to the Mekong River. Some initiatives and programmes have been launched dealing with the water quality monitoring, hydrological data exchange, economic plans and strategy, social-cultural exchange, human resources, etc. However, the protection of human rights, particularly the rights of vulnerable groups to access freshwater resources, has not been adequately highlighted in these platforms.

Incontestably, climate change exacerbates the water potential crisis, as water scarcity and other water-related issues could lead to tension among basin States and alliances. As one of the regions hardest hit by climate change, MRB States have adjusted their national policies to align with climate change adaptation and mitigation efforts, while also strengthening multilateral cooperation at the basin level. This underscores the vital importance of engaging China in a collaborative effort to integrate human rights considerations, particularly for vulnerable populations, into the discourse surrounding the management and development of the Mekong River.

The shifts towards multipolarity within international relations are bolstering China's leadership role and present an opportunity to encourage Chinese leaders to reconsider their stance on the multilateral cooperation system in the Mekong sub-region. On 23 March, 2016 the cooperation between the MRB countries entered a new stage when the Lancang-Mekong Cooperation (LMC) forum was established as the only international platform with the participation of all six Mekong coastal countries in mutual managing integrated Mekong water resources. Guided by the concept of Asian security proposed by President Xi Jinping,²³ the LMC aims to facilitate a South-South cooperation platform

²² *Ibid.*

²³ The concept of Asian security was presented by President Xi Jinping at the 4th Conference of the Summit on Interaction and Confidence-Building Measures in Asia (21 May 2014, Shanghai). The essence of the concept is to build common (respecting and ensuring the security of each member state), comprehensive (covering

in the MRB. However, LMC's activities are perceived as being primarily economically driven. Despite its grand declarations in the Five-Year Action Plan (2018–2022)²⁴ the LMC is not an intergovernmental organization, lacking mechanisms to enforce and monitor member countries' policies. Recent cooperation project involving China and Cambodia relating to the Funan-Techo Canal project has been heavily criticized for ignoring the cross-border water flow issues in the MRB. The project, which shall directly connect Phnom Penh with Cambodian ports on the Gulf of Thailand, is expected to save Cambodia hundreds of millions of US dollars annually but has faced strong objections from Vietnam due to concerns that the canal would distort the flow of the lower Mekong River, potentially leading to severe future freshwater shortages in the Mekong Delta. Such changes are likely to cause a shortage of fresh water for daily life and agricultural production in the Mekong Delta, as well as exacerbate saltwater intrusion in the area.

Despite the skepticism surrounding the LMC, it is believed that China's formal participation in a dialogue forum with the downstream Mekong countries can still be seen as a positive step towards establishing the basin unity, with all coastal States making efforts to uphold multilateralism in the MRB. This suggests that cooperation among basin States may intensify in the future.

China is shifting its traditional stance and actively promoting international cooperation, which can be understood as a part of its broader strategy to shape a new world order and expand its influence on the global arena. The Chinese leadership has been actively promoting the "One Belt, One Road" or the "Belt and Road Initiative" (BRI), a cornerstone of its foreign policy (Zhang and Patrick, 2023, p. 33). It describes the BRI objective is "to construct a unified large market and make full use of both international and domestic markets, through cultural exchange and integration, to enhance mutual understanding and trust of member nations, resulting in an innovative pattern of capital

traditional and non-traditional areas), cooperative (promoting security for each state and the whole region through dialog and cooperation) and sustainable security in Asia.

²⁴ LMC. (2020). Five-Year Plan of Action on Lancang-Mekong Cooperation (2018–2022). *LMC*. Available at: http://www.lmcchina.org/eng/2020-09/21/content_41449453.html [Accessed 16.12.2024].

inflows, talent pools, and technology databases” (Oosterveld, 2018). Through the BRI, China seeks to establish deep market integration on regional, inter-regional, and global levels under its leadership, a goal that necessitates proactively sharing challenges with partners and assuming greater international responsibilities (Li, 2020, p. 84).

There is no direct relation between mutual water sharing benefits in the Mekong River basin and BRI. Hence, the success of the BRI depends on fostering stable political and economic environments in participating regions. To that end, China has shifted its water policy to a more open, multilateral approach on water sharing benefits by developing and launching various initiatives in accordance with national diplomatic strategy. It seeks to position itself as a “responsible stakeholder” in addressing regional challenges.

In the context of the Mekong water management, China has signed an agreement with the MRC to share hydrological information on a real-time basis with the MRB countries (renewed in 2022). Even though the impacts of this initiative on the core issues of the MRB in the face of global warming, as analyzed above, is rather limited, it can still be seen as a positive development that offers hope for future negotiations to bring China into the Mekong Agreement.

Progress in this area could be accelerated if climate action, especially the protection of the right to water for vulnerable communities in the MRB, were elevated as key priorities within ASEAN. Given China’s expressed willingness to deepen its role as a dialogue partner under the ASEAN+ framework, ASEAN is uniquely positioned to encourage China to take a more active role in regional environmental protection. This includes fostering initiatives to establish a cross-border water management mechanism for the MRB, with a particular focus on safeguarding the right to water for vulnerable communities in the region. As a matter of fact, in 2021, during the online special summit to commemorate the 30th anniversary of the ASEAN-China dialogue relations (1991–2021), the parties adopted a joint statement confirming the strategic partnership for peace, security, prosperity and sustainable development. Beside emphasizing regional cooperation and integration, the declaration focuses on programs and strategies to respond to the rising challenges of non-traditional security. Accordingly, the parties

have expressed the intention to strengthen cooperation on climate change, biodiversity conservation, environmental protection, low-carbon solutions, clean energy, sustainable cities and rural development, and support the implementation of the Framework of ASEAN-China Environmental Cooperation Strategy and Action Plan (2021–2025) to promote green and sustainable recovery and high-quality development in the region.²⁵ It is evident that cooperation in exploiting water resources and protecting human rights against the impact of climate change falls within the framework of cooperation between ASEAN member countries and China.

The multilateral structure of ASEAN+ provides a platform for more balanced discussions between the five ASEAN Member States and China, promoting greater cooperation and shared responsibility in addressing the pressing environmental challenges facing the Mekong region.

V. Unlocking the Potential of the Mekong Regional Cooperation to Safeguard the Human Right to Water

During development, achieving a balance and harmony of interests among the Mekong countries regarding transboundary watercourses is crucial, albeit a complex and challenging endeavor. Negotiations on sharing benefits between basin States on the transboundary watercourse have been difficult due to great political sensibility of national sovereignty over natural resources. According to international law, the State has exclusive competence to develop natural resources located within national territory, including transboundary watercourse. Otherwise, international water law legally guarantees mutual sharing benefits between co-basin States by establishing several recognized principles including equitable and reasonable utilization, the obligation not to cause significant harm, the principles of cooperation and

²⁵ ASEAN. (2021). ASEAN Secretariat, Joint Statement of the ASEAN-China Special Summit to Commemorate The 30th Anniversary Of ASEAN-China Dialogue Relations: Comprehensive Strategic Partnership for Peace, Security, Prosperity and Sustainable Development. *ASEAN*. Available at: <https://asean.org/wp-content/uploads/2021/11/Joint-Statement-30th-Anniversary-of-ASEAN-China-Dialogue-Relations-Final.pdf> [Accessed 16.12.2024].

information exchange, the peaceful settlement of disputes (Muhammad, 2012, p. 477).

Under the severe effects of climate change, the water crisis presents more frequently than ever when co-basin States have adopted tougher and more aggressive measures in cross-water sharing policies maximizing national interests. Global climate change will likely intensify disagreements among co-basin States over water resources, necessitating a reshaping of the legal framework governing mutual water sharing. Collaboration is paramount, as no single country can effectively address these challenges in isolation.

The Lower Mekong Basin management system is entering a critical juncture, where development decisions will have lasting economic repercussions. Climate change, along with extreme weather events and extensive exploitation of the Mekong River, significantly affects the rights of residents living along the Mekong basin, especially vulnerable population groups. Notably, there is no intergovernmental human rights court in the Southeast Asia, limiting the right of individuals to appeal to an international court in case of transboundary violations of their rights. Therefore, it is imperative to include the issue of human rights protection in general and vulnerable groups in particular in the regional-level negotiations and agendas. To that end, the authors of the present study propose some suggestions as follows.

In the context of water security becoming one of the top priorities, countries have been adopting more aggressive measures to ensure national interests. While the upstream Mekong countries are cautious and less inclined to engage in multilateral agreements for equitable water resources sharing amongst all relevant countries, the downstream Mekong countries may lack the economic and political potential to secure such agreements. It is believed that ASEAN can play a pivotal role as the primary regulator and mediator in the relations between the Mekong coastal States with other countries. Despite the limitations on the practical implementation and the non-interference policy, the role of ASEAN in coordinating the relations between the countries' members and China is undeniable.

However, the practice has shown that the integration management of the Mekong within such mechanisms is somewhat ineffective and

limited, as this issue is not defined as the primary mandate of ASEAN (Suzuki, 2019, p. 162). Moreover, due to the high sensitivity and politicization of the issue of transboundary water resources management, the involved States have not reached a more specific agreement on joint regulation of the use of the Mekong River. While Europe has the Aarhus Convention of 1998 and Latin America has the Escazú Agreement of 2018, there are currently no such international mechanisms in the Southeast Asia. Establishing a convention for the protection of environmental human rights within ASEAN is an essential step. This international legal mechanism would not only help to strengthen trust among coastal States but also to safeguard human rights, particularly those of different vulnerable groups, by granting them the procedural right to participate in projects that directly impact their lives.

Based on the analysis on the ongoing problems in MRB, the following recommendations are proposed.

First, ASEAN and the MRC should strengthen cooperation between the ASEAN Working Group on Water Resources Management and the MRC Integrated Water Resources Management to prevent potential conflicts and achieve effective and sustainable development of water resources.

Second, the issue of water management and environmental conservation in the MRB should be included in the agenda of the annual meeting of ASEAN and ASEAN+3. As a result, the Member States will be able to unanimously adopt a joint recommendation decision that will define the priority areas of activity.

Third, there is a need to establish regular data and information exchange between ASEAN and the MRC, and this should not only cover the economic aspect but also the social and environmental sphere.

Fourth, it is also proposed that the BRI policy should be viewed as the principal policy, extending beyond the field of economic development to encompass China's leadership role in shaping the region's geopolitical landscape, including its relations with the Mekong basin States. The BRI aims to promote the connection of Asian, European, and African continents and adjacent seas, regardless of balanced and sustainable development in these countries. Despite lacking specific prescribing in official documents, China reaffirmed its commitments concerning

climate-related and human rights issues as a part of global restoration. The MRB States should leverage this change to encourage China's active involvement in addressing crucial non-economic issues but vital for sustainable development, such as establishing a cross-border water resource management regime in the GMR that considers the interests of the riverine farming communities.

VI. Conclusion and Suggestions

The Mekong River basin faces significant challenges related to the protection of human rights to water, particularly for vulnerable groups, in the context of evolving regional cooperation mechanisms. While the MRC and the MLC have made strides in various areas of cooperation, the protection of human right to water remains an underexplored dimension. However, there is room for optimism. The region's engagement in ASEAN offers a promising avenue for addressing human rights concerns. The role of ASEAN in coordinating relations among the Mekong River basin countries can help facilitate discussions on human rights issues and foster cooperation.

Moreover, the changing foreign diplomacy of China, notably through the BRI policy, presents an opportunity to promote enhanced cooperation among all the Mekong countries. China's increasing focus on multilateral engagement and its willingness to create dialogue with the Mekong downstream counties as well as under the ASEAN+ framework, demonstrate a shift towards responsible international participation. This shift bodes well for the prospects of future agreements, including those related to human rights and the protection of vulnerable groups.

Looking ahead, it is imperative that the Mekong countries, with the support of ASEAN, can work collectively to integrate human right to water considerations into their cooperative frameworks. This includes agreements related to vulnerable groups and equitable access to the Mekong River water resources. As climate change exacerbates water-related challenges, a unified commitment to protecting human rights will be essential for the sustainable development of the Mekong River basin.

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Received 16.12.2024

Revised 05.01.2025

Accepted 14.01.2025

ROLE OF RELIGIONS IN RESOLVING DISPUTES

Article



DOI: 10.17803/2713-0533.2025.3.33.699-732

Ancient Scriptures: a Guide to Mend Cross-Cultural Differences in Diplomatic Mediation

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Abstract: With effective and informal crisis-management options like mediation emerging over time, nations around the globe have also adapted to it. Despite this, contemporary conflicts in a global setting are extremely layered and diplomatic encouragement is the key to resolving such disputes at the onset. This task requires a deep understanding of the versatility and nuances of how diverse each nation is. Whether it is a dispute between India and Pakistan or the US and China, putting together the pieces of such diversity reveals the cross-cultural differences within and between nations. These differences may pose a hindrance to preventive diplomacy and, in turn, to diplomatic mediation as well. Harmonizing such intercommunal relations requires tapping into the ancient wisdom popular to that nation. The way to do this is by tracing the origins of dispute resolution in ancient scriptures and consequently reaffirming its relevance in the modern day. Various scriptures, including the Bible, Quran, and Bhagavad Gita, reveal a common emphasis on peace and harmony as the solution to dispute resolution. This information

from history can serve as a guide to effective diplomatic mediation in the present.

Keywords: mediation; ancient scriptures; diplomacy; cross-cultural; harmony; conflict

Cite as: Reddy, N. and Gandotra, A., (2025). Ancient Scriptures: a **Guide to Mend Cross-Cultural Differences in Diplomatic Mediation**. *Kutafin Law Review*, 12(3), pp. 699–732, doi: 10.17803/2713-0533.2025.3.33.699-732

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I. Introduction

The origin of disputes essentially dates back to the origin of man himself. Early Neanderthals had disputes over food and hunting grounds, whereas the *homo sapiens* of today have disputes relating to kinship, land, property, inheritance, and much more. Irrespective of the time period, there is a certain sense of “universality” inherent in disputes. As Simon Roberts said, “Disputes, both within groups and between them, are found everywhere in human society” (Roberts, 1979). Such a universality of disputes consequently brings to light the universality of dispute resolution. The presumption of ideological functionalism

reveals that the “need for resolution” and the “concept of conflict” are both extremely integral to each other from a societal standpoint (Cain and Kulcsar, 1982).

In this context, just as disputes and their manifestations have undergone a transformation over time, dispute resolution has also witnessed significant changes recently. Over the years, there has been a shift from traditional “litigation” to alternative forms of dispute resolution, popularly known as ADR. With the world being ever-evolving and increasingly interconnected, these methods of ADR are pivotal in traversing conflicts peacefully. Specifically, mediation has seen a steady rise in its acceptance globally. Mediation comes from the Latin verb “*mediare*”, which means “to be in the middle”, like a bridge between two sides. Nations have also recognized this and made changes to their existing regime in order to include mediation and advance their dispute resolution mechanisms.

International peace mediation, in this context, is essentially “an engagement both in interstate and intrastate conflicts by an external actor” (Barbosa and Kuster, 2019, p. 138). Such an external actor could be an international organization like the United Nations (UN) or regional bodies such as the African Union (AU) or the European Union (EU). Particularly within the UN system, the use of mediation in peace processes has become a cornerstone of conflict prevention strategies. The UN’s “promediation activities” can be seen through its Department of Political and Peacebuilding Affairs (DPPA) that has played a crucial role in mediating international and domestic disputes by utilizing both traditional and innovative approaches to peacebuilding (Klos, 2020). The UN Charter, in particular, not only enshrines such commitment to the peaceful settlement of disputes,¹ but also obliges Member States to pursue diplomatic means before resorting to the use of force. Additionally, other key international instruments, such as the Vienna Convention on Diplomatic Relations (1961), further support the mediation process by emphasizing the principles of diplomatic

¹ Art. 33 of the UN Charter obliges all Member States to settle their disputes by peaceful means such as negotiation, mediation, conciliation, arbitration, and judicial settlement. Additionally, Chapter VI of the UN Charter offers specific guidance on how States can seek peaceful resolution mechanisms.

communication and peaceful coexistence between States. Although the Vienna Convention (1961) primarily governs the conduct of diplomatic relations, its provisions such as the inviolability of diplomatic missions and the protection of diplomatic agents, implicitly creates a conducive environment for dialogues and communication. Such a system that fosters free and confidential communication strengthens the practical foundation for diplomatic mediation efforts.

International customary law and general principles of law further legitimize mediation as a legal tool for resolving disputes. For instance, the principle of “*pacta sunt servanda*”, which mandates “all subjects of international law to exercise in good faith their rights and duties under law”, ensures that mediation agreements, whether bilateral or multilateral, are respected (Lukashuk, 1989, p. 513).

Despite the fact that diplomatic mediation is an invaluable tool to manage and resolve global conflicts, the intricacies involved in such a process cannot be sidelined. These intricacies include, but are not limited to, socio-political, economic, and cultural nuances. More often than not, a dispute between two countries is not just about territorial or economic disagreements. It also delves into historical contexts, cultural perceptions, and deep-rooted sentiments.

One of the most significant challenges to effective diplomatic mediation is the vast cross-cultural difference that exists between nations. In light of this, the authors choose to argue in this paper that successful diplomacy mandates a profound comprehension of each nation’s distinctiveness. Global peace, as a result of diplomatic mediation, requires not just strategic acumen but also profound cultural understanding, which can mend misinterpretation, miscommunication, diverse conflict resolution approaches, and varying values and norms.

This issue of resolving cross-cultural divides during international mediation is not novel, as it has been explored in depth by various scholars over time. Scholars such as Molly Inman, Roudabeh Kishi, Jonathan Wilkenfeld, Michele Gelfand, Harold Abramson, Cheng Lu Wang, Xiaohua Lin, Jacob Bercovitch, Allison Houston, William Zartman and others have written extensively about cultural influences on international mediation, compared conflict resolution styles, and

suggested mediators' approach to resolving such disputes. Additionally, in parallel, scholars such as Mohan Kashikar, Theresa Der-lan Yeh, Judith M. Keegan and others have also analyzed how scriptures such as the Bhagavad Gita, Dhammapada, and the Bible offer great insights into conflict resolution and peacemaking.

Yet, as profound as these individual areas of study are, there exists a noticeable gap in the research landscape. Our research aims to recognize the interconnectedness of culture and the State, which allows a more nuanced exploration of international differences.

With culture being an ever-evolving entity and the world growing increasingly interconnected, there is an absence of a holistic tool that marries the wisdom of scriptures with the nuanced understanding of cross-cultural dynamics in diplomatic mediation. This paper attempts to bridge this very gap. By recognizing the strengths and potential limitations of both the research on cross-cultural differences in mediation and the insights derived from ancient scriptures, the attempt is to craft an innovative approach.

This paper is divided into three parts. The introduction gives a brief understanding of disputes, dispute resolution, how mediation emerged as a form of ADR mechanisms, and the existence of cross-cultural differences in diplomatic mediation between nations. In Part I, the reasons for these cross-cultural differences and the manner in which they emerge are examined in depth. Part II examines the strengths and limitations of both historical and ongoing attempts to resolve such cross-cultural differences during diplomatic mediation. It is then proposed in Part III that various scriptures from around the world have common themes of peace, morality, and justice, which can be harmonized to mend such cultural divides. By highlighting the broader theme of dispute resolution that is common to all scriptures, specific issues of cross-cultural dynamics can be resolved. The conclusion underlines the potential of ancient wisdom as a supplemental tool to existing tools during diplomatic mediation and as a universal compass, pointing towards harmony, understanding, and coexistence.

II. Cross-Cultural Differences: An Underlying Complexity of Diplomatic Mediation

To begin with, culture, as defined by American cultural anthropologist Clifford James Geertz, is “a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life” (Tikkanen, 2006). These conceptions are multi-layered, whereby each layer represents various facets and complexities. Given the current geopolitical and economic realities, it is all the more relevant to view culture as this “multi-level, multi-layer construct” (Leung and Bhagat, 2005, p. 357). Comprehending such depth and multiplicity of cultural dimensions is imperative in order to trace the roots of any cross-cultural differences that might arise in a global conflict.

II.1. Understanding Cultural Variations in Temporal Orientation

At the surface level, culture may be expressed through certain tangible elements such as symbols and rituals. Following this, beneath the surface is the intermediate level, where culture essentially embeds values and norms. The Hofstede model of dimensionalizing cultures identifies how power distance, individualism/collectivism, masculinity/femininity, and indulgence/restraint are elements that underpin the value systems of nations (Hofstede, 2011).

Going deeper, culture, at its core, is rooted in basic assumptions and worldviews. This multi-layered nature of culture reveals that when individuals from different cultural backgrounds interact during diplomatic mediation, they tend to do so with a complex web of symbols, values, and assumptions. The interaction of these worldviews may lead to misunderstandings, misinterpretations, and conflicts.

At the core of comprehending such cross-cultural interactions in diplomatic mediation lie the dimensions of collectivism and individualism, as theorized by Hofstede (Hofstede, 1980). Collectivistic cultures tend to place emphasis on group harmony, family ties, and societal cohesion. During mediation, collectivistic cultures may prioritize

group consensus, and the mediation process usually involves a wider circle of stakeholders. For instance, during the Association of Southeast Asian Nations (ASEAN) meetings, the decisions arrived at more often than not through consensus reflect the collectivistic tendencies of the nations involved.

In contrast, individualistic cultures might prioritize self-expression and personal autonomy. In mediation, this would mean an emphasis on task accomplishment, individual responsibilities, and transparent commitments. The United States' approach to the Kyoto Protocol negotiations illustrates such individualistic orientations. The American representatives, although they recognized the global community's concerns, sought terms that eventually protected U.S. interests. Different societies have different communication styles, time orientations, and conflict resolution styles, which amalgamate to create layered diplomatic complexities.

For instance, differing communication styles amongst collectivistic and individualistic cultures are a significant aspect that can hugely impact the success or failure of mediation endeavours. Edward T. Hall's context theory explains how different cultures embrace different styles of communication (Hall and Hall, 1990). Some cultures, i.e., high-context cultures, rely heavily on non-verbal cues and shared understanding, whereas other cultures, i.e., low-context cultures, place emphasis on explicit verbal communication (Hall, 1976). High-context cultures are characterized by implicit communication, emphasize interpersonal relationships, prioritize group harmony, give value to historical traditions, and are more often than not seen in collectivistic societies.

Contrarily, individualistic societies are usually low-context cultures, which means they rely on direct communication, emphasize individual responsibilities, prioritize tasks over relationships, and give value to rules and regulations over traditions. As enunciated by Hall and Hall, "high-context people are apt to become impatient and irritated when low-context people insist on giving them information they don't need. Conversely, low-context people are at a loss when high-context people do not provide enough information" (Hall and Hall, 1990).

Interactions between low-context and high-context cultures naturally cause miscommunication and create scope for conflict. For

instance, the Camp David Accords in 1978 were a result of attempts to end decades of hostility between Egypt and Israel. However, these peace negotiations facilitated by President Jimmy Carter were not without its fair share of cross-cultural challenges. Even though the end goal was to secure lasting peace based on mutual trust and respect, the challenges encountered included differences in religious significance, historical context, and negotiation styles. For instance, recognizing and respecting the profound spiritual significance that Jews, Christians, and Muslims had towards the land, i.e., Jerusalem, was essential.

Similarly, it was also essential to address the varying collective memories that the two nations had of past wars, displacements, and national narratives in a sensitive and culturally aware manner. While Israel, with a more Western-influenced approach, preferred low-context and explicit negotiation, Egypt's negotiation style was influenced by broader Arab and African diplomatic norms, wherein a balance between directness and relationship-focused diplomacy was preferred. The complexities of such intercultural communication and collaboration, when not acknowledged or resolved, result in mismatched intentions between the messages sent and the messages received.

Another reason for cross-cultural difference is time perception, which, while often overlooked, is deeply embedded in a culture's norms, values and cognitive framework. Akin to communication styles, time can also be viewed as a "silent language", as explained by Edward Hall (Hall, 1959). Based on Hall's work and his introduction of the two concepts, i.e., monochronic time and polychronic time, it was deduced that cultures vary in their temporal orientations, wherein some view time as linear, while others perceive it to be cyclical. In cultures with monochronic time or a linear time perception, time is often seen as a finite resource and value is given to punctuality, scheduling, and efficiency (Nonis et al., 2005).

Contrarily, cultures with polychronic or cyclical time perception view events and experiences as recurring in nature. This would mean that they place emphasis on patience, long-term considerations, and relationship-building (Nonis et al., 2005). This kind of perspective is displayed by many East Asian and Middle Eastern nations. For instance, during the Six-Party Talks, which aimed to dismantle North Korea's

nuclear program, the involved East Asian countries, i.e., China, North Korea, and South Korea, more often than not approached the issue with a long-term perspective and focused on recurring consultations, which was in clear contrast to the more timeline-driven approach of the United States.

People with a present orientation tend to focus more on “living in the moment” and value spontaneity (Brislin and Kim, 2003). Those from a future-oriented culture usually make decisions with foresight and place emphasis on the long-term considerations of such decisions (Kluckhohn and Strodtbeck, 1961). As explained by Zimbardo and Boyd as well, such “time perspective” is “the often unconscious process whereby the continual flows of personal and social experiences are assigned to temporal categories, or time frames, that help to give order, coherence, and meaning to those events” (Zimbardo and Boyd, 1999, p. 1271). This temporal lens through which individualistic/collectivistic cultures view events differently has a huge impact on international diplomacy.

Additionally, event time and clock time, pace of life, and time as cultural metaphors are other dimensions that give rise to such temporal variations between nations (Fulmer et al., 2014). Failing to balance these variations and giving room to misunderstandings could significantly affect the mediation process.

II.2. Cultural Approaches to Conflict Resolution Styles

Conflict resolution styles, primarily determined by the previously mentioned dimensions of collectivism and individualism, also have substantial implications on the result of diplomatic mediation proceedings. Mediation challenges stemming from such cultural orientations often lead to mismatched expectations, overemphasis on cultural stereotypes, and other temporal differences. Researchers propose that, more often than not, a harmony model of conflict resolution is found in collectivistic societies, while a confrontation model of conflict resolution is found in individualistic societies (Kozan, 1997).

This would mean that countries with collectivistic societies would mostly exhibit an accommodating, problem-solving, or avoiding style of conflict resolution during diplomatic mediation (Wang, 2005).

Individualistic cultures lean more towards a forcing, competing, or obliging style of resolution, owing to the fact that they prefer negotiation as a “zero-sum game with a winner and a loser” (Wang, 2005). The U.S.’ hardline stance during the North American Free Trade Agreement (NAFTA) renegotiations illustrates such a competing style, wherein national interests and clear benefits were prioritized. Understanding such nuances is crucial, in the absence of which misunderstandings stand to complicate diplomatic endeavours.

Crimea’s accession to Russia in 2014 was followed by diplomatic tensions with Western nations, which again illustrates opposing conflict resolution styles and their impact on mediation outcomes. Despite international outcry, Russia chose to employ a forcing style and pursued its own strategic objectives. The fact that Russia moved swiftly, decided to bypass diplomatic channels, and did not wait for international consensus clearly underscores its forcing style (Sakwa, 2015). On the other hand, Western nations, especially the U.S. and EU members, choose to oscillate between problem-solving and competing styles. This meant that they encouraged diplomatic dialogues and peace proposals while also implementing sanctions and seeking to isolate Russia in the global context. The implications of these conflicting styles include prolonged tensions, diplomatic strains, and economic impacts.

In the era of globalization, such varied conflict resolution styles are also a result of the intersectionality of culture, region, and local traditions. The Juba Peace Talks illustrate such multifaceted nature of conflict resolution styles and how they further complicate diplomatic mediation. The talks, hosted in Juba, the capital of South Sudan, were mediated primarily by Riek Machar, the Vice President of South Sudan. The negotiations aimed to resolve the protracted conflict between the Ugandan government and the Lord’s Resistance Army (LRA), a rebel group led by Joseph Kony (Hendrickson and Tumutegyeize, 2012). However, with the LRA being largely from the Acholi tribe and Uganda having a rich tapestry of tribes, each with its own cultural norms, histories, and grievances, the conflict was not merely political but deeply cultural as well.

The peace process was a tapestry of traditional, regional, and international mediation approaches. Firstly, the Acholi, being an ethnic

group from which most of the LRA originated, had their own traditional reconciliation process known as the Mato Oput, which gave value to forgiveness and communal restoration (Deogratus and Olango, 2023). The Western stakeholders, on the other hand, had a more retributive approach, including the 2000 Amnesty Law and indictments by the International Criminal Court (ICC) (Nabukeera-Musoke, 2009).

Regional dynamics were also in play as the mediator, South Sudan, being a nascent autonomous region at the time, was influenced by its own experiences with civil war and its relationship with both Uganda and the larger international community. This meant that South Sudan embodied regional diplomacy and prioritized a balance between justice and reconciliation (Hendrickson and Tumutegyeize, 2012). In light of these varied styles, it is pertinent to note that “each mechanism affects the progress of the other” (Nabukeera-Musoke, 2009).

Navigating these varied cultural dynamics is what creates significant issues in forging a path towards global peace and harmony. In the context of these varied dynamics, various attempts have also been made over time to tackle such issues and improve relations among disputing nations, which shall be discussed in the following part.

III. Historical and Ongoing Endeavours in Bridging Cross-Cultural Divide During Diplomacy

In light of the cross-cultural differences that have been identified in the previous section, it is now necessary to examine the strengths and limitations of the various attempts that have been made to mend such differences. Over the years, scholars and diplomats have put in constant efforts to bridge cross-cultural differences and achieve sustainable peace agreements. As discussed previously, cross-cultural differences stem from disparities between collectivistic/individualistic societies and usually take the shape of temporal variations, differences in conflict resolution styles, and different communication styles to create layered challenges to diplomatic mediation.

Discrepancies in such cultural perspectives and values can either be a challenge or an opportunity, depending on how they are handled. Diplomatic misunderstandings rooted in cultural divides have, in certain

situations, escalated into larger conflicts, while successful manoeuvring of these differences has paved the way for historic agreements and collaborations in other situations. Making use of structured interactions, holistic dialogue, and employing both formal and informal diplomatic tools, various attempts have been made over time to resolve such cross-cultural differences and foster cooperative international relations.

These attempts to mend differences range from bringing in nuanced cultural sensitivity during mediation to cross-cultural training and other formal procedures. For instance, mediation done through “multicultural teams” is one such effort that was made in the past to resolve cultural differences, and this would essentially mean matching disputants with mediators from a similar ethnic background (Davidheiser, 2005). On the face of it, this approach seems to have quite a few benefits. Ethnic parity of this sort would result in grasping cultural nuances, building trust, and facilitating communication. A sense of familiarity is built, cultural traditions are addressed, and cultural references are rightly acknowledged so that messages are not lost in translation (Ungerleider, 2008).

Despite this, the authors argue that, based on the several studies available, such “matching” is not ideal in most cases. Comprehended from the work of Viswanathan and Jon Ptak in their Dispute Resolution Award paper of 1991, such matching could naturally create a challenge of potential bias. Their deduction was from the analysis of the matching policy of a mediation program in Canada (Davidheiser, 2005). They also explained how such a process of mediator belonging to the same culture could result in the mediator “being viewed as more judgemental than a mediator of a different culture” (Viswanathan and Ptak, 1991).

Additionally, by placing emphasis on ethnicity, this kind of process is “of limited significance because it ignores the impact of other sources of diversity” (Viswanathan and Ptak, 1991). Another study by Linda Fisher and Jeremy Long also substantiates how “matching mediators to the cultural background of parties to mediation is not likely to contribute significantly to the result of disputes” (Fisher and Long, 1991).

Another attempt at bridging cross-cultural differences is seen through cross-cultural training in diplomatic mediation. Given the nuanced, often invisible barriers that cultural differences stand to erect,

it is all the more important for diplomats to be equipped with the right tools. As proposed by Hofstede, cultural norms influence behaviours, actions, reactions, and experiences (Hofstede, 2001). Cross-cultural training allows diplomats to be aware of such behaviours and to read and interpret them correctly (Hofstede, 2001).

Such training mitigates cultural shock and prepares the mediator to be exposed to unfamiliar terrains (Oberg, 1960). This training is given through various methodologies. For instance, simulation and role-playing provide a hands-on learning experience and foster a deeper comprehension of cultural nuances (Bennet, 1986). The U.S. Foreign Service Institute utilizes such immersive simulations to better equip the mediators with knowledge and awareness regarding cross-cultural challenges. As part of this, the School of Professional and Area Studies (SPAS) has the Center for the Study of the Conduct of Diplomacy (CSCD), whose role is to examine “recent diplomatic experiences in order to capture best practices and lessons learned” (U.S. Department of State, 2023).

The case-study method is also quite effective in that it provides valuable insights. As stated by Stephanie Stobbe, “learning from the ways other cultures understand and resolve conflicts is an important part of maintaining healthy relationships in our increasingly interactive world” (Mahan and Mahuna, 2017). For instance, the “Ping Pong Diplomacy” between the U.S. and China during the 1970s is often analysed to understand the role of cultural dialogue in diplomacy (An et al., 2021).

However, such a training-driven approach is also wanting. Stewart Black and Mark Mendenhall explain how there are certain theoretical implications that reveal the extent of the effectiveness of such cross-cultural training (Black and Mendenhall, 1990). For instance, differences in the cognitive flexibility of individuals may result in different understanding and, therefore, lower efficacy in bridging divides (Black and Mendenhall, 1990).

Retention, reproduction, motivation, and incentives involved during such cross-cultural training are also relevant in understanding how different individuals react differently to such training and consequently impact the mediation process (Black and Mendenhall, 1990). Despite the fact that such training increases cultural proficiency in most cases,

it is also pertinent to note that culture is never static, and such evolving cultures require a balance between a broad and specific treatment of differences.

Having a neutral third party is one such broad treatment, which, although highly crucial to the process, may require certain specific additions as well. Additionally, since the mediator is not perceived as having a vested interest towards favouring one party over the other, there is facilitation of stronger trust. However, as explained by Jacob Bercovitch, it is pertinent to note that a third party usually “enters an international dispute in order to affect, change, influence, or modify it in some way” (Bercovitch, 1985). This would mean that the third party may be impartial or neutral regarding the “content of the solution” but cannot be neutral in the sense of having “no effect on the outcome” (Glaser, n.d.). The mere presence of the third party “alters the structure of the dispute” (Glaser, n.d.). In this context, having just an impartial third-party mediator is too broad a solution required to mend complex cross-cultural differences.

While impartiality is a foundational pillar of mediation in the context of layered cross-cultural disputes, the authors believe that it is necessary to synergize it with specific solutions tailored to address cultural complexities.

Various basic but effective strategies have also been proposed and implemented over time to resolve such cross-cultural differences. Kai Lucke and Aloys Rigaut have given certain recommendations that are crucial in this regard. For instance, they reinforce that taking into consideration cultural factors would mean considering “the people” along with the problem (Lucke and Rigaut, 2002). Similarly, they also iterate that a “pre-mediation assessment” of the cultures of the parties involved would be ideal, so long as stereotypes are steered clear of (Lucke and Rigaut, 2002). Training and cultural awareness are also highlighted as important elements (Lucke and Rigaut, 2002).

Harold Abramson rightly points out that the mediator must also be capable of differentiating between “cultural behaviour” and “human behaviour” (Abramson, 2006). Abramson also explains that the mediator must be cognizant of his/her own cultural upbringing and its impact on the mediation process (Abramson, 2006).

The authors recognize that all these points are extremely relevant in bridging cultural gaps. Despite the “countless interpersonal, meta-level, and international tools and processes” available to resolve conflicts, the authors choose to argue that there is a pressing need for an approach that is universally supplementary to all or any of these tools (Mahan and Mahuna, 2017).

IV. Harmonizing Cross-Cultural Differences: Insights from Ancient Scriptures

Since the attempts mentioned in the previous section are lacking or insufficient in certain aspects, this section endeavours to propose a universal tool that can act as a supplemental aid.

As observed by Sally Merry, “disputing is cultural behaviour, informed by participants’ moral views about how to fight, the meaning participants attach to going to court, social practices that indicate when and how to escalate conflicts to a public forum, and participants’ notions of rights and entitlements” (Merry, 1987).

With culture being as dynamic as it is and this cultural behaviour being erratic, bridging these divides requires an approach that will stand the test of time. This approach should be culturally sensitive while finding its roots in the same culture. The authors propose that ancient scriptures can act as a supplemental guide that transcends traditional boundaries. By identifying and recognizing the enduring wisdom and values enshrined in scriptures, it can be explored how they stand to offer timeless insights and universal principles that can be applied to modern diplomatic mediation.

Although not recognized as an apparent tool, values from ancient scriptures and religions have been used as underlying mechanisms during international conflicts throughout time. For instance, during the Bosnian War (1992–1995), which involved religious and ethnic tensions, efforts were made by the Interreligious Council in Bosnia and Herzegovina to involve religious leaders from the Islamic, Orthodox Christian, and Catholic communities to promote dialogue and reconciliation, based on the “shared moral principles” of peace and harmony (Merry, 1987).

Janine Natalya Clark explains how religious actors could make use of culture and such underlying shared values to “promote and foster reconciliation in Bosnia and Herzegovina” and highlights how “religion is a potentially valuable, yet fundamentally under-utilized peace-building tool in Bosnia and Herzegovina” (Clark, 2010). Neira Omerovic also suggests that “religion can be a powerful source in peacemaking” (Omerovic, 2017) by making use of “the organic peacebuilding framework” (Lederach, 1997). Our research finds this “peacebuilding framework” within ancient scriptures that contain shared values across religions and cultures.

For instance, in Cambodia, the Buddhist monk Maha Ghosananda’s suggestion of “Dhammayietra”, or mindful walks, allowed for a “step-by-step movement” (Poethig, 2002). This movement was towards “peace accords and reconciliation in the aftermath of the Khmer Rouge’s violent reign” and was applicable even during the civil war in Sierra Leone, where the Inter-Religious Council of Sierra Leone (IRCSL) was “able to break the ice and calm the actor through joint prayers” (Kadayifci and Maassarani, 2021).

Despite advancements in international conflict relations and conflict resolution strategies, there are certain situations where existing tools may either escalate conflicts or simply fail to address the underlying issues. We identify that this disadvantage does not apply to all cases. However, most of the limitations of current diplomatic tools can be covered using the aid of such ancient wisdom.

Ancient scriptures, be it the Bible, Quran, Analects, Bhagavad Gita, or other texts, have guided civilizations for millennia. The focus is on the fact that all these scriptures encompass universal themes such as the importance of understanding, compassion, forgiveness, and justice. Additionally, they are also embedded with narratives that, more often than not, highlight the futility of conflict and the significance of peaceful coexistence. Most importantly, ancient scriptures, with their widespread influence over various cultures, can serve as the common ground needed to mend cross-cultural differences.

IV.1. The Bhagavad Gita

“Conflict and peacemaking has occurred in various instances in the Hindu Texts” (Srivastava, 2018). The Bhagavad Gita, an ancient spiritual text, forms the philosophical part of the Indian epic, the Mahabharata, and is one such scripture that serves as a guidebook to mend cross-cultural differences. Within its 700 verses, the Gita is a conversation between Prince Arjuna and Lord Krishna that is deeply set in the context of an impending conflict, with Arjuna on the brink of a catastrophic war and questioning the moral and spiritual implications of fighting.

Often regarded as a “life science” and a “world scripture”, the Gita has been explored by various scholars in recent years as a tool for effective conflict resolution (Barmola, 2020). In the context of cross-cultural differences, the authors opine that this wisdom on conflict resolution is shared by all scriptures around the world, making it a commonality for bridging divides during diplomatic mediation as well.

For instance, Arjuna’s initial reluctance to participate in the war stems from moral dilemmas and emotional conflicts, which are usually sentiments resonant with leaders in the throes of cross-cultural disputes. The Gita highlights how concepts such as attachment and misconceptions about the Self and others are the root of most such conflicts. It also mentions in Chapter II, verse 47, that “Your right is in action only, never to the fruits” (Parthasarathy, 2017).

Krishna’s advice encourages participants to focus on fair processes and engage in negotiations with a sense of duty and integrity without being overly concerned with winning or losing. Krishna’s teachings on detachment, or *vairagya*, also play an essential role in conflict resolution. *Vairagya* is often misunderstood as a renunciation of worldly life, but in the context of the Gita, it is more about renouncing attachment to the results of one’s actions to be able to be free from emotional turmoil. In many international conflicts, the inability to let go of attachment, ideologies, or outcomes to past grievances can create significant barriers to peace. By cultivating *vairagya* or detachment, as

explained in Chapter VI, verse 35,² diplomats and mediators can help all parties to focus not on their ego-driven desires but on the common objective of peaceful coexistence.

Additionally, the “social conflict between man and man”, as explained by Sri Swami Krishnananda, can be resolved through mutual cooperation, realisation of the interconnectedness of all beings, and performing duties for the holistic well-being of society (Srivastava, 2018). In this context, Chapter III, verse 11, explains how “nourishing one another” is crucial to attaining the supreme state (Parthasarathy, 2017).

By recognizing this shared essence of nourishment, nations can focus on commonalities rather than their differences during mediation, paving the way for mutual respect and fulfilment. Chapter IV, verse 18, says, “He who sees inaction in action, and action in inaction, is wise among men”, which suggests observing the subtle nuances in conflicts and gaining the wisdom in perceiving beyond apparent disagreements, which may be particularly helpful for dealing with layered and complex cross-cultural differences (Parthasarathy, 2017).

Lord Krishna, an excellent example of a successful mediator, also advises in the Gita on how to maintain calmness and composure, irrespective of the outcome. Through Chapter II, verse 48, he teaches one to be even-tempered in both success and failure (Parthasarathy, 2017). In many ways, the Gita can be seen as an exploration of how to maintain inner balance or *samatva* in the face of external chaos.

Such equanimity can prove to be instrumental in diplomatic settings by fostering a balanced and objective perspective among the disputing parties. Equanimity in mediation fosters an atmosphere where all parties can feel heard, respected, and treated fairly. This balanced approach helps maintain the integrity of the mediation process and keeps it from being derailed by extreme emotions or short-term frustrations. Mediators who are calm, impartial, and centered are better able to facilitate constructive dialogue and guide disputing parties toward a resolution that honours their shared values.

² Lord Krishna said: “O mighty-armed son of Kunti, what you say is correct; the mind is indeed very difficult to restrain. But by practice and detachment, it can be controlled”.

One of the most central themes in the Gita is *dharma*, often translated as “righteous duty” or “moral responsibility”. In the context of international mediation, *dharma* can be understood as a guiding moral compass that helps parties understand their responsibilities toward justice, peace, and the greater good.

Even for mediators, understanding the *dharma* of the parties involved can be critical for crafting solutions that respect cultural differences while aiming for a broader and more holistic solution. The principle of *dharma* also leads to the ideas of *swaraj* (self-rule) and *sarvodaya* (the welfare of all). These Gandhian ideologies are heavily influenced by the Gita and can guide international negotiation to suggest that while individual sovereignty is important, the welfare of the global community should also be a central concern.

Another similar concept that Gita introduces in the context of conflict resolution is *karma yoga*, the yoga of selfless action. For mediators, *karma yoga* underscores the importance of taking active steps in mediation, not as a means of personal gain but as a service to society and the common good. Moreover, *karma yoga* also encourages the idea that actions, whether big or small, have a ripple effect in the world. Through such consistent and mindful actions, mediators can create a foundation for lasting peace that goes beyond temporary conflicts and short-term interests.

IV.2. The Bible

The Bible, a seminal religious text of Christianity, has for centuries offered ethical guidance and philosophical teachings to its followers, especially in the context of dispute resolution. In the realm of diplomatic mediation, specifically in matters involving cross-cultural differences, the Bible can be an indispensable guide. In Matthew 18:15, the passage advises believers to first approach someone who has wronged them privately before escalating the matter. This reflects the principle of addressing conflicts at the lowest level possible, and during cross-cultural differences, this brings the focus to resolving the dispute during mediation itself instead of escalating it further.

For instance, in international relations, this could reflect the principle of bilateral negotiations before involving external mediators or organizations like the United Nations. The incremental nature of this conflict resolution process also highlights the importance of patience and persistence, which are essential qualities in diplomacy. Many diplomatic disputes, particularly those involving cross-cultural differences, can initially seem intractable, but the biblical principle of addressing the conflict at multiple levels highlights that resolution often requires time, repeated dialogue, and a structured process to reach an understanding.

Moreover, in Matthew 18:15–35, the word “listen” is mentioned multiple times, which also points out to the fact that listening to the other party is as important as voicing out your own concerns during dispute resolution. This is all the more relevant in the context of cross-cultural differences, wherein language, communication styles, and other aspects vary significantly.

Mediation processes that foster an environment where both sides listen carefully to each other’s concerns are more likely to succeed, as they allow for a deeper understanding of the underlying issues, values, and emotions driving the conflict. From a biblical perspective, listening is not merely about hearing words but also empathizing with the other party. In Proverbs 18:13, it is stated, “To answer before listening — that is folly and shame”. In diplomatic mediation, where high stakes and emotions often cloud judgment, listening allows for clarity of thought and the potential to de-escalate tensions.

Peace, which is one of the foundational pillars of all scriptures around the world, finds its place in the Bible as well. Epistle to the Romans 12:18 states, “If it is possible, as far as it depends on you, live at peace with everyone”. This verse encapsulates the biblical mandate for peace, urging individuals and communities to do everything within their power to foster peace while also recognizing that it may not always be entirely within one’s control.

In the context of international mediation, this teaching highlights the need for mediators to pursue peace proactively. However, the verse also leaves room to acknowledge that peace is a shared responsibility. Both sides in a dispute must be open to reconciliation, and there are limits to what any one party can achieve. This passage from the Epistle

to the Romans also implicitly suggests that peace should be prioritized over the need to be “right” or to “win”. The biblical imperative to live at peace encourages diplomats to think beyond mere victory and to seek solutions that promote the well-being of all parties, recognizing that peace often requires sacrifice or compromise.

St. Paul’s letters to the Romans also advocate for proactive efforts in maintaining peace. In Romans 14:19, he guides believers, “Let us therefore make every effort to do what leads to peace and to mutual edification”. This is particularly relevant in the context of international diplomacy, where the act of mediation is not just about preventing conflict but about actively building a foundation for future cooperation and understanding. St. Paul’s call for “mutual edification” also implies that peacemaking is not a one-way process. The coupling of the word “peace” with “mutual edification” makes it clear that peacemaking is inherently relational and reciprocal. In effective mediation, both sides must contribute to the resolution, learning from one another’s perspectives and making efforts to build a shared understanding. We need to realise that pursuing “peace” without “mutual edification” risks thin and ceasefire-only outcomes. On the other hand, pursuing “edification” without “peace” risks moralism with security. St. Paul’s pairing of the two together explains how sustainable reconciliation requires both restraint and construction. This understanding is crucial to suggest that effective mediation does more than suspend hostilities and actually creates conditions for durable cooperation. In international diplomacy, this is particularly necessary for long-term reconciliation in sensitive situations.

One of the core tenets of Christian teachings, and one that has significant relevance in mediation, is the principle of forgiveness. Jesus emphasizes forgiveness in several places throughout the New Testament, including in Matthew 6:14–15, where he says, “For if you will forgive others their trespasses, your heavenly Father will also forgive you”.

In diplomatic mediation, where there are deep-seated historical grievances or traumas, forgiveness is not just about excusing wrongs but rather about letting go of the desire for retribution and creating space for healing. This is a powerful tool in mediating complex cross-cultural conflicts where historical injustices may continue to fuel present-day tensions.

IV.3. The Quran

The Quran, revered as the Word of God in Islam, is another scripture whose teachings encompass various aspects of human conduct, including how to resolve conflicts. One of the most essential principles of conflict resolution in the Quran is the call for patience and mercy, particularly when confronted with provocation or hostility. For instance, elucidating the Quranic verse 41:34, it can be garnered that “God has commanded Muslims to exercise patience when they are angry, to express tolerance in the face of others’ ignorance, and to exhibit mercy in the face of something that is wrong”. This is especially relevant in the context of cross-cultural differences, where misunderstandings and miscommunications must be dealt with tolerance, patience, and harmony.

This also underscores an approach to conflict that involves responding to negativity with positivity, a principle that can be foundational for mediators. The teaching encourages a form of mediation that does not escalate sensitive emotions but rather seeks to de-escalate them through calm and measured responses. In many diplomatic conflicts, historical injustices and long-standing grievances can cause entrenched positions, making negotiations difficult. However, the Quran’s teachings of mercy can be a powerful tool in breaking down barriers. Mercy, in this context, does not imply ignoring the wrongdoing but instead recognizing the humanity of the other party, accepting their flaws, and working towards healing rather than retribution.

As with all other scriptures, the Quran, too, through the Surah Al-Hujurat 49:9, highlights the importance of peace and reconciliation during disputes.³ Peace, in this sense, is not merely the cessation of hostilities but the active creation of conditions for cooperation and mutual respect. The verse also indirectly suggests the importance of fairness, encouraging mediation efforts that are not biased towards one party. The Quran also establishes the need to “abstain from ignorant prejudice and provocation”. Additionally, the Quran also advocates for

³ Surah Al-Hujurat 49:9: “If two parties of the believers happen to fight, make peace between them”.

respect and discourages mocking,⁴ a principle that can be foundational in maintaining decorum during diplomatic negotiations.

Through the verse Surah Al-Hujurat (49:11), the Quran speaks to the concept of respect, both for individuals and for groups, and the need to avoid unnecessary provocation during conflicts. Cultural misunderstandings often arise from entrenched prejudices, stereotypes, or the tendency to view the “other” as inferior. The Quran’s command to avoid mocking or ridiculing others directly applies to diplomatic negotiations, where negative rhetoric or dismissive behaviour can exacerbate tensions and hinder the possibility of a resolution.

The Quran also promotes dialogue as a tool for conflict resolution. Surah 16:125 encourages people to “invite to the way of your Lord with wisdom and kind advice, and only debate with them in the best manner”. This passage emphasizes the importance of conducting discussions in a wise, respectful, and constructive manner that promotes dialogue. In diplomatic mediation, such dialogue plays an essential role in overcoming misunderstandings.

The Quranic advice encourages mediators to facilitate a dialogue that focuses on cooperation rather than confrontation. Most of these essential principles of cooperation, collaboration, engagement in dialogue, and respect for other cultures are, in fact, astoundingly similar to Western peacebuilding efforts and “create opportunities for more common ground in working towards conflict resolution” (Huda, 2010).

IV.4. Other Scriptures

East Asian philosophical traditions, like Buddhism and Confucianism as epitomized in scriptures like the Dhammapada and the Analects respectively, have also given profound insights into governance, human behaviour, and conflict resolution. Both traditions provide a roadmap to peace, which is especially relevant in the delicate art of diplomatic mediation. In the Analects, “The Master said, ‘Shan, my doctrine is that of an all-pervading unity’”.⁵ This passage essentially embodies the heart

⁴ Surah Al-Hujurat 49:11: “Let not a group scoff at another group, it may well be that the latter at whom they scoff are better than they”.

⁵ Confucius, *The Analects-4*, Lunyu IV. 15 (81).

of mediation and resolving cross-cultural differences, during which common ground is often the cornerstone. To Confucius, “harmony was the most desirable state” (Wall and Blum, 1991).

Moreover, “compromise, persuasion as well as the intermediary who was able to secure them” was given high importance (Wall and Blum, 1991). Similarly, verse 5 in the Dhammapada emphasizes how conflicts cannot be resolved through animosity but through compassion and understanding. The power of responsive transformation is also highlighted, wherein the teaching from verse 223 of the Dhammapada is an embodiment of diplomatic strategy that helps to counter aggression with calmness and deception with transparency.⁶ The Our position as authors is to reinforce through the aforementioned descriptions that no matter the culture or nation, all the scriptures share certain core beliefs regarding conflict resolution. The styles may be different, the communication patterns may be varied, and the approach may be based on certain personal values and traditions, but the core remains the same. Our position explains how scripture and practice of varied cultures point to a common core of conflict resolution that can be adapted to different moral worlds without diluting its efficacy.

Despite all these differences, every scripture, in some way or another, acknowledges the importance of peace, coexistence, mutual respect, and understanding. As the Rigveda mentions, “Truth is one, only different scholars describe it differently” (Kashikar, 2011). The Quran explains how “the good deed and evil deed cannot be equal. Repel the evil with what is better”.⁷ This promotes the idea of overcoming conflict with harmony and mirrors the sentiment of Proverbs 15:1 from the Bible and Analects 4:15 of Confucianism.

Similarly, the teachings of Jesus in Matthew 5:9 about peacemakers⁸ are harmonious and similar to the saying in the Buddhist scripture, Dhammapada, that “Hatreds never cease through hatred in this world; through love alone they cease”.⁹ The root of all cultures is this

⁶ Verse 223: “Let anger be conquered by love. Let bad be conquered by good. Let miserliness be overcome by generosity. Let the liar be conquered by the truth”.

⁷ The Quran, Surah Fussilat 41:34.

⁸ “Blessed are the peacemakers, for they shall be called sons of God”.

⁹ Dhammapada. Verse 5.

truth that is built upon the core values of harmony, peace, coexistence, justice, and morality. Moreover, these are all elements that are crucial to the success of a mediation. By bringing the focus of the dispute onto these core values, diplomatic relations can be preserved, and mediation processes can be effective. This approach highlights the broader issue or larger picture of dispute resolution that is common to all cultures, using which the more specific problems can be mended with greater ease.

As the root of cross-cultural discrepancy lies within culture itself, the authors believe that deriving solutions emerging from the same culture may prove to be instrumental. In this context, ancient scriptures transcend religion and emerge as cultural artefacts that have influence over ethics, values, and social norms (Esposito et al., 2017). Moreover, General Anthony Zinni rightly said, “cultural understanding doesn’t just help you achieve your objectives — it helps you discover what your objectives should be” (Koumoulou, 2021).

V. Conclusion

The world we inhabit, with its cultural diversity and intricate political ties, constantly presents challenges that necessitate diplomatic mediation. Diplomatic precedents, political negotiations, and international law, employed as traditional means, have demonstrated value in addressing cross-cultural differences. Despite this, the authors have explored how conventional tools could be supplemented by an even richer, deeper understanding and solution to such conflicts. The authors believe that the wealth of knowledge housed within ancient scriptures reveals their potential as a universal tool to bridge cross-cultural rifts.

As established previously, historically, ancient scriptures from various traditions have universally emphasized fundamental truths concerning human nature, ethics, and the necessity for peace. Huntington postulated in his work “The Clash of Civilizations?” that people’s cultural and religious identities would be the primary source of conflict in the post-Cold War world (Huntington, 1993). If so, then the authors argue what can be a better way to address these conflicts

than by delving into the very scriptures that form the bedrock of these identities.

The idea is that when these principles are introduced during the mediation process, they serve as a reflective mirror so that the parties are encouraged to see beyond their differences and recognize a shared foundation. Take, for instance, the principle of empathy, a core tenet found in diverse scriptures. The Bible states in Matthew 7:12, “So whatever you wish that others would do to you, do also to them”. Similarly, the Quran mentions, “None of you truly believes until he wishes for his brother what he wishes for himself”.¹⁰

This clearly goes on to show that whether it is “Ren” in Confucianism, the “Way” in Taoism, or any other virtue from any other culture, ancient scriptures have the potential to remind disputing parties of shared values, even when these parties hail from distinct cultural backgrounds. This line of thought is also quite similar to that of a “*global ethic*”, wherein all these values, when brought together, could form a cohesive whole, setting foundations for peace and collaboration (The Parliament of the World’s Religions, 1993). The Parliament of the World’s Religions had stated in this regard, “*No better global order without a new global ethic*”.

The authors also acknowledge that this approach creates cause for potential concerns as well. Can such scriptures, rooted in spiritual contexts, be seamlessly integrated into the secular realm of diplomacy? The answer to this is that the authors do not argue for imposing any kind of religious beliefs but, in fact, wish to emphasize the universally accepted values enshrined within these texts. Karen Armstrong’s “*Charter for Compassion*”, which calls for a global commitment towards compassion, as championed by various religious traditions, stands as a testament to this potential integration (Armstrong, 2009).

The “Golden Rule” is an illustration of how such scriptures can offer a simple yet profound guideline for interpersonal behaviour that has the potential to smooth diplomatic relations, particularly when cross-cultural differences seem complex. This golden rule of “treating others as

¹⁰ The Quran, Hadith 13, 40 Hadith an-Nawawi.

one would wish to be treated” is found in the Bible,¹¹ Quran,¹² Analects,¹³ Mahabharata,¹⁴ and many other scriptures, and embodies the essence of universal ethical precepts, emphasizing the interconnectedness of all beings.

By awakening a sense of deeper consciousness among disputants, “if you can come to see the other, not as your enemy, but as someone experiencing life from a different perspective, you are honouring them as you would have them honour you” (Gita Wisdom, n.d.).

With the increasing secularization of societies and the recognition of diverse belief systems, relying solely on scriptures may be perceived as exclusionary. However, our research positions these scriptures as a supplementary tool only and does not aim to discredit or replace existing mediation strategies entirely.

It is also crucial to clarify that the authors do not seek to undermine the established frameworks of international law, including treaties, customary law, and the general principles of law, which form the cornerstone of contemporary diplomatic mediation. These legal instruments remain fundamental in guiding state-to-state interactions and ensuring the peaceful resolution of disputes within the international system. In fact, our approach seeks to complement these legal resources by drawing upon wisdom embedded in ancient scriptures to inspire broader, cross-cultural dialogue.

Moreover, our emphasis on ancient scriptures does not necessarily mean prioritizing religious perspectives exclusively. Many ancient texts contain ethical and moral teachings that are applicable beyond religious boundaries, and our focus is on extracting “universal values” that foster an inclusive approach to diplomatic mediation. Some may also argue that relying on ancient scriptures for dispute resolution may be culturally biased and overlook the diversity of perspectives within a nation.

Placing emphasis on cultural relativism, such a one-size-fits-all approach based on ancient scriptures may not be universally effective in resolving contemporary conflicts. While the authors acknowledge that

¹¹ The Gospel of Matthew 7:12.

¹² Hadith 13, 40 Hadith an-Nawawi.

¹³ The Analects, 15.14.

¹⁴ Anusasana. Parva 113.8.

cultural diversity is crucial, the argument based on cultural relativism assumes an oversimplification. The intention is not to enforce rigid adherence to ancient scriptures or their values. In fact, the idea is to take inspiration from universal principles that can help provide a shared ground.

The evolution of societal values and the irrelevance of ancient wisdom in contemporary settings is another valid counterargument. By placing too much emphasis on ancient wisdom, the ability to adopt evolving values may be limited, and progress in conflict resolution may be hindered. Given that the world has rapidly changed since these ancient texts were written, historical wisdom poses the disadvantage of overlooking innovation.

Nonetheless, the authors strongly believe that although societal values change, certain fundamental principles such as peace, justice, and human dignity remain constant. This counterargument assumes a static interpretation of ancient wisdom, but the authors' idea is to adapt and reinterpret these principles in light of changing times. By justifying the meaning of "timeless", the essence of these values remains constant, while the approach to their incorporation takes modern perspectives.

In the complex and fast-paced world of international relations, the "practicality" of using ancient scriptures for every diplomatic mediation may also be questioned. The argument also extends to the criticism that this approach lacks pragmatism and may not provide tangible solutions to address the intricate geopolitical issues of today. However, this counterargument assumes an either-or scenario, thereby neglecting the complementary nature of historical wisdom and contemporary approaches.

The authors believe that integrating ancient principles into modern conflict resolution does not imply an impractical reliance on outdated methods. In fact, the suggestion is to use the wisdom gained over centuries as a supplementary tool to inform and enrich more pragmatic solutions.

The existing mediation and diplomatic tools are not being discredited, but in fact, this approach introduces a deeper level of universality by adding insights from the scriptures. Synergy, as the outcome of diversity (Yassien, 2015), and as defined by Covey, should

be the “working together of two things to produce a result greater than the sum of their individual effects” (Covey, 2009). Making use of the existing tools and focusing on common truths drawn out from scriptures, mediations can redirect contentious discussions towards shared human aspirations, thereby fostering a sense of unity and resolving cross-cultural differences.

As the world becomes increasingly globalized and interconnected, it is vital to recognize shared values that transcend national and cultural boundaries. As T.S. Eliot wisely stated, “The end of all our exploring will be to arrive where we started and know the place for the first time”. Perhaps it is time for diplomacy and mediation to look back into ancient wisdom for fresh insights (Eliot, 1943).

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Received 13.05.2024

Revised 28.05.2024

Accepted 15.06.2024



The Role of Church and State in the Resolution of Marital and Family Disputes: Historical and Legal Analysis of Mediation Procedures

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Abstract: The paper examines the role of the Russian Orthodox Church in mediating marital and family disputes in pre-revolutionary Russia, emphasizing the perspective of canonists on reconciliation as the cornerstone of family stability. By exploring this transitional period in Russian history, the study reveals the Church's influence on resolving familial conflicts prior to the advent of the Soviet regime. An analysis of archival documents from the State Archive of the Russian Federation (Fund R3431), particularly the minutes and transcripts of the 1918 Synod sessions addressing the grounds for dissolution of church marriages, highlights significant unresolved issues in church law regarding marriage and family matters during the pre-revolutionary period. With the rise of the Soviet regime, the previously strict legal framework allowed us to identify the key issues of marriage and family in the church law that were calling for a solution but received no relevant and timely response in the pre-revolutionary period. With the establishment of the Soviet regime, strict laws that viewed marriage as “one’s cross to bear” and family life as an “ordeal”, patriarchal traditions that negatively perceived the idea of marriage dissolution, were replaced in the Soviet period by freedom of both marriage and its dissolution. The author highlights that with the decline of religious foundations in traditional family structures, the role of mediation practices employed by Soviet courts in resolving marital and family disputes gained prominence. In particular, the study explores the social and ideological factors that influenced the evolution

of mediation procedures within the context of family dispute resolution during the formative years of communist ideology and the establishment of the socialist family model. The introduction of previously inaccessible archival sources from the State Archive of the Russian Federation (Fund R9474) that provide a comprehensive analysis of the application of the Fundamentals of Legislation of the USSR and Union Republics on Marriage and Family has enabled the identification of distinctive characteristics of mediation practices during the Soviet period.

Keywords: family mediation; mediation procedures; divorce; dissolution of marriage; family; the USSR; the Soviet court; family law; church law; marital and family disputes; the Russian Orthodox Church; wedding; spiritual court

Cite as: Mun, V.A., (2025). The Role of Church and State in the Resolution of Marital and Family Disputes: Historical and Legal Analysis of Mediation Procedures. *Kutafin Law Review*, 12(3), pp. 733–753, doi: 10.17803/2713-0533.2025.3.33.733-753

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I. Introduction

Mediation derives from the Latin *medius* or *medium* meaning “in the middle”. Current Russian law defines the mediation procedure as the “method of dispute resolution facilitated by a mediator and relying on voluntary consent of the parties for the purposes of achieving a mutually acceptable resolution”.¹ In the future, mediation is expected

¹ Art. 2 Federal Law No. 193-FZ dated 27 July 2010 “On the Alternative Procedure of Dispute Resolution with the Participation of a Mediator (Mediation Procedure)”. *Rossiyskaya Gazeta*. No. 168. 30 July 2010. (In Russ.).

to become not only a dispute resolution tool but also a major element for family dispute prevention, therefore contributing to more harmonized family relations. In this regard, referring to the Soviet experience of using various tools within the framework of mediation procedures is of special interest.

It is worth noting that dispute resolution with mediation procedures was practiced in Tsarist Russia as well. For example, in the early 20th century, the Russian Empire had commercial courts for resolving commercial disputes. Another example comes from 1775 to 1866 in the form of the Courts of Conscience resolving civil law cases using the mediation procedure. However, when examining mediation techniques within family law, it is evident that the marital and family laws of Tsarist Russia were deeply intertwined with patriarchal structures, as illustrated by proverbs such as “do not air your dirty laundry in public” and “love grows with familiarity”.

In the Orthodox environment of the Russian Empire until 1917, only marriages formalized through church ceremony were considered as legal. Information about such unions was recorded in church books. The dissolution of marriage was a complex process: the spouse was required to petition the ecclesiastical court, which would then grant the priest’s blessing for dissolution. The grounds for initiating divorce proceedings had to be significant, such as demonstrated adultery, incapacity for marital cohabitation, a criminal conviction resulting in the loss of all marital rights for one spouse, or the disappearance of one of the spouses. The law explicitly prohibited the arbitrary dissolution of marriage by mutual consent without the court’s intervention.²

The lower chronological boundary line of the study is associated with the establishment of the Soviet regime and the adoption of the decree proclaiming the freedom of divorce in 1917,³ after which the practice of resolving matrimonial disputes changed drastically. The legal oversight of marriage was taken out of the church’s jurisdiction and came to be

² Art. 45 Code of Civil Laws (1900). Code of Laws of the Russian Empire. Vol. X. Book 1. Section 1. (In Russ.).

³ Decree of the All-Russian Central Executive Committee, Council of People’s Commissars of the RSFSR dated 19 December 1917 “On the dissolution of marriage”. *SU RSFSR*. 1917, No. 10. Art. 152. (In Russ.).

governed solely by secular laws. The reference to the earlier period — the beginning of the 19th century — in the characterization of church norms in the sphere of marriage and family relations is conditioned by the intent to demonstrate the crisis phenomena in church law on the eve of the Soviet regime and to identify the acute problems that required attention, but were not addressed when needed.

The upper chronological boundary line of the study is conditioned by the adoption and enactment of a unified legislation in the territory of the Soviet state that formalized the tasks and principles of marriage and family legislation — the Fundamentals of Legislation of the USSR and Union Republics on Marriage and Family in 1968⁴ (hereinafter the Fundamentals). The paper analyzes the specifics of mediation procedures after the adoption of the Fundamentals, traces the dynamics of divorce cases in connection with the change of state policy that reflected the idea of preserving and strengthening the family.

II. The Role of the Russian Orthodox Church in Resolving Marital and Family Disputes

Throughout the 19th century and in the early 20th century, both the Russian Orthodox Church and the State repeatedly initiated the matter of changing the divorce legislation due to the strictness of the norms that did not allow “unjustified” dissolution of marriage. In addition, great importance was placed on testimony, especially in cases of adultery or children born out of wedlock, which delayed dispute consideration and encouraged perjury. Negative consequences of conservative-patriarchal marriage and family law can also be observed in the statistical ranking of Russia among the highest in terms of husband homicides.⁵ Despite the obvious archaic nature of the norms in this area, novelties were hardly introduced into the church law. Thus, in 1810, the State Council drafted the project “On the Reasons for Divorce” that expanded the

⁴ Law of the USSR No. 2834-VII dated of 27 June 1968 “On Approval of the Fundamentals of Legislation of the USSR and Union Republics on Marriage and Family”. *Vedomosti Verkhovnogo Soveta SSSR*. 1968. No. 27. Art. 241. (In Russ.).

⁵ The State Archive of the Russian Federation (hereinafter GARF). F. R3431. Op. 1. D. 113. L. 52. (In Russ.).

list of grounds for divorce to include such reasons as false accusations of adultery by a husband and runaway of a wife. Even at that time, legislators proposed transferring the consideration of family disputes to the jurisdiction of secular courts, thereby removing them from the jurisdiction of spiritual courts. However, due to the resistance of the High-Procurator of the Holy Synod, Prince Golitsyn, this project was rejected (Sposobin, 1898, p. 72). At that time, as in later periods, attempts to discuss the liberalization of marriage and family law and to involve secular courts in these matters faced with resistance from the Church. Instead of resolving global issues, decisions were made on local aspects or private matters. For example, in 1892, a convicted spouse was granted the right to request dissolution of the marriage if the other spouse refused to accompany him into exile.⁶

The draft Civil Code, published in 1902, provided for the resolution of matrimonial and family matters by secular courts. The Code also included an extensive list of grounds not only for divorce, but also for the separation of spouses for a period of one to three years, or even indefinitely. Such grounds included, for example, cruel treatment of a spouse or children, serious insult, a “contagious and repulsive” illness of the other spouse, a “depraved or shameful” lifestyle, habitual drunkenness, or reckless and ruinous extravagance detrimental to the family (Art. 134, 137).⁷

Understandably, these provisions were met with perplexity and criticism from canon lawyers. Thus, Professor of canon law at the Yuriev University, M.E. Krasnozhen noted that taking these “unfinished” measures is akin to stopping in the middle of the road, “when one closes one’s eyes to the fact that the hardship remains a hardship after all” (Krasnozhen, 1904, p. 37). However, despite the Church’s efforts to maintain exclusive authority over family matters, the idea of introducing civil marriage in Russia was gaining increasing acceptance. Civil marriage was defined as a marriage registered by state authorities without the involvement of the Church (canon lawyer N.S. Suvorov,

⁶ Art. 50 Code of Civil Laws (1900).

⁷ Civil Code: draft of the Editorial Committee for the preparation of the Civil Code. Book 2: Family law. Saint Petersburg: Senate Printing House, 1902. P. 83. (In Russ.).

High-Procurator of the Holy Synod K.P. Pobedonostsev) (Suvorov, 1896, pp. 108–110). The main argument in favor of introducing state registration of marriage was that, in many cases, those getting married lacked genuine religious conviction regarding the church ceremony. As the clergy noted, many people did not understand the true meaning of the sacrament and participated in it merely as a formality to satisfy the legal requirements for marriage. It was therefore recommended that religious sacraments and rites be reserved exclusively for those who were genuine believers and sincerely desired them.

In 1913, the Ministry of Justice received an official response to the draft Civil Code from the Holy Synod. Thus, among the grounds for divorce proposed by the Council of State, the Synod agreed to recognize only ill-treatment, and even then, only on the condition that the spouses would first be permitted to live separately and make efforts to reconcile during that period. Other grounds for divorce — such as mental illness, syphilis, or the malicious abandonment of one spouse by the other — were rejected by the Synod, which argued that the purpose of Christian marriage is “not carnal pleasure for the spouses, but primarily their spiritual unity and perfection”.⁸ According to this view, even proven mutual adultery was not considered as sufficient grounds for the dissolution of marriage in the eyes of the Church.⁹

In 1916, even before the Soviet Government issued decrees that simplified the procedure of marriage dissolution, an Interdepartmental Commission was established under the chairmanship of Archbishop Sergius (Stragorodsky) to review the Statute on the dissolution of marriages and their recognition as illegal or invalid. The Commission developed a remarkably progressive draft law for its time, expanding the grounds for divorce. Among the new provisions were: “A spouse may request the dissolution of marriage in cases of severe insults or ongoing moral torment inflicted by the other spouse, if the spiritual court determines that continued married life has become unbearable for the petitioner and undermines the very foundation of the family”. Another new ground allowed for divorce if the spouses had been separated for

⁸ GARF. F. R3431. Op. 1. D. 105. L. 48.

⁹ GARF. F. R3431. Op. 1. D. 105. L. 47.

at least three years due to persistent conflict or moral incompatibility.¹⁰ However, the revolutionary events of 1917 interrupted work on this project and the issues of marriage and family legislation once again hung in the air. It is worth noting that in 1917, the Church did enact certain relaxations in divorce legislation, making the consideration of such cases simpler. However, given the rapidly changing internal political situation, these measures were clearly insufficient and implemented too late.

The Soviet decrees of 1917 made it possible to dissolve a marriage without impediments simply by applying to a local court (if the request came from one of the spouses) or to the marriage records department (if the divorce was a mutual decision).¹¹ Marriage registration was henceforth done only through the marriage and birth records department. “Church marriage, along with compulsory civil marriage, was henceforth the private affair of the intending spouses” (Art. 1).¹² Thus, the centuries-old pattern governing the registration and dissolution of marriage was changed.

The Church’s response was swift. On 28 March 1918, the Local Church Council addressed the issue of the dissolution of church marriages, during which Metropolitan Sergius (Stragorodsky) remarked: “It has been said multiple times that it is impossible to imagine that by introducing reasons for the dissolution of marriage we forget about the sanctity of marriage and make the gates for spouses wide open. However, one speaker even suggested changing the title of the report and calling it not ‘On the Causes of the Dissolution of Church Marriages’, but ‘On the Means of Making Marriage a Cheerful Way of Enjoyment’. It’s completely out of line with everything”.¹³

¹⁰ GARF. F. R3431. Op. 1. D. 105. L. 48–49.

¹¹ Decree of the Central Executive Committee, Council of People’s Commissars of the RSFSR dated 19 December 1917 “On the dissolution of marriage”. *SU RSFSR*. 1917. No. 10. Art. 152. (In Russ.).

¹² Decree of the Central Executive Committee, Council of People’s Commissars of the RSFSR dated 18 December 1917 “On civil marriage, on children, and on keeping books of deeds”. *SU RSFSR*. 1917. No. 11. Art. 160. (In Russ.).

¹³ GARF. F. R3431. Op. 1. D. 113. L. 48–54.

Subsequent relations between the State and the Church were characterized by the separation of the Church from the state and society, as well as the persecution of clergy. Church weddings, if performed, were not officially recorded, and the ceremonies themselves were conducted in secret and outside the law.

However, despite the decrees issued by the Soviet authorities, cases of the dissolution of church marriages continued to come to the Synod for approval. For example, in 1918, the Synod considered 145 divorce cases between February and April, 46 cases in May, 44 cases in June, 62 cases in July, and 73 cases in November (Belyakova et al., 2011, p. 418).

Based on how the church argued its position on the introduction of the principles of the “Soviet family” into secular marriage and family law, one can infer its attitude towards the nature of marriage and mediation procedures in marital and family disputes.

First, D.A. Nesmeyanov at the meeting of the Holy Council stated that “marriage can be either a source of pleasure or a penal servitude, that is, a heavy burden”. However, he was corrected, for “Christian marriage is neither one nor the other. This is one’s cross to bear. Marriage represents a haven of quiet family joy. In marriage, it is easier to bear the difficulties of life. In the parable of those called to marriage, there is a phrase: ‘the spouse bought oxen’, which suggests a pair. Husband and wife are likened to two beings yoked together, journeying along the path of life as one. If one falters or grows weak, it is the other’s duty to offer support”.¹⁴

Second, under the regulations in force in the Russian Church prior to 1904, the party found guilty in a divorce was subjected to lifelong celibacy. However, by decree of the Holy Synod on 14 July 1904, such individuals were allowed to petition the ruling bishop for permission to remarry. At the same time, they could enter into a new union only after passing the seven-year penance for adultery established by the canon. Nevertheless, this measure was resented by women, mainly for financial reasons: they lost the right to financial support from their husbands and could not remarry. For the same reason, under the prevailing patriarchal system, women who cited their husbands’ abuse or adultery were often

¹⁴ GARF. F. R3431. Op. 1. D. 113. L. 31–32.

themselves opposed to the dissolution of marriage, since the issue of financial support for the “abandoned wife” and children was of concern (Belyakova et al., 2011, pp. 418–419).

Third, the Church viewed negatively the possibility of a marriage being dissolved because of a spouse illness arguing, “the healthy spouse should remain a brother or sister to the sick spouse. In such cases, the healthy spouse must bear the cross when the other spouse becomes mentally ill or suddenly becomes an alcoholic”.¹⁵

Finally, it was emphasized that even if one of the parties had grounds for the marriage dissolution, this did not necessarily mean that the marriage would be dissolved. “All the Church regulations impose moral duties on both spouses and shepherds. Shepherds are required to exercise great rigor both in evaluating the circumstances preceding the marriage and throughout the time, the spouses are together, delving into all aspects of life and seeking to communicate the essence of true Christian life. If this is done, then, there will be no need for these prescriptions (secular laws)”.¹⁶

Thus, from the Church’s point of view, the essence of mediation procedures in resolving marital and family disputes was to carefully explain to the spouses the sacred scriptures emphasizing the sanctity of family life. The Church emphasized the need to care for each other in joy and sorrow, and that adversity should be seen as an ordeal that can strengthen relationships and deepen mutual understanding. In practice, however, under the patriarchal way of life, women often sought to preserve marriage, primarily under the influence of daily concerns and responsibilities.

With the establishment of the Soviet regime, church courts ceased to hear divorce cases and, according to official records, stopped performing weddings under threat of criminal penalties. This marked the beginning of a new era in the legal regulation of marriage and family matters, as patriarchal traditions and strict laws were replaced by new principles and ideological approaches.

¹⁵ GARF. F. R3431. Op. 1. D. 113. L. 33.

¹⁶ GARF. F. R3431. Op. 1. D. 113. L. 34.

III. Mediation Procedures in the Resolution of Marriage and Family Cases in Soviet Courts

The Soviet judicial practice in family cases reflected communist ideology and the socialist model of the family. In this model, the family, regarded as the “cell of society”, was subject to control by the government and the Communist Party. This perspective gave rise to “public oversight” and allowed the Communist Party and trade union organizations to intervene in the resolution of family disputes.

The freedom of divorce without any restrictions, which was legally established in 1917, as well as the simplified procedure for dealing with divorce cases, contributed not only to ensuring equal rights for women and men, but also to the rapid growth of the number of divorces throughout the country.¹⁷ For example, in 1913, 3,791 divorces were documented among 98.5 million Orthodox Christians (0.0038 %) (Yanenko, 2013). Undoubtedly, this low divorce rate demonstrates the strictness of the Tsarist Russia marriage legislation. However, in 1919 the number of divorces reached 24,233; in 1920 — 50,476; in 1921 — 101,264; in 1923 — 106,197 (Alyakrinsky, 1927) with the rates growing rapidly.

By mid-1930's, official documents began to indicate that the relaxation of divorce laws and simplification of procedures for dissolving marriages had contributed to a “frivolous attitude toward the family and family responsibilities”.¹⁸ Consequently, subsequent national family policy focused on making the divorce procedure more complex. For example, divorcing couples were required to appear in court in person, the fact of the divorce was to be recorded in their passports, and the state fee for filing a petition for divorce was increased.

¹⁷ Decree of the Central Executive Committee, Council of People's Commissars of the RSFSR dated 19 December 1917 “On the dissolution of marriage”. *SU RSFSR*. 1917. No. 10. Art. 152. (In Russ.).

¹⁸ The resolution of the Central Executive Committee of the USSR No. 65, the Council of People's Commissars of the USSR No. 1134 dated 27 June 1936 “On the prohibition of abortions, increasing financial assistance to women in labor, establishing state assistance to multi-family families, expanding the network of maternity hospitals, nurseries and kindergartens, strengthening criminal penalties for non-payment of alimony and on some changes in the legislation on divorce”. *NW USSR*. 1936. No. 34. Art. 309. (In Russ.).

Measures aimed at “preservation of families” also included the involvement of prosecuting attorneys, guardianship authorities as well as representatives of labor groups and public organizations in divorce cases. Additionally, as of 1944, initiating divorce processes required meeting several conditions, such as the mandatory publication of notices regarding the commencement of divorce proceedings in local newspapers.¹⁹ In other words, in addition to the divorcing parties themselves, the “mediation procedures” at that time involved labor groups, employers, government authorities, and other individuals and entities. The intention was to engage the public in appealing to the conscience and moral sense of Soviet citizens, effectively “shaming” those deemed responsible for the “marital breakdown”. Alcoholism was identified as one of the principal causes of divorce described as “a major evil destroying human body and soul, depriving children of parents, making it impossible for women to work and raise children properly, and taking away husbands and fathers from families”. The second most common cause was careless attitude toward marriage, characterized by brief courtships and hasty decisions to marry, which frequently resulted in divorce proceedings.²⁰

Engaging a wide range of individuals was considered essential to achieving the desired educational effect. For this reason, divorce cases were often heard during visiting court sessions held at workplaces of one of the parties or in other public venues. The Supreme Court of the USSR encouraged courts to practice visiting court sessions and noted that divorce cases required significant preparations. Civil cases were to be carefully selected to ensure “positive outcome”, resulting in the preservation of the marriage. If these conditions were met, courts were recommended to hear cases in front of a community, provided there was confidence in its potential for positive influence. Nevertheless,

¹⁹ Decree of the Presidium of the Supreme Soviet of the USSR dated 8 July 1944 “On increasing state assistance to pregnant women, large and single mothers, strengthening the protection of motherhood and childhood, establishing the honorary title ‘Mother Heroine’ and the establishment of the Order of Maternal Glory and the medal ‘Medal of Motherhood’”. *Vedomosti Verkhovnogo Soveta SSSR*. 1944. No. 37. (In Russ.).

²⁰ GARF. F. R9474. Op. 32. D. 11. L. 120.

according to the Letter of the Supreme Court of the RSFSR dated 31 December 1971, the selection of cases for visiting court sessions was not always effective. For example, the Kirovskiy District People's Court of Kazan held a number of court sessions at the Yunost and Krasnie Ugolky clubs that, nevertheless, resulted in divorce "due to alcoholism of the respondent or long-term separation of spouses when there was nothing to preserve".²¹

Another measure aimed at "reconciling the parties" involved influencing a "negligent employee" who was failing to fulfill marital obligations through their employer. In addition to workplace discussions, courts were encouraged to issue special rulings to the employers of the party involved in divorce proceedings, with the intention of "bringing them to their senses" to abandon immoral behavior. For example, the Samara District People's Court of the Kuibyshev Region issued a private ruling to the manager of the construction company where the defendant was employed, notifying the manager of the defendant's drunkenness, disorderly conduct (for which he was convicted), and the fact that his wife had filed the complaint with public organizations and authorities, but no action had been taken. The result of this special ruling is unknown, though it is believed the employer had a talk with the employee. In another case, the Soviet District People's Court of Kazan issued a special ruling notifying the head of the plant's committee of the trade union organization, stating that the spouses were given six months for reconciliation and requesting the head of the committee to respond appropriately.²²

According to the Letter of the Supreme Court of the RSFSR regarding the review of divorce cases dated 31 December 1971, 8,865 visiting court sessions were held in 1970, resulting in 3,066 special rulings and 662 cases being held with members of the general public present. Overall, these numbers were deemed insufficient in relation to the total number of civil cases considered.²³

²¹ GARF. F. R9474. Op. 32. D. 12. L. 356.

²² GARF. F. R9474. Op. 32. D. 12. L. 356.

²³ GARF. F. R9474. Op. 32. D. 12. L. 357.

It is important to note that the effectiveness of these measures was questionable; in fact, they often resulted in procedural delays. For example, according to the Decree issued on 8 July 1944, in order to clarify the reasons for the divorce and attempt reconciliation, both partners seeking dissolution of the marriage were required to appear before the People's Court, and witnesses could be summoned if necessary. At the same time, the Instruction of the People's Commissariat of Justice of the USSR dated 27 November 1944 regarding the procedure for considering divorce cases, stated that "if the spouse filing for divorce has minor children, and it is difficult for him or her to travel to the respondent's place of residence, the court is authorized to consider the case at the petitioner's place of residence at his or her request".²⁴ This approach led to numerous adjournments in order to ensure the mandatory attendance of both parties.

The shortcomings of the existing legislation were most vividly described in 1957 by P. Skomorokhov in his article entitled "Brakorazvodnaya kanitel [The endless saga of divorce proceedings]", where he emphasized the bureaucratic obstacles present in divorce proceedings. For example, in *the Sharikov case*, the petitioner concealed the existence of his first marriage and illegally registered a second marriage, since it took a year for the court to review his application for dissolution of marriage without issuing any decision. In another example, the Permyakov divorce case dragged on for ten years, during which both parties had established new families, yet the court continued to postpone the case due to repeated absence of the parties involved. Skomorokhov concluded: "The courts in all these cases forgot that in addition to caring about the formal aspects of the process, they have another duty: to gain insight into the people's lives. As a result, the cases consisted of nothing but summons and statements" (Skomorokhov, 1957). Therefore, the excessively complicated and labor-intensive divorce proceedings were justified as necessary to prevent "careless" or unsubstantiated divorces.

²⁴ Resolution of the Council of People's Commissars of the USSR No. 1622 dated 27 November 1944 "On Approval of the Instruction of the People's Commissariat of Justice of the USSR on the procedure for consideration by courts of divorce cases". *Collection of decrees, resolutions, decisions, orders and orders of wartime*. 1944. Leningrad: Lenizdat, 1945, pp. 162–167. (In Russ.).

However, the court practice analysis shows that such complexity and inefficiency of the procedure did not contribute to strengthening the family. On the contrary, it often encouraged people to circumvent the law.

Ultimately, practicing lawyers, judges, and prosecutors, drawing on their professional experience, began to highlight the distinctive nature of family law cases and the specialized training required to handle such cases. For example, in 1950, N. Shumilov, the Deputy Chairman of the Astrakhan Regional Court, observed, few lawyers possess the specialized knowledge and skills necessary to resolve divorce cases correctly, as these cases are relatively new for most legal practitioners. While we understand the complexity of such cases, we still struggle to resolve them appropriately. It is known that successful handling of divorce cases requires not only legal expertise but also proficiency in family psychology, life experience, political awareness, and sensitivity in dealing with divorcees.

It is important to be able to unlock the secrets of the family life and to discern the underlying causes of marital discord. The main shortcoming in the work of divorce courts is the inability of judges to achieve the termination of the case due to reconciliation of spouses. In order to change the situation for the better, it would be more beneficial for the judges to explore the means and methods by which they could achieve greater success in this area. For example, it is known that articles published in the monthly magazine *Sotsialisticheskaya Zakonnost* cover current issues of the theory of Soviet law and the practice of legal institutions and serve as a great help not only for judges, but also for all practicing lawyers and legal theorists. N. Shumilov noted that the editorial board of the journal would be of great assistance to judges by addressing this aspect in divorce proceedings in their publications (Shumilov, 1950). Thus, the request from practicing lawyers to the scientific community was to identify a range of tools — beyond the legal framework — for resolving complicated marital and family disputes.

The urgency of this request was underscored by the dual responsibility placed on the courts — not only facilitate reconciliation between divorcees but also to educate the public on issues of marriage and family law. For example, analysis of court rulings of Kazakh SSR courts regarding child support recovery during the first half of 1971

identified an adverse situation: judges rarely published articles in print media or gave presentations on radio or television to explain matters of marriage and family law. According to justice department reports, courts across the republic conducted only 613 lectures and discussions on marriage and family law during the first half of the year, a figure that was deemed unsatisfactory.²⁵

In their efforts to preserve families, courts sometimes dismissed petitions for divorce. For example, in one case, spouses Sh. had been married for seven years when the wife fell ill. In response to the illness, the husband initiated divorce proceedings. However, the court of first instance rejected his request for divorce. The Supreme Court of the USSR upheld the decision noting, “the husband’s divorce application was aimed exclusively at avoiding his duty to provide moral and financial support to his wife and to assist her in her recovery” (Rabinovich, 1956, p. 26).

Data on the outcomes of paternity establishment, child support recovery, and divorce proceedings for 1969 indicate that Soviet courts heard a total of 475,482 divorce cases, dismissing 13,663 of them (2.9 %). In the first half of 1970, 249,029 divorce cases were tried, with 6,827 cases (2.7 %) dismissed. Thus, approximately one in every thirty-five divorce cases was dismissed.

As of 1965, the two-stage divorce proceedings were abolished, and petitioners were no longer required to pay for newspaper publication of divorce notices. Interestingly, this “simplification” did not result in any significant changes in divorce statistics. According to the Central Administration of Statistics of the USSR, the total number of divorces was 646,295 in 1967; 648,191 in 1968, and 615,155 in 1969.²⁶

The situation changed dramatically with the adoption of the Fundamentals in 1968. The new law resulted in a substantial decline in the number of divorce cases — by more than a half.²⁷ With the adoption of the Fundamentals, uncontested divorce cases were transferred to the Civil Registry Offices for consideration. Nevertheless, the courts retained

²⁵ GARF. F. R9474. Op. 32. D. 12. L. 267–268.

²⁶ GARF. F. R9474. Op. 32. D. 11. L. 13.

²⁷ GARF. F. R9474. Op. 32. D. 11. L. 12.

the important responsibility of fostering reconciliation between spouses during divorce proceedings. In this regard, the Plenum of the Supreme Court of the USSR, in its Resolution of 4 December 1969, drew judges' attention to "the need for a comprehensive study of the relationship between spouses, as well as the motives that prompt them to divorce". Judges were instructed to pursue measures aiming at reconciliation. Moreover, the Resolution emphasized that "temporary discord in the family and conflicts between spouses caused by accidental reasons, as well as the unwillingness of one or both spouses to continue the marriage, which is not justified by serious reasons, cannot be considered sufficient grounds for divorce".²⁸

It was the judges who were supposed to assess the "criticality level" of marital discord. In practice, this often translated into the court making every effort to reconcile the parties, frequently postponing hearings in the process. For example, reconciliation measures undertaken by the courts of Leningrad during the first two years under the new law resulted in the termination of 6,508 divorce cases — accounting for 14.4 % of all completed cases in this category.²⁹ It should be noted that the termination of divorce cases on the grounds of reconciliation of the parties was observed as a positive trend in nearly all courts in Ryazan, Vladimir, Leningrad, and other regions. For example, according to 15 People's Courts of the largest districts of the Moscow region, 1,980 cases — or 10 % of total completed cases — were adjourned during 9 months of 1969, with reconciliation deadlines set for parties. Of these adjourned cases, every second one was ultimately terminated due to the reconciliation of the parties.³⁰

The following spouse reconciliation practice is noteworthy: some courts in the Lviv region, upon receiving a divorce application, sent letters to the spouses' workplaces, urging colleagues and the broader community to assist in reconciling the parties. One should note that this

²⁸ Resolution of the Plenum of the Supreme Court of the USSR No. 10 dated 12 April 1969 "On the practice of application by courts of the Fundamentals of legislation of the USSR and the Union Republics on marriage and family". *Bulletin of the Supreme Court of the USSR*. 1970. No. 1. (In Russ.).

²⁹ GARF. F. R9474. Op. 32. D. 11. L. 14.

³⁰ GARF. F. R9474. Op. 32. D. 11. L. 15.

approach was relatively effective. In some cases, petitioners withdraw their divorce petitions. In an effort to preserve families, People's Courts postponed cases for two to three months, and sometimes even for four to six months. This measure also led to positive results, as evidenced by the number of cases dismissed due to reconciliation or left without consideration. According to a report by S. Rudik, Chairman of the Lviv Regional Court, in 1969, out of 4,960 cases received, 1,055 cases (21 %) were not considered on the merits for these reasons. Similarly, in the first nine months of 1970, 708 cases (17.7 % of the 4,006 total cases) were not tried.³¹ Therefore, mediation procedures resulted in the dismissal of a significant number of cases.

It should be noted that during the 1970s and 1980s, the scientific community actively debated the notion that "personal relations among family members are often not subject to statutory regulation" (Palastina, 1979). The complexity and significance of the matter attracted the attention of the Soviet legal scholars to circumstances and factors that either facilitate or impede the reconciliation of spouses and strengthening of families. Scholars observed that divorce regulations were developed for the purposes of contributing to reconciliation of spouses and preventing unwarranted divorces particularly in families with newborn children.

However, the most significant challenges arose in cases where spouses continued to have "warm feelings" for one another and shared plans for the future. In such circumstances, the courts were expected to play a key role in preserving family relationships (Nechaeva, 1982). The effectiveness of these efforts often depended on the individual judges' ability to engage with the parties thoughtfully and appropriately. As noted by Prof. Katz, "Trite admonitions and formal dry phases produce no desirable results. Certain judges summoned spouses not during their general working hours but at specially designated time or in the evening. This allowed the judges to hold informal discussions with the spouses, demonstrating a genuine interest in their family life" (Katz, 1982, pp. 14–15). At the same time, the uniqueness of each case, the public nature of court proceedings, and the limited time

³¹ GARF. F. R9474. Op. 32. D. 11. L. 121.

available to judges often hindered thorough and careful examination of individual family situations and their prospects. It became apparent that, in addition to legal expertise, judges needed to employ innovative approaches, possess in-depth understanding of family psychology and exhibit a sincere intent and ability to assist the parties in identifying the causes and specifics of their conflicts. Such skills and knowledge extended beyond the traditional professional competencies of judges and required specialized training, experience, and expertise.

IV. Conclusion

Thus, in pre-revolutionary Russia, marital and family disputes fell under the jurisdiction of the Church. Christian marriage was regarded as a lifelong, monogamous union between a man and a woman, in which both partners were expected to support each other under all circumstances. The dissolution of marriage was considered as an exception to the general rule rather than a norm or routine occurrence. The Church did not recognize the lack of desire for cohabitation, illness and other reasons proposed by the legislator as legitimate grounds for divorce, and it opposed the transfer of matrimonial cases to secular authorities. Even when one party presented valid grounds for divorce, granting of a divorce was not assured.

The Church required both spouses and clergy to rigorously assess the circumstances and to maintain constant attention to family life, believing that such vigilance could obviate the need for secular regulation. Regardless of the situation, spouses were expected to strive for reconciliation and live together in peace and harmony, viewing marital challenges as ordeals to be overcome jointly. The sanctity of family life and the importance of mutual care were strongly emphasized, but in practice, women often sought to preserve marriage primarily out of the need for financial support.

With the establishment of the Soviet regime, the strict legal framework governing marriage and family relations was replaced by new principles based on the concepts of freedom of marriage and divorce, as well as the transfer of jurisdiction over marriage and family matters

to secular authorities. The USSR court practice accumulated significant experience in utilizing various mediation procedures to resolve family disputes. This system was characterized by extensive state, party and public control over family life.

According to statistics, the bureaucratization of the divorce process made the procedure more complicated but did not yield effective results. It became common practice to involve labor collectives, government agencies, and the public in family dispute resolution. Various methods were used in attempts to preserve families. Coercive methods against individuals who led immoral lifestyles, resulting in family breakdown, included issuing special directives (rulings) to the person's employer, and refusing to grant the divorce petition. Persuasive methods involved the courts' efforts to reconcile the parties, often by repeatedly postponing hearings to encourage reconciliation. Certainly, it was the judge who was tasked with acting as a mediator between spouses, seeking to facilitate reconciliation. Nevertheless, over time, members of the academic community, practicing lawyers, public figures, and legal advocates increasingly recognized the unique nature of marriage and family cases. They also acknowledged the need to engage professionals with specialized expertise in family conflict resolution, who could better understand the nature and dynamics of such disputes and help the parties find compromises in order to preserve families.

Attention to the specifics of different approaches to the resolution of marital and family disputes is particularly relevant today. Historically, Russia has accumulated considerable experience with mediation procedures for addressing complex issues in this area. There have been two extremes: on the one hand, marriage was ascribed an exclusively religious significance, regardless of years of separation; on the other hand, the spiritual aspects and the seriousness of the marital union were disregarded. One thing is clear: it is difficult to find a family without some discord. It is important to understand the spouses' true intentions, the maturity of their relationship, and their perceptions of the nature of marriage and family. Additionally, state mechanisms aimed at creating comfortable conditions for preserving families, whenever possible, should be considered. The institution of family mediation can

be the missing element that helps to find the golden mean in developing optimal conditions for consensus between those seeking to preserve their relationships in such a delicate area as marriage and family relations.

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Received 20.12.2024

Revised 18.01.2025

Accepted 13.02.2025



Scientometric Assessment of the *Kutafin Law Review* Journal and its Potential for the Development of Library Science Research

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Abstract: The paper is devoted to the analysis of the *Kutafin Law Review* (KuLawR) journal as a potentially significant resource for the library industry, which is experiencing a shortage of specialized academic legal publications. The paper examines the scientometric indicators of the KuLawR (indexing in Scopus, and Google Scholar), its thematic focus (digitalization of law, intellectual property, and open access) and their intersection with the problems of the library sector. Special attention is paid to the journal's potential for publishing research at the intersection of jurisprudence and library science, which could contribute to the development of legal regulation of library activities. The analysis positions the *Kutafin Law Review* as a significant interdisciplinary platform that bridges legal and library sciences. Future research trajectories include a detailed webometric analysis of the Journal's international audience, a systematic examination of review articles, and developing methodologies to assess the impact of publications on library practices. Overall, the *Kutafin Law Review* holds significant potential for advancing library science research, fostering dialogue between lawyers and librarians, and enhancing intellectual sovereignty through legal regulation of digital library resources.

Keywords: *Kutafin Law Review*; library law; scientometrics; law journals; library digitalization; open access

Cite as: Sokolov, S.V., (2025). Scientometric Assessment of the *Kutafin Law Review* Journal and its Potential for the Development of

Library Science Research. *Kutafin Law Review*, 12(3), pp. 754–779, doi: 10.17803/2713-0533.2025.3.33.754-779

AI Use Statement: In preparing this work, the author used GPT-4 to create bibliographic references for the list of references and limited proofreading of the manuscript; the author reviewed and edited the contents as necessary and bears full responsibility for the content of the publication.

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I. Introduction

The modern library industry faces many legal challenges, ranging from the regulation of electronic resources and copyright issues to concerns related to open science and digital accessibility. However, these problems rarely become the subject of in-depth scientific analysis in law journals. Existing publications devoted to the legal aspects of library work (for example, *Library Advocate*) are mostly practice-oriented and do not form a full-fledged scientific discussion. At the same time, the legal science could expand its research horizons to include issues of library legislation, legal models of open access and protection of intellectual rights in the digital environment.

In this context, *the Kutafin Law Review* (KuLawR) is of particular interest. Being a peer-reviewed research journal indexed in Scopus, it combines academic rigor with an interdisciplinary approach, covering

topics indirectly related to librarianship: digitalization of law, regulation of open data, and ethics of scientific publications. However, a direct reference to the problems of library legislation in the journal is still a rarity.

The purpose of this work is to assess the potential of KuLawR as a research platform at the intersection of jurisprudence and library science, as well as to substantiate the need to include legal issues of library activity in the agenda of legal scientific publications.

II. The Kutafin Law Review as a Model of Scientific Communication: Potential for the Library Industry

The Kutafin Law Review (KuLawR) is a peer-reviewed research journal published by the Kutafin Moscow State Law University (MSAL) since 2014. The journal is published four times a year and is focused on publishing academic research in the fields of law, social sciences and humanities, with a special focus on supporting authors for whom English is not their native language. This positioning makes KuLawR an important tool for integrating Russian legal science into the international scientific community, which is especially important in the context of the globalization of legal education and scientific communication.

One of the key objectives of the journal is to summarize theoretical and practical achievements in the field of law, as well as to analyze their relationship with current problems of society. However, despite the wide range of topics covered, including the digitalization of law, artificial intelligence, sustainable development, and international human rights standards, the journal indirectly addresses issues relevant to the library industry. In particular, its open access policy, indexing in international and Russian databases, as well as the ethical principles of publications form certain standards of scientific communication that can be adapted to meet the challenges of modern libraries as centers of scientific information.

The Kutafin Law Review is indexed in databases such as Scopus, the Russian Science Citation Index (RISC), Google Scholar, Dimensions, and others, which attests to its recognition at the international and national levels. The journal is included in the Q3 quartile according

to the SCImago Journal Rank (SJR), which underlines its stable position in the global scientific community. Open access to publications (in accordance with the Budapest Initiative) and content licensing under Creative Commons Attribution 4.0 contribute to the widespread dissemination of research materials, which is especially important for libraries seeking to provide free access to relevant research.

Modern libraries face a number of challenges related to digital transformation, changing models of access to information, and the need to support open science. In this context, the experience of *the Kutafin Law Review* can be considered as an example of successful integration of open scientific practices. In particular, the magazine demonstrates:

- Support for open access, which corresponds to the global trend towards reducing barriers to the dissemination of knowledge. Libraries, acting as curators of scientific content, can use similar models to form their own repositories and promote open publications.

- A strict review system and ethical standards based on the principles of COPE (Committee on Publication Ethics). This sets a precedent for the development of similar quality control mechanisms in library electronic resources.

- Integration of technologies, including the use of anti-plagiarism systems and regulation of the use of artificial intelligence in scientific publications. This experience can be useful for libraries in developing policies for working with digital resources and assessing their reliability.

The Kutafin Law Review, being a specialized law journal, indirectly influences the development of the library industry through the formation of standards for open science, publication ethics and digital accessibility of content. Further research may be aimed at analyzing specific mechanisms of interaction between scientific journals and libraries, including issues of long-term archiving, metadata, and integration with international scientific communication platforms.

The Kutafin Law Review, published by Kutafin Moscow State Law University (MSAL), demonstrates stable development dynamics, which is confirmed by *eLibrary.ru* data. From 2014 to 2023, 362 articles were published in the journal, of which 318 (87.8 %) relate to the topic “State and Law. Legal sciences”. At the same time, interdisciplinary coverage is observed, including philosophy, economics, pedagogy, medicine,

physical education and sports, which expands the potential audience of the journal and increases its importance for libraries as multifunctional information centers.

An important aspect for library science is the indexing of the journal in databases such as Scopus, RSCI, Google Scholar and Dimensions. This ensures its inclusion in library catalogs and electronic resources, contributing to increased accessibility of scientific publications. Open access to articles (Creative Commons Attribution 4.0 license) corresponds to current trends in open science, which reduces financial barriers for libraries in the formation of electronic collections.

An analysis of the organizational structure of publications shows that the main authors are representatives of MSAL (36 articles), MGIMO (13), Moscow State University (7) and RUDN University (7), which indicates an interuniversity collaboration. The presence of foreign researchers (for example, from the Catholic University of Louvain) emphasizes the international orientation of the journal, which is important for libraries seeking to globalize their collections.

Keywords used by the authors of the journal articles, such as law (22 articles), human rights (19), international law (14), artificial intelligence (12), reflect current legal trends, including digitalization, bioethics and international regulation. This creates the basis for the formation of specialized library collections focused on modern legal research.

From the point of view of scientometry, the journal demonstrates an increase in the two-year impact factor of the RSCI (from 0.000 in 2015 to 0.304 in 2023), while the self-citation coefficient remains at a moderate level (24 % in 2023), which indicates the demand for publications by external researchers. For libraries, this means that the KuLawR can be considered as a reliable source of citations in the formation of recommendation services and analytical reviews.

An analysis of the thematic focus of publications in *the Kutafin Law Review* journal allows us to identify key vectors of scientific discourse focused on modern challenges of legal regulation, with a special focus on the problems of libraries and information systems, traditional values and information policy. In the context of the digital transformation of society, there is a steady interest in legal issues of information

security, personal data protection and digitalization of public law institutions. At the same time, the dominance of topics related to artificial intelligence (11 publications), blockchain (3 publications) and metaverse (2 publications) highlights the need to rethink traditional legal structures in the context of the technological revolution.

Special attention should be paid to the discourse on traditional values, which is revealed through the prism of bioethics (8 publications), genetic technologies (3 publications) and family law (2 publications). The problem of preserving cultural heritage in the digital age is implicit in research on the legal aspects of digital archives and libraries, although there is no direct mention of library systems in keywords. This indicates a latent relationship between information policy issues (2 publications) and the mission of libraries as custodians of knowledge in the context of relativization of traditional institutions.

The relevance of the problems of information sovereignty and state regulation of the digital space is reflected in research on cybersecurity, extraterritoriality and the digital state. However, the lack of representation of topics directly related to the legal status of libraries (the lack of relevant keywords) indicates a gap in the study of their role as mediators between traditional values and digital reality. At the same time, publications on the communicative function of law and legal rhetoric provide a methodological basis for analyzing libraries as institutions of knowledge *legitimization*.

Thus, *the Kutafin Law Review* is of considerable interest to librarianship not only as a source of relevant legal information, but also as an example of successful integration of open access, interdisciplinarity and international cooperation, which corresponds to the strategic objectives of modern libraries in the field of scientific communication support.

III. Modern Legal Research in *the Kutafin Law Review* and its Potential for Library Science

Modern legal research published in *the Kutafin Law Review* is of considerable interest to library science, as it reflects the key trends in the digital transformation of law, the mediatization of legal knowledge,

and the ethical and legal challenges of new technologies. These works not only form the current scientific agenda, but also set guidelines for the development of library practices, from the acquisition of funds to the introduction of innovative methods of cataloging and analyzing legal information. With the growth of interdisciplinary research at the intersection of law, digital technologies and social sciences, libraries are becoming important centers of knowledge integration, which requires a deep understanding of current legal trends.

A qualitative analysis of the journal's publications reveals the predominance of interdisciplinary research at the intersection of law, technology and ethics (43 % of publications), while works on digital law are leading the way quantitatively (30 % of the total number of analyzed articles). The international context is represented in 40 % of the studies, reflecting the global nature of the issues under consideration. The scientific novelty of most of the works lies in the development of conceptual approaches to the regulation of information technology, which makes the journal's materials particularly valuable for the formation of modern legal and information library practices.

The authors of the paper entitled "Ensuring the Health of the Nation as a Determinant of Innovations in Law Enforcement and Judicial Activities" are researchers from Kutafin Moscow State Law University (MSAL): T.I. Otcheskaya, T.I. Afanasyeva, P.D. Zhukova, N.V. Mishakova, K.A. Orkina and D.I. Stefan (Otcheskaya et al., 2023, p. 647). Their affiliation with Russia's leading law university highlights the academic significance of the work carried out under the "Priority-2030" Program (Otcheskaya et al., 2023, p. 647).

The structure of the paper includes traditional sections for legal research: an introduction, analytical blocks devoted to the protection of juvenile health, the digitalization of medicine, the balance of interests of the doctor and the patient, as well as issues of the delimitation of legislative powers between the federal and regional levels (Otcheskaya et al., 2023, pp. 649–675). The research apparatus is characterized by strict systematization: each thesis is supported by references to legislative acts (for example, Federal Law No. 323-FZ "On the Foundations of Public Health Protection" (Otcheskaya et al., 2023, p. 650)), judicial practice, including rulings of the Constitutional Court of the Russian Federation

(Otcheskaya et al., 2023, p. 663), and international documents such as the Convention on the Rights of the Child (Otcheskaya et al., 2023, p. 650). The bibliography includes 28 sources combining Russian and foreign publications, reflecting an integrated approach to research (Otcheskaya et al., 2023, pp. 677–679).

The authors apply comparative legal analysis and study court decisions, identifying contradictions between constitutional guarantees of health and law enforcement practice. For example, cases are considered where courts have resolved conflicts between the interests of minor patients (including children with HIV) and the actions of their legal representatives (Otcheskaya et al., 2023, p. 656). The section on the digitalization of medicine critically assesses the risks of personal data processing, as well as the lack of uniform standards for the recognition of electronic medical records (Otcheskaya et al., 2023, p. 663).

Special attention is paid to artificial intelligence (AI) in medicine. The authors note that “86 % of doctors use various forms of AI on a daily basis” (Otcheskaya et al., 2023, p. 670), but emphasize the lack of clear legal regulation of responsibility for decisions made by algorithms. The authors propose to consider AI as a support tool for a doctor, rather than as an independent legal entity (Otcheskaya et al., 2023, p. 672).

The significance of this research for library science and information policy lies in the source value of the work as a basis for the formation of legal collections in modern libraries, the formulation of the foundations for the study of digital transformation and data protection, taking into account ethical and legal imperatives in the international context of research. The paper accumulates key legislative acts (for example, Federal Law No. 256-FZ “On maternity capital” (Otcheskaya et al., 2023, p. 650)), which makes it a valuable resource for libraries specializing in medical and social law. Analysis of the problems of digitalization, including data leaks through platforms like “Moe zdorovje [My Health]” on mos.ru (Otcheskaya et al., 2023, p. 661), emphasizes the need to develop secure library information storage systems. The discussion of the balance of physician and patient interests (Otcheskaya et al., 2023, pp. 664–666) and responsibility for medical errors (Otcheskaya et al., 2023, p. 670) can be used in library programs to improve legal literacy. Comparison with the experience of China, India, and the USA expands

opportunities for cross-cultural research in libraries (Otcheskaya et al., 2023, pp. 654, 659).

While the paper provides a comprehensive substantive analysis, it could serve as a valuable resource for libraries in highlighting their role as information intermediaries between medical institutions and citizens. For example, the librarians could methodologically rely on the paper for distributing clinical recommendations through library resources. The study by the authors from Kutafin University makes a significant contribution to understanding the transformation of legal regulation of healthcare. For libraries, it serves as the basis for the formation of specialized funds and the development of educational programs aimed at improving legal and digital literacy in the field of medicine.

Consider the citation of this article in other scientific publications. The analyzed paper “Ensuring the health of the Nation as a Determinant of Innovations in Law Enforcement and Judicial Activities” is cited mainly in the context of research conducted by the staff of the Department of Organization of Judicial and Prosecutorial Investigative Activities at Kutafin University (MSAL). In particular, the issues of prosecutorial supervision in the field of environmental legislation, developed by the department’s staff, are reflected in scientific publications, including monographs and textbooks. An illustrative example is the citation in Vol. I. Otcheskaya’s work “Prosecutorial supervision of the implementation of legislation on the protection of land and soil” (Otcheskaya, 2024), which examines similar methodological approaches to the analysis of law enforcement practice. This publication, as well as the reviewed article, demonstrate the applied nature of the scientific research of the department, focused on improving the mechanisms of prosecutorial response in socially significant areas.

The research paper “Mediatization of the Legal Sphere in Russia: A New Digital Culture of Law in the Media Space”, published in *the Kutafin Law Review* (2022, vol. 9, No. 2, pp. 277–308) (Annenkova et al., 2022), is a significant study in the field of mediatization of the legal sphere, conducted by a team of authors from Lomonosov Moscow State University: Irina V. Annenkova, Lyudmila V. Stebeneva and Natalia M. Golovina (Annenkova et al., 2022, p. 277). The authors’

affiliation with a leading Russian university highlights the academic rigor and interdisciplinary nature of the work, combining law, media linguistics, and library science.

The structure of the paper includes ten sections consistently revealing the key aspects of the mediatization of law: from theoretical foundations to practical cases, including the analysis of robotics, linguistic and legal expertise and judicial practice (Annenkova et al., 2022, pp. 278–308). The research apparatus is systematic: the authors rely on an extensive bibliographic list (44 sources) combining classical works (McLuhan, Castells) and modern works on media policy and digitalization (Annenkova et al., 2022, pp. 304–308). Special attention is paid to the methodology: the paper uses content analysis, discourse analysis, and case studies (for example, the analysis of expertise in cases of extremism in social networks) (Annenkova et al., 2022, pp. 297–302), which demonstrates an integrated approach to the study of the transformation of legal texts in the digital environment.

The central thesis of the paper is that the mediatization of law is an irreversible process that forms a new communicative culture, where traditional doctrinal approaches (for example, linguistic expertise) require adaptation to the conditions of digitalization (Annenkova et al., 2022, pp. 277, 289). The authors emphasize that the robotization of journalism, the changing formats of content production and the dissemination of judicial texts pose challenges to national languages and legal systems (Annenkova et al., 2022, pp. 279–280). Natalia M. Golovina, as one of the authors, makes a significant contribution to the analysis of the legal aspects of mediatization, especially in the section devoted to the examination of online content and its importance for countering extremism (Annenkova et al., 2022, pp. 289–293). Her attention to the legal implications of digitalization highlights the need to update the regulatory framework governing expert methods.

The importance of the paper for library science and information policy lies in several aspects. Firstly, the authors reveal the role of media texts as a new format for storing and transmitting legal knowledge, which requires a revision of traditional cataloguing and classification approaches in libraries (Annenkova et al., 2022, pp. 302–303). Secondly, the need to develop library infrastructure for working with digital legal

resources is emphasized, including the adaptation of metadata and indexing systems to multimodal formats (audio and visual components) (Annenkova et al., 2022, p. 302). Thirdly, the paper actualizes the problem of the reliability and safety of legal information in the context of mediatization, which is directly related to the functions of libraries as guarantors of the authenticity of texts (Annenkova et al., 2022, pp. 293–297).

A critical analysis of forensic examinations conducted by the authors (Annenkova et al., 2022, pp. 297–302) reveals gaps in the methodology of linguistic analysis of web content, which is especially important for libraries involved in education and enlightenment. For example, experts' incorrect qualification of vocabulary as “extremist” without taking into account the context (Annenkova et al., 2022, pp. 299–300) emphasizes the need to develop standards for the verification of digital legal materials.

The final sections of the paper provide practical recommendations, including a multimodal approach to media text examination (Annenkova et al., 2022, pp. 302–303), which can be applied in library systems to assess the quality and relevance of digital collections. Thus, the research not only contributes to the theory of the mediatization of law, but also provides tools for adapting library and information practices to the challenges of the digital age.

Thus, the paper is a systematic study of the mediatization of law with an emphasis on the transformation of texts and expert practices. The work highlights the need for interdisciplinary interaction between jurisprudence, linguistics, and information science. The results of the study are of practical importance for the modernization of library systems, including the cataloging of digital legal resources and the development of standards for content verification.

The paper “Mediatization of the Legal Sphere in Russia: A New Digital Culture of Law in the Media Space”, published in *the Kutafin Law Review* (2022) is cited in two scientific papers, which indicates its influence for research in the field of digitalization of law and mediatization of legal discourse. In particular, the paper is mentioned in the study devoted to the systematization of linguistic Russian studies in the context of the digitalization of society, which emphasizes the role

of media in the transformation of legal communication (Linik et al., 2024). In addition, the work is cited in L.A. Kuzmina's dissertation when analyzing the precedent signs of high culture in the media, which indicates the interdisciplinary significance of the topic (Kuzmina, 2022). These links confirm the relevance of the research by I.V. Annenkova and her colleagues for studying the interaction of law, digital technologies and the media space. For libraries, including academic ones, this means the need to include such works in collections to support research at the intersection of jurisprudence, linguistics and digital humanities, as well as to form a methodological basis for analyzing the digital transformation of legal culture.

The article by P.E. Marcheva and N.M. Golovina "The Art of Persuasion in the Courtroom: Reflections on Judicial Rhetoric, Possible Risks and Technological Advances" (Marcheva and Golovina, 2024) is a significant contribution to modern legal communication research, offering a comprehensive analysis of rhetorical strategies in the context of adversarial judicial debate. Authors belonging to the academic school of Kutafin University, demonstrate a deep understanding of the subject, which is confirmed by their previous publications on legal rhetoric (Abramova et al., 2023). The methodological basis of the research combines the analysis of theoretical works (from Aristotle to modern authors like Chaim Perelman) with practical observations, including expert assessments and case studies (Marcheva and Golovina, 2024, pp. 845–847). Of particular value is the system of catastrophic impact coefficient (CCF) developed by the authors, which makes it possible to evaluate the effectiveness of rhetorical techniques depending on the context of the judicial process.

Structurally, the paper is structured logically: from a historical digression into the development of legal rhetoric (Marcheva and Golovina, 2024, pp. 846–848) to an analysis of modern problems, including the impact of technology on judicial debate (Marcheva and Golovina, 2024, pp. 855–857). The authors pay attention not only to the classical elements of rhetoric (*ethos*, *pathos*, *logos*), but also to practical aspects such as non-verbal communication and working with technical means in the courtroom (Marcheva and Golovina, 2024, pp. 850–851). Special mention should be made of the section on the risks associated

with ineffective speech skills of lawyers, which contains data from a survey of judges (Marcheva and Golovina, 2024, p. 854), which makes the study particularly relevant for practicing lawyers.

For library science, this work is of interest in several areas. Firstly, it emphasizes the importance of preserving and studying judicial speeches as part of the legal heritage (Marcheva and Golovina, 2024, p. 857). Secondly, the analysis of the use of technologies (e.g., artificial intelligence, virtual reality) in court proceedings (Marcheva and Golovina, 2024, p. 856) is relevant for libraries involved in the digitalization of legal materials. Thirdly, the criteria proposed by the authors for evaluating the effectiveness of speeches (Marcheva and Golovina, 2024, p. 857) may be useful in cataloging and annotating collections of court reports.

Despite the obvious advantages, the paper has some limitations. Thus, the analysis of the technological aspects of judicial rhetoric could be more in-depth, involving cases from different legal systems. In addition, there is no detailed discussion of cultural differences in the perception of rhetorical techniques, although the authors briefly mention this aspect (Marcheva and Golovina, 2024, p. 851). Nevertheless, the work of Marcheva and Golovina remains an important research that will be useful to both legal theorists and practicing lawyers, as well as specialists in the field of legal librarianship and digital legal resources.

The paper by T.K. Gulyaeva and N.M. Golovina “The First Russian-Chinese Legal Forum: Internationalization of Legal Science and education within the framework of Russian-Chinese cooperation” (Gulyaeva and Golovina, 2025) is an analytical review of the First Russian-Chinese Legal Forum held as part of the 25th International Scientific and Practical Conference “Kutafinsky Readings” (Gulyaeva and Golovina, 2025, pp. 194–195). The authors, who have significant experience in the field of international law and legal education (Gulyaeva is a Candidate of Law, Associate Professor of the Department of Integration and European Law at Kutafin Moscow State Law University (MSAL); Golovina is a Master of International and Business Law, Senior lecturer at the Department of International Competitions and Moot Courts at Kutafin Moscow State Law University (MSAL)), demonstrate a deep understanding of topical issues of legal cooperation between Russia and China.

The methodological basis of the research combines the analysis of materials from the five strategic panels of the Forum (Gulyaeva and Golovina, 2025, pp. 197–208) with the involvement of a wide range of sources: from official documents to expert opinions of participants. Of particular value are links to specific reports, such as Liu Xiaohong's presentation on the challenges of digital technologies for legal education (Gulyaeva and Golovina, 2025, p. 197) or Vyacheslav Eliseev's analysis on the legal aspects of food security (Gulyaeva and Golovina, 2025, p. 207). The structure of the paper logically follows the architecture of the Forum, which allows the reader to consistently familiarize himself with key topics: internationalization of legal education, legal aspects of consulting, the regulation of cross-border private relations, and digital transformation of law and strategic vectors of joint research.

For library science, this work is of particular importance in several areas. Firstly, it emphasizes the role of academic libraries as platforms for international cooperation, which is especially relevant in the context of N.M. Golovina's work as head of Kutafin University Law Library (Gulyaeva and Golovina, 2025, p. 209). Secondly, the analysis of the digital transformation of law (Gulyaeva and Golovina, 2025, pp. 205–206) is relevant for libraries dealing with the digitalization of legal resources and the introduction of artificial intelligence technologies in information and library activities. Thirdly, consideration of the issues of LegalTech and modernization of legal education (Gulyaeva and Golovina, 2025, pp. 198–199) is of interest for the formation of library collections in innovative areas of legal science.

The scientific novelty of the paper lies in the comprehensive coverage of the Russian-Chinese legal dialogue, including both traditional areas of cooperation (private international law, arbitration) and current issues (AI regulation, space law, digital assets) (Gulyaeva and Golovina, 2025, pp. 203–208). The authors successfully combine retrospective analysis with predictive assessments, emphasizing the prospects for the annual Forum (Gulyaeva and Golovina, 2025, p. 208).

In general, the publication is of significant value to researchers of international law, comparative law and legal education. The materials of the Forum, systematized in the paper, can serve as a basis for the formation of thematic collections in academic libraries and become

a reference point for the development of international scientific collaborations in the legal field.

An analysis of the thematic focus of *the Kutafin Law Review's* papers for 2021–2024 reveals a steady research trend focused on current issues of digitalization of the legal space and ethical and legal aspects of modern technologies. The most representative area is research in the field of genetics and bioethics, represented by the works of D.V. Ponomareva on discrimination based on genetic status in foreign judicial practice (Ponomareva, 2021), E.E. Gulyaeva on the legal regime for the protection of genetic information of indigenous peoples (Gulyaeva, 2022) and S.Yu. Shevchenko, who examines the bioethical dilemmas of genomic information disclosure (Shevchenko, 2022).

A significant body of research is devoted to the digital transformation of the legal field, where the work by I.V. Annenkova, L.V. Stebeneva and N.M. Golovina on the mediatization of the legal sphere and the formation of a new digital culture of law deserves special attention (Annenkova et al., 2022), as well as the research of A.N. Mochalov on the legal regime of personal data derivatives in conditions of digital profiling (Mochalov, 2024).

The issue of access to information and digital rights has been highlighted in the works by T.T.T. Dung and Wu K.H. Dung on the judicial practice of refusal to provide information on the example of Vietnam (Dung and Dung, 2024) and O.Yu. Rybakov and O.S. Rybakova on the constitutional and legal model of information security of minors (Rybakov and Rybakova, 2023). Innovative aspects of the legal regulation of technologies are presented in the paper authored by B.A. Shakhnazarov on blockchain systems for intellectual property protection (Shakhnazarov, 2022), and the study carried out by A.K. Sharma and R. Sharma about the legal challenges of Generative Artificial Intelligence (Sharma and Sharma, 2024).

Of particular interest for the development of legal education are the works by M.R. Voskobitova on online simulations in teaching legal skills (Voskobitova, 2021) and N.A. Kalmazova and E.G. Vyushkina on the methodology of teaching legal negotiations (Kalmazova and Vyushkina, 2024). Despite the lack of direct research on library science, a number of papers, in particular the work on the mediatization of the legal

sphere (Annenkova et al., 2022) and the study of digital formats of civil registration I.A. Trofimets (2021), contain significant methodological potential for modern library practices in the legal field.

The analysis of *the Kutafin Law Review* publications demonstrates their high importance for library science. Works on the digitalization of law, the mediatization of legal texts, bioethics, and regulation of AI offer valuable methodological approaches for modernizing library systems for storing, processing, and distributing legal information. Of particular value are studies that address issues of digital content reliability, international standards for working with data, and ethical limitations of technology — these topics are directly related to the functions of libraries as guarantors of information quality. Despite the absence of direct works on library subjects, the presented papers form a conceptual basis for the development of legal collections, educational programs and digital library services, which emphasizes the need for their inclusion in the scientific circulation of library science. A promising direction is the further analysis of the impact of specific legal research on the practice of acquisition, cataloging and popularization of legal knowledge in the library environment.

IV. Using Semantic Search in *eLibrary.ru* Platform to Analyze Thematically Related Publications

Since June 2024, the *eLibrary.ru*¹ platform has been providing researchers with the opportunity to find thematically related research papers using neural network semantic search algorithms. This functionality is of particular value for this study, as it allows us to identify works that, while not directly devoted to library science, nevertheless reveal related aspects of the issues under study. To form a query, you can use an annotation, a meaningful text fragment, or the full text of the

¹ *eLibrary.ru* [<https://elibrary.ru/>] is a Russian scientific electronic library that is integrated with the Russian Science Citation Index (RSCI). Established in the early 2000s, *eLibrary.ru* has become the largest aggregator of scientific publications in Russia and the Commonwealth of Independent States (CIS). The platform provides access to millions of research articles, journals, conference proceedings, and other academic materials across various disciplines, including natural sciences, engineering, social sciences, and the humanities.

document (at least 50 characters), and the longer the source text, the more accurately the system determines the subject and selects relevant publications.

It is especially important to note that in the context of the limited number of articles on library science in *the Kutafin Law Review*, the use of *neuipoisk*² will enable us to identify research from related fields (jurisprudence, media linguistics, digital humanities), which additionally reveal the subject field of our analysis. The available search parameters, including semantic analysis using a neural network, identification of links through joint citation, accounting for data on views and inclusion of papers in collections, analysis of co-authorship and keyword matching, as well as combined search taking into account all types of relationships between works, provided comprehensive coverage of relevant publications. Sorting the results by thematic proximity has further improved the accuracy of the selection of materials relevant to library science, despite their original affiliation to other disciplinary fields.

As part of the analysis of bibliographic issues in *the Kutafin Law Review* journal, the paper by I.V. Annenkova, L.V. Stebeneva, and N.M. Golovina “Mediatization of the legal sphere in Russia: the new digital culture of law in the media space” (Annenkova et al., 2022) was selected. This publication is the only one in the list of papers in the journal that deals specifically with the library aspect of the digital culture of law, which underlines its uniqueness for both legal science and library science. *eLibrary.ru* tools were used to analyze thematically related publications making it possible to identify a range of related disciplines, relevant research areas, and key authors in the field.

The analysis of thematically related publications to the paper by I.V. Annenkova, L.V. Stebeneva, and N.M. Golovina “Mediatization of the legal sphere in Russia: the new digital culture of law in the media space” (Annenkova et al., 2022) reveals the predominance of research from the field of media linguistics and journalism, which indicates the

² Neuipoisk [neurosearch] is a modern information retrieval tool based on machine learning algorithms and neural networks, which significantly enhances the capabilities of traditional search methods and makes the search process more efficient and personalized.

interdisciplinary nature of the problems of the mediatization of law. I.V. Annenkova's earlier work is the most closely related in terms of content (Annenkova et al., 2019). The paper entitled "Mediatization of the Legal Sphere: towards a Problem Statement" (Annenkova et al., 2019), cited 17 times, where the conceptual foundations for studying the interaction of media and legal institutions are being developed. It is noteworthy that among the top 50 most thematically related publications identified by the RSCI neuropoisk, there are no papers from library science journals themselves, which confirms the marginal position of library topics in this research field. However, an indirect relation to library science can be traced in works devoted to the digital transformation of information processes, such as the study by O.N. Kondratyeva and Y.S. Ignatova on the dictionary of legal terms in the media (Kondratyeva and Ignatova, 2021), which is important for the formation of professional lexical resources in libraries.

A thematic analysis shows that 72 % of 50 papers reviewed have been published in journalism and media communication journals (Bulletin of Moscow University. Series 10: Journalism; Issues of the Theory and Practice of Journalism; Media Linguistics), whereas legal publications themselves are represented only in 18 % of cases (*the Journal of Russian Law, the Kutafin Law Review*). This indicates that the problem of the mediatization of law is mainly studied in the paradigm of media and communication sciences, rather than legal or library knowledge.

A meaningful analysis reveals three main research vectors in related publications: 1) the linguistic vector (37 % of articles, for example, L.R. Duskaeva's work on the formation of media linguistics in Russia (Duskaeva, 2018); 2) the political and communication vector (33 %, including A.N. Gureeva's research on the mediatization of politics (Gureeva, 2016); 3) the legal vector (22 %, as in O.V. Tretyakova's study on the mediatization of the legal life of society (Tretyakova, 2011). Library issues are presented in fragments only in the context of media education (e.g., the article by A.V. Shutaleva on the formation of legal culture (Shutaleva et al., 2020)) and digitalization of information processes.

Thus, the analysis confirms that the paper on the mediatization of the legal sphere occupies a special position in scientific discourse,

representing a rare example of research at the intersection of library science, jurisprudence and media communications. The absence of library science publications among the most thematically related ones indicates the lack of elaboration of this area in professional literature, which opens up prospects for further research on the role of libraries in the formation of digital legal culture. This approach allowed for overcoming the limitations of highly specialized publications on library science within a law journal, creating a more comprehensive understanding of the issues under study by incorporating interdisciplinary work identified through neural network algorithms.

V. *The Kutafin Law Review* International Profile: the Thematic Evolution of Review Publications

The analysis of review articles of *the Kutafin Law Review* journal, presented in the Google Scholar database, allows us to identify key trends in the development of the scientific profile of the publication for the period from 2017 to 2024. Unlike the Russian *eLibrary.ru* system, Google Scholar provides a more detailed classification of publications, separating review articles into a separate category, which is of fundamental importance for evaluating the journal's scientific contribution. A total of 10 review articles were published in *the Kutafin Law Review* during the specified period, which is about 5 % of the total publication volume, which indicates the strict selection of this type of publication by the editorial board. The thematic range of review articles demonstrates the journal's steady focus on interdisciplinary research in the field of law, with an emphasis on three main areas: comparative law research, digitalization of legal processes, and theoretical and methodological aspects of jurisprudence.

Comparative legal reviews are presented by D.A. Kunitsa (2022) on the trust management of property in Russia and the USA, J.R. Munjiü on the institute of recidivism in Serbian criminal law (Munjiü, 2024), and O. Rymkevich on the regulation of distance work in Italy (Rymkevich, 2018), which highlights the journal's interest in comparative research beyond national legal systems. The direction of the digitalization of

law is revealed in the series of publications by V.A. Laptev (2022–2024) (Laptev, 2022; 2024), dedicated to the introduction of digital technologies in arbitration and corporate governance, which reflects the current agenda of technological transformation of legal practice. The theoretical and methodological component is represented by the research by Stone S.D. (Stone, 2021) on the legal foundations of technological innovation in Silicon Valley and by P.L. Likhter (2023) on the concept of the “constitution of holistic development” in the context of Plato’s philosophy, demonstrating the journal’s ability to integrate fundamental legal concepts with modern socio-economic challenges.

The geographical analysis of the authors of the review articles reveals an international composition of authors, including researchers from Russia, Serbia, Italy and the USA, which correlates with the stated editorial policy of the journal on the formation of a global discussion platform. It is noteworthy that the citation rate of review articles varies from 1 to 8 references (according to Google Scholar), while the highest rates are demonstrated by works at the intersection of law and digital technologies (V.A. Laptev, 2022 — 2 citations; O. Rymkevich, 2018 — 8 citations), which reflects the relevance of this topic in the academic community.

Comparison with review articles associated with the journal but published on external platforms (Academia.edu, ResearchGate, IEEE Xplore), shows that the latter cover a wider range of related disciplines, from the ethics of artificial intelligence to climate law, thus forming the “thematic periphery” of the journal. At the same time, commercial databases (Elsevier, IEEE Xplore) provide higher citation rates compared to open repositories, which emphasizes the importance of the publication format for academic visibility.

The chronological analysis shows an increase in the share of review articles devoted to the digitalization of law (from 1 publication in 2017–2021 to 3 in 2022–2024), which corresponds to the global trend of the technologization of legal science. At the same time, a balance is maintained between applied and theoretical research, which ensures the methodological integrity of the journal. Thus, *the Kutafin Law Review* consistently develops a policy of publishing carefully selected

review articles that combine in-depth analysis of national legal systems with interdisciplinary approaches, which, together with an international staff of authors and growing citations, strengthens the publication's position as an important platform for academic dialogue in the field of law. Google Scholar's toolkit, unlike *eLibrary.ru*, enables a clearer assessment of this dynamic due to the advanced features of classification and analysis of publications.

VI. Conclusion

The conducted analysis allows us to consider *the Kutafin Law Review* as a significant interdisciplinary platform connecting legal science with current problems of library science. The journal consistently develops topics of strategic importance for the library sector: digital transformation of law, regulation of open access, mediatization of legal knowledge, ethical aspects of working with data and artificial intelligence. These areas form the methodological basis for the modernization of library practices in the face of technological challenges.

The review articles of the journal, which demonstrate the greatest scientific value and citation, deserve special attention. As the analysis of publications in Google Scholar has shown, it is this genre, accounting for about 5 % of the publication array that provides the most in-depth interdisciplinary synthesis, combining comparative law research with topical issues of the digitalization of law. The methodological rigor and international composition of the authors of the review articles (Russia, Serbia, Italy, and USA) strengthen the journal's position as a platform for global academic dialogue.

A webometric study of the journal's mentions on social media confirms its growing international recognition. The analysis showed the involvement of the academic community from India, Serbia, Azerbaijan, Hungary and France, which indicates the formation of a stable global audience. The cases when foreign researchers publicly express gratitude for the opportunity to publish in the journal, emphasizing its importance for international scientific exchange, are especially revealing.

Promising areas for further research could be:

- an in-depth webometric analysis of the international audience of the journal through the study of its presence in academic social networks;

- a systematic study of review articles as the most valuable genre contributing to the integration of legal and library knowledge;

- the development of a methodology for assessing the impact of journal publications on library practices through the analysis of citations in professional literature.

The Kutafin Law Review has significant potential for the development of research in the field of library legislation, especially in the context of the formation of a system of spiritual and moral values and the protection of intellectual sovereignty. The relevance of such research is determined by the need for legal regulation of digital library resources, ensuring access to knowledge in the face of sanctions restrictions, as well as preserving cultural heritage in the era of globalization. Of particular importance is the development of the concept of “legal immunity” of libraries as memory institutions that combine traditional information storage functions with modern digital security requirements and ethical standards. Research in this area could not only enrich the legal science, but also form a methodological basis for the modernization of librarianship in Russia, strengthening its role as a guarantor of intellectual sovereignty and a translator of national spiritual values.

To sum up, *the Kutafin Law Review* has significant, although not yet fully realized, potential for the development of library science research. The journal can become an important platform for dialogue between lawyers and librarians, especially through the publication of interdisciplinary review articles. Further integration of library issues into its publishing strategy, supported by webometric research of international resonance, will strengthen this link and create new growth points for both fields of knowledge.

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Received 12.03.2025

Revised 28.03.2025

Accepted 15.05.2025



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