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CONTENTS
EMERGING TECHNOLOGIES AND LAW

Alexey V. Minbaleev, Kirill S. Evsikov, Sergey V. Solovkin

**Development of Legal and Normative-Technical Regulation
of Quantum Communications** 781

Yulia Kharitonova, Gergely Ferenc Lendvai

**The Principle of Transparency in AI Regulation: A Comparative
Legal Analysis of the European and Chinese Approaches** 801

ARBITRATION IN PROFESSIONAL SPORTS

Walid Fahmy

**The Impact of the Court of Arbitration for Sport Decisions
on the Structuring of Player Contracts** 829

PUBLIC INTERNATIONAL AND COMPARATIVE LAW

Olga V. Glikman, Yelena Ye. Korolkova

**International Legal Regulation of the Protection
of Energy Facilities during Armed Conflicts** 857

Rustam A. Kasyanov, Ihlas M. Yazberdiev

**Towards the Uniformity and Consistency in Jurisprudence
on the European and Eurasian Patents** 882

Pavel L. Likhter

Concepts of Public Law Dogmatics during European Law Emergence 908

CROSS-BORDER AND DOMESTIC LEGAL CHALLENGES

Vladimir A. Kanashevskiy

**Application and Renunciation of English Contract Law in Russia in Light
of Recent Developments in the Social and Economic Environment** 928

V Jayshree, Mamata Biswal

**Cross-Border Insolvency under the 2016 Insolvency and Bankruptcy
Code: Necessity and Roadmap for Comprehensive Reform** 950

Sergey M. Zubarev, Alexander A. Sitnik, Maxim M. Polyakov

**Administrative-Legal Mechanisms of Anti-Corruption Policy
in the Context of Public-Law Protection of Internal State Sovereignty** 975

Rana Aldulaimi

**The Balance between Objective Justice and Disputed Justice within
the Framework of the Attributive Approach: A Comparative Study** 996

CONSTITUTIONAL LAW REVIEW

Natalia V. Dorodonova

The Right to Family in National Constitutions 1023

EMERGING TECHNOLOGIES AND LAW

Article



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Development of Legal and Normative-Technical Regulation of Quantum Communications

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Abstract: In 2023, the Russian Federation adopted the Concept for the Regulation of the Quantum Communications Industry until 2030. The authors of this article participated in its development. The document emphasizes the necessity of improving both legal and normative-technical regulatory frameworks for activities in this field. The development of an effective legal regulatory system for the quantum communications industry should be preceded by the establishment of a coherent system of technical regulation specific to the quantum sector. From a legal standpoint, key directions for the potential development of the quantum communications industry have been identified. To a large extent, further progress in this area will depend on the determination of a number of technological development trajectories within the sector. The study shows that the system of domestic standards in quantum communications is contradictory and mutually exclusive. Although several standards have been adopted in recent years, their coverage demonstrates the lack of a coordinated standardization plan to meet the priority needs of the industry. The standards for the quantum internet

of things adopted in 2023 have not yet found their end users, and the backbone quantum communication lines created and functioning in our country remain without relevant standards. The analysis of foreign experience shows similar problems in other countries and a lack of unambiguous recommendations from international standardization bodies. This has made it possible to justify the need to adopt a roadmap for the standardization of quantum communications and additional domestic standards for quantum communication trunk lines. The article highlights the importance of the participation of domestic experts in the work of international standardization bodies on developing technical documents in the quantum communications field.

Keywords: quantum technologies; quantum communications; quantum cryptography; post-quantum cryptography; quantum networking; quantum key distribution; quantum law; regulatory framework for the quantum communications sector; standardization of quantum communications

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Contents

I. Introduction	782
II. General Theoretical Issues of Legal Regulation and Normative-Technical Regulation of Quantum Communications	785
III. Legal Regulation of Quantum Communications	788
IV. Normative-Technical Regulation of Quantum Communications	793
V. Conclusion	795
References	798

I. Introduction

In 2023, the Government of the Russian Federation approved the Concept for the Regulation of the Quantum Communications Industry in the Russian Federation until 2030 (Order No. 1856-r dated

11 July 2023; hereinafter referred to as the “Concept”). A roadmap for its implementation has been developed. It includes measures for drafting and coordinating over 50 regulatory projects, including the establishment of state standards.

The authors of this article were involved in the development of the draft Concept and contributed to establishing the theoretical and legal foundation for creating an effective legal framework for the emerging technology. Some of the conceptual approaches were previously published by the authors and are accessible to readers; however, some of these approaches have not yet been presented to the wider public (Minbaleev et al., 2024, pp. 13–52; Polyakova et al. 2022, pp. 106–111). As a result, misunderstandings in legal interpretation and law enforcement have begun to emerge, which may undermine the effectiveness of legal mechanisms aimed at fostering the development of the quantum communications sector. To counter this trend, the authors conduct regular analysis of regulatory practices in Russia and abroad, enabling them to provide recommendations to regulatory bodies for improving current approaches.

This article is devoted to the analysis of approaches to the normative-technical regulation of quantum communications that is currently being implemented at the national level in many countries, as well as at the international level through several international organizations. This work has already begun in Russia as well; to date, several methodological recommendations from the technical committees,¹ as well as several preliminary national standards, have been adopted. It is important to note that national legislation permits the classification of data protection standards as restricted-access information that is not published or made available to the general public. This imposes limitations on research in this field, as well as on the publication of its results. Such technical requirements cannot be taken into account during the publicly available research process, acknowledged as existing requirements, or disclosed. This article fully complies with this restriction, and the analysis is

¹ First of all, the Technical Committee of the Federal Agency for Technical Regulation and Metrology (Rosstandart) 194 “Cyber-physical systems” (TC 194) and Technical Committee of the Federal Agency for Technical Regulation and Metrology (Rosstandart) 26 “Cryptographic Protection of Information” (TC 26).

conducted exclusively on the basis of publicly accessible standards in the field of quantum communications.

Regarding the use of classified standards in the field of quantum communications that are being developed not only in the Russian Federation but also in other countries, it should be noted that the very existence of restricted-access standards serves to mitigate certain risks associated with large-scale attacks on cryptographic data protection systems. However, in the context of an emerging quantum communications market, such standards do not allow consumers to form an informed opinion about the quality of the equipment. In practice, quantum cryptographic devices become a “black box” standardized by an authorized body according to undisclosed criteria for end users. Under these conditions, a fundamental issue arises regarding the assessment of the quality of equipment provided by different manufacturers. If the operational schemes of two types of equipment are not disclosed, yet both are certified for use in the field of data protection, then, from the perspective of rational economic behavior, they are perceived as functionally equivalent. Consequently, consumers are inclined to choose the least expensive option.

This pitfall becomes particularly acute for organizations procuring equipment through competitive tenders, where price becomes the primary criterion in selecting a supplier. As a result, a legal framework is inadvertently created that undermines the manufacturer’s incentive to improve equipment quality. In the long term, this may lead to a decrease in investments in research and development. Therefore, we recommend embedding compensatory mechanisms into the legal framework governing the cryptographic market in general, and the quantum communications market in particular.

To prevent similar issues in the field of technical regulation of quantum communications, we have conducted an analysis of existing domestic and international standards. This analysis has enabled us to identify several key challenges and propose measures for their proactive mitigation.

II. General Theoretical Issues of Legal Regulation and Normative-Technical Regulation of Quantum Communications

In this article, we proceed from the actual social relations currently existing in the field of quantum communications that define several types of the technological usage: for the transmission of various types of information and for the transmission of information used for generating cryptographic keys. Both options have significant commercial potential, but the global market is effectively developing only for goods, works, and services related to the transmission of encryption keys within quantum communications. This necessitates two actions on the part of the State:

- to establish an effective system of legal and technical regulation for quantum communications as a type of data protection technology,
- to ensure, within the legal and technical regulatory framework for quantum communications, the possibility of applying certain rules to govern the transmission of quantum information unrelated to cryptography.

This can be achieved through the creation of a legal regime that establishes general rules for the transmission of quantum information, as well as the rights and obligations of parties in social relations when encryption keys are transmitted via quantum communication channels. It is important to recognize that quantum communication is a unified technology that has simultaneously been subject to legal regulation under both telecommunications law and cryptography law. Consequently, quantum communication equipment qualifies as both telecommunications equipment and cryptographic equipment, thereby requiring compliance with the legal frameworks governing both telecommunications and cryptography. This constitutes a hybrid legal regime.

In Russian law, the legal regime governing quantum communications is constructed as a harmonious combination of rules regulating the rights and obligations of legal subjects in the processes of quantum networking and quantum cryptography. It is important to note that this approach has been agreed upon by the working groups and incorporated into official documents, including the Concept. The purpose of this

classification is to extract the portion of quantum communications that we designate as quantum networking from the realm of non-public legal and technical regulation. This allows for the formation of an open system of legal norms and technical standards for quantum communications equipment without violating the overall legal framework established for cryptography in the Russian Federation.

However, during the implementation of the Concept, an additional issue arose that requires systematization within the framework of legal and technical regulation. The institution of quantum cryptography that received a significant impetus due to preparations for the Q-Day (the “Q-Day” refers to the moment when quantum computers can break today’s public-key cryptography) was mistakenly interpreted in domestic law. This is primarily related to the use of terminology by the professional community that varies across different countries, as well as the absence of a prominent international classification. In response, in 2024, we proposed a classification system for types of cryptography resistant to quantum computing as part of the development of a legal regulatory framework. This classification includes quantum cryptography resistant to quantum computing, classical cryptography resistant to quantum computing, and new cryptographic algorithms resistant to quantum computing.

The classification we have proposed clearly establishes the following fundamental principles that should be incorporated into the Concept for preparation for the Q-Day:

- quantum computing will render a significant number of encryption methods currently in use ineffective;
- cryptographic evolution will occur globally, involving a transition to encryption methods resistant to quantum computing;
- the transition to new encryption algorithms and new types of quantum cryptography carries significant risks associated with misjudgments regarding the capabilities of quantum computers and modern quantum decryption algorithms.

From this, a basic sequence can be derived for government authorities to follow when transitioning to quantum-resistant cryptography:

- identifying encryption methods that are potentially resistant to quantum computing,

- identifying encryption methods that are reliably not resistant to quantum computing,
- transitioning to classical cryptography resistant to quantum computing and quantum cryptography resistant to quantum computing in all cases where it is technically and economically feasible,
- adopting new cryptographic algorithms resistant to quantum computing based on existing research findings, with the mandatory implementation of cryptographic agility technologies.²

An alternative approach to preparing for the Q-Day may lead to increased costs in ensuring information security. In this context, we refer to the expenses companies currently incur when replacing cryptographic algorithms, as well as the additional costs they may incur for subsequent replacements of cryptographic equipment if critical vulnerabilities in new quantum-resistant encryption algorithms are discovered.

In this regard, there are only two conservative strategies:

- transitioning to classical cryptographic methods resistant to quantum computing,
- transitioning to quantum key distribution.

It is important to remember that quantum key distribution is a component of classical cryptography based on symmetric encryption. Currently, within this technology, the cryptographic key is transmitted by a “special courier” on a physical medium. As is evident from this scheme, the transmission of the cryptographic key is currently not vulnerable to decryption by a quantum computer. Therefore, in our view, it is a conceptual error to include, in the official documents of certain public authorities, the transition to quantum key distribution as a method of preparing for the Q-Day.

Quantum key distribution should be regarded as an element of digital transformation. Functions previously performed manually, such as generating and transmitting encryption keys from one point to another, will now occur automatically. As with other cases of digital transformation, this will increase operational speed and eliminate the risk of accidental or intentional human error. It is widely recognized

² By cryptographic agility, we mean the capability of software and hardware to transition to a new encryption algorithm with minimal economic and technological losses, without the need for a complete replacement of software and equipment.

that a significant number of information security breaches within companies result from the behavior of trusted personnel. Thus, the use of frequently and randomly changing quantum keys, transmitted without human involvement, not only relieves personnel of the key delivery task but also significantly enhances the level of information security (Minbaleev and Evsikov, 2023; Reutov and Tayduganov, 2022, pp. 66–67).

Undoubtedly, such digital transformation has different value for companies. Therefore, the primary stakeholders interested in implementing quantum key distribution technologies should be the following actors:

- legal entities managing a significant number of high-risk sources, including mechanisms operated remotely or driven by artificial intelligence technologies (for example, railway companies, airlines, automotive transport companies, etc.),
- legal entities managing substantial volumes of confidential information received from various sources, such as data centers,
- legal entities managing critical infrastructure facilities.

It appears appropriate to define the list of these entities at the regulatory level based on several factors. Quantum communications constitute a costly technology that requires the establishment of infrastructure. The most effective existing model for building quantum communication networks today is a scheme in which backbone quantum communication lines are connected to a metropolitan line arranged in a star topology. For the economically justified allocation of resources during infrastructure development, it is necessary to identify priority users who will be granted access to the backbone quantum communication lines.

III. Legal Regulation of Quantum Communications

The Concept defines nine sector-wide and five sector-specific regulatory directions for the quantum communications industry. The sector-wide directions include the following:

- development and clarification of terms and definitions for the quantum communications industry,

- advancement of legal mechanisms for integrating quantum communications into existing communication networks,
- advancement of legal mechanisms for the use of quantum communications in information security,
- legal liability within the quantum communications industry,
- development of regulatory legal acts pertaining to the quantum communications industry at the international level,
- improvement of the system of technical regulation and conformity assessment in the quantum communications industry,
- provision of support for domestic manufacturers in the quantum communications industry,
- ensuring the development of the quantum communications industry in the face of hostile actions against the Russian Federation, Russian companies, and citizens,
- other regulatory directions within the quantum communications industry.

The sector-specific directions identified by the Concept include the following:

- legislation of the Russian Federation on state (municipal) administration,
- legislation of the Russian Federation on transport security,
- legislation of the Russian Federation in the field of industrial safety,
- legislation of the Russian Federation on space activities,
- other sector-specific directions for improving the application of quantum communications technologies.

The implementation of these directions involves the development and adoption of more than 50 regulatory legal acts. Below, we review the main ones currently under development.

When providing access to quantum communications for a wide range of users, a regulatory issue arises concerning the relationship between the service provider and the consumer. To regulate these relations, it is permissible either to conclude a contract or to establish service provision rules issued by a governmental authority. It appears that the choice between these approaches should be based on an assessment of infrastructure investments. If services are provided via

a quantum communication network established using funds from a commercial company, the State should not interfere in its commercial activities by imposing binding rules on legal entities. However, when infrastructure development is fully or partially financed by budgetary funds, it is advisable to define state rules for the provision of quantum communication services. The same approach should apply if private networks are connected to state backbone quantum communication lines. In this context, the authors of this article have developed a draft of the Rules for the Provision of Quantum Communication Services, which is proposed for adoption at the level of Russian Railways, the operator of the most extensive quantum communication network. It is deemed appropriate that after testing and connecting urban quantum communication networks to the company's network, these rules should be adopted at the level of the Russian Government. Currently, several service provision rules exist in the telecommunications sector. By 2030, the adoption of the Rules for the Provision of Quantum Communication Services is planned.

Measures to support quantum communications equipment manufacturers should be taken. The authors have prepared a draft amendment to the existing product classifiers by type of economic activity (OK (All-Russian Classifier) 034-2014, KPES (Classification of European Union Products) 2008), in force at the federal level since 1 January 2024, pursuant to Rosstandart Order No. 1477-st dated 27 November 2023.

This amendment has enabled changes to current procurement legislation that is based on this classifier. The next step involves amending procurement legislation applicable to public authorities to limit the purchase of these types of products from foreign manufacturers. To this end, a draft amendment to regulatory legal acts has been developed to establish a mechanism for assessing equipment based on whether it is produced within the territory of the Russian Federation or not. It is considered that domestic quantum communications equipment should contain domestically sourced components. This approach, in addition to ensuring technological sovereignty, is expected to secure a market for domestic equipment, thereby serving as a form of support for domestic manufacturers.

In the Russian Federation, several special economic zones and technology parks conducting research in the field of quantum communications have been established. For example, by Decree of the Government of the Russian Federation No. 2133 dated 30 November 2021, the Innovative Scientific and Technological Center “Quantum Valley” was created. Many participants in the quantum communications sector have registered in these zones, enabling them to receive tax incentives and other forms of government support.

Measures to support research in the field of quantum communications have to be taken. In this area, the List of Directives No. Pr-1734 dated 3 September 2023, approved by the President of the Russian Federation, was adopted. It stipulates that the Government of the Russian Federation must ensure the approval of a national project for the development of the data economy until 2030 that includes, among other things, measures for data security using quantum encryption technology. To this end, the Government is required to provide tools for comprehensive support for quantum communications development that will, *inter alia*, ensure the uninterrupted operation of research teams and laboratories in the field. Additionally, according to the List of Directives, the Government of the Russian Federation should consider the following issues:

- simplifying the procedure for accessing state support funds for scientific research conducted under the guidance of leading scientists in Russian higher education institutions, research organizations, and state scientific centers of the Russian Federation, as well as improving control over the expenditure of these funds;

- creating conditions for attracting domestic and foreign scientists and qualified specialists in quantum technologies, including the development of quantum sensors, quantum computing, and communications (hereinafter referred to as “quantum technologies”), to the Russian Federation, including easing visa procedures, obtaining residence permits and Russian citizenship, streamlining the processing of documents necessary for migration registration and employment authorization, and developing mechanisms for individual material support and social and household arrangements for such persons and their family members;

- establishing a university focused on quantum technologies to implement educational programs on advanced developments in this area, including programs engaging schoolchildren in the educational process;

- expanding cooperation in quantum technologies with countries in the BRICS intergovernmental association (Brazil, Russia, India, China, South Africa), including joint funding of projects in this field;

- increasing opportunities for exchanging up-to-date scientific information on future technologies, including quantum technologies, by creating international scientific journals and organizing conferences;

- instituting awards for outstanding scientific discoveries and achievements in future technologies, including quantum technologies, as well as scholarships for young scientists in the field of quantum technologies.

The National Project “Data Economy and Digital Transformation of the State,” for the period up to 2030, is a comprehensive document that includes support measures for various technologies, including quantum technologies. Additionally, in the field of quantum communications support, Presidential Decree No. 529 dated 18 June 2024, “On the Approval of Priority Directions for Scientific and Technological Development and the List of Key Science-Intensive Technologies,” is currently in force. This document approves priority directions for scientific and technological development and enumerates key science-intensive technologies. Among others, it includes the following item: “12. Technologies for Secure Quantum Data Transmission Systems.” This document is crucial for the research sector, as it defines areas eligible for grant funding from the Russian Federation’s budgets.

One should also mention other directions of legal regulation in the quantum communications industry. On 3 September 2023, the President of the Russian Federation approved the List of Directives (Pr-1734) following a meeting with scientists and the plenary session of the Future Technologies Forum. Among other provisions, the document highlights the need to increase the maximum amount of grants provided by the Government of the Russian Federation for scientific research projects headed by leading foreign scientists, and conducted in Russian higher

education institutions, research organizations, and state scientific centers, to 250 million rubles.

The Russian Ministry of Labor has approved a number of professional standards for specialists in the field of quantum communications. Among these, the Ministry's Orders have approved professional standards, including "Specialist in Research and Development in Quantum Communications," "Specialist in Installation and Technical Operation of Quantum Networks," and "Specialist in the Development of Manufacturing Technology for Quantum Electronics and Photonics Devices."

It is important to note that the further development of an effective legal and regulatory system for the quantum communications industry should be preceded by the establishment of a normative-technical regulatory system for the quantum domain. From a legal perspective, key vectors for the potential development of the quantum communications industry have been identified. To a significant extent, further steps in this direction will depend on the definition of several technological development trajectories within this industry.

IV. Normative-Technical Regulation of Quantum Communications

According to Section 1 of the Concept, the initial stage of establishing a regulatory framework for quantum communications requires amending the normative-technical base to incorporate terms already used in strategic planning documents, as well as to define their interrelationships and correlations. Section 6 of the Concept specifies that technical regulation of the quantum communications industry should be based on national standards that define requirements in the following spheres: quantum communication networks, equipment, software, the application of quantum communication technologies in existing communication lines, the testing of quantum communication networks, equipment, and software.

To maintain a high level of information security and protect the quantum communication market, a certification system for equipment, including individual components, is proposed (Dobrobaba, 2024,

pp. 110–112; Nikolskaya, 2024; Ruzhitskaya et al., 2021, pp. 840–845). To harmonize certification requirements and reduce unnecessary administrative barriers, it is essential to implement unified requirements that eliminate the need for manufacturers to obtain multiple certifications for a single piece of equipment from different state bodies or authorized organizations. For the reliability, accuracy, security, and interoperability of quantum communication solutions, it is necessary to standardize normative-technical requirements in this area, considering existing international standards, the experience of other countries, and the current development level of domestic technologies. Furthermore, effective regulatory oversight of cryptographic information security systems in the banking sector requires the participation of the Central Bank of the Russian Federation.

At the time of this writing, the government has not fully achieved any of these objectives, except for the development of a terminology system. It cannot be claimed that the government has completely neglected the standardization of quantum communications. Currently, the following publicly accessible technical documents are in effect:

- Methodological recommendations of the Technical Committee of the Federal Agency for Technical Regulation and Metrology (Rosstandart) 26 “Cryptographic Protection of Information” (TC 26),
- Preliminary National Standards in Quantum Communications issued by the Federal Agency for Technical Regulation and Metrology,
- Preliminary National Standards in the Field of Quantum Internet issued by the Federal Agency for Technical Regulation and Metrology.

The analysis of these standards suggests that all of them are first-generation technical documents designed for a short-term period, after which decisions will be made regarding their approval or modification. Although this approach to standardization is widely accepted, it carries risks for economic entities that invest significant resources in developing the national quantum communications infrastructure. In Russia at present, such entities include two key stakeholders:

- Russian Railways, which has already built and is using a backbone quantum communications network (Ivanov, 2021),
- a consortium of domestic universities that has established an inter-university quantum communication network (Ovsyannikov and Shabanov, 2023).

These networks interact with each other, yet both entities have already invested considerable resources in developing the network architecture and purchasing equipment. If the aforementioned preliminary national standards are amended, there is a risk that the operation of these networks could become difficult or even impossible. Such an outcome must be avoided. It is crucial to prioritize the development of long-term technical acts in quantum communications. This raises the question of the priority areas for standardization in quantum communications. From a technological resource perspective, the most significant technology would be the transmission of quantum keys via satellites (Duplinsky et al., 2023, pp. 104–105). However, the satellite component is currently absent from Russia's quantum communication networks that makes it unfeasible to prioritize this sector for the standardization of quantum technologies.

V. Conclusion

Therefore, we conclude that the initial regulatory steps for quantum communications should comprise the following fields of activities:

- defining the system of legal regimes applicable to quantum communications,
- establishing an internal classification of quantum communication components,
- determining the objectives for the deployment and use of quantum communications,
- identifying priority entities to be granted access to quantum communication infrastructure.

As part of this study, it has been established that the regulatory framework for the development of quantum communications can be structured through three main approaches.

Development of a framework of official documents issued by executive public authorities, including interpretive legal acts, enforcement acts, and advisory instruments such as methodological guidelines. The main advantages of this approach include the ability to issue official documents promptly and regulatory flexibility that makes it possible to address specific life cases arising in the quantum

communications sector. However, this approach also entails several drawbacks, namely:

- public officials may be reluctant to express a clear position on certain legal enforcement matters, due to concerns that such positions could later be deemed incorrect;

- official interpretive acts lack the status of regulatory legal acts in the sense that they cannot be directly cited in court proceedings. As a result, in the event of a legal dispute, there is a risk that a judicial authority might depart from the position of the executive body and reach a different decision in the specific case.

Amendment of existing regulatory legal acts governing the creation and use of quantum communications. This option is considered the most preferable, as it allows for the development of a regulatory framework tailored to the needs of the industry. However, this approach presents several challenges, including the following problems:

- a complex coordination process for the text of the regulatory legal act that may lead to significant changes to its substance, thereby reducing the effectiveness — or even nullifying — the initial legislative initiative,

- a prolonged approval procedure for draft regulatory legal acts.

Establishment of an experimental legal regime in the field of digital innovation. The authors of this article highlight the possibility of excluding quantum communication lines from the general regulatory framework governing communications, information security, and cryptography. At various conferences, roundtables, and strategic sessions, representatives from the industry and public authorities have expressed support for this regulatory approach. Nevertheless, as of today, no legal entity in the Russian Federation has agreed to act as the initiator of an experimental legal regime in the digital innovation sphere. A likely subjective barrier to this approach is the perception of the technology as one that ensures a higher information security level. Consequently, exempting it from certain general rules in the areas of telecommunications or cryptography may adversely affect consumer perception, potentially fostering distrust in the technology, particularly during its initial deployment stage.

The further development of an effective legal and regulatory system for the quantum communications industry should be preceded by the establishment of a normative and technical regulatory framework for the quantum domain. From a legal perspective, the key directions for the potential development of the quantum communications industry have been outlined. To a significant extent, future steps in this direction will depend on the determination of specific technological development trajectories within the industry.

Russia has developed six preliminary national standards in quantum communications. However, only two remain relevant due to the specific needs of the national quantum communications industry and quantum cryptography sector. The quantum Internet of Things standards adopted in 2023 have not yet found practical application (Minbaleev and Evsikov, 2024), while existing backbone quantum communication lines in Russia continue to operate without applicable standards. A plan is currently underway to establish a strategy for developing quantum communications standards, taking into account the most effective practices worldwide.

The analysis reveals a significant gap between the number of domestic standards and those developed internationally, where many aspects of quantum communications have already been standardized (Chen, 2023; Gromova and Petrenko, 2023; Gulyamov, 2023; Kuleshov, 2023; Naumov and Stankovsky, 2019; van Deventer et al., 2022). However, despite this international lead, notable deficiencies remain in the standardization of the following issues:

- materials used in the development of quantum technologies,
- infrastructure for quantum networks, including network management systems,
- quantum equipment.

Russia has not yet initiated standardization efforts in these areas, which represents a critical gap that could adversely impact the sector. Given the existence of Russia's backbone quantum communication line for Russian Railways and the Inter-University Quantum Communication Network, both of which involved substantial infrastructure investments, the adoption of national or international standards that fail to take into account the technologies and advancements of domestic quantum

equipment manufacturers could harm the industry. Therefore, the authors stress the urgent need to adopt new national standards that will protect both quantum network operators and quantum communication service users. A more strategic approach is required, with priorities aligned to current industry needs rather than speculative future developments. Furthermore, the authors highlight the necessity for the active participation of Russian specialists in the development of international standards for quantum communication networks.

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The Principle of Transparency in AI Regulation: A Comparative Legal Analysis of the European and Chinese Approaches

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Abstract: The paper examines the principle of transparency in artificial intelligence (AI) regulations in two legal frameworks, namely, the European Union (EU) and China. The study aims to explore how transparency, a key principle for ensuring accountability and fostering trust in AI technologies, is regulated in these two distinct geopolitical environments. Using a comparative legal analysis approach, the paper reviews primary legal documents, scholarly literature, and expert analyses to identify commonalities and divergences in AI transparency regulations. The findings indicate that the EU's AI Act emphasizes a risk-based approach, categorizing AI systems into high-risk, limited-risk, and minimal-risk categories, with stringent transparency requirements for high-risk systems. These requirements include comprehensive documentation, human oversight, and explainability to ensure that AI systems operate within ethical and legal boundaries. However, the AI Act also holds challenges, particularly for smaller enterprises, in meeting these transparency demands, as well as the technical difficulties in achieving transparency in complex AI models. In contrast, China's regulatory framework, while similarly focused on transparency, integrates socialist moral and ethical values. The Chinese approach categorizes AI systems based on risk and emphasizes the interpretability and explainability of AI systems to ensure compliance with state-sanctioned

moral principles. The findings suggest that while both the EU and China recognize the importance of transparency, their regulatory frameworks reflect broader cultural and political differences. The study concludes that achieving harmonized global AI transparency standards will require ongoing technological innovation, legal refinement, and international cooperation.

Keywords: Artificial intelligence; AI Act; European law; Chinese Law; transparency

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Contents

I. Introduction	803
II. The AI Act: Examination of the European Legislation	806
II.1. Objectives and Risks	807
II.2. Transparency as a Principle and Obligation	808
II.3. Too little or too much? A Critique of Transparency in the context of Compliance and Deepfakes	811
III. Lessons from Chinese Law	813
III.1. China's Experience in Regulating AI Applications	814
III.2. Key Features of China's Approach to AI Regulation	818
III.3. A Brief Comparison in the Context of Russian Initiatives	821
IV. Conclusion	823
References	824

I. Introduction

Artificial intelligence (hereinafter AI) dominates contemporary technological advancement: it sectors both in and outside the technological industry, amends the philosophy of governance and policy-making and steps up as one of the leading topics in scholarly work too. It can no longer be argued that AI is merely a matter of the future. From AI generating systems such as ChatGPT to algorithmic processes and deepfake technologies, as well as a wide range of other applications including autonomous vehicles and automated decision-making, AI has become an integrated and undeniably fundamental component of daily life. The law is mandated with, among other duties, to follow up on such advancements with regulatory efforts. As manifested around the world, different approaches emerge: the liberal framework set forth by the United States, the comprehensive, holistic regulatory aspect proposed by the European Union or the more rigorous legislation on such system in Russia or China might be key examples to support this statement. In this paper a significant principle will be discussed, namely, the legislative principle of transparency in AI. The choice of transparency to be covered is two-fold.

First, transparency emerged as a pivotal principle to ensure accountability, mitigate risks, and foster trust in AI technologies. Second, AI transparency within a global legal context is worth exploring in a comparative review as the principle itself stems from its profound implications for society, governance, and innovation not just in local segments but also in a global perspective. Transparency in this context is overarching in terms of scope: it concerns deployment of AI in certain regions and sectors, bias in systems and even raises critical issues in data governance (and privacy) as well as AI ethics, philosophy of technology and — as presented in this paper — regulation.

It is imperative to introduce the concept of “transparency” first. Literature on transparency in AI is highly interdisciplinary ranging from computer sciences to ethics and philosophy. The definition of transparency is, however, rather complex as each of these disciplines interpret it in a different way. In general, transparency — as a prerequisite of trust in society per Larsson and Heintz (2020) — in AI regulation is

a multidisciplinary concept which entails ensuring that AI systems are open and explainable, understandable, and accountable to their users, operators, and affected parties (Arrieta et al., 2019; Walmsley, 2020; Raja and Zhou, 2023). Larsson and Heintz (2020) also highlight the normative implications of transparency, suggesting that it often carries positive connotations linked to knowledge and trustworthiness, which influence regulatory debates.

In AI regulation transparency serves multiple purposes. On the one hand, it is a principle that is guided by the safeguarding of users and fundamental rights – key legislative imperatives that are almost omnipresent in the newer Internet and technology regulations (Söderlund et al., 2024). On the other hand, transparency also serves as a possible solution or mitigator to the black box problem (Diakopoulos and Koliska, 2017; Busuioac et al., 2022), allowing for a better understanding of how AI-powered, autonomous systems work (Papadouli, 2022).

Naturally, the detailed problematization of black boxes, especially the lack of regulation thereof, would fall out of the scope of the paper; however, it is important to outline the issue briefly. Generally, black boxes are understood as parts or elements of systems, devices, or models whose internal mechanisms are hidden or opaque to the observer (Miller, 2018; Castelvechi, 2016). As Durán and Jongsma (2021) underline, the key problems with black boxes, from an epistemological standpoint, are the many concerns their existence raises, from the lack of transparency to potential biases that are embedded in the systems without the ability to directly assess them.

To contextualize black boxes in the field of AI regulation, black boxes are a critical legislative issue, and it can be said that regulations pertaining to AI are advocating for more explainability and transparency in AI systems for the very reason to eliminate black boxes. Nonetheless, the effectivity of regulations is questionable. Despite sector-specific regulations (Mourby et al., 2021), as there is “no easy solution” to demand explainability using the legal stipulations due the inherent (or rather, innate) nature of black boxes in AI systems, the lack of legal tools, and naturally, the intrinsic nature of AI systems (Gryz and Rojszczak, 2021).

In this regard, we should mention that transparency is extremely hard to achieve on an adequate level. In particular, with respect to more complex AI models and large language models (LLMs), research has highlighted significant technical challenges that frequently impede the effective realization of transparency (Walmsley, 2020) and there is also a heated debate in how transparency can be attained without breaching already existing regulations on data accuracy and privacy (Chaudhary, 2024; Hosain et al., 2023).

Our paper aims to conduct a comparative legal analysis of transparency regulations in AI across two major geopolitical entities: the EU and China. An important limitation should be underlined here. As noted above, while several jurisdictions, including the United States, have developed noteworthy approaches to AI regulation (albeit with indications of a downward shift in regulatory momentum under the current Trump administration (Novelli et al., 2025)), this study intentionally confines its analysis to the two regions/countries previously discussed. The reason for this selection lies in the fact that these two subjects are seemingly leading the “race” of AI regulation. In contrast, the United States’ AI governance remains highly sectoral, fragmented, and largely reliant on non-binding guidelines rather than enforceable federal legislation (Litwin and Racabi, 2024), making a three-fold comparison highly difficult.

In researching the EU’s and China’s approaches, we aim to highlight a comparative, analytical perspective of existing frameworks. Scholarship has been growing exponentially on specific aspects of regulation (cf. Maslova and Sorokova, 2022; Vesnic-Alujevic et al., 2020); however, there is an important research gap to be filled that includes a comparative assessment of two of the most prominent regulatory frameworks. By examining the development, goals, transparency stipulations, and critical points of each regulatory framework, the research seeks to identify commonalities, divergences, and potential implications for global AI governance.

To conduct this research, the study uses a comparative legal analysis approach to review primary legal documents, scholarly literature, and expert analyses pertaining to AI regulations in the regions examined. This methodological framework allows for a nuanced exploration of how

different jurisdictions approach transparency in AI governance, thereby informing discussions on potential legal convergence or divergence. The study contributes to the existing literature by offering a comprehensive analysis of transparency as a regulatory tool in the context of digital technologies. Lastly, the research also proposes an inclusive approach to AI scholarship that invites experts and researchers from the BRICS countries to conduct research in a comparative approach.

II. The AI Act: Examination of the European Legislation

The Artificial Intelligence Act¹ (AIA) represents a significant milestone in the regulation of artificial intelligence, marking a substantive breakthrough in the establishment of a comprehensive legal framework for its governance (Helberger and Diakopoulos, 2022). A pioneering proposal by the European Union, the AI Act seeks to introduce the first comprehensive international regulation on AI systems presenting novelties such as the risk-based approach to AI and the accentuation of safeguarding fundamental rights, as well as constitutional values in an ecosystem where AI is ever-present (Tartaro, 2023).

The idea of a European artificial intelligence regulation began in 2018 when the European Commission unveiled its AI strategy in the Coordinated Plan on Artificial Intelligence (CPAI) document, a joint proposal between EU Member States, the Commission, Norway and Switzerland. The CPAI was ambitious in achieving a number of significant goals; it emphasized the need for a robust and human-centric approach to AI, drew up a plan to better support European AI infrastructure and urged the acceleration of investments in AI technologies and the AI-sector development. This initiative was followed by extensive consultations with stakeholders, including industry experts, academics, and civil society organizations. It should also be mentioned that a journalist leaked the consolidated text of the Artificial Intelligence Act

¹ Regulation (EU) 2024/1689 of the European Parliament and of the Council dated 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.

(AIA) in early 2024; however, the final, authoritative version of the Act was officially published in the Official Journal of the European Union on 13 June 2024.

II.1. Objectives and Risks

The AIA is designed to achieve a plethora of objectives. First, it seeks to ensure that AI systems used within the EU are safe and respect fundamental rights as mentioned above. Though seemingly evident, this approach is critical as the EU aims to widen the scope from a strictly legal regulation to a legal-ethical one; one which regards the ethical and constitutional values of developing a human-friendly AI environment as a paramount goal. Second, it aims to ensure that the Act promotes trust in AI technologies by implementing a risk-based approach to regulation, categorizing AI systems based on their potential impact on individuals and society (Tartaro, 2023). Artificial Intelligence systems (AIS), as defined in Art. 3(1) of the AIA, are machine-based systems designed to function with varying degrees of autonomy, capable of potential adaptation following deployment, and processing inputs to generate outputs such as predictions, content, recommendations, or decisions that affect physical or virtual environments. These systems are classified into three categories, namely, high-risk, limited-risk, and minimal-risk, with high-risk systems being subject to the most stringent regulatory requirements (Novelli et al., 2023). The differentiation between risks is as follows:

1. High-risk AIS: typically, systems used in critical infrastructure, healthcare, and law enforcement that must comply with rigorous safety, risk management, and continuous monitoring requirements due to their significant impact on safety and fundamental rights. One such example is the need for appropriate documentation and high level of compliance with existing standards (Golpayegani et al., 2023).

2. Limited-risk AIS: AIS that are subjected to moderate regulations requiring safeguards to prevent misuse and ensure transparency, addressing potential impacts without the rigid measures applied to high-risk systems.

3. Minimal-risk AIS: AIS that pose negligible risks. They are largely exempt from regulatory oversight but must still adhere to basic transparency principles to inform users about AI interactions.

It is essential to highlight the category of prohibited AI systems, as set forth in Art. 5 of the AIA, which serve as a critical mechanism for safeguarding users. Certain AI systems are banned due to their potential to cause significant harm, including those that employ subliminal techniques to manipulate behavior, exploit the vulnerabilities of specific demographic groups, implement social scoring by public authorities, or utilize real-time remote biometric identification in publicly accessible spaces for law enforcement purposes, except under narrowly defined and strictly regulated circumstances. A critical point here is that such AIS shall not be developed, placed on the market, or used within the EU, meaning that the AIA is narrowing down the scope of possible AI development and business in the Union drastically. Lastly, it is to be underlined that the AIA aims to promote European innovation in the AI sector by creating a “well-functioning internal market” for both AIS and other AI technologies (Pošćić and Martinović, 2022).

II.2. Transparency as a Principle and Obligation

Transparency is a fundamental principle embedded within the AIA to ensure the accountability and ethical deployment of AIS. The Act outlines specific obligations for AI system providers and deployers to enhance transparency and ensure that users and stakeholders are well-informed about AI operations, their capabilities, and limitations. In this context, Art. 4a serves as a cornerstone provision for ensuring transparency, establishing that “AI systems shall be developed and used in a way that allows appropriate traceability and explainability while making humans aware that they communicate or interact with an AI system as well as duly informing users of the capabilities and limitations of that AI system and affected persons about their rights.”

As mentioned above, high-risk AIS face strict obligation that also encompasses a comprehensive set of transparency stipulations. Article 13 of the AIA requires high-risk AIS to be designed and developed with a high level of transparency to enable deployers to

understand and appropriately use the system's outputs. The stipulation specifies that such AISs must be accompanied by clear, comprehensive, and easily accessible instructions. These instructions should include detailed information on the system's characteristics, functionalities, and limitations, as well as the specific context in which the system is intended to operate. Furthermore, extensive documentations must be provided to give insights into the system's accuracy, robustness, and cybersecurity measures. The documentation should also outline any known or foreseeable risks related to health, safety, and fundamental rights. The objective is to equip deployers with all necessary information to make informed decisions and use the AIS effectively and safely.

Table 1: Transparency obligations for high-risk AIS

Area	Description
System Characteristics	Detailed description of the AI system's design, purpose, and tasks it can perform
Capabilities	Information on the system's abilities, including data processing capacity and decision-making processes
Limitations	Explanation of the boundaries within which the system operates effectively, and conditions for performance degradation
Context of Use	Specific scenarios and environments where the AI system is intended to be deployed, including prerequisites for operation
Accuracy	Data on the system's performance accuracy, including error rates and confidence levels
Robustness	Measures to ensure the system's reliability and consistent performance under various conditions
Cybersecurity Measures	Protocols and safeguards to protect the AI system from cyber threats and ensure data integrity
Risk Assessment	Identification of potential risks to health, safety, and fundamental rights, along with mitigation strategies

Moreover, Art. 12 mandates comprehensive logging and record keeping for high-risk AISs to ensure transparency, traceability, and accountability. Providers must maintain automatic logs of relevant events, document system characteristics, manage data, and record system performance and updates. Human oversight measures and

incident reports must also be documented. These records facilitate compliance verification, support incident management, and enhance trust in AI systems. Access to these records is required for audits and inspections, ensuring providers can be held accountable. Furthermore, human oversight and explainability are also crucial components ensuring that AISs operate within ethical and legal boundaries. Providers of high-risk AI systems are required to implement measures that enable human operators to understand, interpret, and control the AI system's outputs (Art. 14). This includes designing systems with technical features that facilitate human intervention when necessary, ensuring that decisions influenced by AI can be reviewed and challenged. Explainability involves providing clear, detailed information about how the AI system processes data and generates outputs, making it possible for human operators to understand the reasoning behind AI decisions (Art. 13). This is crucial for maintaining accountability and preventing unintended consequences by ensuring humans remain in control of AI systems (Art. 14).

Transparency requirements, nonetheless, also extend to AI systems that do not fall within the high-risk category. Article 50 outlines the transparency obligations for providers and deployers of certain AIS, accentuating the need for clear disclosure when individuals interact with AI systems. Providers must ensure that AI systems intended to interact directly with natural persons inform them that they are interacting with an AI system, unless it is obvious to a reasonably well-informed person. Furthermore, AI systems generating synthetic content, such as a text, audio, image, or video, must mark their outputs as artificially generated or manipulated. This requirement is intended to prevent deception and to ensure that users are fully aware of the artificial nature of the content with which they interact.

An important aspect to highlight in this context is the set of rules governing the disclosure of synthetic content. For AI systems that generate or manipulate content, such as text, audio, images, or videos (commonly referred to as deepfakes, though the AIA's definition is quite vague in this regard), Art. 50 mandates clear labeling of such outputs. Providers must mark these outputs as artificially generated or manipulated to prevent the spread of misinformation and ensure that users can distinguish between real and synthetic content. This requirement is particularly

important in contexts where the artificial content might be perceived as genuine, potentially leading to misinformation or deception.

Table 2: Comparison between transparency stipulations in the AIA

Obligations	High-Risk AI Systems	Other AI Systems
Documentation and Instructions	Must include detailed, clear, and accessible instructions covering system characteristics, capabilities, limitations, and context of use	Not explicitly required, but basic transparency and accountability principles must be adhered to
Disclosure of AI Interaction	Must inform users that they are interacting with an AI system	Required when interaction with natural persons is not obvious
Synthetic Content Disclosure	Outputs like text, audio, images, or videos must be clearly marked as artificially generated or manipulated. (Only if applicable)	Generally required to prevent deception, but specific labeling is less stringent than high-risk systems
Logging and Record-Keeping	Must include automatic logging capabilities to record relevant events, data, and interactions	Not required, but providers should maintain basic records for accountability
Human Oversight and Explainability	Must implement measures for human oversight and ensure outputs can be interpreted and controlled by humans	Encouraged to have human oversight, but not as rigorously mandated as for high-risk systems

II.3. Too little or too much? A Critique of Transparency in the context of Compliance and Deepfakes

The AIA is undoubtedly a remarkable first step in international AI regulation. Alas its comprehensive nature, the Regulation is not without flaws. In this segment, a few key issues and challenges will be identified, with particular attention to interpretation and deepfake content.

As detailed above, high-risk AIS face a multitude of transparency obligations. Although the legislator's objective is clear and commendable, the comprehensive nature of the documentation required for high-risk

AI systems pose notable challenges. As seen from the comparative table above, this level of detail necessitates substantial resources and expertise, which can be particularly burdensome for small and medium-sized enterprises (SMEs) and startups that may lack the necessary infrastructure and financial capability to meet these demands.

On the other hand, the requirement for continuous updates and record keeping, as outlined in Art. 12, adds another nuance of complexity to the already extremely complicated compliance issue. In this regard, high-risk AI systems must maintain logs and records that document their performance, including data regarding system failures and instances of non-compliance creating an ongoing obligation procedure that necessitates tiresome and vigorous data management of both systems and processes.

With regard to compliance and interpretation, the principle of explainability must be emphasized as a fundamental requirement. Article 14 requires that these systems provide clear and understandable explanations of their decision-making processes and outcomes. While this is unarguably critical for accountability and user trust, achieving explainability in complex AI models, such as deep learning networks, is inherently challenging due to their opaque nature. This challenge is further exacerbated when AI systems are required to function in real time, as the provision of timely explanations becomes both critical for effective oversight and particularly demanding from a technical standpoint.

An even more pressing issue is the insufficient regulation of emerging technologies such as deepfakes (Moreno, 2024). As argued notoriously by Gosztanyi and Lendvai (2023; 2024) among other scholars (Birrner and Just, 2024), deepfakes present a unique and problematic aspect of synthetic media regulation. Research has covered that deepfakes can be and is mostly used maliciously to spread unconsented porn (either revenge porn or so-called deepnudes) (Mania, 2022), political disinformation and to commit financial fraud, identity theft or violation of privacy.

The Act addresses these issues by imposing specific transparency requirements on AI systems that generate deepfakes, necessitating clear disclosure of their synthetic nature. However, identifying and

regulating deepfakes is technically challenging due to their increasingly sophisticated nature. Ensuring compliance with transparency rules in this context requires advanced detection technologies and continuous monitoring, which can be resource-intensive and it still not guarantees that the polemic trends in deepfake-making changes.

To put it into a practical example, it seems highly unlikely that someone who is developing deepfake porn or generates political deepfake propaganda will meticulously follow the AIA's stipulation to set out a clear disclosure that the given pornographic content or political disinformation is indeed a deepfake content. One can also argue that the above polemic lies in the interconnected nature of deepfake proliferation, and the limitations of regulatory frameworks designed primarily around transparency. The Act's reliance on disclosure *assumes* that actors producing deepfakes will comply with regulatory mandates — a presumption which, more often than not, is at odds with the harmful intent driving their creation.

Furthermore, as deepfake technology advances through ongoing technological innovation and the increasing democratization of its tools, the techniques employed to evade detection and exploit gaps in regulatory oversight likewise become more sophisticated. This dynamic creates a legislative “cat-and-mouse game” where regulatory responses must continually adapt to keep pace with technological advancements and evolving tactics in deepfake production. Therefore, the law in itself will never be enough; without bolstering detection capabilities, enforcing proactive regulations, and fostering international cooperation, the AIA risks being outpaced by the relentless ingenuity of those exploiting deepfakes.

III. Lessons from Chinese Law

Though scholarship has demonstrably covered the AIA, research on other AI regulations is rather scarce. In this context, our study examines the Chinese AI regulation, a legislative approach which aims at respecting socialist morality and ethics in the application of AI in the spirit of “developing science and technology for good” and “human-centered approach.” Chinese researchers emphasize that the application

of AI not only increases efficiency in certain areas of human activity, but also contributes to the development of the economy and society (Yao and Li, 2023). Some researchers argue that the impact of technology on human society is profound, given the idea that “technology development leads to social evolution” (Pu and Xiang, 2023). At the same time, scholars take the cautious position that the risks associated with AI are difficult to predict in the early stages of technological development, although at the current stage the ability to control technological development is relatively strong. However, as technology evolves, our ability to control technology will become extremely limited because at that time “technology will have acquired sufficient power and its own path of development” (Shen, 2024, p. 73).

Security, privacy and discrimination form the basis of AI regulation in China. In the development and use of AI, relevant actors may introduce algorithmic bias and Big data bias into AI in the process of task construction, data analysis and selection of performance criteria, leading to discriminatory outcomes. These tasks determine the focus of specific legal provisions. The principle of AI transparency is considered in Chinese law in direct relation to AI explainability and interpretability, which is referred to as the link between AI and law. Given that “only what is already understandable can be legally formalized,” the interpretability of AI has become a necessary condition for the promotion and application of AI, as well as for addressing its legal liability.

III.1. China’s Experience in Regulating AI Applications

The regulation of AI in China is going its own way. The efforts of lawmakers and legal scholars are aimed at finding ways to minimize the risks of AI applications, as well as finding a fair distribution of responsibility. In 2017, the State Council of the People’s Republic of China published the Next Generation Artificial Intelligence Development Plan. The AI Development Plan is a national strategic-level law that establishes AI as a leading technology for the future. By 2030, it is planned that “the theory, technology and application of AI in China will generally reach the world level, making China a major global center of AI

innovation and achieving remarkable results in the development of the intelligent economy, which will be an important foundation for China to become a leading innovation and economic power.”² At the same time, it was originally envisaged that by 2025, China would only “establish legal norms, ethical standards and an AI policy system, and form AI safety assessment and control capabilities.” Widely known expert on Chinese law in Russia P.V. Troshchinsky (2015) always emphasizes that “the legislative policy of the Chinese authorities is characterized by the gradual development and subsequent adoption of local legislative acts necessary for the country.” There is now a growing debate in China on the need to ensure the unity of legislation in this area, or even the preparation of a unified legal act on AI similar to the EU. The AI law has been included in the legislative work plan of the State Council of the People’s Republic of China for 2023–2024. Regardless of the state’s willingness to adopt a unified legal act, many lawyers believe that the legislation should establish a pluralistic regulatory system for AI, clarify the functions of national standards and industry standards, expand the space for group standards, and focus on the role of ethical standards (Song, 2024).

At the same time, Chinese lawmakers are very cautious in formulating final regulations and are moving in this direction in “small steps.” Since 2022, China has started to consistently adopt regulations on algorithmic recommendations, deep synthesis technologies and generative AI services. The AI regulation was built based on its application areas. For example, the Regulation on the Management of Algorithmic Recommendations in Internet Information Services³ (hereinafter referred to as the Algorithm Regulation) took effect on 1 March 2022 and introduced a regulation for the establishment of an algorithm registration system. Companies are required to apply for algorithm registration through the Algorithm Registration System of the Cyberspace Administration of China (CAC, 国家互联网信息办公室) and disclose the basic operating parameters of the technology.

² Available at: https://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm.

³ 《互联网信息服务算法推荐管理规定》. Available at: https://www.gov.cn/gongbao/content/2022/content_5682428.htm [Accessed 10.12.2025].

The Regulation on the Management of Deep Fusion in Internet Information Services⁴ of 25 November 2022 (hereinafter referred to as the Deep Fusion Regulation) was adopted to strengthen the comprehensive management of Internet information services, and it also provides a framework for the registration of AI systems. The registration procedures and rules are standardized based on practice. On 10 July 2023, the CAC issued the Interim Measures on the Management of Generative Artificial Intelligence Services⁵ (hereinafter referred to as the Interim Measures) that took effect on 15 August 2023. This act defines the concept of generative AI and compliance obligations for providers of relevant products and services. In doing so, China has implemented a “dual registration” mechanism consisting of an algorithm registration system and an AI registration system (for large language models (LLM)). The registration of large language models requires the most effective interaction between regulators and service providers in order to gain regulatory experience and develop clear and specific rules that encourage companies to comply with their algorithm registration obligations, especially in terms of assessing the security of large language models. Disclosure of algorithms at the time of registration is helpful. According to regulators, the transparency of AI applications in specific areas should be audited.

In parallel with the formulation of national rules and regulations, local acts were introduced, such as the Regulations on the Development of Artificial Intelligence Industry in Shenzhen Special Economic Zone (《深圳经济特区人工智能产业促进条例》) dated 1 November 2022 or the Regulations on the Development of Artificial Intelligence Industry in Shanghai (《深圳经济特区人工智能产业促进条例》) dated 10 October 2022. That is, regional rulemaking was also included in addressing the applicability of specific AI products. The above-mentioned acts stipulate that the development of the AI industry follows the principles of technology advancement, application orientation, human-centered design, security and manageability. Initially, Chinese law did not

⁴ 《互联网信息服务深度合成管理规定》. Available at: https://www.gov.cn/zhen-gce/zhengceku/2022-12/12/content_5731431.htmhttps://www.gov.cn/xinwen/2021-01/24/content_5582219.htm [Accessed 10.12.2025].

⁵ 《生成式人工智能服务管理暂行办法》. Available at: https://www.gov.cn/zhen-gce/zhengceku/202307/content_6891752.htm [Accessed 10.12.2025].

treat AI as a separate object, but as part of the industry. In particular, the Shanghai Document mentioned above defined that the term “AI industry” refers to the key industries such as research, development and production of software and hardware products, system applications and integrated services related to artificial intelligence, as well as the integration and application of artificial intelligence in human life support, social management, economic development and other related fields (Art. 3 of the Regulation on the Development of the Artificial Intelligence Industry).

On 1 March 2024, China’s National Cybersecurity Technology Standardization Committee officially released the Basic Security Requirements for Generative AI Services⁶ (hereinafter referred to as the Basic Security Requirements). This law details the requirements for implementing the relevant provisions of the Interim Measures, such as the legitimacy of data sources, content security, etc., and provides effective methods for generative AI service providers to conduct security assessments in practice. It not only improves the internal security capabilities of companies in the field of generative AI services, but also provides standards for regulators to assess the security level of specific services.

The regulation of AI at the Statute level shall not conflict with the laws of the PRC that form the basis of the legal regulation of the country’s information and technology development, such as PRC Cybersecurity Act,⁷ PRC Data Security Act,⁸ PRC Personal Data Protection Act,⁹ PRC Science and Technology Progress Act,¹⁰ as well as the Regulations on Security Assessment of Internet Information Services with Public

⁶ 《生成式人工智能服务安全基本要求》. Available at: <https://www.tc260.org.cn/front/postDetail.html?id=20240301164054> [Accessed 10.12.2025].

⁷ 《中华人民共和国科学技术进步法》. Available at: https://www.gov.cn/xinwen/2021-12/25/content_5664471.htm [Accessed 10.12.2025].

⁸ 《互联网信息服务算法推荐管理规定》. Available at: https://www.cac.gov.cn/202202-01/04/c_1642894606364259.htm [Accessed 10.12.2025].

⁹ 《中华人民共和国个人信息保护法》. Available at: https://www.cac.gov.cn/2021-08/20/c_1631050028355286.htm?eqid=b7a9c7a1000acbc7000000026465ed77 [Accessed 10.12.2025].

¹⁰ 《中华人民共和国科学技术进步法》. Available at: https://www.gov.cn/xinwen/2021-12/25/content_5664471.htm.

Opinion Attributes or Social Mobilization Capabilities¹¹ (hereinafter referred to as the Security Assessment Regulations), the Regulations on Management of Information Services of Public Internet User Accounts.¹² All these regulations together form a closely related framework for the management of algorithms in various sectors, especially in the provision of generative AI services. In general, the AI regulation in Chinese Law is concerned with establishing several types of obligations: obligations related to supervision mechanisms; obligations related to algorithm training; obligations related to content management; and obligations of service providers to users.

III.2. Key Features of China's Approach to AI Regulation

Against the backdrop of the rapid expansion of artificial intelligence applications, China has been actively developing mechanisms to ensure the legal enforceability of the principle of transparency. In many respects, the principle of transparency is referred to because of its key importance for solving the problem of “black box” of algorithms (Zhang, 2024). Researchers note that the concept of transparency has two components: formal and substantive (Zhang, 2024). Formal transparency implies the disclosure of basic information about artificial intelligence, which makes the deployment and use of artificial intelligence unclassified. Substantive transparency is closely related to the AI interpretability, which emphasizes a meaningful explanation of the disclosed information in an understandable form, thereby breaking down knowledge barriers and making the relevant information truly recognizable. At first glance, this approach appears to be consistent with the European model. Article 4 of the Algorithm Regulation stipulates that the provision of algorithmic recommendation services shall follow the principles of fairness and honesty, openness and transparency. Service providers shall formulate and make public the rules of recommendation (Art. 7), optimize the transparency and interpretability of rules for searching, sorting, selecting, promoting and

¹¹ 《具有舆论属性或社会动员能力的互联网信息服务安全评估规定》. Available at: https://www.cac.gov.cn/2018-11/15/c_1123716072.htm [Accessed 10.12.2025].

¹² 《互联网用户公众账号信息服务管理规定》. Available at: https://www.gov.cn/xinwen/2021-01/24/content_5582219.htm [Accessed 10.12.2025].

displaying content (Art. 12), inform users about the principles, purpose and intentions of recommendation services as well as about the basic mechanisms of algorithmic recommendation services (Kharitonova and Tianfang, 2022).

At the same time, Chinese legal acts have their own specificities. The peculiarities of the Chinese approach are as follows. First, much AI research in China is conducted through the prism of the rule of law doctrine (Zhang, 2024). In this context, it seems logical to say in general that the principles of transparency and explainability should be carefully considered when implementing the rule of law: based on the consideration of existing technical conditions, different disclosure and explanation obligations should be imposed according to the different capabilities of regulators and the public. A second feature of the Chinese approach can be described as AI systems categorization. The scholarship suggests that there has been a paradigm shift in digital law in China from the initial individual risk prevention by lawyers to systematic risk management based on hierarchical and classified management, managing the entire life cycle of AI systems (Zhao and Zhou, 2024). This perspective can also be compared with the European one. As in the EU, algorithm classification and safety management are seen as the main tool for algorithm safety management in the future. However, even here we find distinctive features of the Chinese approach, based on the previous experience of rulemaking.

The Algorithms Regulation establishes general criteria for the classification of recommendation algorithm service providers based on the attributes of the service's public opinion or social mobilization capacity, the content category, the number of users, the degree of importance of the data processed by the algorithm recommendation technology, the degree of interference with user behavior, etc. The regulation of algorithms at the level of platform supervision provides for a hierarchical and classified management system and, for general-purpose platforms, the obligation to keep web logs and to cooperate with the State. For platforms that are opinion leaders or have social mobilization capabilities, a registration system will be introduced, and a proactive security assessment will be required. Entities providing online news and information services must obtain a license to provide

news and information services in accordance with the law. Regarding the application of the Algorithm Regulation, the benchmark standard for the classification of algorithms also depends on the degree of “sensitivity” of the data but will be changed to an indicator of the degree of “importance” of the data, which is most consistent with the standards of the Data Security Act. For example, the Interim Measures on the Management of Generative AI Services require that the provision and use of generative AI services comply with fundamental socialist values, implement effective measures to prevent discrimination based on ethnicity, belief, or country of origin, avoid the concentration of algorithmic power, and refrain from violating individuals’ rights or the rights and interests of others in relation to personal information. These measures further mandate the enhancement of transparency in the operation and deployment of generative AI services.

In cases of high-risk illegal and offensive content relating to national security and public safety, the obligation for service providers to take preventive measures should be more stringent. In cases of illegal and offensive content relating only to the infringement of private rights characterized by a low risk the obligation for service providers to take preventive measures should be relatively less stringent (Yao and Li, 2023). Thus, for different levels of AI risk, China adopts implementation standards based on classification and scenarios and promotes the principle of transparency in two aspects: protecting users’ and the public’s right to information and ensuring the implementation of national regulatory powers. However, unlike the European approach, China takes the position that, given the existing technical conditions, it is necessary to differentiate the content requirements of the information to be disclosed and explained according to the different capabilities of regulators and the public, and to adopt graded and classified sub-scenarios of implementation standards for different risk levels of different AI.

A third important feature of the Chinese approach can be described as a commitment to require the application of AI within the framework of socialist morality and ethics. It is generally accepted that discrimination should not create algorithmic power and should not violate individual rights and the right to personal information of others. At the same time, a feature of China’s approach is that the Interim

Measures on the Management of Generative AI Services requires that the provision and use of generative AI services should be in line with core socialist values and that effective measures should be taken to prevent the creation of ethnic, religious, national, etc. discrimination. The Algorithms Regulation sets standards for information services in Art. 6–10 that focus mainly on the control of illegal and unwanted information, in Art. 8 clearly states that “no algorithmic model shall be designed to cause users to become dependent on or excessively consume information in violation of laws and regulations or in violation of ethics and morality.” The Algorithms Regulation also includes a prohibition to use algorithms to manipulate information and influence public opinion on the Internet. Thus, in addition to written laws and regulations, The Algorithms Regulation requires adherence to public morality and ethics, business and professional ethics, fairness and honesty, openness and transparency, scientific validity, and honesty and trustworthiness.

It seems that the violation of socialist core values and discriminatory content are classified as high-risk and require special attention and management. It is believed that the credible development of AI in China can be ensured by establishing and improving the examination system, supervision system and legal liability system.

III.3. A Brief Comparison in the Context of Russian Initiatives

A brief comparison can also be made with the Russian approach to AI regulation. While China’s model is characterized by proactive ethical guidelines and detailed regulatory efforts to align AI development with socialist values, Russia’s regulatory landscape remains more fragmented and strategic in nature. The key act in Russia today is the National Strategy for the Development of Artificial Intelligence for the Period up to 2030¹³ (hereinafter Strategy 2030), which outlines the main

¹³ Decree of the President of the Russian Federation dated 10 October 2019 No. 490 “On the development of artificial intelligence in the Russian Federation” (together with the “National Strategy for the development of artificial intelligence for the period up to 2030”). *Sobranie zakonodatelstva Rissijskoj Federatsii* [Collection of Legislation of the Russian Federation]. 2019. No. 41. Art. 5700.

principles of the development and use of AI technologies. The principles of regulation of technology development identified in the Russian legislation have not been deeply interpreted either in law enforcement practice or in the explanations of authorized bodies and are largely of a recommendatory nature. At the same time, the principles listed in Strategy 2030 partially overlap with several similar postulates reflected in ethical codes and recommendations in Russia and overseas.

Summarizing the experience of legal regulation of AI in China in comparison with the approaches of the European Union allows identifying some ideas that can be adopted in Russian legislative practice. First, both Chinese and European experience has shown that the unified AI legislation tends to the concept of comprehensiveness against the background of prudence and gradation of risk classification. At the same time, the unique experience of segmented regulation in China and, to a certain extent, the experimental-legal approach in Russia allow acting as cautiously as possible when creating a regulatory sandbox system, creating a rather narrowly differentiated regulation of AI systems. In any case, a system of control and monitoring of compliance with the requirements of the law on the use of AI will be introduced.

However, the jurisdiction and the bodies or commissions empowered to exercise such control operate according to different principles. At the same time, the Chinese approach to compliance with socialist morality and ethics in the application of AI, which is stricter than in the EU in the spirit of “developing science and technology for good” (“科技向善”), is in line with the tendencies of Russian law to protect traditional spiritual and moral values, culture and historical memory. The Chinese approach, on the other hand, tends to be rigid regarding the issue of censorship, which should not become the main trend of Russian law. The European approach seems closer to the Russian philosophy.

Some scholars have pointed out that the EU’s approach of restricting the use of high-risk AI systems may lead to over-regulation and negatively affect the development of industries such as generative AI or biometrics. China’s risk regulation scheme is essentially a shift from classifying risks for different products to classifying different risks arising from the same product (Arrieta et al., 2019), which is more appropriate for technologies such as generative AI. Thus, when

forming the Russian position on the content of legal regulation of AI applications, it is necessary to consider the positions of different countries to minimize risks and develop appropriate legal solutions in this area.

IV. Conclusion

The paper aimed to demonstrate that transparency is a pivotal yet highly complex principle in AI regulation, with profound implications for legal accountability, trust, and governance. As for the current major legislative landscapes, we can observe two highly diverging approaches. The European Union proposes individual safeguards, human oversight, and systemic accountability through a binding regulatory instrument, while China's framework embeds transparency within a broader ideological commitment to maintaining social harmony and state-sanctioned moral values, combining algorithmic explainability with a strong emphasis on governance and state oversight.

Though both initiatives are commendable as they are aiming to highlight ever-growing importance of transparency, there are still crucial legislative issues to assess. For instance, the divergence between the EU's and China's approaches signals a significant challenge for the future, namely, the absence of a universally shared understanding of transparency. This issue presents challenges not only with respect to ensuring compliance and guaranteeing access to effective legal remedies for affected parties, but also, at a more systemic level, poses a significant obstacle to the pursuit of global harmonization in AI governance. Achieving such harmonization is of critical importance: without reconciling societal, cultural, and regulatory divergences, the development of AI standards risks becoming fragmented, thereby undermining the coherence and effectiveness of cross-border cooperation, regulatory alignment, and oversight mechanisms in the AI domain. Demanding full uniformity would be highly naïve – even seemingly evident legal issues such as the protection of fundamental rights differ state by state or region by region (Escobar, 2024). Therefore, in the case of AI regulation, a regulatory field that can be described by extreme differences in regional developments and strategies, we can

hardly imagine a consolidated transparency regulation. Nonetheless, we propose and advocate that cooperative efforts should be made to commence a discussion on shared legal values and goals between authorities. In this regard, however, we also underline that transparency “alone,” even when mandated, is insufficient. The inherent opacity of complex AI systems, the technical difficulties of achieving meaningful explainability and the varying capacities for regulatory enforcement necessitate a multifaceted approach. Future regulatory efforts must integrate technological innovation, dynamic monitoring mechanisms, and adaptive legal frameworks capable of responding to the evolving nature of AI. Lastly, the principle of transparency must be continually reimagined — not only as a legal obligation but also as an evolving societal expectation. Achieving this will require sustained interdisciplinary collaboration, international dialogue, and the political will to bridge competing regulatory philosophies, ensuring that transparency in AI is not merely a rhetorical ideal but a functional, enforceable reality.

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The Impact of the Court of Arbitration for Sport Decisions on the Structuring of Player Contracts

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Abstract: This research paper examines the influence of the Court of Arbitration for Sport (CAS) on the structuring of players' contracts within professional sports. It highlights how CAS rulings shape contractual norms and practices, impacting both players' rights and clubs' responsibilities. The analysis includes a review of landmark cases that have set precedents in contract disputes, illustrating the balance between the player autonomy and the club interests. The findings suggest that CAS decisions promote greater transparency and fairness in contract negotiations, also enforcing compliance with regulatory frameworks. Ultimately, the study underscores the evolving role of CAS in fostering a more equitable sporting environment, influencing contract terms related to transfers, salaries, and dispute resolution. This research contributes to a deeper understanding of the legal landscape in sports and its implications for contract management.

The research further explores the implications of these rulings on the drafting of contracts, emphasizing the need for clubs to incorporate clearer terms regarding the player conduct, compliance with regulations, and dispute resolution mechanisms. Strategies for mitigating risks associated with contract breaches are also discussed, providing practical insights for clubs and agents. The paper concludes by advocating for

an ongoing dialogue between stakeholders to enhance the integrity and effectiveness of contractual agreements in sports. By understanding the impact of CAS decisions, the sports industry can better navigate the complexities of player contracts in an evolving legal landscape.

Keywords: Court of Arbitration for Sport (CAS); players' contracts; contractual norms; FIFA Regulations on the Status and Transfer of Players (RSTP); contract negotiations

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Contents

I. Introduction	831
II. Background of the Court of Arbitration for Sport	832
II.1. Establishment and Purpose	832
II.2. Jurisdiction and Scope	833
III. Key Decisions Affecting Player Contracts	834
III.1. Case Study 1: Zoltán Vasas Case	835
III.1.1. Legal and Regulatory Context of the Zoltán Vasas Case	835
III.1.2. How Courts Support the Validity of the Service Contract by Accepting the Right of the Club to Protect its Sportive Investment	837
III.1.3. Examination of FIFA Regulations Pertaining to Player Contracts	839
III.1.4. Analysis of the CAS Decisions Relevant to the Case	840
III.1.5. Implications of the Zoltán Vasas Case on Future Legal Precedents	840
III.2. Case Study 2: Financial Implications for the Canadian Football League of a CAS Final Award	841
III.2.1. Overview of the Canadian Football League and the Role of Sports Arbitration in Professional Sports	842
III.2.2. Financial Impact of Sports Arbitration on the Canadian Football League	842
III.2.3. Analysis of the Economic Consequences of Arbitration Awards on Team Budgets and Salary Caps	843
III.2.4. Examination of How Arbitration Outcomes Influence Contract Negotiations and Player Compensation Structures	843
IV. Contractual Implications of CAS Decisions	844
IV.1. Guaranteed Contracts v. Performance-Based Contracts	845
IV.2. Agent Representation and Compensation	846

V. Enforcement and Compliance Mechanisms	846
V.1. FIFA Football Agent Regulations (FFAR, 2023)	847
V.2. National Laws and Jurisdiction	848
VI. Future Trends and Challenges	849
VI.1. Technological Advancements	850
VI.2. Globalization of Sports Contracts	851
VII. Conclusion	852
References	854

I. Introduction

Sports leagues and athletic associations have extensive rules and regulations impacting player hiring and retention. These range from player eligibility rules to salary and compensation rules. Sports arbitrations and tribunals defined jurisdiction and dealt primarily with the player-related employment and compensation issues. In these cases, proper legal contracts between athletes and employers are important for the proper functioning of the system. Inadequate contracts or violations of rules can result in the athlete's forfeiture of compensation and/or other economic advantages and involve agents or other parties in expensive legal actions (Bull and Faure, 2022, p. 22).

The Court of Arbitration for Sport serves as an eminent international arbitral institution resolving disputes involving athletes and governing bodies. CAS exercises jurisdiction on the basis of the parties' consent to arbitrate before it. Sports arbitration is widely regarded as advantageous because awards are rendered expeditiously and parties may present their cases in a preferred language. Procedural obstacles related to scheduling or linguistic accommodation are comparatively limited within this forum. Moreover, the availability of a specialized tribunal dedicated to sport significantly explains athletes' preference for arbitration. CAS rules and procedures furnish parties with swift and, typically, substantively just determinations, offering a coherent alternative to proceedings before the numerous administrative and disciplinary bodies that operate across the sports industry and regulators worldwide within contemporary sporting governance (Lindholm, 2021, p. 1).

II. Background of the Court of Arbitration for Sport

The most critical features of CAS are its field of activity, its body formation decisions, its general application rules, and the main principles set forth in the arbitration process. The cooperation and consultation relationship between international sports associations in disputes between players and clubs have laid the foundation for the development of CAS. This independent organization enlightens the International Olympic Committee. Founded in 1984 in Lausanne, Switzerland, the Court of Arbitration for Sport generally addresses issues under international and international legal regulations (Baddeley, 2020, pp. 4–5).

The Court was established to counterbalance the dominance of internal disciplinary organs, to prevent jurisdictional conflicts among external chairpersons, and, above all, to create an expedited avenue for resolving disputes efficiently. The primary objective of CAS is to deliver decisions promptly and economically, relying on experts possessing specialized knowledge of sport. A distinctive feature of this judicial mechanism is its binding effect on the parties, ensuring adherence to arbitral provisions while distinguishing its rulings from those of national courts. Moreover, the institutional framework of this new professional domain determines its organizational structure and encompasses a broad array of matters, including multiple specialized divisions responsible for resolving disputes across various branches of athletic activity (Nafziger, 2011, pp. 2–3).

II.1. Establishment and Purpose

Article R27 of the Code of Sports-related Arbitration delineates the scope of the CAS jurisdiction and specifies the types of disputes it is competent to adjudicate. These disputes encompass matters involving athletes, officials, and other individuals subject to the rules of International Federations or National Olympic Committees. The article also covers appeals against decisions rendered by such bodies, as well as disputes arising from the application of the World Anti-Doping Code adopted by the World Anti-Doping Agency (WADA). Furthermore,

CAS is also empowered to resolve matters arising from employment contracts within the domain of sport, as well as disciplinary sanctions and eligibility disputes within sporting organizations. This provision delineates CAS's operational scope and underscores its pivotal role as the principal arbitral authority in the resolution of international sports disputes.

In this context, the International Council of Arbitration for Sport (ICAS) plays a critical role as the body responsible for overseeing the organization and administration of CAS. Strictly speaking, ICAS does not directly resolve disputes; rather, it devotes its efforts to the institutional, organizational, and financial management of CAS activities, thereby ensuring the Court's independence, stability, and effective functioning within the global system of sports arbitration. As a member of ICAS, and recognizing that CAS is the authoritative body responsible for deciding these disputes and hearing appeals, it is vital that its rulings are respected. Such decisions should be regarded as exemplifying the rule of law and sports ethics, and must be adhered to without external interference. Indeed, the concept of fair play in sports, as outlined in the structures governed by CAS, cannot remain a mere ideal without tangible legal backing and enforceable consequences (Pust, 2021, p. 75).

On such an important issue, it is worth analyzing whether there can be two opposing considerations about the same undue facts practiced, considering particularly the deliberate behavior practiced by one of the participants of a sports structure. In fact, we observe that athletes, through their representative entities or not, often seek activities in the CAS to resolve conflicts that arise with other entities that administer their sports. The present article analyzes some CAS case law to demonstrate how these decisions and their conflicts may have beneficial consequences for structuring player contracts (Chappelet, 2020, pp. 309–320).

II.2. Jurisdiction and Scope

Article 3 of the *Code of Sports-related Arbitration (CAS Code)* enumerates the categories of disputes that fall within CAS jurisdiction. Among the most significant are those of a financial nature, which typically

arise in connection with professional sports contracts, player transfers, or the organization of competitions. Such disputes often involve multiple stakeholders within the sports sector – including clubs, federations, and sponsoring entities. Other cases may occur between individuals or corporate bodies that have entered into agreements concerning the financing of sports facilities or events, such as broadcasting rights or commercial sponsorship arrangements (Khanjari and Dadgar, 2021, p. 60).

Another important category of arbitration within CAS competence includes disputes arising from contractual relationships in the field of sport. For instance, in 1986, the *Union Cycliste Internationale (UCI)* was authorized to consider issues stemming from the application by the Luxembourg Federation of the *Fédération Internationale de Cyclisme Professionnel (FICP)* Code. This authority was based on a contractual arrangement granting FICP the power to recognize the federation as the official national body. Such practice contributed to the development of a specialized legal framework acknowledging individual rights and reinforcing the principle of fair competition in sport (Clausen, 2018, p. 4). Accordingly, CAS has emerged as a specialized arbitral authority that consolidates the principle of legal specialization within international sport. By applying a combination of international and domestic norms, CAS ensures a consistent and coherent legal standard in the resolution of sports-related disputes across jurisdictions worldwide. In *Racing Association Ltd. v. British Greyhound Racing Ltd.*, the declarations added subsequent content and therefore, it was treated as an agreement.

III. Key Decisions Affecting Player Contracts

An aspect that has attracted comparatively limited scholarly attention concerns the influence of CAS decisions on the structuring of player contracts. This is particularly striking given that CAS, since commencing its operations in 1984, has produced an extensive body of jurisprudence addressing sport-specific legal questions. The tribunal primarily adjudicates high-profile football disputes, cases of global relevance, and controversies in which national judicial mechanisms offer little practical assistance or risk undermining the effectiveness of

arbitral remedies, while also shaping interpretative approaches within several European jurisdictions, including that of the Italian legal system (Chappelet, 2020, pp. 309–320).

Although CAS has rarely been a forum for the resolution of disputes caused by player contracts, it can be argued that much of its case law offers an insight into the structuring of player contracts in certain sports – of a different type, for example, tennis players, too – and have a direct impact upon the way in which contracts are structured. As a result, it is important in some areas of sport, particularly those where it is unusual for parties to take legal disputes to domestic courts and where few, if any, statutes govern the relationship between players and their employers, to bear in mind the jurisdiction of CAS when structuring player contracts. Information about the court and its procedures and rules is available in fact in a split publication called “Regulations” (Yan, 2023, pp. 66–68).

III.1. Case Study 1: Zoltán Vasas Case

III.1.1. Legal and Regulatory Context of the Zoltán Vasas Case

The intricacies surrounding the *Zoltán Vasas* case arise from the intersection of international sports regulation and the protection of athlete rights. Central to the dispute lies Zoltán’s contractual relationship with his club, which has generated significant questions regarding the application of the Fédération Internationale de Football Association (FIFA) Regulations on the Status and Transfer of Players. The complex nature of player contracts requires a careful equilibrium between adherence to governing-body directives and the safeguarding of individual professional interests. Legal interpretation depends largely on how contractual duties are enforced under FIFA provisions, with particular attention to the validity and proportionality of clauses governing transfers and dispute-resolution mechanisms. Moreover, CAS jurisprudence has been instrumental in defining the limits of player entitlements and club obligations within this context. Recent scholarship stresses that the evolving body of CAS decisions strengthens the demand for transparency and equitable conduct in contractual

relations, revealing broader implications for the governance of international sport (Smith, 2022, pp. 45–64). The intensifying scrutiny of player contracts and their conformity with transnational legal norms further underscores the urgent need to reform existing regulatory frameworks to ensure the effective protection of athletes' fundamental rights (Jameson, 2022, pp. 101–115).

The intricate dynamics of these cases reveal significant challenges in reconciling club interests with players' fundamental rights, shedding light on the necessity of robust legal protections within sports (Smith, 2022, p. 64). Thus, the outcome of this case not only impacts Zoltán's career but also sets a precedent regarding the enforcement of contractual terms under the broader legal framework of international soccer.¹

With meticulous attention to detail and a comprehensive and methodical approach, we will uncover and unravel the complex and multifaceted nature of this clause, ultimately ascertaining and confirming its true nature and legal standing. Our analysis and evaluation will provide valuable insights and a deeper understanding of the myriad legal implications and ramifications that emerge from the inclusion and validation of such a clause. This in-depth examination will shed light on the various interpretations and perspectives regarding the functioning, validity, and impact of the amortization clause, ultimately contributing to ongoing discussions and debates within the sports industry and legal community. By critically examining and comprehensively addressing all

¹ In the Zoltán Vasas case, CAS was tasked with addressing a dispute between the player and his club regarding the enforcement of his contract. The case brought to the forefront key issues surrounding the interpretation and application of contractual terms within the context of international soccer. In its ruling, CAS not only resolved the specific dispute but also set a significant precedent regarding how contractual obligations and players' rights are to be treated within the broader legal framework of international soccer. The decision emphasized that, while clubs hold significant influence, the legal protections surrounding players' fundamental rights — such as fair treatment, payment, and contract enforcement — must be upheld, ensuring that players are not unduly exploited or subject to unfair conditions. Thus, the outcome of Zoltán's case not only impacted his career, allowing him to move forward with legal certainty, but also clarified the broader principles of contract enforcement and player protection in international sports law. This case serves as an important reminder of the need for a balanced approach that protects both the commercial interests of sports organizations and the individual rights of players. *See* CAS 2011/A/2375. FK DAC 1904 a.s. v. Zoltán Vasas, Award of 31 October 2011.

relevant legal, contractual, and jurisprudential aspects, we will present a comprehensive and well-substantiated analysis that elucidates the true nature and legal status of the amortization clause. Through our rigorous and meticulous evaluation, we aim to provide clarity, coherence, and understanding, thus contributing to the advancement and development of sports law jurisprudence (Baddeley, 2020, pp. 4–5).

III.1.2. How Courts Support the Validity of the Service Contract by Accepting the Right of the Club to Protect its Sportive Investment

To support the validity of the player service contract, it is essential to consider several fundamental legal principles that form the basis of such contracts. The first of these principles is the ultimate guarantee in the sport working relationship, which refers to the rights and obligations of the parties to the contract. This guarantee reflects the legal relationships between the player and the club, ensuring the protection of both parties' rights, including financial and personal rights (Khanjari and Dadgar, 2021, p. 80). This contractual framework is also underpinned by general labor law principles, as seen in the case of *Bosman v. Union Royale Belge des Sociétés de Football Association*, which established the right of players to move freely between clubs within the EU, affecting the scope of player contracts.²

In this context, the challenge lies in distinguishing between patrimonial elements (such as wages and benefits) and personal elements (such as rights related to image or reputation) within the contract. This distinction is crucial because it directly impacts the interpretation of contract clauses in the event of disputes, potentially leading to different legal outcomes (FIFA Regulations on the Status and Transfer of Players, 2020³).

² Court of Justice of the European Union (CJEU). *Bosman v. Union Royale Belge des Sociétés de Football Association*, Case C-415/93, Judgment of 15 December 1995.

³ Fédération Internationale de Football Association (FIFA). *Regulations on the Status and Transfer of Players*. 2020 Edition. Available at: <https://www.fifa.com/legal/regulations> [Accessed 01.11.2025].

Furthermore, the contract term and amortization scheme are key components of sports contracts, particularly in the case of professional players. Typically, a sport service contract includes a payment schedule that divides the total remuneration over the duration of the contract. This allows the club to alleviate its financial burden in the long term, providing financial flexibility in managing obligations such as wages and compensations. Both compensation payments and the amortization scheme are vital as they establish how the player's entitlements are paid over the term of the contract, whether through monthly salary payments or compensation in the event of contract termination. This is often governed by FIFA Regulations on the Status and Transfer of Players, which sets out the framework for payment obligations and compensation in cases of breach or early termination (FIFA Regulations on the Status and Transfer of Players, 2021⁴).

When considering financial obligations, there is a balance between wage obligations and state obligations. In certain cases, the state or regulatory bodies have a role in overseeing contract terms to prevent exploitation or unfair practices in contractual arrangements. State obligations may include regulations protecting the rights of professional athletes, enhancing player rights against clubs that may seek to evade their contractual commitments. The European Court of Justice (ECJ) has consistently ruled that state regulations must not infringe upon the free movement of workers within the European Union (EU), as seen in the *Kühne and Heitz case*⁵ where the Court emphasized the protection of athletes' rights to fair contract conditions.

Another crucial aspect is the limited court control due to the specific nature of the outcome in the sport service contract lexicon. Sports contracts are characterized by unique features that demand legal flexibility, as the outcomes in disputes are often limited based on the specific nature of the sport. Consequently, sports arbitration becomes

⁴ Fédération Internationale de Football Association (FIFA). Regulations on the Status and Transfer of Players. 2021 Edition. Available at: <https://www.fifa.com/legal/regulations> [Accessed 01.11.2025].

⁵ Court of Justice of the European Union (CJEU). *Kühne and Heitz NV v. Produktschap voor Pluimvee en Eieren*, Case C-453/00, Judgment of 13 January 2004, ECLI:EU:C:2004:17.

the preferred method for resolving disputes, reflecting the need for a legal framework that accommodates the dynamic nature of sports contracts. CAS plays a central role in resolving sports-related disputes, providing a specialized forum for the unique nature of sports contracts (Code of Sports-related Arbitration, 2021).

Finally, the protection of the EU constitutional dynamic interpretation ensures that the legal interpretation of sports contracts aligns with evolving European constitutional principles. A dynamic interpretation that considers legal and social developments in the sports sector helps maintain a balance between protecting the rights of players and providing flexibility for clubs in structuring their contracts. This interpretation strengthens the player's rights in the face of potential exploitation and ensures clubs' adherence to international regulations. This aligns with the EU objective of promoting both economic freedom and social fairness in sports, as outlined in the Treaty on the Functioning of the European Union (TFEU), particularly in relation to labor mobility and worker protection (TFEU, Art. 45).

III.1.3. Examination of FIFA Regulations Pertaining to Player Contracts

The intricate framework set forth by FIFA in regulating player contracts serves to delineate the rights and obligations of both clubs and players, establishing a structured milieu for the management of professional relationships within the sport. Central to these regulations is the stipulation that contracts must be in written form, ensuring transparency and accountability. Moreover, FIFA mandates adherence to specific clauses related to the duration of contracts and termination rights, which are designed to protect player autonomy while also safeguarding club investments, a balance that has been scrutinized in the past CAS decisions. Crucially, FIFA guidelines also address the transfer of players, delineating the protocols that govern international movement and the financial implications that ensue, highlighting the complexities inherent in global labor relations within football (Wild, 2011, pp. 11–16). This regulatory framework, while comprehensive, is continually tested by emerging legal challenges, underscoring the evolving nature of sports law.

III.1.4. Analysis of the CAS Decisions Relevant to the Case

In evaluating the implications of the CAS decisions, it is imperative to understand how previous rulings have shaped the legal landscape surrounding sports contracts and disputes. Notably, a consistent adherence to the FIFA regulations regarding player contracts can be observed across various cases adjudicated by CAS. These rulings frequently underscore the necessity of transparency and fairness in contractual obligations, reflecting a commitment to upholding both the spirit and letter of existing regulations. Furthermore, the decisions illustrate the often complex interplay between national laws and international sporting regulations, which can lead to divergent outcomes depending on jurisdictional interpretations. The precedent established by these rulings does not only create a framework for resolving disputes, but also serves to deter contractual infractions by reinforcing the enforceability of agreements within the sports context, thereby highlighting the enduring influence of CAS jurisprudence in cases like that of *Zoltán Vasas*. Recent studies emphasize that CAS has increasingly favored the sanctity of contractual agreements, reinforcing the idea that sports law must adapt to contemporary expectations of integrity and diligence within contract enforcement (Smith, 2022, pp. 45–67).

III.1.5. Implications of the *Zoltán Vasas* Case on Future Legal Precedents

The implications of the *Zoltán Vasas case* extend beyond its immediate legal resolution, potentially reshaping future interpretations of contractual obligations within sports law. As the case navigated the intricate balance between the FIFA Regulations and existing players contracts, it underscored the necessity for clarity in contractual language, which may compel governing bodies to revise their regulatory frameworks to minimize ambiguity. One must critically examine whether the existing regulations sufficiently address the complexities inherent in player contracts, as this case demonstrates the potential pitfalls of vague language. Future cases will likely reference the *Zoltán Vasas* decision as

a precedent in determining the enforceability of specific clauses tied to the player conduct and economic compensation, establishing a clearer pathway for adjudication in similar disputes. However, stakeholders should consider whether relying solely on this precedent is sufficient or if further legal innovation may be necessary to address unforeseen circumstances in the evolving landscape of sports law. Consequently, this case may not only influence courts and arbitration bodies such as the Court of Sports Arbitration, but also prompt stakeholders — including players, clubs, and agents — to reassess their contractual strategies and expectations in light of newly clarified legal precedents. As stakeholders reevaluate their positions, it will be crucial for them to remain adaptable and open to ongoing changes, as such developments highlight the dynamic nature of sports law and its capacity to adapt to evolving circumstances within competitive contexts.

III.2. Case Study 2: Financial Implications for the Canadian Football League of a CAS Final Award

Within the domain of professional sport, contractual arrangements fundamentally shape the financial architecture of leagues and athletes alike. The Canadian Football League (CFL), facing a distinctive array of institutional and economic challenges, operates within a complex framework wherein the consequences of a CAS final award may extend beyond isolated disputes to encompass broader fiscal repercussions for the league as a whole. Central to this inquiry is the dichotomy between guaranteed and performance-based contracts, each imposing divergent financial obligations and managerial responsibilities upon clubs. As both players and organizations confront the implications of arbitral determinations, the extent of potential liability or financial security depends substantially upon the contractual model adopted. Consequently, the inherently unpredictable character of arbitral outcomes demands a sophisticated understanding of how such decisions transcend dispute resolution to reshape the economic sustainability and strategic orientation of the CFL, thereby redefining its overall financial equilibrium and competitive integrity (Schmoll, 2003, pp. 1060–1065).

III.2.1. Overview of the Canadian Football League and the Role of Sports Arbitration in Professional Sports

The intricacies of the CFL do not only reflect the cultural significance of the sport in Canada, but also the financial dynamics that govern its operations. As a professional league, the CFL operates within a framework of unique challenges, particularly in securing financial stability while fostering competitive parity. This balance is pressed further by the influence of sports arbitration, which serves as a critical mechanism for resolving disputes between players and franchises.

The role of arbitration does not only clarify contractual obligations but also delineates the boundaries between guaranteed contracts and performance-based agreements. As evidenced in broader contexts of sports law, arbitration outcomes can have significant financial implications for franchises, affecting revenue-sharing models and investment strategies in the league (Schmoll, 2003, pp. 1060–1062). Thus, the interplay between arbitration decisions and league economics remains a pivotal factor for the CFL sustained growth and competitiveness in North American professional sports.

III.2.2. Financial Impact of Sports Arbitration on the Canadian Football League

The intricate financial landscape of professional sports, particularly within the CFL, is notably influenced by the outcomes of sports arbitration, which can have substantial ramifications for both franchises and players alike. The evolving jurisprudence surrounding sports law establishes frameworks that govern contractual obligations, including distinctions between guaranteed and performance-based contracts. For instance, arbitration awards that uphold player grievances can lead to significant financial liabilities for CFL teams, changing not only their current payroll structures, but also their future budgeting strategies. As emphasized in the context of broader sports law developments, disputes resolved through arbitration can generate a body of jurisprudence that reshapes competitive dynamics within leagues, paralleling trends

observed in other professional sports like hockey, where Canadian cities have faced challenges in maintaining franchises due to U.S. municipal investments (Schmoll, 2003, pp. 1060–1062). Ultimately, the financial repercussions of arbitration decisions underscore the necessity for teams to navigate a complex legal and economic environment, where strategic planning is essential to mitigate risks associated with player contracts and dispute resolutions (Mitten and Hayden, 2010, p. 274).

III.2.3. Analysis of the Economic Consequences of Arbitration Awards on Team Budgets and Salary Caps

The interplay between arbitration awards and team financial structures can significantly impact budgets and salary caps within CFL. When a final award from sports arbitration is issued, it can lead to unforeseen financial obligations that teams must navigate, often testing the limits of their established budgets. For instance, teams may find themselves compelled to honor guaranteed contracts, which can inflate payroll figures and restrict their ability to pursue new talent within the confines of the salary cap.

This phenomenon is further complicated by the presence of performance-based contracts, which, while offering teams flexibility, can introduce a degree of uncertainty into future financial planning. As highlighted in recent analyses of the economic consequences of arbitration on sports leagues, clubs often face a delicate balancing act between adhering to league-imposed financial constraints and ensuring competitive viability, necessitating a strategic approach to roster management and fiscal responsibility (Yoost, 2006, pp. 496–507; Pelnar, 2007, pp. 121–122).

III.2.4. Examination of How Arbitration Outcomes Influence Contract Negotiations and Player Compensation Structures

The dynamics of arbitration outcomes play a critical role in shaping contract negotiations and player compensation structures within professional sports leagues, including the CFL. As outcomes of arbitration can set precedents, they inform future negotiations,

specifically regarding the balance between guaranteed contracts and performance-based remuneration. The increasing awareness of athletes regarding their rights, accelerated by arbitration decisions, fosters an environment where players demand more favorable contract terms. This has been illustrated in other leagues, such as the National Hockey League (NHL), where the evolution from owner-centric models to cooperative structures was influenced by arbitration rulings, leading to significant gains for players (Cutting, 2003, pp. 44–70). Furthermore, analyses of antitrust implications highlight the impact of these rulings on collective bargaining and compensation frameworks, ultimately promoting competitive balance and financial stability within leagues (Pelnar, 2007). Consequently, arbitration does not only influence individual contracts, but also reshapes the broader compensation landscape in professional sports.

IV. Contractual Implications of CAS Decisions

In conducting arbitral proceedings pursuant to the arbitration agreement and the relevant sporting regulations governing each dispute, CAS renders final and binding awards. Such determinations ensure the issuance of a conclusive decision, thereby bringing disputes to definitive resolution. The finality of CAS awards constitutes one of the tribunal's principal attractions within the international sports law framework. This section offers a concise examination of the general legal implications of such awards, delineating both the extent of their binding authority and the structural mechanisms through which they operate, while elucidating their ultimate significance for the formulation and organization of player contracts (Goh and Anderson, 2022, p. 251).

Arbitration is a private system that allows parties to decide their disputes in a structured, voluntary, and consensual manner, aiming for more effective justice. Sports arbitration is a private dispute resolution method used in sports. It is preferred by athletes, clubs, and associations because it is generally flexible, involves arbitrators with specialized knowledge of sport, and delivers awards that can easily be enforced worldwide within the scope of what is intended in

the civil, jurisprudential order, and determined by the fit of the case. For specialized arbitration, courts and original rule-making bodies rely on specialized and completely voluntary decisions, leading users to prioritize arbitration over ordinary justice for specialized disputes (Hebbar and Kelkar, 2020, pp. 164–165).

IV.1. Guaranteed Contracts v. Performance-Based Contracts

Guaranteed player contracts in sports are contracts in which the player contracts indicate the amount of money a player will be paid regardless of the occurrence of definite events. For instance, even when an athlete suffers an injury, the player will still be paid despite not competing in games. The performance-based contract starts by paying a basic fee or wage, but part of the player's earning is connected to the player's performance as designated in the contract. These might include the number of games played, the amount of minutes he plays, the number of points, rebounds, assists, and steals, etc. This could also be that the player will receive performance incentive bonuses during tournaments or competitions (Kaul, 2020).

Historically, athletes competing in the Olympic Games, as well as the participating nations, have not received monetary remuneration, deriving instead recognition and national prestige. By contrast, owners and players in the National Basketball Association (NBA) operate under diverse contractual frameworks, including short-term arrangements such as the "ten-day" or "call-up" contract. This differentiation in compensation reflects the varying levels of skill and contribution among players. A particular controversy arose during a suspension, wherein the athlete contended that the arbitral tribunal rendered its decision pursuant to American law rather than the Olympic Charter. This raises the critical question of whether arbitral bodies in the realm of sport evaluate disputes exclusively through an economic lens, or whether they also endeavor to balance regulatory compliance with broader normative and ethical considerations intrinsic to international sports governance (Chappelet, 2020, pp. 309–320).

IV.2. Agent Representation and Compensation

The revered clause of the contract between an athlete and the athlete's agent addresses the payment of the agent. Because of the controlling language prohibiting racial discrimination in sports contracts, the promotion and protection of athletes of particular racial backgrounds are heretofore dealt with. Here, we will investigate, evaluate and construct an economically balanced approach to compensating an athlete's agent from the point of view of furthering the interests of the athlete. If the athlete's right of freedom of contract is to be recognized as fundamental in nature, then the athlete and the athlete only should be the party who decides the extent of their agent's representation and payment (Nafziger, 2011, p. 3).

To help explain how there remains a lack of economic balance in many early relationships between the athlete and the agent, an example may be very helpful. Professional athletes in many cases are drawn from the lower middle class or even working class. Usually they do not come from the extreme wealth of the upper class and have very little knowledge or experience in the business field of an agent. They have worked extremely hard to excel at an athletic endeavor in which they enjoy participating. Soon that participation develops into a possible career that would take care of themselves and possibly their entire family for generations to come. They depend upon a capable agent to assist them in the negotiations that, in turn, would allow a sports franchise owner to pay the athlete a fair and competitive wage (Goh and Anderson, 2022, p. 235).

V. Enforcement and Compliance Mechanisms

In the international sports world, there are numerous examples of a coach or team interfering with a player's contract. If the player signs the new contract and the appropriate tribunal holds that his actions did not violate his existing contract, but there has been a transfer fee, do we have a business tort? The victim of the contract is unable to perform under it despite the findings of the tribunal. Should a lacrosse player be given unwaivable enforceable fiduciary duties?

Any player registered with a professional league is under contract with that respective professional league unless the professional league and the player have a release and/or termination agreement or a binding release and/or termination order issued by the appropriate national and continental basketball federation. Players are under contract unless the team or the player can prove a just cause. Circumstantial evidence is not enough. Once player rights are asserted, a Committee employee shall not negotiate with a team or player other than for a transaction involving the player's employer of record. The Final Four Group argues that its contract with a player is binding and that the State Committee should adhere to its end of the bargain (Kurua, 2023, pp. 23–30).

There have been several recent examples of an employee or executive of a player transferring team acting as a mediator/hearing officer in matters involving the transfer of players. These include soccer and the NBA (Sroka, 2024). Can someone wearing three different hats come up with a just cause, antitrust, or a fiduciary duty result without bias? These are selections that do not take into account those persons that are active in different leadership roles during negotiations. Can someone wearing two hats be truly objective and impartial?

Scholars broadly concur that the consolidation of multiple roles by sports officials or arbitrators threatens the impartiality of arbitral proceedings. Sroka contends that structural conflicts of interest, where individuals act simultaneously as executives and adjudicators, undermine institutional neutrality and public trust in sports arbitration. This concern is echoed by Goh and Anderson who emphasize that the legitimacy of CAS depends on transparent governance and the strict separation of administrative and adjudicatory functions (Goh and Anderson, 2022, pp. 240–245).

V.1. FIFA Football Agent Regulations (FFAR, 2023)⁶

FIFA regulates players' agents and their activities, including termination of player-club contracts. Players can authorize agents

⁶ FIFA Football Agent Regulations. Adopted 10 December 2024, fully applicable 1 January 2025. Available at: <https://digitalhub.fifa.com/m/1e7b741fa0fae779/original/FIFA-Football-Agent-Regulations.pdf> [Accessed 01.11.2025].

for commercial representation, but regulations only set minimum standards. Clubs, players, and authorized subjects can impose stricter rules. Sanctions like fines and transfer bans protect sporting and commercial interests. Player contracts between a player and a club make it possible to determine the rights and obligations of each party. The contracting parties have the right to adopt proposals on the conditions in the contract – the player offers his work and the club commissions it. The legal framework of the player’s status concerns the expression of free will and the worker’s freedom. This is why the negotiations between the player and the club must comply with the rules on freedom, equality, and integrity of the exercise of employment, as laid down in national and European law and included in the Collective Agreement. The individual negotiation is at the center of the contracts between the players and the clubs. There may be no derogation from the framework of the convention without the will of the two players: the standards lay essentially an excessive role of basketball factors (McLaren, 2022, pp. 206–210).

V.2. National Laws and Jurisdiction

According to Swiss legislation, whenever an arbitral tribunal commences its operations, the state court is automatically precluded from hearing the case. Arbitration is based on *lex voluntatis*, that is, the parties can decide themselves what are the rules that are to be applied to their disputes. In case of a determination uncertainty, the right forum is the arbitrator. As a result, if the parties have decided that the disputes arising from their relation are arbitrated by CAS, no state court can have jurisdiction to hear that particular case. To establish the extent of national judges’ jurisdiction when faced with decisions of an arbitral tribunal that conflicts with public policy is therefore an important issue. Different legal systems have different types of appeal. In some countries, the parties can only challenge the award’s validity. This issue is rather limited and only a few procedural issues are considered. Other countries provide the parties with a possibility to appeal on the merits. In that case, national judges will proceed as if they were re-examining a first judgment (Nafziger, 2011, pp. 17–18).

In Switzerland, the decision of an international arbitrator can be opposed under strict admissibility requirements, such as time bar, etc. For the rest, the parties cannot contest the merits of the decision. In other words, when an award is issued, it cannot be appealed on the merit. As a result, Swiss national judges have a very limited scope to consider that a particular decision of an arbitrator could potentially be in conflict with the public policy.⁷ On the other hand, certain decisions that are contrary to fundamental principles of international public order can be the subject of an appeal (Nafziger, 2011, pp. 17–18).

VI. Future Trends and Challenges

The most recent season of women's professional football represented a significant advancement for the sports industry in Europe, as leading clubs such as FC Barcelona and Paris Saint-Germain (PSG) committed substantial financial and institutional resources to the women's game. As professional football continues to expand, it will inevitably face complex financial pressures and structural tensions subject to legal scrutiny and requiring external policy evaluation. Furthermore, the persistent difficulty among affluent, highly educated players in adapting to a market-based salary model — one that enables top performers to secure a proportionally fairer share of existing revenues in elite

⁷ Swiss Federal Act on Private International Law (PILA), Art. 190 (1987, in effect as of 2023). It is worth noting that Art. 190 of the Swiss Federal Act on PILA defines a very narrow scope for challenging international arbitration awards in Switzerland. A party can only request the annulment of an arbitral award under specific circumstances, the most notable being a violation of public policy. In this context, Art. 190(2)(e) of PILA provides that an award can be challenged if it is contrary to "Swiss public policy" or what is known as "public order." However, this exception is applied very restrictively, with the violation of public policy needing to be severe and clear, typically involving a breach of fundamental principles of public order. As a result, judicial review in Switzerland is limited to issues concerning procedural fairness or conflicts with fundamental principles of public order, reflecting the principle of ensuring the finality of arbitral awards. Thus, Swiss courts are not permitted to review or appeal arbitral awards on substantive grounds or assess their correctness on the merits. This approach reflects the Swiss legal framework's tendency to minimize judicial intervention in international arbitration proceedings, thereby enhancing stability and ensuring the respect for the independence and effectiveness of arbitration as a dispute resolution mechanism.

leagues — constitutes an ongoing regulatory and economic challenge that demands careful reassessment within the broader framework of sports governance and equity in compensation (Hebbar and Kelkar, 2020, p. 170).

Thus, we have argued that it is important not to give up on the ability of the market-based system to continue to evolve towards a salary and competitive balance structure that earns significant respect and results for the women's professional soccer players in the top overseas leagues. The women's professional soccer players in Spain are currently considering United States legal structure, and we raised these issues as a position of what to be considered. Should the players in both the US and Spain decide to consider the legal structure, they would be departing significantly from the historical position of FIFA, leagues, and the players as pushing for dispute resolution issues in CAS. Either way, the decisions will have significant impacts on the future salary and competitive balance negotiations (Sroka, 2024, pp. 287–289).

VI.1. Technological Advancements

In assessing this impact, technological innovation has served as a pivotal factor in transforming both the commercial and athletic dimensions of modern sport. Players and their managers increasingly enter into sophisticated commercial agreements with service providers who cater to their professional and personal needs, reflecting the growing commercialization of athletic performance. Advances in sports technology and training methods have also significantly enhanced player efficiency and gameplay. For instance, while six decades ago a footballer who scored a goal was expected to retrieve the ball manually — limiting the overall pace and scoring opportunities — modern innovations in equipment, training, and officiating have dramatically altered the tempo and strategic dynamics of the game. Consequently, contemporary matches can exhibit both intense action and tactical restraint, as evidenced by high-intensity contests that may nonetheless conclude in scoreless draws (Chappelet, 2020, pp. 309–320).

This growing concentration on the players brought about a substantial inflation in their financial rewards. The two commercial

actors in professional sports — the athletes and the club managements — found themselves struggling to adapt to this rapidly evolving market dynamic. These developments led to heightened levels of participation, engagement, and exposure to financial risks for those who, *ultima facie sine aedibus* (that is, seemingly without a solid institutional foundation), entered the expanding commercial sphere of professional sport. During the last 125 years, with respect to some clubs, it is possible to talk about the “club tradition.” Nevertheless, giving soccer as an example, it is interesting to realize that Manchester United main assets, in accounting terminology, besides the facilities, turned out to be the players, who at any time have individual employment contracts with their employers (Sroka, 2024, p. 288).

VI.2. Globalization of Sports Contracts

Sports today have become a component of global mass culture, and many experts attribute that influence on the dynamics of technological progress and the development of mass media. Progress and globalization phenomena surrounding the sports industry are reflected in a number of factors. First of all, changes to the economic and social system sphere of sport have spawned megabusiness. Sports goods and services today are among the leaders in the market of material production, tourist reception, and, above all, entertainment services that are considered the most attractive markets from a commercial point of view. At the same time, along with the objectively related activists, the economic crisis has led to the collapse of some sports organizations that have been in existence for more than a century. The basis of these negatives is generally accepted modern sports features and differences from other spheres of material production: specificity, cross-field, amateur-professional connections. However, now sports are studied not only by sports researchers, but also by economists, sociologists, legal scientists, and so on (Goh and Anderson, 2022, pp. 245–247).

The deepest level of integration into the global market occurs within the megabusiness segments built around individual athletes. Today, it is widely acknowledged that the most accomplished and commercially successful athletes have become the true icons — or “kings” — of the

global sports business. The success of sporting events at both national and regional levels increasingly depends on the capacity of star athletes to generate substantial advertising and marketing revenues, reflecting the extent to which their personal brands drive the industry's growth. In this context, the globalization of sport should be understood not only as a process of integrating athletic activities into the international economic arena but also as one that elevates individual athletes into transnational symbols of cultural and commercial influence. Yet, since the late twentieth century, scholars have noted inherent contradictions within this global expansion: while it promotes economic development and cultural exchange, it also exposes sport to distortions and imbalances — phenomena sometimes described as the “pathologies” of globalized systems of human activity (Goh and Anderson, 2022, pp. 247–248). The fact that decision-making in sports mega-stardom and high-level competition, which slowly lead to global structuring of certain sporting events and markets, often discards traditional bureaucratic-legal methods, transparency, legality, accountability, and fairness principles (Goh and Anderson, 2022, pp. 247–248).

VII. Conclusion

This research explores the recent jurisprudence of the Court of Arbitration for Sport (CAS), which has addressed a wide spectrum of disputes across the global sports system. A predominant characteristic of CAS jurisprudence is its consistent attempt to balance the diverse interests at stake in the sporting arena — those related to the integrity of competition, the protection of athletes' rights, and the autonomy of sports governance. CAS has developed a distinct approach to dispute resolution, guided by principles enshrined in the Olympic Charter and other international instruments.

The Court's contributions can be identified in several key domains. In the sphere of human rights, decisions such as *Caster Semenya v. IAAF (CAS 2018/O/5794)*⁸ illustrate CAS's engagement with the right

⁸ Court of Arbitration for Sport (CAS). *Caster Semenya v. International Association of Athletics Federations (IAAF)*, CAS 2018/O/5794, Award of 30 April 2019.

to non-discrimination and equality in sport. Regarding the autonomy of sports law, the tribunal in *USOC v. IOC (CAS 2008/A/1545)*⁹ reaffirmed the independence of sports institutions from political or external interference. In terms of the protection of minors, *FC Barcelona v. FIFA (CAS 2014/A/3793)*¹⁰ underscored the necessity of safeguarding young athletes in international transfers. Finally, concerning effective access to justice, *Matuzalem v. FIFA (CAS 2008/A/1519)*¹¹ demonstrated CAS's recognition of an athlete's right to a fair hearing even when confronted with substantial procedural costs. Taken together, these decisions have created a coherent body of jurisprudence which, when applied in good faith by sports institutions and stakeholders, strengthens both the principle of sports specificity and the fair administration of sports law.

Research also found a tendency of CAS to respect the same reformulation of the internal order of these sports entities. The final decision will be the result of a correct balance between moving the entire world community around the public trust, the celebration of sports with minimal possible risk of damage and a regulation consistent with the economic business. This percentage must be predominant and unquestionable. However, this balance, and above all this moderation, is still an aspiration of regulation, which endorses sports law to be ready and able to accompany social transformations. The peculiarities and principles of sports law adapted to the new economy of sports and the modes of behavior arising from good faith should guide all procedural activity of CAS, guaranteeing justice, effectiveness, and definitiveness to cases within the material and objective examination and the respectful and legitimate decision identical to the decisions of common justice.

In conclusion, there are still several open questions that require further research and study that are the focus of this work. Some of the key questions include: how can sports law be adapted to keep pace with

⁹ Court of Arbitration for Sport (CAS). United States Olympic Committee (USOC) v. International Olympic Committee (IOC), CAS 2008/A/1545, Award of 16 October 2008.

¹⁰ Court of Arbitration for Sport (CAS). FC Barcelona v. Fédération Internationale de Football Association (FIFA), CAS 2014/A/3793, Award of 24 April 2015.

¹¹ Court of Arbitration for Sport (CAS). Matuzalem v. Fédération Internationale de Football Association (FIFA), CAS 2008/A/1519, Award of 19 May 2009.

the ongoing developments in the sports economy? What fundamental principles should guide the procedural activity of CAS in light of these changes? Additionally, what are the optimal ways to balance maintaining public trust and celebrating sports while considering the economic interests of the involved parties? Finally, what are the challenges in ensuring justice, effectiveness, and finality in CAS decisions while respecting the fundamental principles of common justice? These questions remain open and call for further analysis and discussion in the future.

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International Legal Regulation of the Protection of Energy Facilities during Armed Conflicts

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Abstract: The recurring attacks on energy facilities during armed conflicts raise concerns about the effectiveness of their legal safeguards. The examples provided in the article of assaults on various types of energy infrastructure, including those employing modern means and methods of warfare, highlight the scale and multifaceted nature of this issue. The article identifies the norms of international humanitarian law (IHL) and other branches of international law that are applicable to the protection of energy facilities not only during armed, but also in peacetime. It also examines the rights and responsibilities of various actors under international legal standards in relation to these attacks.

The authors have identified gaps and issues in the legal regulation of the protection of energy facilities, as well as proposed legal positions for the improvement of these norms. Key issues identified include the

limited definition of “installations and structures containing dangerous forces,” as outlined in the 1977 Additional Protocols to the 1949 Geneva Conventions, the evolving nature of armed conflicts, the blurred lines between wartime and peacetime, the difficulties in applying the principle of distinction between civilian and military targets when planning and assessing attacks on energy facilities.

The authors have demonstrated the need to improve the international legal regulation of the protection of energy facilities and have outlined directions for the codification and progressive development of international legal norms. These proposals encompass the expansion of the term “installations and structures containing dangerous forces” as defined in the 1977 Additional Protocols, the establishment of a comprehensive definition of “energy facility” within a universal convention on international energy security, the creation of mechanisms to investigate assaults on energy facilities, and the enforcement of accountability for illegal actions directed at these facilities.

Keywords: energy facilities; attacks on energy facilities; protection of energy facilities; power plants; pipelines; international law; international humanitarian law; cyber operations; autonomous weapon systems; artificial intelligence

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Contents

I. Introduction	858
II. Applicable International Law	865
II.1. Norms of International Humanitarian Law	866
II.2. Norms of Other Branches of International Law	871
III. Conclusion	875
References	878

I. Introduction

Over the past century, energy infrastructure has frequently been subjected to attacks during armed conflicts, leading to significant repercussions such as the disruption of economic activities, the release

of toxic materials, environmental degradation, and risks to human life and health. The United Nations Security Council has repeatedly condemned attacks on oil facilities, pipelines, and other installations and emphasized the importance of their protection.¹

In Russian research, scholars emphasize that states must ensure the physical security of energy resource extraction and transportation infrastructure, including cases of damage caused by armed conflict (Kotlyar, 2010; Savchuk and Kondratyev, 2011). Russian experts in international energy relations highlight the growing number of threats of terrorist attacks on energy infrastructure facilities, as well as the need to ensure the reliability and uninterrupted operation of fuel and energy sector enterprises to guarantee energy security (Zhiznin et al., 2020).

It should be noted that the terms “energy facility” or “energy object” are not defined in any universal international treaty. The term “energy facility” has a broad meaning, encompassing facilities for the production, transportation, and storage of various types of energy that play a crucial role in a State’s economy, security, and livelihood of its population (Park and Andrews 2004). Currently, there is no specific international treaty that comprehensively regulates the protection of all energy facilities, either generally or during armed conflicts. Instead, various international treaties contain provisions that address the protection and security of individual energy facilities.

In the realm of a comparative legal analysis, it is important to highlight that Russian legislation does not provide a definition for the term “energy facility” and lacks a cohesive legal framework for the protection of such facilities. This is largely due to the significant differences in the energy sectors where these facilities operate, the varying technological characteristics of energy facilities, and the specifics of their construction, operation, and protection. For example, Federal Law No. 256-FZ dated 21 July 2011, “On the Security of Fuel and Energy Complex Facilities,” applies to “fuel and energy complex facilities” that are defined as “facilities in the electric power industry,

¹ United Nations Security Council Res. S/RES/2046 (2012), 2 May 2012, S/RES/2075 (2012), 16 November 2012, S/RES/2155 (2014), 27 May 2014, S/RES/2156 (2014), 29 May 2014, S/RES/2051 (2012), 12 June 2012, S/RES/2076 (2012), 20 November 2012.

oil extraction, oil refining, petrochemical, gas, coal, shale, and peat industries, as well as facilities for oil product supply, heat supply, and gas supply.”² The Federal Law No. 170-FZ dated 21 November 1995, “On the Use of Atomic Energy,” establishes special legal regulations for the protection of “atomic energy use facilities” that include nuclear installations, radiation sources, and storage sites for nuclear materials and radioactive substances.³ Russian legal research emphasizes that the defining characteristic of fuel and energy complex facilities is their significance for the country’s economy and the security of livelihoods (Romanova et al., 2015, p. 99).

Political and legal assessments of attacks on energy facilities by states and international organizations vary. The consequences of such attacks also differ depending on the type of energy facilities, the specifics of the relevant energy sectors, their role within the energy sector, and the overall economy of the State where the facility is located, as well as the impact on states or regions whose interests are affected by the attack.

During the Iran-Iraq War (1980–1988), the oil industry facilities of both countries were subjected to regular bombings. The destruction of Iranian oil platforms by the United States became the subject of proceedings before the International Court of Justice (ICJ). Iran unsuccessfully attempted to prove that these actions violated the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the two countries. The Court acknowledged that the destruction of the oil platforms might have adversely affected Iran’s oil exports and, in turn, the trade freedoms assured by the aforementioned treaty.⁴

In June 1981, Israeli fighter jets struck the Iraqi reactor Osirak, causing significant damage. The United Nations General Assembly condemned Israel’s actions, emphasizing that “the result of an armed

² Federal Law adopted on 21 July 2011 No. 256-FZ “O bezopasnosti ob’yektov toplivno-energeticheskogo kompleksa” [On the Security of Fuel and Energy Complex Facilities]. Collection of Legislation of the Russian Federation.

³ Federal Law adopted on 21 November 1995 No. 170-FZ “Ob ispol’zovanii atomnoy energii” [On the Use of Atomic Energy]. Collection of Legislation of the Russian Federation.

⁴ International Court of Justice. 1996. Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports.

attack on a nuclear facility... would be serious radioactive consequences, which could also lead to the onset of radiological warfare.”⁵

In 1999, in the territory of the former Republic of Yugoslavia, NATO bombings destroyed oil refineries and chemical plants, leading to the release of toxic substances and the death and injury of civilians (Guskova, 2012, pp. 331–544). Russia condemned NATO’s aggressive actions, undertaken without the authorization of the UN Security Council, and initiated the adoption of a resolution demanding an end to the bombings. However, this initiative was supported by only three out of fifteen members of the Security Council (India, China, and Namibia).⁶

In 2006, Israel launched an attack on the power plant in Jiyeh, Lebanon. As a result of the bombing, heavy fuel oil spilled into the Mediterranean Sea, causing an environmental disaster (Henckaerts and Constantin, 2014). These actions were not subject to international legal assessment.

The consequences of attacks on energy facilities can extend beyond the immediate combat zone and persist even after hostilities have ended. For instance, in 2016, a fire ignited by the Islamic State (IS) at the Mishraq power plant in Iraq produced a toxic smoke plume that necessitated the hospitalization of thousands suffering from serious respiratory conditions.⁷ Additionally, in the same year, IS ignited oil wells in Qayyarah,⁸ Iraq, and launched attacks on a gas compressor station in Kirkuk, as well as an oil collection site, resulting in the destruction of a storage tank.⁹

⁵ United Nations General Assembly. Resolution A/RES/38/9. 10 November 1983.

⁶ “My ne vprave zabyt’ etu tragediyu”: 21 god nazad nachalas’ agressiya NATO protiv Yugoslavii. *Balkanist*. Available at: <https://balkanist.ru/my-ne-vprave-zabyt-etu-tragediyu-21-god-nazad-nachalas-agressiya-nato-protiv-yugoslavii/> [Accessed 25.01.2025].

⁷ UN Secretary-General. Report of the Secretary-General, S/2019/373. 7 May 2019.

⁸ Otstupayushchiye terroristy podozhgli 19 neftnyanykh skvazhin v rayone Mosula [Retreating terrorists set fire to 19 oil wells in the Mosul area]. Available at: <https://rg.ru/2016/11/07/otstupaiushchie-terroristy-podozhgli-19-neftnyanyh-skvazhin-v-rayone-mosula.html> [Accessed 25.01.2025].

⁹ “Islamic State attacks two energy plants in north Iraq, kills five.” Available at: <https://ca.reuters.com/article/idCAKCN10B05F/> [Accessed 25.01.2025].

In 2019, unidentified individuals carried out an armed attack on oil refineries in Saudi Arabia using unmanned aerial vehicles (UAVs), resulting in a 50 % reduction in the country's oil production.¹⁰ In Syria, terrorist groups have repeatedly attacked oil facilities, leading to oil spills and environmental pollution. In early 2020, militants targeted oil refineries and oil pumping stations, causing significant damage.¹¹

In September 2022, the Nord Stream 1 and Nord Stream 2 gas pipelines were sabotaged. This major attack on energy infrastructure occurred during the Russia-Ukraine armed conflict (after the start of Russia's Special Military Operation on 24 February 2022), albeit outside the immediate theater of military operations – in the exclusive economic zones of Denmark and Sweden, northeast of the island of Bornholm. In addition to significant material damage, the explosions caused serious environmental consequences.¹² Despite the scale of the incident, no international investigation was conducted. A draft resolution submitted by Russia to the United Nations (UN) Security Council in 2023 calling for an international investigation was rejected. The Prosecutor General's Office of the Russian Federation initiated a criminal case in connection with an act of international terrorism. The Investigative Department of the Russian Federal Security Service (FSB) opened a criminal case under Part 1 Art. 361 of the Russian Criminal Code.¹³ However, in Switzerland, where the pipeline operator company is registered, the

¹⁰ Exclusive: U.S. probe of Saudi oil attack shows it came from north – report. Available at: <https://www.reuters.com/article/us-saudi-aramco-attacks-iran-exclusive/exclusive-u-s-probe-of-saudi-oil-attack-shows-it-came-from-north-report-idUSKBN1YN299/> [Accessed 25.01.2025].

¹¹ Siriya zayavila ob atake boyevikov na neftyanyye ob'yekty v portu Baniyas. Available at: <https://www.rbc.ru/rbcfreenews/5e2f2fa59a79476218f8c7a1> [Accessed 25.01.2025].

¹² Otvet ofitsial'nogo predstavatelya MID Rossii M.V. Zakharovoy na vopros MIA "Rossiya segodnya" v svyazi s dvukhletney godovshchinoy podryvov gazoprovodov "Severnnyy potok-1" i "Severnnyy potok-2" [Response of the official representative of the Russian Ministry of Foreign Affairs M.V. Zakharova to the question of the International Information Agency "Russia Today" in connection with the two-year anniversary of the explosions of the Nord Stream 1 and Nord Stream 2 gas pipelines]. Available at: https://www.mid.ru/ru/foreign_policy/news/1972550/ [Accessed 25.01.2025].

¹³ GP initsiirovala delo o terrorizme posle povrezhdeniy na "Severnnykh potokakh" [The Prosecutor General's Office has opened a terrorism case following damage to the Nord Stream pipeline]. Available at: <https://ria.ru/20220928/potok-1820183210.html/> [Accessed 25.01.2025].

incident received no criminal legal assessment. The coastal states of Denmark and Sweden, in whose exclusive economic zones the explosions occurred, also declined to pursue criminal prosecution. Requests for legal assistance sent by the Prosecutor General's Office of the Russian Federation to the competent authorities of Germany, Denmark, Finland, Switzerland, and Sweden, in accordance with international obligations, were effectively ignored.

Since 2022, the Armed Forces of Ukraine (AFU) have conducted numerous armed attacks on the Kakhovka Hydroelectric Power Plant (HPP). In June 2023, an explosion caused its devastation, leading to a rise in the Dnieper River's water level by over 11 meters. This event resulted in the flooding of 40 settlements and infrastructure sites that housed hazardous chemicals that eventually entered the Black Sea. The incident inflicted significant harm on the land, agricultural activities in the area, and the ecosystem of the Dnieper River.¹⁴

The armed attacks on the Kakhovka Hydroelectric Power Plant (HPP) have jeopardized the safety of the Zaporizhzhia Nuclear Power Plant (NPP), which is technically interconnected with it. In this regard, the Director General of the International Atomic Energy Agency (IAEA) has outlined principles that, if followed by the parties to the armed conflict, would help prevent a nuclear disaster at the Zaporizhzhia NPP:

1. there should be no attacks from or on the plant;
2. the Zaporizhzhia NPP must not be used as a storage site for heavy weapons or as a base for military personnel;
3. the external power supply to the plant must not be put at risk;
4. all structures, systems, and components necessary for the safe and reliable operation of the Zaporizhzhia NPP must be protected from attacks or acts of sabotage.¹⁵

¹⁴ Eksperty obsuzhdayut resheniye ekologicheskikh problem Donbassa i Novo-Rossii [Experts discuss solutions to environmental problems in Donbass and NovoRossiya]. Available at: https://www.mnr.gov.ru/press/news/eksperty_obsuzhdayut_reshenie_ekologicheskikh_problem_donbassa_i_novoRossii/?sphrase_id=958282/ [Accessed 25.01.2025].

¹⁵ Glava MAGATE perechislil printsipy, kotoryye pozvolyat predotvratit' yadernuyu aviariyu na Zaporozhskoy AES [The head of the IAEA listed the principles that will help prevent a nuclear accident at the Zaporizhzhia NPP]. Available at: <https://news.un.org/ru/story/2023/05/1441497> [Accessed 25.01.2025].

Military operations are progressively transitioning into the realm of cyberspace, with assaults on energy infrastructure being carried out via computer networks. These cyberattacks have a direct impact on the security of energy systems. Nevertheless, the perpetrators of these attacks frequently remain unidentified. A prominent instance is the cyberattack that used the Stuxnet computer virus against the Iranian uranium enrichment facility in Natanz in 2007 (Belous, 2020, pp. 143–145), which represented a significant risk to nuclear safety.

In 2002, a cyberattack on Venezuela's principal oil enterprise, *Petróleos de Venezuela, Sociedad Anónima (PDVSA)*, led to a notable decline in the nation's oil output.¹⁶ In 2015, energy infrastructure in Ukraine experienced a cyberattack that resulted in multiple regions suffering power outages.¹⁷ In 2019, Venezuela's foremost hydroelectric facility, El Guri, was also targeted by a cyberattack, causing extensive power disruptions throughout the country.¹⁸ Venezuelan officials indicated that the cyberattack might have been initiated from the United States; however, no formal declarations or confirmations were issued by other states concerning the incident.

In February 2020, in the United States, malicious software halted operations at a natural gas compression facility, as the emergency response plan did not account for cyber threats or include appropriate protective measures.¹⁹ In May 2020, a series of cyberattacks targeted supervisory control and data acquisition (SCADA) systems at water treatment and supply facilities in Israel.²⁰

¹⁶ The 2002 Oil Lockout: 10 Years Later. Available at: <https://venezuelanalysis.com/analysis/7527> [Accessed 25.01.2025].

¹⁷ Eksperty: prichina dekabr'skogo blekauta v Kiyevе — khakerskaya ataka [Experts: The cause of the December blackout in Kyiv was a hacker attack]. Available at: <https://www.bbc.com/russian/news-38589448> [Accessed 25.01.2025].

¹⁸ Vlasti Venesuely nazvali kiberataku prichinoy otklyucheniya sveta v strane [Venezuelan authorities blamed a cyberattack for the country's power outage]. Available at: <https://www.rbc.ru/rbcfreenews/5c994f5b9a79478c70f8413d> [Accessed 25.01.2025].

¹⁹ Natural Gas Compressor Facility Shut Down After Ransomware Attack. Available at: <https://www.natlawreview.com/article/natural-gas-compressor-facility-shut-down-after-ransomware-attack> [Accessed 25.01.2025].

²⁰ Hackers Targeted ICS/SCADA Systems at Water Facilities, Israeli Government Warns. Available at: <https://securityaffairs.co/wordpress/102361/hacking/israeli-water-facilities-attacked.html> [Accessed 25.01.2025].

II. Applicable International Law

Under current international law, the construction, operation, and protection of specific energy facilities are regulated by norms from various branches of international law, including maritime, energy, nuclear (atomic), environmental, and humanitarian law.

As a general rule, the norms of international law that define the legal regime of energy facilities and regulate their protection can be divided into two categories based on applicability of the relevant international treaties and their period of validity: norms applicable in peacetime and norms applicable during armed conflicts, i.e., norms of international humanitarian law (hereinafter referred to as IHL).

However, a number of norms applicable in peacetime continue to operate during armed conflicts as well. Article 3 of the Draft Articles on the Effects of Armed Conflicts on International Treaties, prepared by the International Law Commission, states that “if it appears from the subject matter of the treaties that they are intended to continue in operation, in whole or in part, during armed conflict, the outbreak of an armed conflict does not *ipso facto* affect their operation.”²¹ The International Law Commission also noted that the law applicable to armed conflicts is “clearly broader” and that “it is not sufficient to recognize international humanitarian law as *lex specialis*,” as “other branches of international law may also be applicable.”²²

The list of international treaties formulated in the Draft Articles does not directly include treaties defining the status of energy facilities. However, the treaties mentioned in the list — such as those concerning the permanent regime or status of territories, international protection of human rights, environmental protection, international watercourses, aquifers, and related structures and facilities — may be applicable to energy facilities,²³ as well as in assessing the legal consequences of attacks on them.

²¹ International Law Commission. Draft Articles on the Effects of Armed Conflicts on International Treaties, 6 August 2008, UN Doc. A/63/10.

²² Draft Articles on the Effects of Armed Conflicts on International Treaties.

²³ Draft Articles on the Effects of Armed Conflicts on International Treaties.

II.1. Norms of International Humanitarian Law

It is essential to recognize the differences in the applicability of IHL norms based on the type of armed conflict, whether international or non-international. This differentiation is rooted in the conditions governing the application of IHL sources, particularly the 1949 Geneva Conventions and their 1977 Additional Protocols (AP).

Nevertheless, contemporary armed conflicts exhibit significant variations compared to those of the previous century. Classifying the nature of modern armed conflicts presents considerable challenges (Maleev and Glikman, 2008). These conflicts often have a hybrid character, involving various anti-government factions, including terrorist groups, that frequently receive support from foreign nations. The regulations for declaring war, as outlined in the 1907 Hague Convention (III) on the Opening of Hostilities, are no longer applicable.²⁴ The distinctions between war and peace are increasingly blurred, with active military operations taking place in urban areas, where civilians and civilian infrastructure are intentionally targeted.

The key issue in planning attacks on energy facilities and assessing the acts committed is determining the legal status of the energy facility and, accordingly, the legality of the attack against it. The principles of IHL are crucial in this context, having been consistently recognized in international judicial proceedings as customary norms of IHL.²⁵

A fundamental aspect of this discussion is the need to maintain the principle of distinction between civilian and military objects, as only military objects are permissible targets (i.e., legitimate military objectives). In the context of armed conflicts, installations like power plants and oil storage facilities often serve dual purposes. Due to their essential function in supporting opposing military forces, they are frequently classified as legitimate military targets in contemporary warfare. As highlighted by E. David, the airstrikes on oil refineries

²⁴ Hague Convention (III) Relative to the Opening of Hostilities. Signed 18 October 1907.

²⁵ International Court of Justice. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion. ICJ Reports 1986. International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Kupreškić et al., Case No. IT-95-16, Judgment. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2, Judgment.

in Iraq, Iran, and Kuwait did not elicit significant objections from states, as these facilities supplied fuel to rival armed forces. The only exceptions occurred in instances where such attacks led to considerable environmental damage (David, 2011, p. 312).

A further issue is the lack of a unified understanding of the scope, classifications, and formulations of the principles of international humanitarian law (IHL). There are varying positions among states, the stance of the International Committee of the Red Cross (ICRC),²⁶ and different doctrinal approaches on this matter. For example, the principle of proportionality and its content remain subjects of debate (David, 2011, pp. 835–836; Blishchenko, 1984, p. 89; Kotlyarov, 2013, pp. 57–58).

Within the framework of international treaties and sources of IHL, it is important to determine which general treaty norms apply to the protection of energy facilities and whether there are specific provisions that address their unique characteristics and the challenges arising from attacks on them in modern armed conflicts.

The 1907 Hague Convention on the Laws and Customs of War on Land along with other Hague Conventions and declarations do not contain specific provisions on the protection of energy facilities. However, these treaties remain highly significant as they establish the foundations of international legal regulation for modern armed conflicts (Glikman, 2018). For the protection of energy facilities, the Martens Clause²⁷ is applicable since attacks on energy facilities affect the rights of both the population and belligerents. Additionally, the Provisions on the Laws and Customs of War on Land enshrine the principle of

²⁶ Osnovnye printsipy Mezhdunarodnogo dvizheniya Krasnogo kresta i Krasnogo polumesyatsa [Fundamental Principles of the International Red Cross and Red Crescent Movement]. Available at: https://www.icrc.org/sites/default/files/document/file_list/4046_fundamental-principles-ru.pdf [Accessed 16.02.2025].

²⁷ The clause found in the preamble of the Second Hague Conference of 1899 concerning the Laws and Customs of War on Land states that, in situations not addressed by existing agreements, the nationality of the belligerents is safeguarded and serves as a foundation for international rights, as long as these rights are derived from enduring humanitarian principles and the requirements of public conscience. This provision was subsequently incorporated into various other treaties, forming a cornerstone of International Humanitarian Law.

restricting belligerents in their choice of means and methods of warfare (Art. 22) and outline the prohibited means of causing harm to the enemy (Art. 23).

The 1949 Geneva Conventions of 1949 also do not include specific norms on the protection of energy facilities. However, special norms applicable to certain energy facilities are established in the 1977 Additional Protocols I and II to the Geneva Conventions (hereinafter referred to as AP I and AP II).²⁸ According to Art. 56 of AP I and Art. 15 of AP II, “Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”²⁹ These articles specify particular objects enjoying special protection, while other installations and structures containing dangerous forces, as well as energy facilities in a broader sense, remain without special legal protection (e.g., pipelines, offshore oil platforms, solar panels).

During the 1974 Diplomatic Conference, a proposal was made to incorporate provisions into Art. 56 of AP I that would provide special protection for oil rigs, oil storage facilities, and oil refineries. However, it was concluded that these entities did not possess dangerous forces as defined by the article.³⁰ Additionally, there was a suggestion to amend the term “namely” to “such as” in order to broaden the definition of installations and structures; this amendment was ultimately not accepted, as the aim was to create a text that would be universally agreed upon.

In the research titled “Customary International Humanitarian Law,” it is stated that a customary norm exists that mandates that “if attacks are carried out on installations and other structures, special care must be taken to avoid the release of dangerous forces and consequent

²⁸ Available at: <https://www.un.org/ru/humanitarian/law/geneva.shtml> [Accessed 16.02.2025].

²⁹ Available at: <https://www.un.org/ru/humanitarian/law/geneva.shtml> [Accessed 16.02.2025].

³⁰ Report of the Rapporteur to the Third Committee. CDDH/III/264, 13 March 1975, pp. 350–352.

severe losses among the civilian population” (Henckaerts and Doswald-Beck, 2005, pp. 139–142). Moreover, it is emphasized that the special care required for the objects mentioned in Art. 56 of AP I and Art. 15 of AP II should also extend to other structures, including chemical and petrochemical plants.

The stipulations outlined in Art. 56 of AP I and Art. 15 of AP II have faced significant criticism from experts in international law due to their lack of comprehensiveness and failure to consider other entities whose destruction could lead to irreversible damage (Kotlyarov, 2009, pp. 104–105). It has been noted that Art. 56 of AP I does not encompass additional installations, including those involved in the extraction of oil and petroleum products (Vitzthum, 2011, pp. 875–876). Furthermore, some scholars advocate for the inclusion of pipelines within the scope of international humanitarian law (IHL) norms (Vylegzhanin and Moskva, 2015). In Russian legal theory, a proposal has been made to adopt a more expansive definition of “objects containing dangerous forces” within the aforementioned articles (Puzyreva, 2007, p. 75).

Attacks on energy infrastructure inflict damage on both individual human rights — such as the deprivation of access to energy essential for nutrition and education — and collective rights, particularly the rights of peoples and nations to freely manage their natural resources, as well as the right to a healthy environment. Additionally, when energy facilities are targeted, the protection of the rights of legal entities becomes a pertinent issue, especially when the owners of these facilities are foreign corporations, thereby complicating the legal framework.

A separate legal challenge in protecting energy facilities during armed conflicts is the absence of special international treaties of a universal nature regarding the use of modern means and methods of warfare, such as cyber operations (Safonov et al., 2021, p. 45), unmanned aerial vehicles (UAVs) (Teteriuk and Chizhevsky, 2016), and autonomous weapon systems (AWS) (Ivanov et al., 2021).

The deployment of computer networks to target various entities in armed conflicts presents several legal dilemmas and questions: what qualifies as an attack under IHL? At what point does IHL become applicable to actions executed via computer networks (Sassòli, 2019, pp. 656–658)? What computer networks are deemed military objectives;

how the principles of IHL are maintained; and under what circumstances a cyberattack is regarded as direct participation in hostilities? Some of these issues are addressed in the contentious Tallinn Manual 2.0 (Schmitt et al., 2017, pp. 1–8), created by a panel of experts under NATO's guidance.

In legal doctrine, there are various approaches to qualifying a cyberattack: recognizing it as an act of aggression against a state (Jensen, 2002, p. 207) or considering it aggression only if it results in consequences equivalent to those caused by conventional weapons (Brown, 2006, pp. 187–188). Some argue that computer networks can be used as a legitimate means of conducting military operations against energy facilities, as they may reduce the risk of releasing dangerous forces (Schmitt, 2002). A number of countries have asserted the right to carry out preemptive cyberattacks, including against critical infrastructure facilities.

Cyberattacks inflict significant harm on the global economy. Information and communication technologies are frequently employed to meddle in the domestic affairs of nations. The lack of a universal international “code of conduct” in the cyber domain renders all countries susceptible to threats.³¹ In December 2024, the UN General Assembly adopted the text of the Convention against Cybercrime that was developed at Russia's initiative. The primary objective of this Convention is to foster international collaboration in addressing specific crimes perpetrated through information and communication systems. Nevertheless, critical global issues persist, including the unregulated use of the Internet, the need for enhanced cybersecurity for nations, the absence of a cohesive conceptual framework, the execution of cyberattacks during both armed conflicts and peacetime, and the lack of international legal mechanisms for investigating cyberattacks and holding offenders accountable.

Significant damage to and destruction of energy facilities during armed conflicts are often caused by attacks using UAVs. The use of

³¹ Global'nyye problemy kiberbezopasnosti i mezhdunarodnyye initsiativy Rossii po bor'be s kiberprestupnost'yu [Global cybersecurity challenges and Russia's international initiatives to combat cybercrime]. Available at: https://www.mid.ru/da/foreign_policy/news/-/asset_publisher/cKNonkJEo2Bw/content/id/4350978 [Accessed 26.01.2025].

UAVs is not prohibited by international law. However, they remain subject to the restrictions and prohibitions established by the general norms of IHL. Additionally, complex legal issues arise, including the responsibility of the operator, owner, and manufacturer of UAVs. Furthermore, the use of UAVs in peacetime also presents challenges in establishing the legal grounds for their presence in the airspace of a foreign state (Kholikov and Sazonova, 2017).

The problems that may arise from attacks on energy facilities using AWS are linked to unresolved general issues regarding the use of AWS, such as maintaining human control over their operation, the ability of AWS to comply with IHL norms and recognize participants in armed conflicts, and holding software developers, operators, and commanders legally accountable (Ivanov et al., 2021). Gaps in legal regulation in this area, combined with the rapid development of military technologies, threaten the possibility of ensuring international peace and security and may lead to a loss of human control over the use of force (Skuratova and Korolkova, 2019). Furthermore, discussions are ongoing regarding the challenges of ensuring ethical norms in the development of AI technologies (Tikhomirov et al., 2019, pp. 240–242), granting “robots” special legal personality (Gabov and Khavanova, 2018), and the proposal to transfer certain algorithms and data into state ownership “to enhance transparency and ensure the safety of their use” (Shestak and Volevodz, 2019).

Despite the absence of specific international legal norms regulating the use of the aforementioned and other modern means and methods of warfare, they are subject to the general requirements and restrictions established by IHL, as well as to international legal norms on the responsibility of states and individuals.

II.2. Norms of Other Branches of International Law

The regulations established by the 1982 United Nations Convention on the Law of the Sea are relevant to the safeguarding of energy facilities situated in maritime zones, particularly those pertaining to the establishment and utilization of artificial islands, installations, and

structures.³² It is essential to recognize that the legal framework governing such facilities is contingent upon the specific type of maritime area in which they are situated. Additionally, it is important to highlight that the high seas are designated for peaceful activities. Facilities engaged in operations within the Area must also adhere to this principle of peaceful use, as outlined in Art. 88, 141, and 147 of the 1982 Convention. The 1982 Convention, along with the Convention on the Continental Shelf³³ and the 1958 Convention on the High Seas,³⁴ provides guidelines for the functioning of submarine pipelines. Any assault on these facilities or their destruction would constitute a breach of the rights of states that exercise jurisdiction over them, as well as infringe upon the property rights of the owners and operators of energy facilities.

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation establishes a list of criminal acts against ships not permanently attached to the seabed and obligates participating states to take the necessary measures to establish jurisdiction over these crimes.³⁵ The 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf extends the provisions of the 1988 Convention to fixed platforms located on the continental shelf and includes a list of unlawful acts against such facilities.³⁶ The 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation obligates states to take appropriate measures to combat oil pollution and establishes

³² United Nations Convention on the Law of the Sea. Adopted on 10 December 1982. Available at: https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_r.pdf [Accessed 16.02.2025].

³³ Convention on the Continental Shelf. Adopted on 29 April 1958. Available at: https://www.un.org/ru/documents/decl_conv/conventions/pdf/conts.pdf [Accessed 26.01.2025].

³⁴ Convention on the High Seas. Adopted on 29 April 1958. Available at: https://www.un.org/ru/documents/decl_conv/conventions/pdf/hsea.pdf [Accessed 26.01.2025].

³⁵ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Adopted on 10 March 1988. Available at: https://www.un.org/ru/documents/decl_conv/conventions/maritime.shtml [Accessed 26.01.2025].

³⁶ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Adopted on 14 October 2005. Available at: https://www.un.org/ru/documents/decl_conv/conventions/shelf_security.shtml [Accessed 25.01.2025].

a mechanism for cooperation in the event of an incident causing oil pollution.³⁷

In situations where the destruction of energy facilities leads to air pollution, applicable sources of international environmental law are invoked including the 1979 Convention on Long-Range Transboundary Air Pollution,³⁸ the 1985 Vienna Convention for the Protection of the Ozone Layer,³⁹ and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,⁴⁰ among others. The special protection afforded to nuclear installations is grounded in the universal principles of international nuclear law that include the 1963 Vienna Convention on Civil Liability for Nuclear Damage,⁴¹ the 1994 Convention on Nuclear Safety,⁴² and the 1980 Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.⁴³

Attacks on energy facilities create complexities related to material liability for the damage caused and the protection of the rights of owners, especially if they are foreign investors or if the facilities were built as part of international energy projects. Accordingly, in such cases, the norms of international investment law and international energy law are

³⁷ International Convention on Oil Pollution Preparedness, Response and Cooperation. Adopted on 30 November 1990. Available at: https://www.un.org/ru/documents/treaty/oil_pollution_preparedness [Accessed 26.01.2025].

³⁸ Convention on Long-Range Transboundary Air Pollution. Adopted on 13 November 1979. Available at: https://www.un.org/ru/documents/decl_conv/conventions/transboundary.shtml [Accessed 26.01.2025].

³⁹ Vienna Convention for the Protection of the Ozone Layer. Adopted on 22 March 1985. Available at: https://www.un.org/ru/documents/decl_conv/conventions/ozone.shtml [Accessed 26.01.2025].

⁴⁰ Montreal Protocol on Substances that Deplete the Ozone Layer. Adopted on 16 September 1987. Available at: https://www.un.org/ru/documents/decl_conv/conventions/montreal_prot.shtml [Accessed 16.02.2025].

⁴¹ Vienna Convention on Civil Liability for Nuclear Damage. Adopted on 21 May 1963. Available at: https://www.un.org/ru/documents/decl_conv/conventions/pdf/circ566.pdf [Accessed 16.02.2025].

⁴² Convention on Nuclear Safety. Adopted on 17 June 1994. Available at: https://www.un.org/ru/documents/decl_conv/conventions/pdf/circ449.pdf [Accessed 16.02.2025].

⁴³ Convention on the Physical Protection of Nuclear Material and Nuclear Facilities. Adopted on 26 October 1980. Available at: https://www.un.org/ru/documents/decl_conv/conventions/nucmat_protection.shtml [Accessed 16.02.2025].

applied. The 1994 Energy Charter Treaty (Art. 12) provides guarantees to foreign investors whose investments in the territory of another State have suffered as a result of armed conflict, a state of emergency, civil unrest, or similar events.⁴⁴ The State must grant such investors the most favorable treatment in obtaining restitution, compensation, indemnification, or other forms of settlement.⁴⁵

A number of bilateral international treaties of the Russian Federation regulating international projects for the construction of energy facilities include guarantees for the compensation of damages to organizations participating in the project in the event of armed conflicts or other uses of armed force. For example, Art. 4 of the 2015 Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Pakistan on Cooperation in the Implementation of the “North-South” Gas Pipeline Project stipulates that “the Pakistani Side guarantees to the authorized organization of the Russian Side and other organizations involved in the implementation of the project compensation for all direct losses incurred by them as a result of war or other military conflicts, revolution, insurrection, mutiny, riot, terrorist acts, and other similar events.”⁴⁶

According to Art. 10 of the 1992 Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran on Cooperation in the Construction of a Nuclear Power Plant on the Territory of Iran, “if the implementation of this Agreement is disrupted... by wars, hostilities, or any other cause beyond the control of either Party,” representatives of the Governments must immediately consult with each other and agree on measures to minimize potential damage to both Parties.⁴⁷

⁴⁴ Energy Charter Treaty. Adopted on 17 December 1994. Available at: <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-ru.pdf> [Accessed 16.02.2025].

⁴⁵ Energy Charter Treaty. Adopted on 17 December 1994.

⁴⁶ Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Pakistan on cooperation in the implementation of the North-South gas pipeline construction project. Adopted on 16 October 2015. Available at: <https://www.consultant.ru> [Accessed 16.02.2025].

⁴⁷ Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran on cooperation in the construction of a nuclear power plant in Iran. Adopted on 25 August 1992. Available at: <https://www.consultant.ru> [Accessed 16.02.2025].

It is noteworthy that in 2009, Russia, having opted not to join the 1994 Energy Charter Treaty, formulated a Conceptual Approach to a New Legal Framework for International Energy Cooperation (Goals and Principles).⁴⁸ According to this document, Russia considers it necessary to develop a universal international treaty, the parties to which would include energy resource-producing (exporting), transit, and consuming (importing) countries, and which would cover all aspects of global energy interaction.⁴⁹

In 2010, Russia introduced draft conventions aimed at promoting international energy security and addressing emergency situations related to the transit of energy materials and products. The draft convention defines international energy security as a condition of the global energy system where a dependable and continuous supply of energy materials and products to consumer nations is achieved under terms that are acceptable to all stakeholders in the global energy market, while minimizing environmental harm and supporting sustainable socio-economic development for the global community (Potanin, 2012, p. 140). Regrettably, this initiative remained only a draft, primarily due to the reluctance of European nations to shift these discussions from the framework of interregional cooperation — where the EU countries participating in the Energy Charter Treaty play a pivotal role — to a more universal platform. Should this proposal be realized in the future, it would be prudent to broaden the definition of international energy security to encompass the safety of energy infrastructure.

III. Conclusion

The international legal framework governing the protection of energy facilities in times of armed conflict extends beyond the confines of IHL applicable during such conflicts. Attacks on energy infrastructure may result in breaches of obligations imposed by various branches

⁴⁸ Conceptual Approach to the New Legal Framework for International Cooperation in the Energy Sector (goals and principles). Available at: <http://kremlin.ru/supplement/258> [Accessed 16.02.2025].

⁴⁹ Conceptual Approach to the New Legal Framework for International Cooperation in the Energy Sector (goals and principles).

of international law, including international environmental law, international maritime law, international nuclear law, and international energy law, as well as individual and collective human rights recognized in international human rights law. To ascertain the relevant legal provisions in each particular case, it is essential to consider multiple factors that have yet to be systematically organized within the realm of international law.

Many international legal issues related to the protection of energy facilities during armed conflicts stem from the changing nature of modern armed conflicts, the difficulty of determining the type of armed conflict to establish the scope of applicable norms, the blurring of boundaries between war and peace, and the challenges of applying the principle of distinction between civilian and military objects when planning and qualifying attacks on energy facilities. Additionally, the unresolved general international legal issues concerning the use of computer networks, autonomous weapon systems, and unmanned aerial vehicles directly and negatively impact the protection of energy facilities. Unfortunately, it is evident that these problems will not be resolved at a universal level through international cooperation in the near future.

A study of the IHL norms relevant to armed conflicts, alongside other international legal standards applicable to diverse energy facilities, reveals the necessity for their codification and progressive enhancement in light of contemporary international legal challenges. It is recommended that this endeavor be undertaken by the International Law Commission, a subsidiary organ of the UN General Assembly. Furthermore, the formulation and adoption of legal instruments addressing these matters at the regional or interregional level may result in heightened legal disputes among states, a situation that ought to be prevented.

The codification and progressive enhancement of international legal standards aimed at safeguarding energy facilities during both peacetime and wartime should be pursued in the following areas:

- 1) broadening the definition of “facilities containing dangerous forces” as established in the Additional Protocols of 1977 to the Geneva Conventions of 1949, as the current definition does not encompass

all categories of contemporary energy facilities across various energy sectors;

2) including in the Additional Protocols of 1977 of specific criteria to be utilized when planning attacks that would facilitate the determination of an energy facility's status (i.e., the classification of an energy facility as a military target);

3) incorporating in the proposed universal convention on international energy security, as suggested by Russia, of an expansive definition of "energy facility," along with criteria for their classification based on type, kind, territorial legal regime, the legal status of the facility itself, and its significance for the State's energy security;

4) establishing within this project of a mechanism for investigating attacks on energy facilities, as it is essential that, despite the existence of an investigation procedure under general international law, numerous attacks on energy facilities have not only evaded international scrutiny but have also been inadequately investigated under the national laws of the respective states;

5) formulating of a mechanism to hold states and other entities accountable for unlawful actions against energy facilities.

It seems that a specialized international legal approach should be developed to protect the energy facilities from the destruction that could cause significant or irreparable harm to the environment (i.e., trigger an environmental catastrophe). To address this issue, international legal approaches established under IHL for the protection of various categories of cultural property could be utilized.

Until the identified problems are resolved in a universal international treaty, it is essential to actively develop national legislation on the issues discussed in the research above to ensure the protection of Russia's energy facilities during armed conflicts and to prevent threats in peacetime. The legal positions formed by the Russian Federation on these matters should be actively and widely used in international cooperation, with efforts to enshrine these positions in regional international treaties that could be concluded within the framework of the Commonwealth of Independent States (CIS), the Collective Security Treaty Organization (CSTO), or the Shanghai Cooperation Organization (SCO).

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Towards the Uniformity and Consistency in Jurisprudence on the European and Eurasian Patents

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Abstract: The paper analyzes dispute-resolution practice for European patents and evaluates mechanisms to ensure its uniformity, with emphasis on the functioning of the European Union. The European patent dispute system is complex and involves multiple adjudicative bodies — national courts of contracting states to the European Patent Convention, the European Patent Office’s Boards of Appeal, the Unified Patent Court, and the Court of Justice of the EU — which creates a need for tools to harmonize case law and consolidate European patent law. Using comparative legal analysis and statistical data on Eurasian patent disputes, the study assesses the applicability of European harmonization mechanisms to the Eurasian patent system and concludes that establishing a specialized supranational court for Eurasian patents would currently be premature. The analysis draws on foreign and Russian scholarly literature, national court practice across Europe, and decisions of the Court of Justice of the European Union (CJEU), the European Patent Organization (EPO) and the Court of Intellectual Property Rights.

Keywords: Unified Patent Court; European Patent Court; disputes on European patents; disputes on Eurasian patents; European patent; Eurasian patent

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Contents

I. Introduction	883
II. Protocol on Interpretation: Challenges of Harmonization of the National Judge's Approaches to Patent Claim Interpretation	884
III. Judicial Cooperation as a way to Harmonize the Practice on Disputes over the European Patents	888
IV. Cooperation between EPO and National Courts to Harmonize the Practice on European Patent Disputes	890
V. UPC: New Hopes for Effective Harmonization of Patent Litigation Practice in Europe	893
VI. The Role of the CJEU in Harmonization of Patent Litigation Practice	896
VII. Dispute Resolution Concerning Eurasian Patents: Implementing European Experience	899
VIII. Conclusion	901
References	904

I. Introduction

The European Patent Convention of 1973 (hereinafter referred to as the EPC, Munich Convention) was adopted as one of the first steps towards the harmonization of European patent law. The EPC stipulates rules for granting a European patent, which is effective in one or more contracting states. Once granted the European patent becomes a subject of national regulation of each designated EPC member state. In other words, the European patent does not have a unitary character in the EPC countries and represents a set of patents with a legal force equivalent to national patents (the so-called "classical" European patent). Though the preamble to the EPC indicates the desire of its member states to define certain standard rules governing European patents so granted, which, however, may signal on the limited potential of the Munich Convention in terms of harmonizing European patent law. At the same time, the EPC serves as a basis for further steps towards the harmonization of European patent law. The EPC sets forth that any group of its member states are free to conclude an international agreement according to which such a European patent has a unitary character in the territory of these countries. With the adoption of Regulation (EU) No. 1257/2012

of the European Parliament and of the Council of 17 December 2012 on enhanced cooperation in the field of unitary patent protection (hereinafter referred to as Regulation (EU) No. 1257/2012), a European patent may, at the request of its holder, acquire a unitary effect. Such a patent is called a European patent with unitary effect, or, as it is commonly abbreviated, a unitary patent (hereinafter in the paper such a patent will be referred to as a unitary European patent).¹

Dispute resolution on European patents is complicated by the number of jurisdictional bodies whose competence includes the consideration of such cases: national courts of the member state to the EPC, appeal bodies of the European Patent Office (EPO), the Unified Patent Court (UPC), the Court of Justice of the EU (CJEU). The same European patent may be the subject of parallel judicial and quasi-judicial proceedings, which may lead to legal uncertainty. Thus, the national court of the EPC countries have repeatedly come to different and contradictory decisions when considering disputes over the same European patent (see, for example, *Novartis and Gibavision v. Johnson & Johnson, Document Security System v. European Central Bank, Pozzoli v. BDMO SA, Conor v. Angiotech, Apple v. Samsung*, etc.) (Khuchua, 2019, pp. 262–263). However, this can be explained by the lack of a single legal regulation of the validity of issued European patents and the existing differences in the procedural rules for considering patent disputes.

This paper examines mechanisms developed to harmonize and unify the approaches to resolve disputes concerning European patents.

II. Protocol on Interpretation: Challenges of Harmonization of the National Judge’s Approaches to Patent Claim Interpretation

The Protocol on the Interpretation of Art. 69 EPC (hereinafter referred to as the “Protocol”) was adopted to supplement the Munich Convention and provides guidance on the use of the European patent application materials on the basis of which the scope of protection

¹ Hereinafter in the article, a term “European patent” will be referred both to the classical European patent and the unitary patent (the European patent with unitary effect), unless the context indicates otherwise.

conferred by a European patent is determined. According to the Protocol, the scope of protection should be determined in an approach that ensures “fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.” Since the outcome of a patent dispute depends largely on the determination of the scope of protection, the “golden mean” principle enshrined in the Protocol was intended to serve as an effective means of ensuring uniform practice in the examination and resolution of disputes on European patents by national courts. Nevertheless, this measure did not preclude national courts from rendering inconsistent decisions on the same European patent in proceedings between the same parties.

The original version of the Protocol included only one article that prescribed national judges to follow a “middle ground” between the strict (literal) and liberal (broad) approaches when determining the scope of protection afforded by a European patent. In the first case, the wording used in the claims is limited to its literal meaning. This approach provides a reasonable degree of certainty for third parties, but on the other hand, there remains a risk of unfairness to the patent owner if what he believes he is claiming is excluded by the use of the wording in the claims in its strict, narrow meaning. In the second case, the wording in the claims is used only as a guide to determine the “inventive concept” protected by the patent. This approach guarantees a sufficient level of protection for the patent owner but leaves third parties uncertain as to the extent of the legal protection of the patented invention (England, 2016, p. 689). By thus conferring upon courts broad discretion in interpreting Art. 69 EPC and in determining the extent of legal protection, the Protocol has been described as a “masterpiece of ambiguity” (Baillie, 1976, p. 153).

This remark is not unfounded. The fact is that within the framework of national jurisdictions, the formation of the practice of considering disputes on European patents was determined by the established features in the approaches to the construction of the formula of an invention and its interpretation in order to determine the scope of legal protection provided. Accordingly, EPC contracting states adopt divergent positions with respect to the doctrine of equivalents. For example, the English legal order’s adherence to a literal approach to defining the scope of

protection generally precludes recourse to the doctrine of equivalents, whereas that doctrine is applied, in varying forms, in the German, French and Dutch legal systems. In other words, if the doctrine of equivalents is recognized, holders of European patents can count on a more liberal approach in the process of protecting their own patent rights, relying on a broader interpretation of the claims and, as a result, broader legal protection. If the doctrine of equivalents is denied, the legal protection provided by the patent is considered narrower, which, in turn, provides some certainty to third parties regarding the scope of legal protection of the patented invention.

Thus, in the absence of uniform and explicit rules for determining the scope of legal protection of a patented invention (and this issue is one of the basic ones in the process of resolving a patent dispute), the courts of European countries are forced to be guided by approaches that either had already been established by the time the EPC was adopted, or were still in the process of being developed. For this reason, it seems inevitable that the courts of the EPC countries will issue divergent decisions on a dispute over the infringement or revocation of the same European patent. The most illustrative example is *the Improver case*, where a patent owner sought for an injunction against the use of the patented invention in the competitor's products developed by Remington Corporation. The decisions of the courts of European countries in this case turned out to be contradictory: for example, in Germany, Belgium, Italy and the Netherlands, the courts considered the infringement of the European patent proven, while the courts in England, Austria and France came to the opposite conclusion, rejecting the patent holder's claim (Khuchua, 2019, pp. 261–262).

At the same time, following the Protocol's adoption, a gradual shift has been observed in some national courts of certain European jurisdictions' attitudes toward the doctrine of equivalents and in their approaches to its application. This is especially noticeable in the practice of English courts, whose position changed significantly after amendments were made to the text of the Protocol, effectively recognizing the application of the doctrine of equivalents. Thus, in the further cases the so-called "Protocol questions" were formulated, which constitute a three-step test for the application of purposive interpretation methods (England, 2016,

p. 691). Later, in *the Kirin-Amgen case*,² the compliance of the principle of purposive interpretation with the provisions of the Protocol was confirmed, but the court clarified that the Protocol questions should be used solely as a guide for the judge who must answer the key question: “What would a person skilled in the art have understood the patentee to have used the language of the claim to mean.”³ It concluded that the Protocol “shuts the door on any doctrine which extends protection outside the claims.”⁴ Ultimately, the precedent established in *Actavis* recognized the applicability of the doctrine of equivalents in English patent law, at least insofar as European patents are concerned.

In German patent law, the recognition of the doctrine of equivalents was established in the *Formstein case*.⁵ Suggested In essence, the legal position articulated in that case is that the scope of legal protection extends to equivalent claim features that would have been regarded by a person skilled in the art as obvious substitutes for the claimed features (England, 2016, p. 692). The standard of proof by which such obviousness is established has been developed in subsequent case law, the most notable example being *Schneidmesser I*.⁶ The standard of proof is a three-step test consisting of three consecutive questions accepted to be called *Schneidmesser* questions (“*Schneidmesser* questions”). The wording of the *Schneidmesser* questions is similar to the Protocol questions developed by English judges in the previously mentioned *Catnic and Improver cases* (England, 2016, p. 692). At

² United Kingdom House of Lords. *Kirin-Amgen Inc. v. Hoechst Marion Roussel Ltd & Ors.* [2004] UKHL 46 (21.10.2004). Available at: <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041021/kirin-1.htm> [Accessed 03.01.2025].

³ United Kingdom House of Lords. *Kirin-Amgen Inc. v. Hoechst Marion Roussel Ltd & Ors.* [2004] UKHL 46 (21.10.2004), Para. 69.

⁴ United Kingdom House of Lords. *Kirin-Amgen Inc. v. Hoechst Marion Roussel Ltd & Ors.* [2004] UKHL 46 (21.10.2004), Para. 44.

⁵ Federal German Court. Case Law Decision of the Bundesgerichtshof (Federal Court of Justice), 10th Civil Senate, of 29 April 1986 (X ZR 28/85). OJ EPO 1987, 551. Available at: <https://www.epo.org/xx/legal/official-journal/1987/12/p551/1987-p551.pdf> [Accessed 03.01.2025].

⁶ Federal German Court. Case Law Decision of the Bundesgerichtshof (Federal Court of Justice), 10th Civil Senate, of 29 April 1986 (X ZR 28/85). OJ EPO 1987, 551. Available at: <https://www.epo.org/xx/legal/official-journal/1987/12/p551/1987-p551.pdf> [Accessed 03.01.2025].

the same time, according to German jurisprudence, the application of the doctrine of equivalents may be limited if an equivalent element of claims is recognized as unpatentable (*Formstein case*) or is disclosed in the description but not claimed as an independent element of claims (so-called “selection decision principle”) (*Oclusion*⁷ and *Diglycidyl*⁸).

III. Judicial Cooperation as a way to Harmonize the Practice on Disputes over the European Patents

Judicial cooperation between national courts is perhaps an unobvious but, as it turns out, quite successful and probably a promising and effective way to harmonize the practice of European patent litigation and, as a consequence, European patent law itself (Walsh, 2019, p. 423). Judicial cooperation may be exercised through studying foreign case law while considering pending patent disputes by national judges or in informal meetings and internships of patent judges.

In adjudicating patent disputes, British judges have repeatedly relied on decisions of their foreign counterparts. For example, in the *Grimme case*⁹ a decision of a foreign superior court had precedential value among EPC member states when that dispute involved a point of patent law of general importance (“where a point of patent law of general importance”). According to the UK Court of Appeal, it is possible to depart from the reasoning of a foreign judgment if there is a firm conviction that the foreign court’s findings are erroneous. It is interesting to note that the *Grimme* judgement emphasizes the importance of applying the same rules wherever possible, given the

⁷ Federal German Court. Bundesgerichtshof, Urteil 10.05.2011. X ZR 16/09. (In Germ.). Available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=56437&pos=0&anz=1> [Accessed 03.01.2025].

⁸ Federal German Court. Bundesgerichtshof. Urteil. 13.09.2011, X ZR 69/10. (In Germ.). Available at: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=X%20ZR%2069/10&nr=58039> [Accessed 03.01.2025].

⁹ United Kingdom Court of Appeal (Civil Division). *Grimme Maschinenfabrik GmbH & Co KG v. Derek Scott (t/a Scotts Potato Machinery)*. 2010. WCA Civ 1110. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2010/1110.html> [Accessed 03.01.2025].

absence of a common patent court for the EPC countries, and notes the success of national judges in ensuring some degree of uniformity by referring to foreign court decisions. The Grimme case is also notable for the fact that the English judges engaged in consultations with their German and Dutch counterparts, inquiring whether they had encountered analogous cases concerning the matter at issue.

Later, in *Schütz*¹⁰ the UK Supreme Court took into account the judgement of the German courts, since Germany is also a party to the EPC. In the course of the case, it was observed that due to the different approaches to many patent law issues, it was not possible to achieve complete consistency in the national courts, which, however, is not excluded in the future. Therefore, according to the English judges, “it is sensible for national courts at least to learn from each other and to seek to move towards, rather than away from, each other’s approaches.” As *the Warner-Lambert case*¹¹ shows, foreign judgements have prompted English judges to re-examine their own findings with respect to the same European patent. Nevertheless, while acknowledging the undesirable circumstance of divergent decisions concerning the same European patent, the judge maintained his position, which was noted to be less favorable to the patent and apparently at variance with the views of his foreign counterparts.

French judges also occasionally refer to the judgments of their foreign counterparts, for example in cases such as *Milan v. AstraZeneca*, *Warner-Lambert v. Sandoz*, *MVF v. Intelligent Insect Control*, *Lilly v. Sanofi-Aventis*, *Akzo v. Nobel* (Walsh, 2019). However, French court decisions are characterized by their brevity, which makes it difficult to assess how much weight French judges ultimately attach to foreign judgements (Walsh, 2019, p. 428).

Regular informal meetings of judges from EPC member states, held in various formats, play a significant role in the harmonization

¹⁰ United Kingdom Supreme Court. *Schütz Ltd. v. Werit Ltd.* Case No: A3/2009/2582. [2013] UKSC 16. Available at: <https://www.bailii.org/uk/cases/UKSC/2013/16.html> [Accessed 03.01.2025].

¹¹ United Kingdom Supreme Court. *Warner Lambert Company LLC v. Generics (UK) Ltd t/a Mylan and another* [2018] UKSC 56. Available at: <https://www.bailii.org/uk/cases/UKSC/2018/56.html> [Accessed 03.01.2025].

of practices in patent dispute resolution and in the development of European patent law more broadly. First, the harmonization of European patent litigation practice is facilitated by the appointment of so-called “external members” to the Enlarged Board of Appeal from among the national judges (Art. 11(5) EPC, Rule 12d(2) of the EPC Implementing Regulations). At the same time, external members are entitled to continue to perform their employment and official duties at the national level, i.e., to continue to be national judges.

Secondly, particular emphasis should be placed on the European Patent Judges’ Symposium and the European Forum of Judges. The European Forum of Judges is convened biennially, while the Symposium is held on an annual basis. The European Patent Judges’ Symposium dates back to 1982 and it is held every two years. During the meetings, representatives of national courts, the Court of Justice of the EU and the Enlarged Board of Appeal exchange experiences, ideas and opinions on points of debate in European patent law, including through case studies. According to the data published on the website of the European Patent Organization, the Symposium of European Patent Judges was last held in 2015. In contrast to the Symposium, the European Judges’ Forum continues to bring together leading experts annually to discuss key developments in patent law and practice.

Thirdly, the EPO organizes regular internships for national judges. These internships provide national judges with the opportunity to become more familiar with the EPO’s practice, which can then be applied in specific cases at the national level.

IV. Cooperation between EPO and National Courts to Harmonize the Practice on European Patent Disputes

In addition to judicial mechanisms, a European patent may be challenged in a “quasi-judicial” proceeding. Thus, within nine months following the publication of the decision to grant a European patent, any interested party may lodge an opposition with the European Patent Office against the grant of said patent. Upon examination of the opposition, the European patent may be upheld, revoked or amended; the decision shall have legal effect in the territory of all EPC member

states in respect of which the European patent has been granted. The decision on the opposition may be appealed against. In such a case, the appeal is heard by the Board of Appeal and, if the case has a precedent-setting character, by the Enlarged Board of Appeal.¹²

The harmonization of national court practice with the legal positions established by the European Patent Office in the course of opposition proceedings and appeals concerning European patents constitutes another mechanism for aligning legal approaches in the resolution of European patent disputes. UK judges are considered to be the most active in this regard. Thus, in the *Merrell Dow case*, the UK's duty was for the first time articulated as an obligation to interpret the provisions of national patent law, insofar as possible, in conformity with the interpretation of analogous provisions of the EPC, requiring courts to take into account the decisions of the Boards of Appeal (Walsh, 2019, p. 424). It was recognized that, although such decisions were not legally binding, they should be accepted as persuasive authority. In *Genentech*, the UK Court of Appeal reaffirmed the duty of enforcers to interpret national patent law in the spirit of the Munich Convention, noting that if such an approach resulted in a departure from established practice, it should be regarded as the intention of the judges to comply with the EPC (Walsh, 2019, p. 424).

At the same time, the declared "duty" does not mean that English judges must rely unconditionally on the EPO's practice. In *Biogen*, the UK House of Lords reached different conclusions from those reached by the EPO, while noting that there was no divergence in the practice of the two enforcement bodies (McDonagh, 2017). Further, in the *Human Genome Science* case, recognizing the importance in consistency of approaches, the UK court noted that the national court is not bound by the reasoning of the EPO's decision where, in the opinion of the national court, the EPO makes a decision that is inconsistent with the EPC or its prior practice.¹³ As a result, the judges held that the UK courts favor a uniform approach in interpreting the EPC and national patent law

¹² Hereinafter in the text of this article, both the "Boards of Appeal" and the "Enlarged Board of Appeal" will be collectively referred to as "Boards of Appeal" or "EPO" unless the context requires clarification.

¹³ United Kingdom Supreme Court. *Human Genom Sciences Inc. v. Eli Lilly*. 2011. UKSC/2010/0047. Available at: https://supremecourt.uk/uploads/uksc_2010_0047_judgment_1b5c97f73a.pdf [Accessed 03.01.2025].

and in adhering to EPO practice, while preserving a certain room for dialogue that allows lower courts to depart from an EPO decision if, in their view, it is inconsistent with the EPC, prior domestic practice, or is based on a misunderstanding of the parties' arguments.

Germany also recognizes the importance of the EPO's jurisprudence in European patent invalidation cases. For example, in *Zahnkranzfräser*,¹⁴ the German court ruled that although the EPO's decisions in its European patent invalidation proceedings were not legally binding, they constituted expert opinions of considerable weight, which should be taken into account when assessing patentability in national proceedings. This legal position was later confirmed by the German Federal Supreme Court in *Walzenformgebungsmaschine*,¹⁵ where it was held that although the Federal Patent Court was not bound by EPO decisions inconsistent with national jurisprudence, it seemed appropriate to adopt a decision in the interest of the uniform application of European patent law.

It should be noted that not only do national courts take into account the decisions of the European Patent Office, but, conversely, the EPO periodically examines and takes an interest in the interpretative practices of the European Patent Convention as developed by national courts and national patent offices. Thus, the decision in *Case G5/83* indicates the obligation of the EPO and its appeal panels to take into account the practice of interpretation of the EPC by national courts and patent offices of the States Parties to this international agreement. At the same time, later in *the G1/13* case, the EPO was recognized as having a decisive role to play in the interpretation of the EPC and in making decisions at last instance on matters relating to the grant of European patents.¹⁶ However, the EPO cannot be relieved by the EPO

¹⁴ Bundesgerichtshof, 5 May 1998 (X ZR 57/96). (In Germ.). Available at: <https://www.epo.org/en/legal/official-journal/1999/05/p322.html> [Accessed 03.01.2025].

¹⁵ Bundesgerichtshof, 15 April 2010 (Xa ZB 10/09). (In Germ.). Available at: <https://www.epo.org/en/legal/official-journal/2010/11/p622.html> [Accessed 03.01.2025].

¹⁶ Technical Board of Appeal. Case number T154/04, 15.11.2006. Available at: <https://www.epo.org/boards-of-appeal/decisions/pdf/to40154ep1.pdf> [Accessed 03.01.2025].

of its assigned duty to act as an independent quasi-judicial body due to harmonization considerations.¹⁷ Therefore, when provisions of national law conflict with the meaning of the EPC, the EPO is limited in relying in its decisions on the practice of national courts and national patent offices.¹⁸

V. UPC: New Hopes for Effective Harmonization of Patent Litigation Practice in Europe

The Agreement on the Unified Patent Court, also known as the Unified Patent Court Agreement, (hereinafter UPCA) was adopted by a number of EU member states in 2013. The UPCA provides for the establishment of the Unified Patent Court (UPC), a court common to the member states of the UPCA that forms part of their national judicial systems and possesses exclusive jurisdiction over disputes concerning both unitary and “classical” European patents. The UPC consists of a Court of First Instance and a Court of Appeal. The Court of First Instance consists of a central division as well as local and regional divisions. Local divisions are established in the UPCA member states upon request, and regional branches are established for two or more the UPCA member states upon request. There are currently twenty local and regional divisions and one central division based in Paris, with sections in Munich and Milan. The Court of Appeal operates in panels based in Luxembourg. As a rule, cases before the Court of Appeal are heard by panels of five judges.

Since the UPC became operational on 1 June 2023, it is premature to speak about the influence of the practice of this international specialized judicial body on the harmonization of approaches in the examination of European patent disputes by national courts or EPO’s appellate boards. Therefore, for the time being, it cannot even be said that national courts or EPO’s appellate boards rely on the case law of the UPC. Moreover,

¹⁷ Technical Board of Appeal. Case number T154/04, 15.11.2006.

¹⁸ Enlarged Board of Appeal. Case number G0001/13, 25.11.2014. Available at: <https://www.epo.org/boards-of-appeal/decisions/pdf/g130001ex1.pdf> [Accessed 03.01.2025].

that with so many judicial divisions within the UPC, conflicting practice between central, local and regional divisions may be inevitable (Cohen, 2024). Therefore, first, care should be taken to ensure that the UPC does not disintegrate into disparate local court jurisdictions applying different practices in patent disputes (Michele-De Gazotte et al., 2022). This is expected to take years of work by the Court of Appeal (Cohen, 2024) that may decide to transfer a case to the full composition of the UPC if the case is of exceptional importance and the decision may affect the uniformity and consistency of the jurisprudence.

The UPC shall be composed of legally qualified judges and technically qualified judges. To ensure the independence and impartiality of the UPC, judges are prohibited from engaging in any other activity, regardless of whether it generates income, except where otherwise permitted by the Administrative Committee. However, the right of legally qualified judges can combine their duties with judicial functions at the national level, subject to conflict-of-interest rules (Art. 17(3) of the UPCA), is noteworthy. Apparently, this is not an exception but is already an active practice in the work of UPC. Thus, recently appointed new judges of the Unified Patent Court continue to perform their duties in national courts (Klos, 2024). It seems that such overlap could potentially have a positive effect on the harmonization of European patent litigation practice at the national and supranational levels. Conversely, such judges may transfer to the UPC the legal approaches used in patent disputes before national courts.

In addition, in order for national courts to apply the case law of the UPC, special mechanisms are required. Such mechanisms have been discussed earlier in the paper. In Germany, for example, the decision in *Walzenformgebungsmaschine*¹⁹ to review decisions rendered by EPO authorities and by courts of other EPC member states addressing a substantially similar issue and, where appropriate, to provide reasons for reaching a different conclusion. However, in some jurisdictions, e.g., the Netherlands, such mechanisms are not observed in the practice of

¹⁹ Bundesgerichtshof, 15 April 2010 (Xa ZB 10/09). (In Germ.). Available at: <https://www.epo.org/en/legal/official-journal/2010/11/p622.html> [Accessed 03.01.2025].

national courts even when the case involves the same parties, more or less the same facts and the same European patent (Michele-De Gazotte et al., 2023). It remains to be seen how actively national courts will rely on the case law of the UPC in European patent disputes, but it may be assumed that this will not present a significant challenge for those jurisdictions that are, to a greater or lesser extent, familiar with the doctrine of precedent (e.g., Germany, France).

Even in the UK, which was a signatory to the UPCA but had to withdraw from this international agreement due to Brexit, the case law of the UPC may have relevance (Michele-De Gazotte and Snape, 2023). It has been suggested that Ireland could serve as an alternative to representation of the UK jurisdiction in the UPC. The accession of that country would be reportedly an important development as Ireland would be the first and the only state party to UPCA representing the common law system. UPCA and the Rules of Procedure contain common law principles and procedures with which continental law judges may not be familiar (Whelan et al., 2023, p. 31). In this context, the Irish jurisdiction of the UPC may be of particular interest to those who rely on common law principles and rules (e.g., US companies). In addition, there has been a significant increase in the presence of international pharmaceutical companies in Ireland in recent years. The prospects for informal interaction between the English courts, where the proportion of patent disputes is not likely to decrease, and the judges of the Irish division of the UPC, for whom the decisions of their English colleagues are generally persuasive and authoritative, are therefore interesting (Whelan et al., 2023, pp. 31–33).

Some patent specialists hope that if the UPC can achieve harmonization of the practice of patent litigation between court divisions, such a result will definitely have a positive impact on the practice of national courts, and consequently there will be prospects for uniformity in the practice of European patent litigation at both national and supranational levels (Michele-De Gazotte et al., 2022). Sir Robin Jacob, former UK patent judge, one of the architects of the UPC argued that national courts will listen to the legal positions of the UPC, as the decentralized system of national courts and Board of Appeal deciding patent disputes

with conflicting decisions will not be a thing of the past.²⁰ It is also important that the UPC, in its turn, is not going to “reinvent the wheel,” but, as the President of the UPC Court of Appeal said in one of his interviews, will seek to take into account the case law already established by the national courts and the Board of Appeals.²¹

VI. The Role of the CJEU in Harmonization of Patent Litigation Practice

The CJEU does not examine patent disputes on the merits but gives the so-called preliminary rulings concerning the interpretation of the EU Treaties and legal acts of the EU institutions at the request of national courts (Art. 267 TFEU). The binding nature and legal force of the CJEU’s preliminary rulings are determined not by the EU Treaties, but by the established practice of the CJEU itself (Ispolinov, 2016, pp. 72–74). Thus, in its preliminary rulings in the International Chemical Corporation case, the CJEU stated that there are sufficient grounds for any national court – not only the court that submitted the preliminary request – to regard an EU legal act declared invalid in a preliminary ruling as invalid for the purposes of resolving disputes before it.²² Further, in *Köbler case*,²³ the CJEU held that if a national judgement was made with an apparent refusal to follow the established practice of the CJEU on the matter, this would be considered a sufficiently serious

²⁰ Unified Patent Court: “Conflicting decisions aren’t something of the past.” Kluwer Panet Blog. 13.12.202 Available at: <https://patentblog.kluweriplaw.com/2023/12/13/unified-patent-court-conflicting-decisions-arent-something-of-the-past/> [Accessed 03.01.2025].

²¹ No such thing as a “wait and see” approach, warns UPC’s top judge as sunrise period begins. / IAM Media. 01.03.2023. Available at: <https://www.iam-media.com/article/no-such-thing-wait-and-see-approach-warns-upcs-top-judge-sunrise-period-begins> [Accessed 03.01.2025].

²² European Court of Justice. Case C-66/80, International Chemical Corporation v. Amministazione delle Finanze dello Stato. 1981, ECR 1191. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A619198080CJ0066> [Accessed 03.01.2025].

²³ European Court of Justice. Case C-224/01, Gerhard Köbler v. Austria. 2003, ECR I-10239. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0224> [Accessed 03.01.2025].

violation. In other words, the preliminary ruling of the CJEU is that it is binding for all national courts of the EU countries. In subsequent cases examined by the CJEU (see e.g., *Traghetti*,²⁴ *Ferreira*²⁵) the binding nature of its preliminary ruling has only been reinforced (Demark, 2020, pp. 358–365).

Interestingly that none of the EU legal acts applicable in the field of European patent law contains norms defining the criteria of patentability, signs of infringement and grounds for invalidity of a European patent, i.e., the basis of substantive patent law. These issues are regulated by international treaties (EPC, UPCA) or national legislation of the EU countries, and, accordingly, they cannot be referred to the CJEU for their interpretation. It is noteworthy that rules of such content are absent even in Regulation (EU) No. 1257/2012, as a result of which this legal act is often described as an “empty shell.”²⁶ On the contrary, the rules defining the elements of direct and indirect infringement and cases excluded from patent protection have been transferred from the original version of this legal act to the text of the UPCA (Wadlow, 2013, pp. 207–208). This solution was proposed by the UK and was justified by the desire to limit the jurisdiction of the CJEU, as its judges were considered to lack the necessary expertise in the field of patent disputes, and the procedure to give a preliminary ruling takes a long time and leads to additional costs.²⁷

It seems that one of the reasons for this skeptical attitude towards the CJEU was its jurisprudence on the interpretation of the

²⁴ European Court of Justice. Case C-173/03, *Traghetti del Mediterraneo SpA* [2006] ECR, p.I-5177. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0173> [Accessed 03.01.2025].

²⁵ Court of Justice of the European Union. Case C-160/14, *João Filipe Ferreira da Silva e Brito and Others v. Estado português*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CA0160> [Accessed 03.01.2025].

²⁶ See: Unitary Patent system is an arbitrary and ailing hybrid monster mix. // Kluwer Patent blogger. 09.12.2021. Available at: <https://patentblog.kluweriplaw.com/2021/12/09/unitary-patent-system-is-an-arbitrary-and-ailing-hybrid-monster-mix/> [Accessed 03.01.2025].

²⁷ House of Commons European Scrutiny Committee-Sixty-Fifth Report of Session 2010-12, *The Unified Patent Court: Help or Hindrance?* Pp. 15–19. Available at: <https://publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1799/1799.pdf>, <https://doi.org/10.1093/ji/plp/jps230> [Accessed 03.01.2025].

Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificates for medicinal products (SPC Regulation).²⁸ The need for supplementary protection certificates (SPCs), which extend the term of patent protection for up to five years, arises from the fact that the grant of marketing authorization for medicinal products requires clinical trials and other lengthy studies. The SPC Regulation appeared to be difficult for national courts to apply, which has led to a steady stream of applications to the CJEU requesting interpretation of this legal act. In turn, the provision of Art. 3(a) of the SPC Regulation, which requires that an SPC be granted only for a product protected by the basic patent, has proved to be the most difficult for the CJEU to interpret. Despite the repeated interpretation of this provision by the CJEU, the questions of what kind of subject matter is to be protected and what criteria should be used to determine whether a product is protected by a basic patent remain controversial and open (Cambrook and Millson, 2020).

In the *Brüstle* case²⁹ the CJEU interpreted certain rules of European Parliament and of Council Directive No. 98/44 dated 6 July 1998 on the legal protection of biotechnological inventions (Biotechnology Directive). The CJEU defined the concept of human embryo broadly and classified stem cell inventions applicable not only for industrial and commercial purposes but also for research purposes as unpatentable. By doing so CJEU significantly expanded the scope of application of the exceptions to patentability under Biotechnology Directive. The CJEU's findings raised serious concerns and effectively left biotechnological research developments without the right to patent protection undermining the prospects for new stem cell-based therapies (Vrtovec and Scott, 2011, pp. 502–503). However, the CJEU later clarified its conclusions regarding patentability of stem cell inventions in *the International*

²⁸ Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version) (Text with EEA relevance) OJ L 152, 16.06.2009, pp. 1–10. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R0469> [Accessed 03.01.2025].

²⁹ European Court of Justice. Case C-34/10, *Oliver Brüstle v. Greenpeace eV*. ECR I-09821. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0034> [Accessed 03.01.2025].

*Stem Cell case*³⁰ by limiting its previously proposed broad definition of a human embryo (Minssen and Nordberg, 2015). In the light of this new preliminary ruling, some argued that the CJEU's findings in *the Brüstle case* were based on "poor technical advice" (Brack, 2016), which probably led to the disputed conclusions.

VII. Dispute Resolution Concerning Eurasian Patents: Implementing European Experience

Disputes concerning Eurasian patents granted under the Eurasian Patent Convention (EAPC) possess certain specific features. First, the structure of the Eurasian Patent Organization (EAPOrg) lacks a body competent in examination of revocation proceedings. A Eurasian patent can be challenged by filing an opposition with the Eurasian Patent Office (EAPO) under the administrative revocation procedure. Such an opposition may be filed within three years of the grant of a Eurasian patent. An *ad hoc* panel composed of three EAPO examiners is constituted to consider an opposition filed against the grant of a Eurasian patent. The decision made regarding the opposition can be appealed by filing an appeal to the President of the EAPO, who appoints a new panel. A Eurasian patent annulled under the administrative revocation procedure shall be deemed not to be in force in all EAPC countries from the date of filing of the Eurasian patent application.

Secondly, a Eurasian patent may be revoked before national courts or national patent offices during its term. In all EAPC member states except Kazakhstan, a revocation action is subject to mandatory pre-trial examination by the national patent office, whose decision is effective within the territory of the respective state and may be appealed in court. In the event of simultaneous contestation of a Eurasian patent at both the national and supranational (EAPO) levels, a decision to invalidate the patent may be rendered by a judicial or other competent authority of an EAPC member state only after the administrative annulment procedure

³⁰ European Court of Justice. Case C-364/13. International Stem Cell Corp. v. Comptroller General of Patents, Designs and Trade Marks. 2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0364> [Accessed 03.01.2025].

has been completed. Infringement cases are heard by courts of different levels whose judgements are effective only in those countries where they were made. No conflicting judgements over the same Eurasian patents were found in the EAPC countries, although some scholars argue that different national courts have come to inconsistent decisions regarding infringement of the same Eurasian patents (Krupko, 2018, p. 206).

According to the EAPOrg, since 2010, only 40 oppositions against the grant of a Eurasian patent have been filed with EAPO. At the national level, since 2018 approximately 70 oppositions and revocation actions against Eurasian patents have been filed in the EAPC member states, with the overwhelming majority of such cases registered in Russia,³¹ followed by Belarus and Kazakhstan; in the other jurisdictions no such cases have been recorded.³² The Russian jurisdiction seems to be a preferable forum for disputes over the Eurasian patents because of functioning of the Intellectual Property Court (IP Court) there; no patent courts were established in other EAPC countries. The total number of infringement cases is unknown and appears not to be amenable to reliable quantification.

At present, the IP Court is confronted with gaps in Eurasian patent regulation and is seeking ways to discern the actual intent of the EAPC signatories and to ascertain how specific EAPC provisions are interpreted, understood, and applied in those jurisdictions (*Tofacitinib case*³³ and *Tadalafil case*³⁴). Meanwhile, the IP Court preferred to cooperate in these cases with the Ministry of Foreign Affairs of the Russian Federation (Russian MFA). It is likely that, due to the small number of disputes over Eurasian patents in certain EAPC countries such as Kazakhstan and Belarus, or their complete absence in some

³¹ See more details in the EAPO webinar “Dispute Resolution Practice. Eurasian integration in the field of intellectual property.” E.N. Makhankova, A.V. Gutman. Available at: <https://www.eapo.org/wp-content/uploads/2024/01/praktika-rassmo-treniya-sporov-evrazijskaya-integracziya.pdf> [Accessed 03.01.2025].

³² See more details: Report on the research work “Development of the draft strategy of the Eurasian strategy of intellectual property development until 2035.” RGAIS. 2023. P. 46.

³³ Ruling of the Presidium of the Intellectual Property Rights Court of 22.11.2021 in case No. SIP-1030/2020. Available at: <https://kad.arbitr.ru/>.

³⁴ Resolution of the Presidium of the Court of Intellectual Property Rights of 08.07.2020 in case No. SIP-664/2018. Available at: <https://kad.arbitr.ru/>.

jurisdictions³⁵ the IP Court was unable to identify relevant cases considered by national courts or other competent authorities of the EAPC member states. For this reason, the IP Court resorted to an unconventional approach to ascertain how the EAPC is interpreted, understood, and applied in other jurisdictions. Indeed, there are not any obstacles for the IP Court to support its judgements by reference to foreign case law if the relevant foreign judgements can be easily found. In *the Jakvinus case*³⁶ and *Sofosbuvir case*³⁷ the IP Court cited judgements of the national courts of the European countries and the CJEU to argue its findings and conclusions (and there was no need to engage any competent authority to study foreign judgements).

Thus, we can highlight three features of the disputes concerning the Eurasian patent in context of their developments towards uniformity and consistency. Firstly, the IP Court demonstrates its openness to judicial cooperation and dialogue with national judges or other competent national authorities of the EAPC countries. Sometimes the national bodies of certain EAPC countries appear to be not cooperative (e.g., in the above-mentioned *Tofacitinib case* only three of the EAPC countries were cooperative). Secondly, In the Eurasian region, mechanisms for judicial cooperation between national courts in disputes concerning Eurasian patents have not been developed, due to their absence and the relatively low number of such cases in jurisdictions outside the Russian Federation. Thirdly, decisions of the EAPO's *ad hoc* panels are not considered as persuasive authority at the national level.

VIII. Conclusion

The European experience illustrates the complexity of achieving harmonization of European patent law through legislative measures. This process typically lasts for a long period of time, necessitates the

³⁵ Report on the research work "Development of the draft strategy of the Eurasian strategy of intellectual property development until 2035." RGAIS. 2023. P. 46.

³⁶ Ruling of the Presidium of the Intellectual Property Rights Court of 23.09.2022 in case No. SIP-1027/2020. Available at: <https://kad.arbitr.ru/>.

³⁷ Ruling of the Presidium of the Court of Intellectual Property Rights of 04.06.2020 in case SIP-740/2018. Available at: <https://kad.arbitr.ru/>.

pursuit of compromises, and, due to divergences in the interpretation of European patent law, does not invariably result in the intended outcome. In particular, the Protocol adopted as a supplement to the Munich Convention was intended to ensure a uniform approach by national courts to the interpretation of Art. 69 of the European Patent Convention (EPC), which defines the scope of legal protection. The Protocol sought to establish a balanced position between two divergent interpretative approaches; however, its ambiguous wording ultimately resulted in inconsistent judicial decisions rendered by national courts concerning identical European patents.

The harmonization of European patent law is facilitated by the mechanisms used by national courts to ensure uniformity of practice in European patent litigation. A good example is the consistent development by UK and German judges of uniform legal approaches to the interpretation of Art. 69 of the EPC and the determination of the scope of legal protection. A teleological interpretation of the Munich Convention may serve as a foundation for the application, by national courts of the EPC member states, of mechanisms designed to ensure the uniform adjudication of disputes concerning European patents. As is known, the EPC was adopted as one of the first steps towards the harmonization of European patent law, which, among other things, follows from its content. Subsequently, there were repeated attempts to create a unified EU patent system and a common judicial mechanism for resolving disputes concerning European patents both within the EU and involving non-EU countries, until the UPC became operation since summer 2023.

In the process of adjudicating a European patent dispute, a national court may examine the practice developing within its own jurisdiction and then compare it with the approaches taken by courts in other EPC countries. The national court can then decide for itself whether it should modify the practice within its own country so that it is, for example, in line with the practice of most European countries, or whether it should preserve its distinctiveness. The latter may be necessary when the disputed situation involves, for example, moral values — an area of life in which European countries, even within the EU, may still have significant differences. To this end, national courts, by studying the case

law of foreign courts, retain the freedom to decide differently where there are reasons to do so.

The UPC has two features that should ensure, at least within this judicial body, a uniform practice in European patent litigation. Firstly, the Unified Patent Court comprises of the Court of First Instance, that is decentralized, and the Court of Appeal, that is centralized. The Court of Appeal is a structure intended to promote the uniformity of judicial practice across these divisions. Secondly, the composition of the judiciary, consisting of national judges who continue to exercise their functions within their respective national judicial systems, may potentially contribute to the development of consistent jurisprudence among the national courts of the EPC member states. This shall foster the harmonization of European patent law. The UPC has exclusive jurisdiction over European patent disputes under Art. 32 of UPCA. However, UPCA provides for a seven-year transitional period during which actions in respect of a dispute over a “classical” European patent may be brought before national courts or other competent national authorities (Art. 83 UPCA). In the absence of formal grounds for harmonization of practice between the Unified Patent Court and national courts, it can be assumed that mechanisms for mutual recognition of practice will be developed to ensure uniformity, as is the case between national judicial authorities. While being skeptical of the CJEU’s case law concerning patent issues, it is reasonable to expect that the practice of the UPC will have an authoritative value among the national courts of the countries participating in the UPCA.

The significance of the CJEU’s jurisprudence in the field of European patent law is ambiguous. It seems that the problem lies in the fact that the preliminary rulings of the CJEU are binding on the national courts of the EU countries and the need for those courts to retain a certain degree of freedom to make a decision that deviates from the established practice, taking into account the specific circumstances of the case.

Number of disputes over the Eurasian patents outside of Russia is small (or in certain EAPC countries are not recorded at all. Therefore, there is no alarm divergences in case law of national courts in EAPC

countries, but it may appear in future when the number of patent litigation cases increases in other EAPC countries.³⁸

However, even at present, the improvement of mechanisms employed by national judicial bodies competent to adjudicate disputes concerning Eurasian patents appears to be of considerable significance. EAPO's management is advocating for creation of a supranational patent court for the EAPC countries,³⁹ but it may be premature now due to a relatively small number of disputes involving Eurasian patents.

The IP Court demonstrates its readiness to judicial cooperation and dialogue with national judges or other competent national authorities of the EAPC countries. Both Tofacitinib and Tadalafil cases illustrated that the IP Court prefers to use the teleological means of interpretation the EAPC and the Patent Regulation in disputes concerning the Eurasian patent. In this light it may be recommendable to establish a supranational institution competent to provide an interpretation of the rules of the EAPC and the Patent Regulation. It is noteworthy that Art. 149a(b) of the EPC allow European countries to create such an institution even though this provision has never been applied. In the EAPC countries the quasi-judicial institution may be formed of on ad-hoc basis and comprise of the national patent judges, the renowned patent professional and scholars.

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³⁹ This has been repeatedly stated by the current EAPO leadership. See, for example: https://rapsinews.ru/judicial_news/20230926/309248481.html.

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Concepts of Public Law Dogmatics during European Law Emergence

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Abstract: The article is devoted to the impact of the idealistic concepts of the Antiquity made on the development of concepts of public law dogmatics during European law emergence. The current research is topical both for science (it helps to understand the conceptual framework as well as the way of thinking of those who specialize in public law) and application: the perception of the ideological grounds of public law dogma not only strengthens the relevant institutes of law regulating the public authority, but can also consolidate the legal community as the bearer of a relatively autonomous professional tradition important for the society. As in the early stages of its development dogmatics was mostly private law, the structure of public law in many ways was made of civil constructs and concepts. A new public law identity was shaped only at the end of the 19th century and the fundamental public law borrowings could be avoidable.

The article attempts to find out the way the idealistic methodology influences the perception of public law pioneers of the main elements of legal reality, considering the dichotomy of idealistic and material, private and public, positive and natural law. Special attention is paid to the interpretation of the concept of “State” by J. Bluntschli, K. Gerber, O. Gierke and various conceptual approaches to the State (as a mechanism, system, legal entity, construct, etc.) in the theory of public law and order. It is noted that as compared to the representatives of a later developed legal positivism German lawyers trace down “ethical and spiritual contents” of law. The final part of the article is dedicated to the interpretation of legal dogmas as viewed in objective idealism. To solve the tasks set in the article, historical and legal, logical, hermeneutical,

dialectical, formal and legal, sociological, theoretical and predictive as well as other methods of cognition are used.

Keywords: public law dogmatics; public law ontology; public law and order; legal positivism; Romano-Germanic law; Plato; Aristotle; J. Bluntschli; K. Gerber; O. Gierke

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Contents

I. Introduction	909
II. Particular Features of Developing Public Law Dogmatics of the 19th Century and “Metaphysic” Constituents of Legal Reality	911
III. The Public Law Doctrine of K.F. Gerber with Regard to the Theory of Eidos	914
IV. The Interpretation of O. Gierke’s Doctrine of Public Law with Regard to Plato and Aristotle	920
V. Insight into the Legal Dogmatic Concepts in Terms of Objective Idealism	923
VI. Conclusion	925
References	926

I. Introduction

Since the end of the 19th century the word “dogmatics” has been associated first of all with the “science of law in force” (Muromtsev, 1884). The main conceptual framework of the science is legal positivism. It is often compared to philosophical positivism that tended to be a theoretical base of a formal scientific methodology. This external view (in terms used by Herbert Hart — “*an external view*” (Hart, 1961, p. 6)) is quite disputable, as legal positivism can be viewed internally (“*an internal view*”), when it is important to take into account the fact that legal positivism as a dominant legal ideology developed from civil law (and it is the civil law that has been its framework even now). Public law representatives often borrowed civil and legal terms and constructs into public law. But not all civil categories and concepts comply with rigorous criteria of philosophical positivism. Hence, the statement that

legal and philosophical types of positivism have a genetic affinity are far from being perfect.

But this brings up the question about the etymological connection between legal dogmatics and the dogmas of religion or other social regulators. This similarity can be stressed: legal principles as well as religious dogmas are often beliefs, but not science. The tasks of both legal and religious dogmatics are mainly reduced to the interpretation of basic terms, their classification to substantiate some complicated parts of the acting law and holy texts.

Despite this similarity, legal positivism is clearly characterized as science and is contrasted not only with any religion, but also with any metaphysics. But in fact, both legal dogmatics and legal positivism make up some kind of a categorial system often based on basic principles and metaphysic (notional) concepts.

The present article deals with the mentioned principles and concepts of the period when public law dogmatics originated in European law. Thus, here is a question as to whether legal ideals, values, and principles can be recognized as constituent parts of legal reality or not. The answer to this question is sought in the doctrinal works of J.C. Bluntschli, F. Stahl, K. Gerber, O. Gierke, and other theoreticians, who had an impact on the development of public law and still influence the regulation of social relations.

The main idea of the article is looking for the methodological influence of idealistic concepts of the Antiquity on the development of public law dogmatics. To pursue this objective, the author will look into the following matters:

- 1) scrutinizing the particular features of a positivist and a natural-law approach to the basic terms of legal reality (in terms of the concept “State”);
- 2) looking into the public law doctrine of K.F. Gerber from the standpoint of the theory of eidos;
- 3) interpreting the public law doctrine of O. Gierke with regard to Plato and Aristotle;
- 4) examining the problems of comprehending the public law doctrine from the standpoint of objective idealism.

To solve the tasks, we use general scientific (induction, deduction, analysis and synthesis) as well as special methods of cognition: historical, logical, hermeneutical, dialectical, sociological, formal, and legal.

II. Particular Features of Developing Public Law Dogmatics of the 19th Century and “Metaphysic” Constituents of Legal Reality

Reviewing the fundamental concepts of European public law dogmatics should be started with the Reformation period, when the structure of public relations changed greatly at the national level under the influence of some cultural, social and religious factors. Moreover, in 1648 the Peace of Westphalia resulted in the development of a new world system of relations. The complication of legal reality gave rise to the differentiation of private and public interests and the justification of this differentiation in the terms of legal dogmatics.

As dogmatics mainly used to be private law at that time, Western European representatives of public law often used well-known private law word combinations. For example, Althusius and Bodin defined public authority as *potestatem publicam*. The terms *potestatem publicam* and *potestas privata* of private law were introduced to the private law theory on human rights (Spectorsky, 2006, p. 109). According to E.V. Spectorsky, when the pioneers developed public dogmatics, they started with the description of states, generalizing their polihistorical knowledge through metaphysical “sources” of ancient Greek philosophers, “they thought it necessary to apply to universal public law and start to research it” (Spectorsky, 2006, p. 109).

The structure of Western European public law originated mainly from civil law. For example, the State was often interpreted as some kind of a legal entity, that is as a civil construct. At the same time the State had some conventional features of a psychophysical individual, its own rights, particular power and even moral virtue.

Johann Caspar Bluntschli (1808–1881), a professor at the University of Munich, made an attempt to gloss over the impact of civil law making the following distinction, “Public law fundamentally comes from the State, while private law relies on individuals. One of them

regulates state legal relations and the other — the rights of individuals” (Bluntschli, 1868, p. 4). It is evident in Russian that there is tautology in Bluntschli’s words: public law implies the State, while private law — individuals. It is clear that this “definition” is not good enough to get into public or private law. But then J. Bluntschli points out to some “transients.” For example, in the part where the State has an exclusive property right, for tax purposes it is equal to any individual (Bluntschli, 1868, p. 5).

Instead of using the reasoning of Roman law (as Bluntschli used to do) and steady looking for the criteria to distinguish between *ius publicum* and *ius privatum*, he makes much confusion speculating on public law. Thus, Bluntschli says, “There is a rule for public law: public law is a public duty. An authorized person is required to use his right” (Bluntschli, 1868, p. 5). This rule is good indeed to distinguish between public and private law. In fact, an individual can ignore his rights. But it is noteworthy that (even if Bluntschli just makes an attempt to define the concept “power” as exercising the power) this distinction of public and private law is quite risky, because it does not make the difference between the right and statutory duty.

Bluntschli is not the representative of the theory of legal positivism (it did not exist then in the way we know it now), but he is considered to be the forerunner of legal positivism. That is why, when he reflects on public law ontology, there are principal references to the heritage of Ancient Greek philosophers in his publications, “Thus, any law may be ideal and include moral constituents. But as law it also rests on reality and therefore is material and real. The material aspect of law is ignored by abstract ideology. As a rule, it invents some notional public principle and derives a number of logical conclusions from it disregarding real State and its real relations. Plato himself in his work “Republic” made the same inaccuracy and as a consequence made the statements that contradicted individual character and needs” (Bluntschli, 1868, p. 29).

Taking into consideration the task to search for the impact the idealistic concepts made on the development of public law, this quotation is remarkable for several reasons. In contrast to full-fledged lawyers-positivists who followed Bluntschli, he himself cannot ignore “moral aspects” of law in his reviews. He starts his research with the “ideal

aspects” of law. At the same time Bluntschli cannot give up reviewing the constituents of legal reality from a materialist perspective. Among other things, he mentions the “corporeal form” (In Germ. *leibliche Gestalt*) of legal constructs. This dualism in understanding law is traced back in Bluntschli’s further discourse, when he criticizes Plato’s utopist words about the State as soon as he analyses the concept of law. It results in misunderstanding the methodological criteria of distinguishing between law and the State.

It seems that different elements of legal reality using the methods of objective idealism should be distinguished after its constituents are classified. It is possible to do only if the concepts, principles, values are considered to be part of legal reality.

In terms of positivism (normativism) the world of law first of all consists of the laws, approved in due course. Despite the fact that social reality is full of norms, legal reality and the legal framework are not identical. Extralegal *ad hoc* law and equitable rules should be differentiated.

The division into public and private law involves modelling the structure of legal reality, including constitutional values and ideals, principles of law, legal norms and relations, internal links of legal phenomena. Some constituents of legal reality are of a public law nature (constitutional and legal values), while others are private law (legal relations). In this regard there is a problem to solve — whether it is possible to differentiate the public law elements considered to be basic *eidos* and the ones that just reflect the essence of law. Hence, they risk to distort it.

In view of all of the above, we can make an intermediate conclusion, saying that the algorithms of developing public law at some historical stage depend on the basic grasp of the three things:

a) are “metaphysical” constituents (ideals, values, etc.) considered to be elements of legal reality? It is obvious that Bluntschli as well as other German lawyers influenced by their fellow idealists (mainly I. Kant and G. Hegel) still review “moral aspects” of law;

b) what are the purposes of seeking for balance between individualism and collectivism in law? The answer to this question illustrates the entire “architecture” of public law dogmatics. German

lawyers had an opinion that “any study about the State that is based only on the individual, looks like private law” (Gierke, 1874, p. 82);

c) the priority of positive or natural law approach.

III. The Public Law Doctrine of K.F. Gerber with Regard to the Theory of Eidos

A significant theoretical contribution to the development of public law was made by the professor of the University of Tübingen (and the Minister of the Kingdom of Saxony) Karl Friedrich Wilhelm von Gerber (1823–1891). An important remark about the origin of public law is made by K.F. Gerber, “The right to rule emerged as the right of the individual and was restricted by private law. The money to exercise this right mainly came from the princely private property... After the prince’s death his state turned into the net estate to be shared by different beneficiaries. The property was managed by the servants as agreed with the ruling person” (Gerber, 1852, p. 4).

K.F. Gerber assumed that he directly contributed to building a new public law identity without any fundamental adoption from the public law doctrinal heritage. Not all German authors easily accept the civil origin of public law. But the public law lawyers pay special attention to Gerber’s postulate that effective public law depends not on legal norms, but on the efficiency of law and order, “Public law is less dependent on fundamental objective norms, than on the proper execution of public law individual rights, which are as clear, definite and justiciable as individual rights” (Gerber, 1852, p. 29). This quotation implies that public law is made up not of legislative norms, but of judgements for people’s claims to protect public law freedoms.

Thus, professor K.F. Gerber is seen to be one of the first heralds of legal positivism in Germany. Compared to the Berlin old-schooler Friedrich Julius Stahl (1802–1861), who, taking monarchism as the basic principle of State (Stahl, 1845), made it valid for any conservative theory of state, Gerber focused on the diffuse concept of “folk” (*Volk* in German). At the same time Gerber could not ignore monarchism as the principle of his public law theory. In his work “The Basic Law for Germany” he makes an attempt to combine the liberal interpretation

of the concept of “folk” and the protective idea of the constitutional monarchy. The concept “State” in Gerber’s theory is therefore in the middle of the chain of concepts of “popular sovereignty” and “monarchist sovereignty.”

This is the way Gerber correlates the concept of “folk” and the concept of “State”: “In the State the people live according to the rule of law. They are recognized as a morally consolidated and legally empowered entity in it. They look for and find all necessary means to protect and pursue their common interests in it. They get the structure that enables them to utilize their moral strength for the common good in it. It is the State, that is a legal form for people’s cohabitation” (Gerber, 1880, p. 1). The quote form is also attractive: as can be seen, the first and the last sentence basically match up. Thus, the author of the idea of equating the State and its rule of law is not the founder of normativism H. Kelsen, but rather K. von Gerber. Kelsen, though, would hardly support the idea that the State as a legal category (i.e., as the rule of law) requires such metaphysical attributes as common good, people’s moral strength and particularly the people as a morally united entity.

But the aforementioned quote from Gerber’s work reveals the impact of Hegel’s concept of the three levels of law (abstraction, morals and ethics). Speaking about the moral foundation of legal reality in Hegel’s book “Philosophy of Right,” the author mentions that the outer State is “a civil society, a membership of independent, unitary in its formal universality based on their needs and with a legal structure as a means of people’s and property safety and by means of external order for their special and common interests” (Hegel, 1990, p. 208). Free personal will, according to Hegel, is made using private law constructs: through ownership, if it involves property will, and also through the right to contract, if it’s the will of others.

Then Gerber gives the final definition of the concept of “State”: “The State as a defender and the mouthpiece (*Bewahrer und Offenbarer* in German) of all people’s efforts to morally develop their cohabitation is a top level of a legal person under the rule of law” (Gerber, 1880, p. 2). As in his first quotation, Gerber differentiates the concepts of “State” and “folk,” but the logical sequence is inconsistent: at first, he says that the State and the rule of law are equivalents, then he says that the State

is equal to the top level of a legal person. The rule of law is considered to be the third “figure of speech,” distinct from the concepts of “folk” and “the top level of a legal person.”

It is obvious that by logic a legal person is associated with the rule of law. But then this brings up the question of what is primary. Either “the State — a legal person” formalizes the rule of law or the latter forms the State as a legal person. Gerber does not make it clear in his work.

The interpretation of Gerber’s concept in the view of Plato’s theory of *eidos* seems attractive. According to Wilhelm Windelband, Plato’s dialectics pretends to explore true being as it is manifested in the double meaning of the concept of “idea” (*eidos*), “Functionally and intellectually, *eidoi* are concepts and even generic concepts; but as subjects recognized and expressed in the definition of concepts, *eidos* are “gestalts” of true reality, the being itself in its meaningful definiteness” (Windelband, 1901, p. 78). There is a description of one of the paradoxes of the theory of *eidos* about the way *eidos* can develop into the things.

The problem of any idealism (both objective and subjective) is to identify and give theoretical proofs of the connection between people’s (inner) consciousness and the (outer) world of the things observed (phenomena or real objects). As it follows from Windelband’s quotation, Plato combined two concepts of *eidos* as a form and as a special content. Under Plato’s theory, a man as a sentient being deals only with intelligible objects, with the rationally cognizable things. Phenomenal world itself is just an uncoordinated stream of feelings.

This is how Martin Heidegger interprets the nature of an intelligible object, “I can identify the very thing in front of me as a book just because I have an idea of what the book is. If we did not understand it, there would not be any opportunity to see the book as a book. But there is probably some sort of a unique provisional knowledge of things which enables us to see the things as they are” (Heidegger, 2001, p. 153). Under Plato’s theory of *eidos* there are inevitably lots of intelligible objects. This fact in its turn gives rise to the problem of the balance among various intelligible objects. All intelligible objects, as it is clear from Heidegger’s book, are designed by our mind in accordance with Plato’s theory of recollection. But there are the ones among intelligible objects that are always preferred by Plato, “It is quite remarkable and

explanatory in this respect that there are never any questions just about the logs or stones, but about identical or big logs, there are also no questions just about the deeds or acts, but always about fair and nice deeds” (Auffarth, 1883, p. 14).

Public law gives particular importance not just to the perception of Plato’s theory of *eidos* with its approach to universals, but the opportunity to create a hierarchy of various elements of legal reality that make up an array of intelligible objects. Thus, under Plato’s theory of *eidos* all intelligible objects can be divided into two big categories: neutral and anthropologised objects, the latter are axiologised ones.

Going back to Gerber’s theory under review, it is important to mention that when relying on Plato’s theoretical and methodological approach, we can make the following logical conclusions under the theory of *eidos*. First of all, ideas as universals (e.g., the idea of common good) differ fundamentally from technical concepts (e.g., from the concept “rule of law”). The principal difference is that Plato’s idea is concurrently some value and the concept itself is just a technical element in the system of categories of any science. Hegel also thinks that the truth is that “fairness is identical with the concept” (Hegel, 1812, p. 4). Therefore, when they discuss a true State they mean that “they are the things they should be, i.e., their real nature matches their concept” (Hegel, 1812, p. 4). Secondly, ideas and values may be hierarchically related to each other. Thirdly, if it takes place, there should be the third ideal value to provide the equity and a proper balance with the first ideas and values.

Plato says that only the *eidos* “essence” (*οὐσία* in Greek) ensures the uniformity of the system of *eidos*. There is essence by definition, it is inherent in being. In the hierarchy of *eidos* of “being” is at the top. It means that essence is no less than essential, it cannot but exist. However, not all the existing things are essential. In other words, there are always values to ignore.

It makes being dependent on essence or essentiality. Being can be qualified by means of essence. Thus, there are at least two ways to show how the concepts of “essence” and “being” are related: a positive and a negative one. In the first case it is about essential and true being. The second case involves nonessential and false being, that is a pure

existence of various transient and temporary things. Along the lines of Plato's argument of the third person (Plato, 1993) there is at least the dichotomy of the idea of "being" depending on the fact whether the concept of "essence" involves "being" or not. Then there is another *eidos* of "being," which is to resolve the contradictions and bring together essential and nonessential being.

Neither of the three categories used by Gerber while trying to define the concepts of "State" — "folk," "the rule of law," or "the top level of a legal person" matches the status of the third integrating idea, even if von Gerber thinks each one of them has its own value. In this case Gerber's discourse about the State is logically and axiologically incomplete, while the main concept of public law should be complete.

But there is one more important thing in Gerber's theory: bringing the concept of "State" under the category of "the top level of a legal person" made Gerber stay away from the established tradition to regard the State as a machine. As the concept of "person" implies the will and reason, it is incompatible with the concept of "machine." But the contradiction here is that Gerber is one of the coauthors of the so-called legal constructivism. A constructive method enables a positivist lawyer to generate new legal concepts and to integrate them into the available system of categories in law. It is the dominance of Gerber's constructive method among other methods that proves that he is a mechanist (Stolleis, 2014). Indeed, there is no formal difference between the mechanistic construct of "State" and its competing personalist construct of the "State."

In the beginning of the 19th century the metaphor of "State as a machine" was not adopted by the representatives of the historical school of law founded by Friedrich Carl von Savigny (1779–1861) (Savigny, 1840). They assumed that any community has its own living history, dominates over individuals and is beyond their subjective constructivism. Political community, first of all, has the dignity that is incompatible with the idea of a rationally constructed mechanism. From their point of view, therefore, the metaphor of "State as an organism" is more acceptable (Hertwig, 1922).

The problem of advantages and disadvantages Gerber saw in the metaphors "State as a machine" and "State as an organism" still

remains unsolved. In his book “The Basic Law for Germany” Gerber says, “State authority is a willful power of a moral organism thought to be a personality. It is not a man-made mechanical summing of many wills, but it is a collective moral power of confident people” (Gerber, 1880, pp. 19–20).

However, further in the text Gerber dissociates himself from the metaphor “State as an organism,” not in favor of the concept “state — machine,” but in favor of the metaphor “State as an individual.” The point is that Gerber makes the meaning of the concept of “organism” unreasonably narrow. He does not admit the idea that the “organism” can be self-aware. Gerber explains: the concept of “organism” is acceptable as a starting point for the state legal structure. State authority, after all, operates mainly on a true social interaction. But it is possible with the introduction of the concept of “political will.” The will can be inherent only in the “top level of a legal person,” i.e., a legal construct of the State that comes from its own organic infrastructure (Gerber, 1880, p. 2).

Gerber points out that it is possible to design public law only with a view to the legal construct of a state individual: “The idea that the state law will be able to do without this intermediate point and that the concept of “natural organism” is sufficient would be rational, if one admits that the State is a system of integrated natural bodies. Their action is controlled by some superior foreign procedure and state activities are not conscious, but are merely supplementary and functional by nature. This natural function is based on abstract and natural laws” (Gerber, 1880, p. 222).

Gerber’s doctrine interpretation with regard to the theory of eidos suggests that objective idealism made an impact on the development of public law (and is still important for it), because, on the one hand, it prevents from subjectivizing the law, while, on the other hand, it contradicts methodological reductionism that accepts the right to exist only for physical reality, ignoring metaphysical categories of legal values and principles. Under Plato, idealistic concepts postulate that it is an objective scale that makes the element legal, i.e., involving the idea of law independent on any opinions. Objective legal values and ideals are legal eidos on condition that they match the status quo, the nature of a man as a sentient and a social being.

IV. The Interpretation of O. Gierke's Doctrine of Public Law with Regard to Plato and Aristotle

If C. Gerber can be treated as one of the first heralds of legal positivism in Germany, Otto von Gierke (1841–1921) is seen as his consistent ideological opponent among German lawyers-organologists. He was a bright and distinctive representative of the historical school of law. O. Gierke blamed C. Gerber for distorting the German legal idea and even for breaking “the German spirit in German law” (Gierke, 1895, p. 92).

O. Gierke is an example of a German scientist, who is a rigorous methodologist as well as an excellent specialist. “Progressing in every science should develop its fundamental concepts in two directions. It is to clear them up and make them deeper” (Gierke, 1874, p. 1). Gierke, for example, strictly differentiates formalist and pragmatist methods in law (Gierke, 1874, p. 4). The first method ensures the visibility, transparency, and simplicity of the categories, but simultaneously loses thoroughness. The second one, on the contrary, is aimed at searching for concept implications, which, due to their frequent and formal usage, were perceived by the parties of legal relations differently.

O. Gierke blames C. Gerber and his successors for great deception, “Law is not going to deal with legal reality in the way grammar relates to the language. It is going to set up the rules, but not identify them. It is going to prevail, but not to explore life. The main thing for it is the “system” that appears to be the end in itself instead of being supportive. As a result, we have a system of inapplicable expressions <...> In contrast to this unilateralism a more pragmatic branch of law has been trying to bring to the forefront the inner vital content of law. [All this is just] to pay tribute to the essence of law as a historical expression of the spirit of the society” (Gierke, 1874, p. 8).

According to Gierke, state law, and namely the concept of “State,” turned out to be an “apple of discord” between the formalist and pragmatic schools of German law (Gierke, 1874, p. 15). There were some unresolved fundamental problems at the origins of public law. Is the State the subject or the object of public law? If it is the subject, is it the only subject or it is opposed to its own public legal capacity of its

members? What is a legal understanding of the State's public and legal identity, if any? Is this identity legally applicable just as an external or also as an internal principle of public life? (Gierke, 1874, p. 16).

O. Gierke thinks that the individualism of lawyers-positivists is definitely connected with the private law ideology and thus is separated from the public law ideology. Basically, every theory about the State, based entirely on the individual, turns to private law notions. Though in doing so it is possible to save the legal nature of state law, but in so far as state law becomes dependent on the private law idea (Gierke, 1874, p. 82).

As for legal and positivist criticism of the ancient heritage, Gierke partially accepts the criticism about Plato and does not accept the criticism about Aristotle. Thus, Gierke agrees that Plato's metaphor about the State as a "man" gave rise to the development of anthropomorphic ideas about the State. Gierke's opinion is that despite the fact that the metaphor is ambiguous and open to misuse, the core of Plato's idea about the active, i.e., organological nature of the State, is correct (Gierke, 1874, p. 52).

In our opinion, legal and positivist rejection of Plato's theory about the State is influenced by Gerber's and his successors' latent good feeling to the metaphor "State as a machine." The rejection of the organic origin of a true theory about the State, after all, implies attention to the mechanistic origin of public law dogmatics.

Gierke fully agrees with Aristotle's idea that the State represents:

- 1) a natural possession, but not a man-made optional construct;
- 2) an organic union, but not a mechanistic setup of fragments;
- 3) a unity consisting of parts;
- 4) a single spiritualized living thing (Gierke, 1874, p. 52).

These statements can be rejected by the representatives of legal anthropology, because they treat the "individual" only as human beings isolated from one another. This attitude, however, contradicts modern sociology and Plato's and Aristotle's holistic theories. It turns out then that Aristotle as a state theoretician is sometimes closer to modern sociology than the German lawyers-positivists of the 19th century.

Aristotle, referring to the concept of "State," suggests we come from the fact that the man cannot be isolated, he is a political animal (ζῷον

πολιτικόν in Greek). But there is a more correct interpretation, such as “a state (policy) animal,” because then Aristotle makes it clearer, “and the one who, due to his nature, but not because of situational factors, lives out of the State is either a morally immature creature or a superman” (Aristotle, 1983). Even this interpretation will not fully express the meaning of the word that also includes social, public, moral behavior of an individual. Gierke’s organic theory of the State correlates to Aristotle’s concept and is based “on the historically fixed fact, that a man has always been dual-natured: an individual for himself and a clan member. Neither of these characteristics without the other could make a person human” (Gierke, 1874, p. 83). Parties to enter legal relations inevitably generate intersubjective abstractions as the objects of legal reality, describing it by means of formalism and objectivity.

Superficially, Gierke’s organic theory of State is dualistic, that is it implies some gap between public and private affairs. However, no matter if Gierke is a strong dualist or not, the theory mentioned admits the interpretation inspired by Plato’s and Aristotle’s dialectics. This interpretation can be important for legal ontology in terms of defining the constituents of legal reality and of a possible algorithm of their arrangement in a holistic manner.

Let us remember that in “Republic” Plato insists that musical training is of national importance (Plato, 1994, p. 162). For example, some individual of the Platonist State should learn to play the flute as much as playing the flute would have been part of his life. In this case, playing the flute on the public holiday, this individual, making music for others, makes it for himself at the same time, and vice versa. Thus, his musical excellence cannot be divided into a public and a private one, though they are seemingly related, but are disjoint. Moreover, according to Aristotle’s ethics there is a special quality or “arete” (“excellence”) of a flute player (Aristotle, 1983, p. 452). This quality wants him to be an “excellent” flute player both for himself and for others, that is to say for self-esteem as well as for people’s admiration.

There are some aspects in Gierke’s organic theory of State, which are no less attractive. To begin with, the State is not the only community, where individual lives. Moreover, the State is a rather distant community for an individual. It is usually indirect through transitional communities,

beginning with family, school, including music school, university, handicraft, parish, etc. (Gierke, 1874, pp. 87–88). Under this organic theory of State the term of “public authority” makes a clear sense. The concept of “public legal person” is just a legal center, a concentrated registration of the whole life of the State machine. Its life is exercised through the activity of its members (transitional communities) and its authorities (e.g., ministries, departments, officials) that at the same time have an isolated existence. Nevertheless, only the state mechanism is a real unity, because all the isolated existences being state constituents form groups under the idea of the integral State (Gierke, 1874, p. 88).

Gierke also rejects the dogma of classical legal positivism that the State is always primary while law is secondary. Law is equal to the State in its value. Neither the State emerges from legal reality, nor the legal reality emerges from the State. Although they are single-rooted, they grew up together “to improve on each other. Both the idea of the State and the idea of law for people are innate” (Gierke, 1874, p. 92).

Thus, public-law dogmatics develops according to the idea that law is intersubjective. It depends on the set of two and more subjects and some legal facts common to them. Objective reality losing its subjectivity during legal relations, which do not mean any individual isolation by definition, appears in the relations on some benefits. Understanding of intersubjectivity is based on some special reality combining the descriptive and the prescriptive aspects of law.

V. Insight into the Legal Dogmatic Concepts in Terms of Objective Idealism

The idealistic concepts of the Antiquity are significant for the formation and the development of public law dogmatics among other things because they help to generate legal universals as independent ontological units. So, it is necessary to abstract oneself from physical reality when it comes to the State as the subject of law: it is invisible, intangible, but it is definitely an element of legal reality. The same remains true with other objects and subjects of legal relations.

But we should see the methodological difference between the concept of “individual” in everyday and legal reality. O. Gierke pointed

out that an individual as a legal concept emerged due to the abstraction of “singling out part of the reality” made by legal consciousness (Gierke, 1895, p. 268). It is no mere coincidence that in civil law the image of an average subject acting with the degree of care admitted natural for this kind of legal relations emerges when the principle of conscientiousness or intelligence is exercised. In this respect H. Kelsen pointed out that “Modern legal orders presuppose an average human being and an average set of external circumstances under which people act causally determined” (Kelsen, 1934, p. 97). An average type of a man implies idealist abstraction from a certain object, but it is part of legal reality.

The parties to the legal relations similarly recognize some public law construct and identify it. They, for example, (at least instinctively) differentiate the idea of the State from the idea of a legal entity. Though legal universals can irritate with their ephemerality, but the rate and the similarity of perceiving these ideas confirm the existence of legal reality. The materialist approach is insufficient here, because it is impossible to define some essential categories of public law without universals. People’s minds always come across the phenomena that cannot be reduced to physical notions: legal ideals, principles, values.

The problems of eidetic nature of legal dogmatic concepts are associated with the accuracy of their definition. People’s opinions are judgemental even if they refer to external characteristics. That is why it is more convenient for the party to the legal relations to use the subject matter as an abstraction. Thus, one of the time-proved approaches to the problem of a proper identity of the manifested essences is proposed by the theory of eidos. Under Plato’s theory, the world phenomena are similar to supreme ideas that are becoming the cause and the purpose of development (Plato, 1994, p. 298). As for legal phenomena, the theory of eidos suggests that subjective perception is not determinative for the essence of the legal reality constituents. Actually, objective scope, i.e., the idea of law independent of judgemental perception, makes them legal.

The ontological status of legal phenomena through the combination of timeless ideas was proved by the representatives of the German neo-Kantian law school H. Cohen (Cohen, 1902), R. Stammler (Stammler, 1928) and others. Those who criticized the independent ontologi-

cal status of legal reality referred to the transience and variability of legal relations. But one should take into account the difference between existential legal values and a set of regulations.

Universal legal ideas (*eidos*) can be treated as the meaning of public law concepts. The definition of the concept of “reality” given by P. Berger and T. Luckman is attractive. They define the reality as the possibility to exist irrespective of subjective will (Berger and Luckmann, 1991, p. 13). The very fact of a universal perception of concepts is basic for people’s social cooperation. Moreover, legal reality involves the reality of legal acts – legislative acts and those enforcing legislation. In other words, the objects of legal reality, if not used in the meaning “*existere*,” denote “*esse*” as intelligible objects perceived by the subjects of law.

The reviewed approaches are of instrumental value during the development of legal reality, because its elements are often complex abstract structures, which cannot be reduced when it is necessary to solve the main problems of public law.

VI. Conclusion

If one looks into the first European concepts of public law with regard to Plato’s theory of *eidos*, it is possible to find out that the idea as a universal (e.g., the idea of common good) fundamentally differs from technical concepts (e.g., from the “rule of law” concept). The main difference is that for the Platonist the idea is always some value and the concept itself is just a technical element in the structure of the system of categories of a particular science. Meanwhile there could be some hierarchy of ideas-values. In this case it is reasonable to search for the third perfect value to ensure the ratio between the first two ideas-values.

Objective idealism is methodologically significant for public law dogmatics, because it confronts the reduction of admitting the ontological status of only the physical objects and also the diffusion of the ideas of legal relativism and polyvariability that admit the development of legal reality only in the mind of an individual.

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Application and Renunciation of English Contract Law in Russia in Light of Recent Developments in the Social and Economic Environment

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Abstract: The paper outlines the prospects and problems surrounding the application of English contract law in Russia in light of the recent development in the social economic environment in Russia. This development has been predominantly influenced by the beginning of the Special Military Operation (the SMO) in February 2022 and by the Western sanction policy that was implemented thereafter. Since the collapse of the Soviet Union in 1991, Russian contract law has been significantly reformed. This has been achieved by the introduction of the principle of freedom of contract and autonomy of will into the Russian legal system in an explicit and detailed manner. As a result, parties to international contracts have widely used the right to choose any national law as applicable to their arrangements. For decades, it has been a common business practice in Russia to subject international contracts, specifically financial deals as well as mergers and acquisition transactions, to English law. This happened because of the unique instruments of English law which did not have any equivalent in Russian law. Due to the high demand for these instruments from the business community, certain amendments were introduced in the Russian Civil Code in 2015.

These amendments implemented some contract law instruments which have their origin in English law. Consequently, Russian contract law has become more business oriented. Many international contracts concluded before February 2022, and some contracts concluded thereafter are still regulated by English law. Russian judicial practice proves that application of English law to contracts does not entail application of foreign sanctions and Russian counter-sanctions to the respective contractual relations. These sanctions and counter-measures are not regarded as a part of contract law applicable to contracts. Furthermore, English contract law allows aggrieved parties to successfully protect their interests in cases where their counterparts committed a breach of contract as a result of voluntarily following the sanction policy.

Keywords: credit agreements; conditions precedent; warranties; representations; covenants; remedies; compensation; damages; sanctions; penalty; liability; breach; frustration; common law; indemnity

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Contents

I. Introduction	929
II. Russian Practice of Application of English Contract Law	930
II.1. Instruments of English Contract Law	930
II.2. Remedies for Breach of Contract under English Law	933
III. Failure to Fulfil Contractual Obligations and Sanctions	937
III.1. Principle of Strict Liability	937
III.2. Doctrine of Frustration and Sanctions	938
IV. Influence of English Law on Russian Contract Law	943
V. The Prospects of Using English Law by Russian Courts	946
VI. Conclusion	948
References	948

I. Introduction

Until the beginning of the Special Military Operation (SMO) in February 2022, English law was one of the most widely used national legal systems in transactions between Russian and foreign parties. Over

80 % of mergers and acquisition transactions (M&A) were governed by English law (Ivory and Rogoza, 2012, p. 5). The popularity of English law can be explained by such factors as the presence of legal instruments which are essential for achieving positive business results, but until recently did not have equivalents in Russian law. These instruments include, *inter alia*, warranties and representations, indemnities, conditions precedent and covenants. These instruments are necessary to implement the parties' commercial arrangements.

In the last decade, the situation has changed dramatically. First of all, several fundamental changes were introduced into the Russian Civil Code (the RCC) in 2015. These changes implemented in Russian law some legal instruments which have their origin in English law. Secondly, after the beginning of the SMO in February 2022, many international companies left the Russian market and terminated their contractual and partnership relations with their Russian counterparts. Subsequently, many transactions and commercial arrangements are now subject to the law of friendly jurisdictions, but not to English law, which is currently regarded by some lawyers as "toxic" law. In addition, the SMO shifted the focus of foreign investors away from the Russian corporate and financial market. Furthermore, Russian regulators introduced many restrictions on the transactions with residents from unfriendly jurisdictions. As a consequence, the number of contracts subjected to English law has decreased significantly. Finally, the de-offshorisation policy, which was announced before the SMO and has continued since then, resulted in a decrease in the use of offshore holdings and sub-holdings structures by Russian businesses. These relations used to be regulated by English law. This is not the case now.

In this paper, we are going to address these and other related issues.

II. Russian Practice of Application of English Contract Law

II.1. Instruments of English Contract Law

Because of its flexibility and the presence of unique instruments, English law has been widely used by Russian business in order to regulate different types of commercial and corporate relations, specifically financial arrangements, corporate issues, trust and trust-like matters.

Historically, English law played a leading role in the regulation of credit agreements and other financial arrangements. As Russian practice proves, credit and credit facility agreements concluded by Russian banks with foreign banks were traditionally subject to English law. Most, if not all, of these agreements stipulate jurisdiction of foreign arbitration institutions or English courts to consider disputes arising out of such agreements. Before the SMO, Russian courts rarely dealt with these agreements, usually only when such disputes fell under the jurisdiction of Russian courts by default, e.g., when the parties did not stipulate a dispute resolution clause in their agreement or when they decided that it would be easier to claim repayment of the debt from a Russian debtor through a Russian court.

Due to its flexibility, English law allows the parties in financial deals to take into account the particularities of a specific deal and stipulate the requirements necessary to secure repayment of the loan. In particular, the facts which were recognized as established by the contract shall not be proved. This principle is known as “contractual estoppel” and was established in the decision of the England and Wales Court of Appeal in *Springwell Navigation Corporation v. JP Morgan Chase Bank and Others* [2010].¹ In Para. 143 of the decision the court concluded:

“If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. [...] there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties.”

The requirements for a loan can be realized by using the concept of conditions precedent, i.e., specific provisions which should be in place in order for a loan to be provided. “Conditions precedent are clauses which provide that certain parts of the contract will only come into force if and when agreed conditions are met. [...] These conditions do not need to be within the control of the parties and do not even need to be

¹ [2010] EWCA Civ. 1221. Available at: <https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2010/1221.html&query=springwell&method=boolean> [Accessed 02.01.2025].

realistic, provided that they are clear and can be objectively assessed” (Ivory and Rogoza, 2012, pp. 18, 19). Such conditions may require the borrower to obtain approval for the transaction from its investment committee and/or major shareholders, or to provide collateral, surety, or any other form of security for the repayment of the loan amount.

The most valuable instruments that have always been in high demand from parties to credit transactions, are warranties & representations, which a borrower should give to a lender. A warranty is a promise that a particular statement made is true at the date of the contract. Warranties are often included in loan and credit agreements, where the borrower assures the lender that the borrowers’ accounts give a true and fair view of the assets and liabilities of the borrowers’ company at a specific date and that the borrower has no outstanding payments and liabilities before any banks, lenders, tax authorities and other creditors (Ivory and Rogoza, 2012, pp. 11, 12). Breach of warranty gives the aggrieved party the right to claim damages but not rescind the contract (Treitel, 2015, Para. 18-042).

Representations are statements made by one party which induce the other party to enter into the contract. In the case of misrepresentation, the aggrieved party may claim rescission of the contract and compensation of damages. The aim of damages is to put the innocent party in the same financial position they would have been in if they had not entered into the contract (Treitel, 2015, Para. 4-005, 20-021). The purpose of warranties and representations is to maintain the status quo in the borrower’s position from the moment of the conclusion of the loan agreement until the moment the parties fulfil their contractual undertakings (Vishnevskij, 2018, p. 111).

Another English law instrument that is common for loan and credit agreements is covenants. A covenant is an agreement or promise from the covenantor to do or refrain from doing something, binding on the person who makes the covenant. They can be positive (e.g., “to provide key financial information to the bank on request”), or negative (e.g., “not to grant new security without the prior consent of the bank”) (Ivory and Rogoza, 2012, p. 20). Covenants are often used in international contracts, but they are only effective if they comply with applicable national law.

II.2. Remedies for Breach of Contract under English Law

The main remedy available at Common law is damages. The definition of damages is derived from the leading precedent *Robinson v. Harman* [1848], according to which:

“The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

This rule allows the aggrieved parties to restore their position and gain compensation for their losses.

Damages in English law are compensatory by their legal nature, because their aim is to restore the situation in which the suffering party would have been in if the breach had not happened. Therefore, the remedies for breach of undertakings under the contract should also be compensatory. This rule was formulated by the Supreme Court of the United Kingdom (the UK) in 2015 in *Bunge SA v. Nidera BV*:

“The fundamental principle of the common law of damages is the compensatory principle, which requires that the injured party is ‘so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed’: *Robinson v. Harman* [1848] [...]. In a contract of sale where there is an available market, this is ordinarily achieved by comparing the contract price with the price that would have been agreed under a notional substitute contract assumed to have been entered into in its place at the market rate but otherwise on the same terms.”²

Hence, the right to claim damages and their amount is predetermined by a comparison between the actual position of the plaintiff after the breach and the position which he had been in before the breach. At the same time, damages are based on the loss of the aggrieved party but not on the gain received by the party in breach³ (Treitel, 2015, Para. 20-004). According to another principle of recovery of damages, the plaintiff shall not be placed in a better position than he would have been in if the contract had never been breached (Treitel, 2015, Para. 20-

² *Bunge SA v. Nidera BV* [2015] UKSC 43.

³ *Tito v. Waddell (No. 2)* [1977] Ch.106 at 332; *The Solholt* [1983] 1 Lloyd's Rep. 605 at 608.

007). In *Ruxley Electronics and Construction Co Ltd v. Forsyth* [1996], it was established that “damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party” (Treitel, 2015, Para. 20-007).

According to English law, damages can be in the form of direct loss and loss of profit. Direct loss means non-receipt of the performance under the contract, whereas loss of profit (also known as consequential loss) is the subsequent adverse consequences of such non-receipt (Treitel, 2015, Para. 20-005, 20-025). Direct loss should be awarded either as a “substitute” for the right infringed, or as the cost of performance (Treitel, 2015, Para. 20-005). Thus, loss of profit could be in the form of the interest which a bank or any other creditor would have received if it had placed the funds (which the debtor should have repaid to him) on the financial market. It should be noted that English law allows consequential losses (loss of profits) to be recovered provided that the link between the loss and the breach is not too remote (Treitel, 2015, Para. 20-025). A detailed description of this approach can be found in specialized literature: “In some cases, the claimant reasonably did not borrow replacement money and is entitled, subject to remoteness, to claim the lost profits that would have been made from investing the money that the defendant should have paid the claimant, even if that investment would only have been on deposit in a bank” (Kramer, 2014, Section 7.2).

Russian case law proves that the provisions of English law on damages are applied by Russian state courts to credit and credit facilities agreements. In some instances, English law rules allowed Russian parties to protect their interests against their foreign counterparties.

In the case of *TransKapitalBank JSC (Russia) vs Credit Suisse AG (Switzerland)*,⁴ TransKapitalBank joined the credit facility agreement concluded between Credit Suisse and an Uzbek company (the borrower). In the framework of the agreement, TransKapitalBank provided a loan facility to the borrower to the amount of EUR 10 million. The borrower repaid the loan in due course and transferred the amount due and

⁴ Decision by the Arbitrazh Court of the City of Moscow, case No. A40-129186/2022-52-995 dated 10 February 2023. Available at: <http://www.consultant.ru/>. (In Russ.). [Accessed 05.01.2025].

accrued interest to Credit Suisse. The latter, acting as a credit agent, was supposed to transfer these funds to TransKapitalBank, but refused to do so, because on the date of the repayment due (April 2022), the US authorities placed TransKapitalBank on the Specially Designated Nationals and Blocked Persons List (SDN) List.⁵ As a result, after April 2022, Credit Suisse refused to transfer the funds to honour its contractual obligations under the credit facility agreement.

The agreement was subject to English law and stipulated the jurisdiction of the London Court of International Arbitration (the LCIA). However, *TransKapitalBank* filed a claim against Credit Suisse to the Arbitrazh Court of the City of Moscow in accordance with Art. 248.1 of the Arbitrazh Code of the Russian Federation (the APC), which gives the Russian state arbitrazh courts exclusive jurisdiction over disputes involving companies and individuals against which a foreign state or international institution has imposed sanctions. The Arbitrazh Court of the City of Moscow assumed its jurisdiction and confirmed that the dispute should be resolved on the basis of English law applicable to the agreement. The court concluded that the defendant failed to prove that they had not been able to fulfill their contractual obligations to remit the funds to the plaintiff. As a Swiss legal entity, Credit Suisse was not obligated to abide by the restrictions imposed on these Russian banks by the US authorities. Voluntary compliance with the sanction rules of foreign states does not release the defendant from liability.

The court asserted that compensation of damages is the main remedy for the breach of contract available at English law. The aim of damages is not to punish the party in breach, but to compensate the losses of the aggrieved party. According to the general principle of English law, compensation of damages is aimed to place the plaintiff in the same situation as if the contract had been duly performed.

In a similar case, *Bank Zenit JSC (Russia) vs Credit Suisse AG (Switzerland)*,⁶ *Bank Zenit* provided a loan amounting to USD 20 million

⁵ Specially Designated Nationals And Blocked Persons List (SDN). Available at: <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> [Accessed 05.01.2025].

⁶ Decision by the Arbitrazh Court of the City of Moscow, case No. A40-121033/2023-52-989 dated 12 December 2023. Available at: <http://www.consultant.ru/>. (In Russ.). [Accessed 05.01.2025].

under a credit facility agreement concluded between *Credit Suisse* and *Intergrain S.A.* (the borrower). In February 2023, the UK Office of Financial Sanctions Implementation HM Treasury (the OFSI) placed *Bank Zenit* on the UK sanctions list.⁷ After that, Credit Suisse, acting as a credit agent, refused to transfer the funds to Bank Zenit under the credit facility agreement. The agreement was subject to English law and the disputes should have been referred to the LCIA. Despite the arbitration agreement, in accordance with Art. 248.1 of the APC, Bank Zenit brought an action against Credit Suisse in the Arbitrazh Court of the City of Moscow.

The court concluded that the restrictions imposed on *Bank Zenit* by the OFSI are not mandatory for *Credit Suisse*, as it is a Swiss legal entity, not a UK legal entity. In addition, the UK sanctions do not form part of English contract law chosen by the parties as applicable to their contract (*lex contractus*). Sanction restrictions form part of the personal law of UK companies and individuals (*lex personalies*), but not part of *lex contractus*. Furthermore, the sanction restrictions implemented by the OFCI contradict international law and Russian public policy. Because sanctions are public rules, they do not have any extraterritorial effect and cannot be applied outside the territory of the UK. The court awarded the plaintiff damages in the amount of USD 20 million for breach of contract under English law.

Apart from damages and interest, the aggrieved party may claim the payment of a fixed sum for the breach of contract. Traditionally, English law differentiated between penalty clauses, which are invalid, and liquidated damages clauses, which are generally upheld (Treitel, 2015, Para. 20-129).

It was stated in the leading case of *Dunlop vs New Garage Ltd* [1915] that if a sum for breach of contract is of an unconscionable amount, it will be considered penal and unenforceable. The court will strike out the penalty clause entirely and will not adjust it with a lower sum. If the clause is a “genuine” attempt by the parties to estimate in advance the loss which would result from the breach, it is a liquidated damages clause (Treitel, 2015, Para. 20-130, 20-131).

⁷ UK Sanctions List. Last Updated: 28.02.2025. Available at: <https://www.gov.uk/government/publications/the-uk-sanctions-list> [Accessed 06.03.2025].

A valid liquidated damages clause is one where: (a) an agreed sum constitutes a genuine pre-estimate of the loss from breach, (b) there is an intention on the part of the parties to calculate losses in advance, (c) the amount of damages is reasonable.

A typical liquidated damages clause is as follows:

“[...] therefore, the Contractor shall be liable to the Owner for payment of liquidated damages to the amount of \$ 1,000 for each day that substantial completion is delayed beyond the contract time. Such liquidated damages are intended to represent estimated actual damages and are not intended as a penalty [...]”

Furthermore, in two famous cases *Cavendish Square Holding BV v. Talal El Makdessi* [2015] and *ParkingEye Ltd v. Beavis* [2015] (Treitel, 2015, Para. 20-138), it was established that remedies are not penalties if they are (i) not “out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”; (ii) not extravagant; and (iii) not intended to punish the party.

III. Failure to Fulfil Contractual Obligations and Sanctions

III.1. Principle of Strict Liability

A breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract or improperly performs his obligations. Suggested: In the event of a breach, the aggrieved party may pursue one of several remedies, including claiming damages, seeking payment of an agreed sum, requesting specific performance of the contract, or obtaining an injunction (Treitel, 2015, Para. 17-049).

English law supports the principle of “strict liability.” “The most obvious illustration of this principle is provided by the case of a buyer who cannot pay the price because his bank has failed or because his expectation of raising a loan has not been fulfilled, or because he is prevented by exchange control regulations from remitting money to the place where he has agreed to pay, or because his supply of the currency in which he has agreed to pay has become exhausted and cannot be replenished. In such cases, there is no doubt that he is liable: inability

to pay money, even if it occurs entirely without the fault of the party who was to make the payment, is not an excuse for failing to make the payment” (Treitel, 2015, Para. 17-065). These rules were established in *Universal Corp v. Five Ways Properties Ltd* [1979] and *Congimex SARL (Lisbon) v. Continental Grain Export Corp (New York)* [1979]. “The principle of strict liability may be modified by the terms of the contract (e.g., by a “force majeure” clause), but unless this is done, liability is quite independent of fault” (Treitel, 2015, Para. 17-065).

It should be noted that the principle of strict liability was applied by the Russian courts in the aforementioned cases (*TransKapitalBank* and *Bank Zenit*). Specifically, the refusal of Credit Suisse, who was acting as a credit agent, to honor their payment obligations to the Russian banks constituted a breach of the principle of strict liability established by English law.

According to the judgement in *Bank Zenit JSC vs Credit Suisse AG*, the reference of the defendant (*Credit Suisse*) to the fact that they could not fulfill their obligations because of Bank Zenit was included on the OFCI sanction list was not valid, since Credit Suisse is a Swiss legal entity. The inclusion of the bank on this list did not constitute a force majeure event either. The court cited McKendrick, saying that in accordance with current doctrine the concept of force majeure is alien for English law (McKendrick, 2013, p. 5).

III.2. Doctrine of Frustration and Sanctions

According to common law of contract, liability for non-performance of the contractual obligations is strict. Except in certain cases, non-performance of contractual obligations constitutes a breach of contract, granting the aggrieved party the right to claim damages (McKendrick, 2013, p. 3). The substantiation of this rule was given by the Court of King’s Bench in 1647 in *Paradine v. Jane*:

“When the party by his own contract creates a duty or charge upon himself, he is bound to made it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract” (McKendrick, 2013, p. 3).

Currently, common law allows obligors to be released from liability for failure to perform their contractual duties in certain cases. Specifically, such an excuse is possible under the doctrine of frustration. The leading precedent in this field is *Davis Contractors Ltd. v. Fareham U.D.C.* [1956], according to which the doctrine of frustration excuses non-performance where “a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract” (McKendrick, 2013, p. 5). However, the terms of the contract are *prima facie*⁸ absolute. “It is not surprising that judges are nowadays generally reluctant to find that a particular contract has been frustrated” (McKendrick, 2013, p. 5).

Some foreign creditors have tried to invoke the doctrine of frustration to justify their refusal to fulfill their contractual obligations before Russian banks which are included on sanction lists. Some lawyers try to justify non-performance by reference to the arguments in *Ralli Bros v. Compania Naviera Sota y Aznar* [1920] where the English court established a common law rule that “where an act required by a contract to be performed in a foreign country becomes illegal under that country’s law, the contractual obligation to perform that act is discharged” (Chitty, 2018, Para. 30-360). However, the factual matters in this case are fundamentally different from the cases reviewed by Russian courts. Specifically, the payments which had to be made by the credit agent (Credit Suisse) to the Russian banks were not illegal under either Russian or Swiss law.

The doctrine of frustration of the contract was consolidated by Lord Radcliffe in *Davis Contractors Ltd v. Fareham UDC* [1956]: “Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do” (McKendrick, 2013, pp. 38–39; Symons and Dalby, 2022, p. 176).

⁸ Lat. — based on the first impression; accepted as correct until proved otherwise.

Further, in *Tsakiroglou & Co. Ltd. v. Noblee & Thorl, G.m.b.H.*⁹ and *Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Evgenia)*¹⁰ the courts came to the conclusion that hardship in performance of a contract does not make the contract frustrated. In the case of *Tsakiroglou*, a contract was made for the sale of groundnuts to be delivered from Sudan to Hamburg. When the contract was made both parties expected that shipment would be via Suez, but this was not stated in the contract. The court held that the contract was not frustrated by the closure of the Suez Canal, and that the seller ought to have shipped the goods via the Cape of Good Hope. Although this would have taken two and a half times as long as shipment via Suez and would have doubled the cost of carriage, the difference between the two methods of performance was not sufficiently fundamental to frustrate the contract. In other cases related to Suez,¹¹ the courts also arrived at the conclusion that the difference between the two methods of delivery (i.e., via the Suez Canal or via the Cape of Good Hope) was not fundamental enough to claim frustration of contracts (Treitel, 2015, Para. 19-031).

In *British Movietonews Ltd v. London and District Cinemas*,¹² considered by the House of Lords, Lord Simon said:

“The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate — a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to the execution, or the like. Yet this does not in itself affect the bargain which they have made” (Treitel, 2015, Para. 19-005).

As it follows from the aforementioned cases, English law is based on the assumption that termination of a contract due to impossibility of performance (frustration) is available only if the change of circumstances became so significant that it made the performance of the contract impossible or illegal for the party. The parties are expected to foresee the occurrence of certain negative scenarios, such as strikes, wars or price

⁹ [1962] A.C. 93.

¹⁰ [1964] 2 Q.B. 226.

¹¹ *Glidden v. Hellenic Lines Ltd* 275 F. 2d. 253 (1960); *Transatlantic Finance Corp v. USA* 363 F.2d 312 (1966); *The Captain George K* [1970] 2 Lloyd's Rep. 21.

¹² [1952] A.C. 166 at 185.

fluctuations, and they should not refer to the doctrine of frustration just because the performance has become more burdensome than was anticipated at the time of the conclusion of the contract (McKendrick, 2013, p. 43).

The Arbitrazh Court of the City of Moscow applied this rationale in the cases of *TransKapitalBank* and *Bank Zenit vs Credit Suisse*. In both cases, the place of performance of payment was located in Switzerland (the place from which the payment should have been made by the credit agent (Credit Suisse)), and in Russia (the place where the relevant Russian bank (a creditor) should have received the money). According to the agreements, the payments should have been made in USD, and such payments should have been cleared through the Bank of New York Mellon. These payments, if they had been made, could have potentially been blocked. However, according to the credit facility agreements, the places for performance of the contractual undertakings were outside the US. Therefore, the credit agent could not refer to impossibility or illegality of performance in the place where these obligations should be performed, i.e., in Russia and Switzerland. As a result, rescission of the agreements due to impossibility of performance (frustration) was not an available remedy in these cases.

It should be noted that the illegality of performance due to sanctions imposed on the bank was discussed in a leading case in this area — *Libyan Arab Foreign Bank v. Bankers Trust Co* [1989].¹³ However, this issue deserves separate consideration and we will not discuss it here.

From the perspectives of English law, the refusal of the credit agent (Credit Suisse) to transfer the funds received from the borrower to the creditor (*TransKapitalBank* and *Bank Zenit*) due to decision of the credit agent to voluntarily follow the OFAC and OFSI sanction rules does not release the credit agent from liability for failure to perform the credit facility agreements. Other sanction risks, specifically the risks of secondary sanctions being imposed by the US authorities, may release a party from performance of the contract only if it is specifically stated in the contract itself. Such a rule of English law was established in *Lamesa Investments Limited v. Cynergy Bank Ltd* [2020]¹⁴ (Treitel, 2015,

¹³ Q.B. 728.

¹⁴ EWCA Civ 821.

Para. 19-036). Normally, credit facility agreements are only concerned with the obligations of the creditor, borrower and other obligors. They do not usually grants the credit agent the right to refuse payment to a creditor due to the fact that the latter has been included on sanction lists.

In English law, “a contract may be discharged if it provides for a method of performance which becomes impossible” (Treitel, 2015, Para. 19-030). Thus, in *Nickoll & Knight v. Ashton Edridge & Co* [1901] a contract stipulated that goods should be “shipped per steamship Orlando from Alexandria during [...] January.” The Orlando later ran aground in the Baltic, so she could not get to Alexandria in January. It was held that the contract was frustrated since it was to be construed as providing for performance only in the stipulated manner (Treitel, 2015, Para. 19-030).

However, there is another general rule in English contract law which states that if a supervening event makes one of alternative performances, provided by the contract, impossible or illegal, the contract is not discharged so long as another alternative remains possible and lawful.¹⁵ English law does not allow the court to amend or put an end to the contract simply because the contract has become more onerous as a result of supervening events. As was seen above in the *case of the Tsakiroglou*, English courts are very hesitant to invoke the doctrine of frustration in cases other than of impossibility (Smits, 2021, p. 202).

Therefore, the risk of secondary sanctions being imposed on the credit agent by the US authorities could be mitigated or overcome by changing payment from USD to another currency upon the parties’ agreement if they are willing to do so. Nevertheless, even if we apply the rule that the contract should be performed exactly in the way the parties agreed to (*Nickoll v. Ashton*), a fear of secondary sanctions does not constitute a reasonable ground for non-performance.

In the above-mentioned cases, which were under the consideration of Russian courts, the credit agent was not bound by any specific method of performance of the contract in accordance with the relevant

¹⁵ *Barkworth v. Young* (1856) 1 Drew. 1 at 25; *Reardon Smith Line Ltd v. Ministry of Agriculture; Fisheries and Food* [1963] A.C. 691 at 730; Treitel, Para. 19-053.

credit facility agreement. A substituted or alternative method, such as payment in euros or pounds, could not be radically different from the method stipulated by the credit facility agreement, i.e., payment in USD. Therefore, there was no grounds for application of the doctrine of frustration by the court.

IV. Influence of English Law on Russian Contract Law

As a result of the high demand for English contract law instruments from Russian parties, it was decided to introduce certain English law instruments into the Russian legal system. The respective amendments were included in the RCC in 2015. They concern conditional contracts, representations (“zavereniya”), waivers, indemnities (compensation of losses), irrevocable power of attorneys and others. We will briefly consider some of these recent developments below.

First of all, some elements of the concept of warranties and representations were promulgated in Art. 431.2 of the RCC. This Article provides that a party is liable for any statement (“zaverenie”) which relates to circumstances relevant to entering into a contract if that representation is untrue. Such representation (“zaverenie”) may relate to the subject matter of the contract, authority to enter into the contract, existence of licenses, a party’s financial status, etc. For the breach of such a statement (“zaverenie”), the aggrieved party may claim either (a) damages or (b) a penalty. If the representation was essential but it was not true, the aggrieved party may also claim (c) rescission of the contract.

It should be noted that the concept of “zaverenie” under Russian law combines characteristics of both warranties and representations under English law. Thus, for breach of “zaverenie,” the aggrieved party may claim both damages and rescission of the contract, which is common remedy for the breach of representations but not warranties under English law. In addition, English law does not provide such a remedy as a penalty for the breach of either warranties or representations, whereas “zaverenie” does. Finally, “zaverenie” could be a statement about the facts (which is a characteristic of a warrantee under English law). “Zaverenie” could be also a statement which induces the other party

to enter into agreement (which is a characteristic of a representation under English law). In sum, the Russian concept “zaverenie” does not provide a distinction between warranties and representations as they are understood in English law. In fact, it does not make any difference between warranties and representations and covers both concepts.

Amendments were also introduced in the RCC regarding conditional contracts to make them closer to international practice, specifically to the English concept of conditions precedent. Traditionally, Russian law recognized conditional contracts, but the conditions had to be outside the control of the parties. If the conditions were within the control of the parties, this contract was never made. After the introduction of the respective amendments in 2015, the new approach is that Russian law does recognize conditional contracts, even if the conditions are within the control of the parties. Even in such a case, the contract is considered formed, valid and enforceable. Article 327.1 of the RCC introduces a concept similar to conditions precedent. It provides that the fulfillment of obligations (and the exercise, modification and termination of certain rights under a contractual obligation), may be conditioned by (a) the performance or non-performance of certain actions by one of the parties of the obligation or (b) the occurrence of other circumstances stipulated by the contract, including those fully dependent on the will of one of the parties.

As regards covenants, unlike English law, Russian law is still developing in this area. Positive covenants should be enforceable as they are treated as an obligation by the courts. Negative covenants are not permitted since, according to the general principle, a party cannot waive its right to do something, except for some exclusions (Ivory and Rogoza, 2012, p. 21). This general rule is established by Art. 9 of the RCC which provides that “A waiver of rights does not result in termination of these rights.” The exception from this general rule is provided by Art. 450.1 of the RCC, according to which, “A party to a contract may waive a certain right under the contract.” This rule applies only to individuals and companies involved in entrepreneurial activities. Russian practice proves that liability waivers are permissible provided that they are (a) specific and do not release the party from liability in general, (b) are limited to entrepreneurial activity, and (c) they concern contractual

rights only. Covenants are now used in agreements subjected to Russian law. Provided that certain conditions are met, they are recognized as valid by Russian courts (Ushakov and Haraeva, 2013, p. 161).

One of the most popular instruments in the commercial world is an irrevocable power of attorney, which was introduced in the RCC in 2013 (Art. 188.1 of the RCC). This power of attorney (PoA) secures the fulfilment of specific contractual duties by the parties. It empowers an attorney to act in their own interests, and sometime against the interests of a principal (an issuer of the PoA), who may not revoke the PoA and needs to follow the rules agreed upon by the parties.

This instrument is widely used in English governed contracts, specifically in share purchase agreements (SPA) and credit agreements when a debtor's PoA authorises the creditor to sell the debtor's assets in order to fulfill the debtor's obligations to repay a loan. After 2013, Russian governed contracts often require a party (e.g., a seller in the SPA) to issue an irrevocable PoA. The introduction of these rules on an irrevocable PoA into the Russian legal system was initiated by the Working Group for the Creation of the International Financial Center in Moscow. Initially, this initiative caused certain concerns, but still was implemented (Vitryanskiy, 2018, p. 20).

Another English contract law instrument which plays a significant role in corporate transactions is put and call options. Under English law, "a put option is a right or option conferred on one party to require another to compulsorily purchase an asset (for example, shares) under the terms of a pre-agreed contract," whereas "a call option is the right for one party to require another party to sell its shares for a pre-determined price" (Ivory and Rogoza, 2011).

Until recently, Russian law did not properly address the regulation of such issues and there were reasonable doubts as to whether or not put and call options were enforceable. In 2015, provisions on option agreements were introduced into the RCC. According to Art. 429.2 of the RCC, an option agreement is one which provides an irrevocable offer for the party to conclude one or several agreements on the conditions stipulated by the option agreement. Under Art. 429.3 of the RCC, under an option agreement, one party may require another party to undertake certain actions, such as to make a payment or accept assets, under

conditions provided by the option agreement. Option agreements are widely used in shareholder arrangements, which are now often subject to Russian law.

Apart from the above-mentioned institutions, Russian law also accepted other legal concepts which we will not consider here in detail. Some of these concepts are the product of international and domestic business practice, but most of them have their origin in English contract law.

V. The Prospects of Using English Law by Russian Courts

English contract law has proved its efficiency and relevance in regulating international business transactions with Russian parties. Now, we are going to consider the factors which undermine the prospects of the use of English law in Russia.

The first factor is the Western sanction policy and Russian anti-sanction measures which were launched as a result of the SMO started in February 2022. Today, most Russian businesses prefer not to subject their contracts to English law and the jurisdiction of English courts. The usual explanation for this is that they try to avoid difficulties in hiring English counsel and paying for their services. The companies associated with the Russian state (some of which have been placed on the US, EU and UK sanction lists) are also afraid of unfair treatment in English courts.

The second factor is the de-offshorization policy, which started with the introduction of the rules on controlled foreign companies (CFC rules) in the Russian Tax Code in 2014 (these rules have been in effect since 2015). It is a well-known fact that for many years before the SMO, English law was actively used by Russian businesses and their foreign counterparts to regulate their M&A transactions, shareholder and share purchase agreements. These deals used to be structured through offshore jurisdictions. Russian courts rarely dealt with these corporate law matters and trust arrangements since the respective contracts traditionally referred all disputes to international arbitrations or English courts. The de-offshorization policy, and the countermeasures adopted by the Russian authorities, have limited the practice of using

offshore holding and sub-holding companies by Russian businesses. Such structures are still used but not on such a scale as before February 2022.

Finally, several amendments introduced in the RCC have made Russian law more attractive to Russian businesses and reduced their dependence on English law. In other words, as more English law instruments are introduced into the Russian legal system, the more contracts are subject to Russian law by the respective parties.

Unfortunately, current Russian court practice also has examples of negative treatment of English contract law. In a number of cases, Russian courts refused to apply English law that should have been applicable by virtue of the contractual choice of law clause. In the case of *Sovcombank (Russia) vs Citybank N.A. (USA) & Citybank JSC (Russia)*,¹⁶ a swap contract was subject to English law. However, the court refused to apply this foreign law because it allegedly contradicted Russian public policy (Art. 1993 of the RCC). According to the judgement, Western economic sanctions cannot justify the violation of the rights of a Russian legal entity, including any violation which was committed by way of unilateral rescission of a contract.

In the case of *Gasenergobank JSC (Russia) vs UBS (Switzerland)*,¹⁷ a plaintiff joined a credit facility agreement concluded between a defendant and a third entity (a borrower). The defendant, acting as a credit agent, was supposed to transfer the funds he received from the borrower to the plaintiff, but refused to do so, because the plaintiff was placed on the SDN List. It is worth noting that the facts of this case were similar to those in the cases of *TransKapitalBank* and *Bank Zenit vs Credit Suisse* that we have already analysed in this paper. In all these cases, the credit facility agreements were subject to English law. However, in the case of *Gasenergobank*, the court did not apply English law and did not provide any reasons for this. Instead, the court applied

¹⁶ Decision by the Arbitrazh Court of the City of Moscow, case No. A40-167352/23-3-1320 dated 17 October 2023. Available at: <http://www.consultant.ru/>. (In Russ.). [Accessed 31.03.2025].

¹⁷ Decision by the Arbitrazh Court of the City of Moscow, case No. A40-155943/23-3-1228 dated 23 October 2023. Available at: <http://www.consultant.ru/>. (In Russ.). [Accessed 31.03.2025].

Russian law and there was no explanation of such a choice. The courts in these and similar cases deviated from the provisions of Russian law, which does not allow the renunciation of foreign law merely because the relevant jurisdiction is an unfriendly one. In addition, the law of unfriendly jurisdictions does not include a “sanction component.” In other words, anti-Russian sanctions do not form part of any foreign contract law which had been chosen by the parties as applicable to their contract (*lex contractus*). Finally, the applicable foreign contract law, even if it is the law of an unfriendly country, allows the suffering party to effectively protect their interests to the maximum extent permissible by this national law.

VI. Conclusion

Russian judicial practice proves that English contract law has been widely applied by Russian courts in the resolution of contract law disputes. Contrary to popular opinion, the mere fact that the UK is on the list of unfriendly jurisdictions does not preclude Russian courts from applying English law if it was chosen by the parties in their contract or if the Russian conflict of law rule referred to it. Furthermore, English law allows the aggrieved parties to mitigate their losses and protect their interests in the best way in Russian courts. It should be stated that sanctions, even if they are adopted by the UK authorities, are not applicable to the contracts as they are not a part of English contract law.

It is obvious that despite economic sanctions, English contract law continues to be applied by Russian courts even in the current social economic environment by virtue of autonomy of will or conflict of law rules. The role of English law as a regulator of business dealings in contracts with Russian parties will be less than it used to be. In some instances, it will be replaced by Russian law, in others the parties will use different versions of English law, such as Hong Kong law, Indian law and the legal systems of other friendly jurisdictions.

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Cross-Border Insolvency under the 2016 Insolvency and Bankruptcy Code: Necessity and Roadmap for Comprehensive Reform

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Abstract: Cross-border insolvency remains one of the most significant yet unresolved challenges within India's insolvency framework. Despite increasing globalization and India's expanding integration into the global economy, the country still lacks a comprehensive statutory framework to deal with insolvency cases involving debtors, creditors, and assets across multiple jurisdictions. Currently, India depends mainly on ad hoc measures — most notably the cross-border insolvency protocol approved by the National Company Law Appellate Tribunal (NCLAT) in the 2019 Jet Airways case. While such protocols provide temporary, case-specific relief, they are often time-consuming, costly, and fail to ensure predictability or uniformity. To address the lacunae in the 2016 Insolvency and Bankruptcy Code (IBC), and to regulate cross-border insolvency in India, the Insolvency and Bankruptcy Code (Amendment) Bill (2025) has been introduced in the *Lok Sabha* (the lower house of Parliament). However, instead of laying down substantive regulatory provisions, the proposed amendment merely delegates the power to the Central Government to frame rules at a later stage, thus leaving this critical gap unresolved. The study addresses these shortcomings by tracing the evolution of cross-border insolvency frameworks and critically examining India's legislative and judicial approaches both before and after the enactment of the IBC. Through this analysis, the paper identifies the major challenges that hinder India's adoption of an

effective framework, including the limitations of “soft law,” inconsistent international practices, the lack of regional cooperation, and sovereignty concerns. The findings of this article recommend that India adopt a uniform, predictable, and enforceable framework for cross-border insolvency, drawing on the principles of the UNCITRAL Model Law on Cross-Border Insolvency (1997) with necessary modifications to address public-policy concerns. The establishment of such a framework would help mitigate transaction costs, reduce the burden on the judiciary, and at the same time foster greater certainty, procedural efficiency, and confidence among stakeholders. In conclusion, the paper maintains that establishing a stable cross-border insolvency regime is essential for strengthening India’s insolvency framework and positioning the country as a credible player in the global financial system.

Keywords: Bankruptcy; IBC; India; UNCITRAL; model law; cross-border insolvency

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Contents

I. Introduction	952
II. Evolution of Cross-Border Insolvency Frameworks	953
II.1. Traditional Approaches	953
II.2. Modern Approaches	953
II.2.1. Regional and International Initiatives	954
II.2.2. Comity and Protocols	955
III. UNCITRAL Model Law on Cross-Border Insolvency (1997)	956
IV. Cross-Border Insolvency Regulation in India:	
Pre-2016 and Post-2016 Initiatives	959
IV.1. Pre-2016 Era	960
IV.2. Post-2016 Era	963
V. Challenges and Proposed Solutions	969
VI. Conclusion	971
References	972

I. Introduction

Globalization integrates economies and stimulates international trade. International trade, in turn, serves as a cause and consequence of globalisation. Globalisation and international trade, though distinct concepts, are two sides of the same coin: on the one hand, globalisation facilitates trade; on the other, increased trade further strengthens globalisation. As Nobel Prize winner Amartya Sen rightly stated, “*Globalisation is a historical process that has offered an abundance of opportunities and rewards in the past and continues to do so today*” (Sen, 2002). However, while globalization and international trade provide multinational corporations with opportunities for growth and expansion, they also expose them to the risk of cross-border insolvencies (Westbrook, 1993).

Cross-border insolvency, also known as transnational insolvency or international insolvency, has become an inevitable phase in the modern business cycle, often arising when multinational corporations burdened with outstanding debts face financial downfall. The term lacks a universally accepted definition, but in practice, it is deemed to occur when a financially distressed corporate debtor, possessing assets, operations, and creditors across multiple jurisdictions is unable to honour its debt obligations. This can be illustrated through a hypothetical example. *XYZ Corporation*, incorporated in India, owns substantial assets in both India and Russia. To finance its operations, the company secures loans from creditors based in these two jurisdictions. If *XYZ Corporation* fails to fulfil its repayment obligations and becomes insolvent, creditors in both India and Russia may initiate insolvency proceedings at the same time within their respective jurisdictions. A situation of this nature, where assets and creditors are located in multiple jurisdictions, exemplifies the concept of cross-border insolvency and highlights major challenges associated with it, such as divergences in domestic insolvency laws, obstacles in inter-jurisdictional judicial communication, recognition of foreign proceedings and judgments, and the need to safeguard the interests of domestic and foreign creditors. In response to these challenges, the international community has consistently pursued both practical and theoretical measures to evolve workable frameworks governing cross-border insolvency.

II. Evolution of Cross-Border Insolvency Frameworks

II.1. Traditional Approaches

The earliest recorded instances of cross-border insolvency dates back to the medieval period involving Italian banks and merchants (Punta, 2018). In 1290, the “*Riccardi of Lucca*” that managed the royal payments of King Edward I, collapsed due to a liquidity shortage triggered by the Anglo-French War of 1294 (Dougherty, 2009). Similarly, in 1302, *Ammanati Bank of Pistoia* collapsed after the closure of its Rome branch. Its debtors were spread across multiple jurisdictions, including Spain, England, Portugal, Germany, and France, and pursued recovery proceedings. Although the use of *letters rogatory* enabled the bank to secure partial recovery, domestic Italian insolvency laws proved inadequate in addressing the cross-border character of such claims (Graham, 2009, p. 147). These instances illustrate an early form of the *territorialist approach*, where states sought to limit insolvency strictly within their national legal systems, largely ignoring foreign claims and the international aspects of financial distress (Adams and Finche, 2008).

II.2. Modern Approaches

Efforts to regulate cross-border insolvency initially began at the domestic level, but challenges posed by “conflicts of law” and “choice of the forum” soon exposed its limitations. It prompted the international community to explore solutions through private international law. The first concrete steps in this direction were the *Treaties of Montevideo* (1889) and the *Bustamante Code* (1928) that represented the earliest attempts to unify private international law and, within that framework, sought to structure and harmonize certain aspects of insolvency and bankruptcy involving international elements (Lorenzen, 1930, p. 499). Influenced by the movement to unify private international law, efforts moved towards creating a uniform commercial code and unification of bankruptcy regimes (Mason, 20012, p. 125).

II.2.1. Regional and International Initiatives

Regional initiatives acted as a catalyst, as regions with strong cultural, economic, and trade ties had the capacity to undertake regional unification. For instance, the Nordic Convention on Bankruptcy (1933), as signed between the Nordic Countries – Denmark, Finland, Iceland, Sweden, and Norway – focused on the recognition and enforcement of bankruptcy decisions. The European Union advanced similar efforts through the EEC Commission Draft (1980) and the European Convention on International Aspects of Bankruptcy (1990). Both failed to take effect but prepared the ground for the European Union Convention on Insolvency Proceedings (1995) that came into operation on 31 May 2000 and created a unified framework for regulating cross-border insolvency within the EU (Burton, 1999, p. 207).

The effectiveness of regional frameworks prompted the international community to pursue cross-border insolvency regulation at international level. Bankruptcy jurists began to criticize the *territorialist approach* and proposed its extreme opposite approach – *universalism*. The *universalism* approach proposes a single forum applying single insolvency law to regulate the cross-border insolvency of multinational corporate debtors (LoPucki, 2005, p. 143). This approach, however, was criticized for being overly idealistic and impractical. It soon became evident that it was too early and premature to regulate cross-border insolvency through *hard law instruments* such as treaties and conventions. Consequently, the international community shifted its focus to *soft law instruments* such as model laws and guidelines, which provided a more flexible path for addressing cross-border insolvencies. This flexible framework, combining elements of both territorialism and universalism, evolved into what is now known as the *modified universalism* approach (Mevorach, 2018). Several international organizations and institutions began to follow this approach by introducing coordinated and practical frameworks for regulating cross-border insolvencies: The International Bar Association (IBA) drafted “The 1996 Cross-Border Insolvency Concordat,” the United Nations Commission on International Trade Law (UNCITRAL) introduced “The 1997 Model Law on Cross-Border

Insolvency,” and the American Law Institute (ALI) developed “The 2000 Transnational Insolvency Project for NAFTA Countries” (Barrett, 1996).

II.2.2. Comity and Protocols

During the late 20th century, in the absence of a uniform international regime the increasing incidence of cross-border insolvency was addressed largely through “*the comity of courts*” and the “*cross-border insolvency protocols*.” *Hilton v. Guyot* was one of the earliest cases wherein Justice Gray explained the principle of comity:

“Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”¹

However, this principle gained significant attention in the insolvency proceedings of Maxwell Communication Corporation plc that ultimately concluded through the adoption of a “cross-border insolvency protocol” (Pottow, 2007, p. 221). The material facts underlying the case can be summarized in the following manner: Maxwell Communication Corporation had previously made transfers to Barclays Bank plc, National Westminster Bank plc, and Société Générale under credit arrangements negotiated in England. The bankruptcy of Maxwell Communication Corporation plc, initiated administration proceedings in England and Chapter 11 bankruptcy proceedings in the United States. Its administrators challenged the pre-petition transfers in the U.S. Bankruptcy Court as preferential payments under Sections 547 and 502(d) of the U.S. Bankruptcy Code, raising the issue whether U.S. avoidance provisions could apply to foreign transactions in coordinated proceedings. The U.S. Bankruptcy Court held that the avoidance provisions of the Bankruptcy Code, namely Sections 502(d) and 547,

¹ *Hilton v. Guyot* (Supreme Court of the United States 1895).

were inapplicable to the pre-petition transfers in question, relying on the principle of *comity*, which required deference to English insolvency law in light of England's predominant interest and the cooperative nature of the parallel proceedings.

Ultimately, after a series of orders and decisions, U.S. Bankruptcy Judge Judith K. Brozman and her U.K. counterpart, Lord Hoffmann, approved a protocol that resulted in a Joint Plan of Reorganization under U.S. law and a Scheme of Arrangement under U.K. law (Westbrook, 1996). In this regard, Judge Brozman observed:

“The joint administrators in England and the examiner in New York, subject to the jurisdiction of both courts, have conducted the administration of Maxwell Communication Corporation plc with unprecedented cooperation, pursuant to a document known as the ‘Protocol’.”²

The Maxwell Communication Corporation case marked the beginning of a new era, as it prompted courts to recognize protocols as a potential means of addressing cross-border insolvencies; this approach was subsequently affirmed by the bankruptcy courts in cases such as Olympia & York, Everfresh Beverages, Commodore Business Machines, Nakash, Solv-Ex, AIOC, and Lehman Brothers (Flaschen and Silverman, 1998). Protocols were tailor-made cooperation agreements between parties duly approved by the concerned court. While functioning as a practical tool for managing cross-border insolvencies, they nonetheless reveal significant limitations. Their case-specific nature demands extensive judicial time and resources. Moreover, the lack of uniformity often leads to inconsistencies in application across jurisdictions, creating uncertainty for the parties. Therefore, although protocols have been successful in addressing cross-border insolvencies, they continue to remain an *ad hoc* mechanism for their resolution.

III. UNCITRAL Model Law on Cross-Border Insolvency (1997)

In 1966, the United Nations constituted the United Nations Commission on International Trade Law (UNCITRAL) to foster modernization and harmonization in the sphere of international trade

² Maxwell Communication Corporation, 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

and investment laws. Pursuant to its mandate to address insolvency with a cross-border dimension, UNCITRAL adopted the Model Law on Cross-Border Insolvency in 1997.³ The preamble of the Model Law clearly articulates its purpose in the following words:

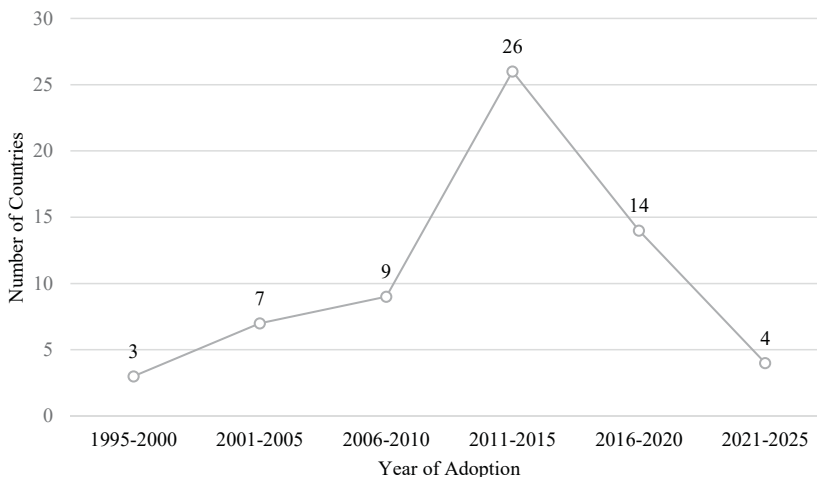
“The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; (b) Greater legal certainty for trade and investment; (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) Protection and maximization of the value of the debtor’s assets; And (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”

The objectives of the UNCITRAL Model Law are implemented through four core principles: access, recognition, relief, and cooperation and coordination. The articulation of these principles is evident in its systematic arrangement into five chapters comprising thirty-two articles. Chapter I outlines the general introductory provisions (Art. 1–8); Chapter II contains provisions enabling foreign representatives and creditors to access domestic courts (Art. 9–14); Chapter III governs recognition of foreign proceedings and relief (Art. 15–24); Chapter IV prescribes mechanism for cooperation with foreign courts and foreign representatives (Art. 25–27); and Chapter V deals with concurrent proceedings (Art. 28–32). The purpose of the Model Law is not substantive harmonization of national insolvency laws but the promotion of procedural uniformity. This procedural harmonization is moderated by the safeguard contained in Art. 6, which authorizes states to carve out exceptions from the provisions of the Model Law when their domestic public policy is at stake.

UNCITRAL has consistently endeavoured to promote the adoption of the Model Law by overcoming impediments to its implementation. In

³ UNCITRAL Model Law on Cross-Border Insolvency. (1997). Available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> [Accessed 25.11.2025].

doing so, it has extended support to all three branches of government — the judiciary, the executive and the legislature — both during enactment and in the subsequent interpretation of the law. To further facilitate its implementation, UNCITRAL has also prepared important supporting documents. First, the 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation was formulated to provide judges and insolvency practitioners with structured guidance on the practical mechanisms for cooperation and communication in cross-border insolvency proceedings. Second, the 2013 UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency was drafted to supply background information, explanatory commentary, and details of the Commission’s deliberations and decisions during the preparatory work. Third, the 2013 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (revised 2022) was prepared to assist judges in addressing questions that may arise under the Model Law. Finally, the 2021 Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency was published to provide a comprehensive compilation of case law, organized by article, to facilitate consistent interpretation and implementation of the Model Law.



Adoption of UNCITRAL Model Law on Cross-Border Insolvency, 1997

The adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency has progressed in distinct phases. The first wave of adoption occurred in 2000, when Japan, South Africa, and Mexico became the earliest jurisdictions to incorporate the Model Law. This was followed in the subsequent years by its adoption in Canada (2005), United States (2005), New Zealand (2006), and Australia (2008). The most substantial phase took place during 2011–2015, when 26 jurisdictions, the majority of which were least developed or developing economies, implemented the framework. The following years, however, witnessed a marked slowdown, with only four jurisdictions – Angola (2021), Costa Rica (2021), Rwanda (2021), and Saudi Arabia (2022) – adopting the Model Law between 2021 and 2025. Despite this progress, several jurisdictions, including Russia, India, China, and Germany, have not yet embraced it. At present, legislation based on or influenced by the Model Law has been adopted in 60 States across 63 jurisdictions. Although the pace of adoption has slowed in recent years, India, Malaysia, and many other jurisdictions are actively considering its incorporation, reaffirming the Model Law’s enduring relevance and its potential for broader implementation in the future.

IV. Cross-Border Insolvency Regulation in India: Pre-2016 and Post-2016 Initiatives

The principle of *Vasudhaiva Kutumbakam* which means “*unification of the world as one family*” stimulated globalization in ancient India. However, aggrieved by the struggle for freedom, the independent India refrained from participating in the modern waves of globalization. The socialist leaders aimed at self-reliance and self-sufficiency. Ultimately, in 1991, the government introduced liberalization, privatization and globalization (LPG). After 25 years of economic reforms, India took a significant step with the enactment of the Insolvency and Bankruptcy Code in 2016.

These reforms enhanced India’s economic agility and deepened its international ties. Amid these advancements, however, the rise of globalization brought the complex challenge of cross-border insolvency, which calls for deeper exploration. Critics lauded the Indian insolvency

reform for its regulation of domestic insolvencies, but noted that it lacked a procedural framework for handling international insolvencies. Just as reversing a car can sometimes be necessary to steer it in the right direction, understanding the current landscape of cross-border insolvency requires a retrospective glance. Before delving into the intricacies of the existing cross border insolvency system, it is essential to examine the position of Cross-Border Insolvency (CBI) prior to the IBC's implementation.

IV.1. Pre-2016 Era

Before the enactment of the Insolvency and Bankruptcy Code (IBC) in 2016, India had no unified statute for governing corporate and individual insolvency. Individual insolvencies were governed by two archaic laws: the 1909 Presidency Towns Insolvency Act and the 1920 Provincial Insolvency Act. Corporate insolvencies, on the other hand, were governed by several discrete statutes, including the Companies Act of 1956, the Sick Industrial Companies (Special Provisions) Act of 1985, the Recovery of Debts Due to Banks and Financial Institutions Act of 1993, and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002 (Das, 2020, p. 104). Additionally, there was no specific mechanism to regulate cross-border insolvency or to protect the rights of foreign creditors. The landmark case of *Rajah of Vizianagaram v. Official Receiver* in 1962 finally recognized the rights of foreign creditors.⁴ Despite this recognition, India continued to struggle with regulating international insolvency cases. Until the late 20th century, these cases were handled based on the principle of *lex fori* rather than *lex situs* (Sikri, 2009, p. 467). However, in the early 21st century, there was a significant push to reform commercial laws with a particular focus on enhancing regulations around cross-border insolvencies. In response, key government agencies, such as the Ministry of Corporate Affairs and the Reserve Bank of India established several committees to address these issues and update the legal framework.

⁴ *Rajah of Vizianagaram v. Official Receiver* 500 (Supreme Court of India, 1962).

1. Report of High-Level Committee on Law Relating to Insolvency and Winding-up of Companies (2000)

In 2000, the Indian Government established the High-Level Committee on the Law Relating to Insolvency and Winding up of Companies presided over by Justice V. Balakrishna Eradi. In Chapter 6 of the Committee's report, the Committee recommended that India adopt the 1997 UNCITRAL Model Law on Cross-Border Insolvency, which the World Bank and the International Monetary Fund (IMF) have repeatedly promoted.⁵ After examining the cross-border insolvency laws of the United States (The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 11 U.S.C. s 1501-32), the United Kingdom (The Insolvency Act 1986), Singapore (The Companies Act (Cap. 50, 2006 Rev Ed) s 377(3)(c)), and Malaysia (The Companies Act of 2016), the committee suggested using the UK Insolvency Act of 1989 as a foundation for drafting India's cross-border insolvency legislation. However, at that time, the United Kingdom employed multiple approaches to cross-border insolvency, and the UK Insolvency Act 1986 did not align with India's domestic needs. Consequently, the Eradi Committee's recommendations on cross-border insolvency (CBI) could not be implemented.

2. Report of the Advisory Group on Bankruptcy Laws, Reserve Bank of India (2001)

Following this endeavour, in 2001, the Reserve Bank of India established the Advisory Group on Bankruptcy laws chaired by Dr. N.L. Mitra with an aim of reforming India's bankruptcy laws.⁶ The Mitra Committee made a brief recommendation in its report for India to adopt the 1997 UNCITRAL Model Law on Cross Border Insolvency.

⁵ Report of High-Level Committee on Law Relating to Insolvency and Winding up of Companies (2000). Ministry of Corporate Affairs. Government of India. Available at: https://www.mca.gov.in/mca/html/mcav2_en/home/dataandreports/reports/library/library.html [Accessed 25.11.2025].

⁶ Report of the Advisory Group on Bankruptcy Laws (2001). Reserve Bank of India. Available at: <https://rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225> [Accessed 25.11.2025].

3. Report of Expert Committee on Company Law (2005)

In 2004, the Ministry of Corporate Affairs set up the Expert Committee on Company Law under the chairmanship of J.J. Irani.⁷ This Committee, like its predecessors, advocated the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency.

4. Report of Bankruptcy Law Reform Committee (2015)

In 2015, the Government of India established the Bankruptcy Law Reform Committee, with Dr. T.K. Vishwanathan as its Chairman.⁸ The committee was tasked with proposing one of the most significant economic reforms: drafting a comprehensive law on insolvency and bankruptcy for India. The Vishwanathan Committee initially refrained from addressing cross-border insolvency in the drafting of the IBC Bill, recognizing it as a complicated and extensive area of study. However, the Committee mentioned international instruments that could serve as references in drafting cross-border insolvency legislation.

5. Report of the Joint Parliamentary Committee on Insolvency and Bankruptcy Code, Sixteenth Lok Sabha (2015)

In 2015, the IBC Bill, crafted by the Bankruptcy Law Reform Committee, was presented to the Joint Parliamentary Committee for review.⁹ During its review, the Joint Parliamentary Committee raised concerns about the absence of a cross border insolvency mechanism. To address this gap and ensure basic governance of cross-border insolvency, the Department of Economic Affairs recommended including provisions based on “reciprocity” within the IBC Bill (2015). These

⁷ Report of Expert Committee on Company Law (2005). Ministry of Corporate Affairs. Government of India. Available at: https://www.mca.gov.in/mca/html/mcav2_en/home/dataandreports/reports/library/library.html [Accessed 25.11.2025].

⁸ The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (2015). Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ibbi.gov.in/BLRCReportVol1_04112015.pdf [Accessed 25.11.2025].

⁹ Report of the Joint Committee on the Insolvency and Bankruptcy Code, Sixteenth Loksabha (2015). Available at: https://ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf [Accessed 25.11.2025].

recommendations were duly considered, and Clauses 233A and 233B were added in the IBC Bill (2015). As a result, Sections 234 and 235 were introduced in the 2016 IBC for regulating cross-border insolvency.

IV.2. Post-2016 era

The 2016 Insolvency and Bankruptcy Code (IBC) revolutionized India's approach by introducing an effective framework for regulating domestic insolvencies. This landmark legislation led to the repeal of many outdated laws and to amendments of others. The following Acts were repealed: the 1909 Presidency Towns Insolvency Act, and the 1920 Provincial Insolvency Act. The following enactments were amended to varying degrees: the Indian Partnership Act of 1932; the Central Excise Act of 1944; the Income Tax Act of 1961; the Customs Act, 1962; the Recovery of Debts Due to Banks and Financial Institutions Act, 1993; the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002; the Sick Industrial Companies (Special Provisions) Repeal Act of 2003; the Payment and Settlement Systems Act of 2007; the Limited Liability Partnership Act of 2008; and the Companies Act of 2013 (Das, 2020, p. 104). Although the IBC does not directly address cross-border insolvency, it incorporates enabling provisions in Part V, Sections 234 and 235, which provide the necessary foundation for addressing international insolvency issues.

1. Section 234 and 235 of Insolvency and Bankruptcy Code (2016)

Section 234 empowers the Indian Government to engage into agreements with foreign governments to facilitate the implementation of the IBC (2016) in cross border insolvency cases. Section 235 further allows the resolution professionals, liquidators or bankruptcy trustees to seek assistance from Indian adjudicating authority to obtain information or take actions concerning assets in countries with which India has bilateral agreements. When necessary for resolving insolvency, liquidation, or bankruptcy proceedings, the adjudicating authority may issue a formal letter of request to the pertinent foreign court or authority,

soliciting the procurement of evidence or the execution of specific actions. The goal of these agreements is to extend the reach of the IBC to corporate debtors' assets located outside India. However, despite the cooperation envisaged by Section 234, the Indian government has no reciprocal agreements with other countries, rendering Sections 234 and 235 effectively a dead letter.

2. Insolvency Law Committee Report (2018)

In order to address cross-border insolvency issues in India, the Ministry of Corporate Affairs constituted the Insolvency Law Committee chaired by Shri Injeti Srinivas. In its 2018 Report, the Committee proposed incorporating a new chapter into the Insolvency and Bankruptcy Code as draft "Part Z" which included 5 chapters, 31 provisions, and a Schedule specifically dedicated to cross-border insolvency.

It was the first time when a draft part was created for regulating cross-border insolvency law largely influenced from the 1997 UNCITRAL Model Law on Cross Border Insolvency. The Committee, in its reports, recommended adoption of the majority of the Model Law's provisions; however, the report did not confine its scope to the Model Law. It also conducted a comprehensive review of international best practices — drawn from regional instruments and State practice — which brought greater certainty to the regulation of cross-border insolvency. For instance, the committee examined multiple legal frameworks, including the European Union Convention on Insolvency Proceedings, the Cross Border Insolvency Regulations of 2006 (UK), the Companies Act of 2006 (Singapore), Chapter 15 of the US Bankruptcy Code, and the Cross Border Insolvency Act of 2000 (South Africa). One of the Committee's key recommendations was to incorporate legislative reciprocity — a principle not found in the Model Law but adopted in jurisdictions such as Mexico, South Africa, and Romania. Additionally, the Committee recommended adopting the Judicial Insolvency Network (JIN) Guidelines to enhance communication and cooperation between courts dealing with cross-border insolvency issues, reflecting practices observed in Singapore, the UK (England and Wales), and the USA. The Committee also suggested retaining the term "*manifestly*" within the public policy exception, as

seen in Art. 6 of the UNCITRAL Model Law, Section 1506 of Chapter 15 (US), Art. 6 of Schedule 1 of the Cross Border Insolvency Regulation of 2006 (UK), and Section 6 of the Cross Border Insolvency Act of 2000 (South Africa). This approach differs from Singapore's Companies Act of 2006, which omits the term "*manifestly*." By choosing to retain the term, the Committee aims to ensure that foreign insolvency decisions will only be rejected when they are clearly and significantly contrary to India's public policy (Jayshree and Biswal, 2024, p. 108).

3. The Jet Airways Case

As India worked to strengthen its cross-border insolvency regime, it encountered one of the most significant cross-border insolvency cases — the Jet Airways case. Owing to enormous debt, Jet Airways halted operations on 17 April 2019, prompting creditors from both India and the Netherlands to initiate insolvency proceedings. The National Company Law Tribunal (NCLT) in India initially did not recognize the Dutch proceedings due to the absence of a reciprocal agreement as required under Section 234 of the 2016 IBC. However, on appeal, the NCLAT did not regard Section 234 as an impediment rather allowed the Dutch administrators to collaborate with Indian insolvency professionals and creditors.¹⁰ The NCLAT then approved a *protocol* outlining the cooperation terms (Misra and Feibelman, 2021, p. 329). Interestingly, even though neither the Netherlands nor India has formally adopted the UNCITRAL Model Law, the protocol drew heavily from its core principles. The Jet Airways case, along with other cases highlighted the pressing need for comprehensive cross-border insolvency legislation in India.

4. Cross-Border Insolvency Rules/Regulations Committee Report (2020)

On 23 January 2020, the Ministry of Corporate Affairs formed another committee, chaired by Dr. K.P. Krishnan, to provide a regulatory framework for the enforcement of Part Z (Srivats, 2020). In June 2020, *the Cross Border Insolvency Rules/Regulations Committee (CBIRC)*

¹⁰ Jet Airways (India) Limited vs State Bank of India & Anr, 707 (National Company Law Appellate Tribunal 2019).

submitted its recommendations to enhance India's cross-border insolvency regulatory framework. These recommendations proposed updates to the draft of Part Z and amendments to the 2013 Companies Act, the 2016 IBC, and the Limited Liability Partnership Act (2008). The Committee reviewed the application of the MLCBI in fifteen countries, extracting key elements to shape India's law.¹¹

Central to the Committee's recommendations were the foundational model law principles of access, recognition, relief, coordination, and cooperation, which are crucial for shaping India's cross-border insolvency framework. Drawing inspiration from the judicial standards of the United States and the United Kingdom, the Committee also proposed a "code of conduct" for foreign representatives involved in cross-border insolvency cases. Furthermore, to establish effective guidelines for cooperation and communication, the CBIRC extensively referred to various international frameworks, including the JIN Guidelines (2016), the EU Guidelines (2014), NAFTA Guidelines (2000), and the Global Principles for Cooperation in International Insolvency Cases (2012) formulated by the joint efforts of the American Law Institute (ALI) and International Insolvency Institute (III). After evaluating these diverse frameworks, the Committee recommended developing a hybrid model tailored to India's needs.

In detailing relief mechanisms available in cross-border insolvency cases, the Committee clearly distinguished between interim and discretionary relief. The CBIRC agreed with the Insolvency Law Committee's perspective and suggested incorporating discretionary reliefs while leaving the decision to incorporate interim relief to the central government's discretion. Additionally, the CBIRC recommended continuing the practice of developing protocols, citing UNCITRAL's Practical Guide on Cross-Border Insolvency Cooperation, which observed a 40 % increase in recovery value following the establishment of amicable protocols. To further enhance effectiveness in handling cross-border insolvency cases, the Committee proposed capacity-

¹¹ Report on the Rules and Regulations for Cross-Border Insolvency (2020). Ministry of Corporate Affairs, Government of India. Available at: <chrome-extension://efaidnbnmnibpcjpcglclefindmkaj/https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-oclh9-6e353aefb83dd0138211640994127c27.pdf> [Accessed 25.11.2025].

building programs for both the regulatory authority, the Insolvency and Bankruptcy Board of India (IBBI), and the adjudicating authority, the National Company Law Tribunal (NCLT). These programs aim to equip these authorities with the necessary skills and knowledge for managing cross-border insolvency cases, thereby ensuring a flawless implementation of the proposed framework. By assimilating these recommendations, the Committee endeavoured to establish a formidable regime for cross-border insolvency in India. This initiative sought to rectify the deficiencies exposed by high-profile cases such as *the Jet Airways Case* and to ensure a more efficacious and collaborative international insolvency process in India.

5. Parliamentary Standing Committee on Finance (2021) – Thirty-Second Report: “Implementation of the IBC – Pitfalls and Solutions”

In 2021, the Parliamentary Standing Committee on Finance released its thirty-second report “Implementation of IBC – Pitfalls and Solutions,” which examined barriers in the Insolvency and Bankruptcy Code (IBC) and addressed cross-border insolvency concerns. In its review, the Committee considered the recommendations of the ILC and CBIRC reports and concurred with their findings. It highlighted the need for adopting a cross-border insolvency framework immediately.¹² Acting on this recommendation, the Ministry of Corporate Affairs (MCA) on 24 November 2021 invited public comments on the proposed framework, marking an important step toward its eventual adoption.

6. Parliamentary Standing Committee on Finance (2024) – Sixty-Seventh Report on “Action Taken by the Government on the Observation/Recommendation Contained in Thirty-Second Report”

In February 2024, the Parliamentary Standing Committee on Finance published its sixty-seventh report “Action Taken by the

¹² Thirty Second Report on “Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions” (2021). Seventeenth Lok Sabha. Committee on Finance. Available at: https://eparlib.sansad.in/handle/123456789/811572?view_type=search [Accessed 25.11.2025].

Government on the Observation/Recommendation Contained in Thirty-Second Report.” This report assessed the steps taken by the government in response to earlier recommendations and highlighted that the MCA is still examining the implementation of cross-border insolvency framework under the code¹³.

7. The Insolvency and Bankruptcy Code (Amendment) Bill (2025) (as introduced in Lok Sabha)

The Insolvency and Bankruptcy Code (Amendment) Bill (2025) was introduced in the Lok Sabha, the Lower House of Parliament, with the objective of amending various provisions of the 2016 Insolvency and Bankruptcy Code. Among its key proposals, Clause 67 of the Bill introduces a new provision, namely Section 240C, into Part V of the Code. This section titled “Power to make rules for cross-border insolvency” empowers the Central Government to frame comprehensive rules for the regulation and administration of cross-border insolvency proceedings, thereby addressing the complexities arising from insolvency cases involving foreign jurisdictions.¹⁴ The text of the newly proposed Section 240C is provided below as follows:

“240C. (1) Notwithstanding anything to the contrary contained in this Code and the Companies Act, 2013, the Central Government may prescribe the manner and conditions for administering and conducting cross-border insolvency proceedings under the Code, for such class or classes of debtors and corporate debtors as may be notified by the Central Government.

(2) The rules made under this section may provide that any of the provisions of this Code or the Companies Act, 2013 shall apply with such exceptions, modifications and adaptations, as may be required to

¹³ Sixty Seventh Report on “Action taken by the Government on the Observations/ Recommendations contained in Thirty-Second Report (17th Lok Sabha) on the subject “Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions.” Seventeenth Lok Sabha. Available at: https://eparlib.sansad.in/handle/123456789/2975951?view_type=search [Accessed 25.11.2025].

¹⁴ Insolvency and Bankruptcy Code (Amendment) Bill (2025). Available at: [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://prsindia.org/files/bills_acts/bills_parliament/2025/The_Insolvency_and_Bankruptcy_Code_\(Amendment\)_Bill,_2025.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://prsindia.org/files/bills_acts/bills_parliament/2025/The_Insolvency_and_Bankruptcy_Code_(Amendment)_Bill,_2025.pdf) [Accessed 25.11.2025].

administer and implement the provisions of this section and rules made thereunder, including designating one or more Benches for dealing with proceedings under this section.

(3) A draft of every rule proposed under this section shall be laid before each House of Parliament in such manner as provided under Sub-sections (4) to (6) of Section 59A, which shall, *mutatis mutandis* apply, to the rules made under this section.”

The 2016 Insolvency and Bankruptcy Code introduced the concept of “cross-border insolvency” for the first time and authorized the Central Government to regulate it by issuing rules. Section 240C of the Code empowers the Central Government to make rules for conducting cross-border insolvency proceedings applicable to specified classes of debtors or companies as notified. The rules may also provide that provisions of the Insolvency and Bankruptcy Code or the 2013 Companies Act shall apply, subject to such modifications or exceptions as may be necessary to address the requirements of cross-border case. In addition, the Government may designate particular benches of tribunals to handle these proceedings. Before coming into force, a draft of such rules must, however, be laid before both Houses of Parliament in accordance with the prescribed procedure.

V. Challenges and Proposed Solutions

The development of a cross-border insolvency framework faces significant challenges in several jurisdictions, including India. A key difficulty arises from the very nature of the Model Law on Cross-Border Insolvency (MLCBI), which is classified as “soft law.” While this categorization is intended to promote flexibility, it has paradoxically weakened uniform adoption across jurisdictions. Adding to this complexity, the broad variations in exemptions granted by different countries create further obstacles in international insolvency proceedings. This problem is particularly evident with respect to utility companies. In certain jurisdictions, such entities are accorded exemptions or preferential treatment due to their critical role in providing essential services, whereas other jurisdictions afford no such protections. As a result, the treatment of utility companies during insolvency proceedings varies widely, gener-

ating uncertainty for stakeholders and disrupting the smooth resolution of cross-border cases. Such inconsistency undermines international cooperation and diminishes both predictability and fairness in insolvency outcomes.

Secondly, the absence of regional cooperation significantly worsens these challenges. Regions such as North America and Europe have succeeded in adopting regional regulations that harmonize insolvency proceedings and streamline dispute resolution. By contrast, South Asia continues to face geopolitical tensions, which make any prospect of a regional cross-border insolvency arrangement highly unlikely.

Thirdly, the strong emphasis on national sovereignty further complicates efforts to establish reciprocity-based agreements. The strained relationship between jurisdictions illustrates how competing national interests may obstruct meaningful collaboration. This resistance to cooperation not only delays the creation of a regional framework but also reinforces legal fragmentation. Consequently, stakeholders are left to navigate a complex web of inconsistent regulations, a situation that threatens the stability of financial systems within the region and undermines broader goals of global economic integration.

Fourthly, despite global efforts to promote the MLCBI, its universal adoption continues to face significant obstacles. Many jurisdictions have refrained from fully embracing it, relying instead on protocols or reciprocal arrangements. In India, the absence of a statutory framework and reciprocity agreements has compelled tribunals to adopt case-specific protocols for addressing cross-border insolvency matters. Although such protocols can provide workable solutions in individual cases, they also generate substantial challenges. The formulation and approval of these protocols impose a considerable burden on the judiciary, rendering the process slow and cumbersome. Moreover, the need for a tailored approach in each case results in prolonged delays and considerably higher transaction costs across jurisdictions.

In light of these challenges, proactive measures are essential to accelerate the development of a robust cross-border insolvency framework. Widespread adoption of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) — as evidenced by the effectiveness of Chapter 15 of the U.S. Bankruptcy Code and comparable regimes —

would be a key step. By promptly enacting laws, countries can position themselves as preferred jurisdictions for corporate debtors and creditors. Adopting the MLCBI without insisting on reciprocity clauses would promote greater harmonization of cross-border insolvency laws globally.

Encouraging regional cooperation where feasible is also critical. In regions where geopolitical tensions are prevalent, building cooperative frameworks can help overcome these divisions. This would facilitate smoother insolvency proceedings across borders and foster international cooperation.

Additionally, promoting awareness about the MLCBI among countries that have not yet embraced it is crucial. This can be achieved through international advocacy, educational initiatives, and technical assistance, ensuring that countries understand the benefits of a unified approach to cross-border insolvency. By implementing these solutions, we can address the complexities and inconsistencies currently hindering the formulation of a robust cross-border insolvency regime.

VI. Conclusion

The global investment climate, shaped by growing economic volatility and geopolitical uncertainty, has led to a surge in cross-border insolvencies. India's efforts to address these issues through Sections 234 and 235 of the 2016 IBC have highlighted the inadequacies of the current reciprocal provisions, underscoring the urgent need for reform. Despite India's longstanding membership in UNCITRAL and its role as a founding member, the country has not yet implemented the MLCBI. In India the lower House of Parliament, i.e., *Lok Sabha*, has introduced the 2025 Insolvency and Bankruptcy Code (Amendment) Bill. The proposed amendment bill marks the first legislative attempt to formally introduce the concept of cross-border insolvency into the Insolvency and Bankruptcy Code; however, it remains fraught with significant limitations. Rather than establishing a ready regulatory framework, Section 240C merely empowers the Central Government to formulate rules in the future, which must in turn undergo the parliamentary approval process. This renders the creation of an effective framework

more protracted and uncertain. Moreover, the Amendment does not clarify whether India intends to incorporate or adopt the UNCITRAL Model Law on Cross-Border Insolvency, which is the widely accepted international standard in this area. Such clarity will only emerge once the Central Government frames the rules under this provision. Thus, while the Amendment represents a step forward in formal recognition of cross-border insolvency within the Indian insolvency regime, it does little to resolve the pressing need for a clear, predictable, and enforceable mechanism. Ultimately, until a stable regulatory mechanism is established, India will continue to regulate cross-border insolvency through the cross-border insolvency protocol, as used by the NCLAT in the *Jet Airways case*. While these protocols provide temporary relief and case-specific solutions, their tailor-made nature, dependence on court approval, and associated costs, render them time-consuming and inefficient. A uniform mechanism would therefore be essential to bring certainty, efficiency, and credibility to India's cross-border insolvency regime.

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Administrative-Legal Mechanisms of Anti-Corruption Policy in the Context of Public-Law Protection of Internal State Sovereignty

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Abstract: The paper presents a comprehensive study of the role of the administrative-legal mechanism in countering corruption within the system of public-law protection of the internal state sovereignty of the Russian Federation. At present, the issues of combating corruption in public administration remain highly relevant and require further research from the perspectives of various legal disciplines. Today, different mechanisms for countering corruption are recognized in the contexts of constitutional law, criminal law, administrative law, civil law, international law, etc. However, the authors argue that in the face of new challenges and threats, the administrative-legal mechanism for countering corruption holds a central role in ensuring the internal state sovereignty of the Russian Federation. It not only predominates among legal mechanisms for preventing corrupt practices within state institutions, but also establishes the necessary conditions for public authorities to successfully carry out the tasks and functions assigned to them to strengthen Russian statehood. The study substantiates the conclusion that the administrative-legal anti-corruption mechanism is most clearly manifested in specialized anti-corruption management forms and methods employed by specially authorized public authorities and officials. The authors emphasize the need for further refinement of this mechanism through a qualitative transformation of anti-corruption forms and methods at both the federal and regional levels of the Russian

Federation. Special attention is given to the inherent connection between the administrative-legal anti-corruption mechanism and the public-law protection of Russia's internal state sovereignty. It is impossible to achieve an adequate level of legal protection of national sovereignty under public law without effective functioning of this mechanism.

Keywords: corruption; anti-corruption measures; administrative-legal mechanism for countering corruption; administrative-legal forms and methods; public law protection; sovereignty; internal state sovereignty; public authorities

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Contents

I. Introduction	976
II. The Administrative-Law Mechanism for Countering Corruption:	
Concept, Structure, and Content	977
III. Anti-Corruption Administrative and Legal Forms and Methods	
in Public Law Enforcement of Internal State Sovereignty	984
IV. Conclusion	990
References	991

I. Introduction

Corruption in public administration ranks among the most complex and multifaceted challenges. This socio-legal phenomenon is a persistent feature of governance systems, significantly impeding the functioning of state institutions and ultimately having a profoundly negative impact on governmental and societal structures, particularly in times of crisis. Eradicating corruption entirely from the mechanisms of state and societal governance is impossible, as global experience

unfortunately demonstrates. However, developing effective measures to minimize this detrimental phenomenon remains an obligation for every public authority.

Countering the spread of corruption in public administration is a priority of the domestic policy of the Russian Federation. The threat of corruption lies in its capacity not only to erode the institutional foundations of social relations but also to undermine the organizational and legal framework of internal sovereignty of the Russian state. It disrupts the normal functioning of state institutions, erodes public trust, discredits governmental authorities, fosters unlawful activities, and demoralizes society.

These challenges are exacerbated in the context of the hybrid wars necessitating urgent improvements to existing legal anti-corruption mechanisms. The administrative-legal mechanism must play a central role here, as it holds the highest potential for preventing corruption-related offenses and safeguarding the stability of Russia's internal state sovereignty (Zubarev and Troshev, 2024).

II. The Administrative-Law Mechanism for Countering Corruption: Concept, Structure, and Content

Many Russian scholars have long noted that “corruption in Russia has reached a scale that concerns the entire society” (Boskholov, 2010, p. 51). We support the view that “corrupt societies cannot be reliable, democratic, or equitable,” which in turn clearly “indicates the failure of governance systems’ legitimacy” (Deryabin, 2005, p. 72). The danger of corruption also lies in its high latency (over 95 %) and the significant difficulty in detecting its direct unlawful manifestations (Antonyan and Polyakov, 2022, pp. 673–674).

Corruption stems from numerous factors — not only legal and social, but also economic, political, and psychological. From a psychological perspective, an individual’s corrupt behavior “may be driven by circumstances that reduce the moral costs of dishonest conduct and enable unethical actions, while allowing the individual to still perceive themselves as honest” (Mironova and Tatarko, 2021, p. 13). In other words, individuals may rationalize their corrupt conduct by referencing

perceived inequities directed at them or by invoking situational factors, such as prevailing power dynamics. Thus, it is reasonable to conclude that the presence of corrupt practices in the public sector reflects not only flaws in the existing organizational-legal governance system but also a “decline in public morality, distorted by corruption” (Bashankaev, 2015, p. 155).

In foreign literature, corruption is extensively analyzed across various disciplines. Some scholars emphasize economic determinants, framing corruption as “illegal appropriation of resources diverted from their intended use for collective benefit and converted into illicit private gain” (Marino, 2025). Public administration in many macro-regions is plagued by corruption. High corruption levels are documented in most African, Latin American, and Southeast Asian countries. For instance, public spending in Sub-Saharan Africa (SSA) is “often distorted and disproportionately allocated to non-productive sectors, largely due to corruption” (Mondjeli and Ambassa, 2025).

However, positive trends in countering corruption can be observed in some major states promoting active anti-corruption policies. For example, since 2012, China has implemented one of the largest anti-corruption campaigns in public administration in recent decades (Nechevin, 2023, pp. 86–101) evidenced by “the high number of officials investigated for corruption and the series of reforms introduced to alter bureaucratic norms” (Ming Fang et al., 2025).

In modern Russia, corruption increased sharply in the late twentieth and early twenty-first centuries, a pivotal, crisis-driven phase characterized by accumulated contradictions associated with the formation of the Russian Federation’s statehood (Basova, 2012, p. 6). Corruption was officially recognized as a nationwide problem requiring significant efforts from the state and society to minimize its causes, identify and suppress corrupt practices, and hold perpetrators accountable.

The adoption and rigorous, sustained implementation of a national anti-corruption policy – promoted at the highest echelons of government – was instrumental. The President of the Russian Federation has repeatedly emphasized that “combating corruption at all levels requires professionalism, seriousness, and responsibility; only by meeting these

conditions, he argued, can anti-corruption efforts produce results and win broad, informed public support.”¹ In scholarship, anti-corruption policy is defined as “a scientifically grounded, consistent, and systematic effort by state institutions and civil society to counter corruption” (Malko, 2010, p. 106). It aims to “establish and enforce anti-corruption legislation in combating crimes and offenses, addressing the systemic challenge of corruption” (Khamazova, 2008, p. 12).

The legal framework for countering corruption is based on the provisions of Federal Law No. 273-FZ dated 25 December 2008 “On Countering Corruption”² (hereinafter referred to as the Federal Anti-Corruption Law). This regulatory legal act cannot be considered as an ideal legal instrument capable of minimizing corrupt practices. The law may be regarded as significantly belated in terms of its adoption and entry into force. Certain provisions of the law continue to draw criticism from the academic community to this day. For instance, the legal definition of the category “corruption” essentially enumerates criminal offenses possessing characteristics of corruption failing to address the socio-legal nature of corruption — an approach that can nevertheless be observed in the legislation of some Member States of the Commonwealth of Independent States (CIS).³ Moreover, many anti-corruption instruments — such as anti-corruption monitoring, anti-corruption propaganda, and anti-corruption education — are regulated in greater detail at the level of constituent entities of the

¹ See Address of the President of the Russian Federation to the Federal Assembly dated 1 December 2016. Available at: https://www.consultant.ru/document/cons_doc_LAW_207978/ [Accessed 13.06.2025]. (In Russ.).

² Federal Law No. 273-FZ dated 25 December 2008 “On Countering Corruption” (as amended). *Rossiyskaya Gazeta*, No. 266, 30 December 2008. (In Russ.).

³ For example, Para. 6 Art. 1 of Law of the Republic of Kazakhstan No. 410-V dated 18 November 2015 “On Countering Corruption” (as amended on 1 January 2025) defines corruption as “the unlawful use by persons holding responsible state positions, persons authorized to perform state functions, persons equated to those authorized to perform state functions, or officials of their official powers and related opportunities for the purpose of obtaining or extracting property (non-property) benefits and advantages for themselves or third parties, either personally or through intermediaries, as well as the bribery of such persons through the provision of benefits and advantages.”

Russian Federation through relevant regional laws.⁴ It should be noted, however, that the Federal Anti-Corruption Law has generally established a sufficiently solid legal foundation for combating corruption, enabling the consolidation of efforts by civil society institutions and the state in this direction.

The legislative definition of corruption has led to the predominance of a criminal-law approach to countering corruption in Russian jurisprudence, which specifically focuses on combating corruption-related crimes (Kochoi, 2018; Ivanov, 2017; Prozumentov, 2016). It should also be noted that modern Russian legal scholarship encompasses research on various aspects of international law (Magomedov and Alieva, 2018), constitutional law (Tsirin et al., 2021), and civil law (Botnev, 2015) countermeasures against corruption.

In administrative law theory, the existence of an independent institution of administrative-legal counteraction to corruption has been substantiated (Polyakov, 2023), where special anti-corruption forms and methods play a central role (Polyakov, 2024). We note that this institution is already known to modern science of administrative law and has been researched by individual scholars, particularly in relation to combating corruption in the customs authorities of the Russian Federation (Kurakin and Zvyagin, 2010). The authors propose to define administrative-legal counteraction to corruption in public governance as a normatively regulated activity of authorized power subjects aimed at implementing a complex of special forms and methods that ensure prevention of corruption offenses and minimization of consequences of corrupt practices in public administration (Polyakov, 2023).

However, the issue of content of administrative-legal counteraction to corruption requires a more comprehensive approach using the established doctrinal legal category of “legal mechanism,” which is applied across various branches of law (constitutional, administrative,

⁴ This specifically concerns the provisions of the following laws: 1) Art. 10 “Anti-Corruption Monitoring” of the Law of Arkhangelsk Oblast No. 626-31-OZ dated 26 November 2008 “On Countering Corruption in Arkhangelsk Oblast” (as amended), 2) Art. 6 “Anti-Corruption Propaganda” of Law of Chelyabinsk Oblast No. 353-ZO dated 29 January 2009 “On Countering Corruption in Chelyabinsk Oblast” (as amended), 3) Art. 5.1 “Anti-Corruption Education” of Law of Vologda Oblast No. 2054-OZ dated 9 July 2009 “On Countering Corruption in Vologda Oblast” (as amended). (In Russ.).

financial, information, etc.). In particular, A.D. Selyukov defines a legal mechanism as “a normatively regulated complex of managerial relations concerning application of methods, instruments, and rules” (Selyukov, 2010, p. 2).

The legal mechanism is closely interconnected with another legal category, namely, the mechanism of legal regulation, fundamentally developed within the theory of the State and law. S.S. Alekseev understood the mechanism of legal regulation as “a unified system of all legal means, organized in a sequential manner, through which legal influence on social relations is ensured” (Alekseev, 1966, p. 30). It should be noted that in scholarly research, the categories of *legal mechanism* and *mechanism of legal regulation* are often equated (Kuznetsova, 2013). We agree with O.V. Pankova’s opinion that “the theory of state and law has not yet proposed a unified understanding of legal mechanism, and the overwhelming majority of legal mechanisms are considered as components or subsystems of the mechanism of legal regulation” (Pankova, 2020).

Both categories under consideration are used in the science of administrative law. The concept of “mechanism of administrative-legal regulation,” its structure and content have been thoroughly studied in works of leading Soviet and Russian administrative law scholars (I.I. Veremeenko, Yu.M. Kozlov, V.D. Sorokin, Yu.A. Tikhomirov, L.L. Popov, etc.). For instance, I.I. Veremeenko defined the mechanism of administrative-legal regulation as “a set of administrative-legal means through which influence is exerted on relations formed in the process of executive-administrative activity of the State” (Veremeenko, 1981).

The category of “administrative-legal mechanism” is recognized by most scholars as equivalent to the mechanism of administrative-legal regulation. For example, V.E. Stepenko considers the administrative-legal mechanism for ensuring the functioning regime of the state border of the Russian Federation as “a set of administrative-legal means of influencing social relations arising in connection with ensuring proper protection of the state border of the Russian Federation” (Stepenko, 2006, p. 14).

In our opinion, the foundation of administrative-legal counteraction to corruption lies precisely in the administrative-legal mechanism,

representing a set of administrative-legal means aimed at preventing, detecting and suppressing corruption offenses, as well as minimizing their negative consequences for society and the State.

The universality of this approach lies in the fact that the classical triad of the mechanism (norms, legal relations, and acts implementing rights and obligations) enables the formation of more complex, comprehensive legal instruments that reflect the specific features of legal influence in a particular area of managerial relations – in this case, countering corruption. For example, administrative law norms determine the status of subjects of administrative-legal counteraction to corruption and their competence. According to Art. 5 of the Law “On Countering Corruption,” these primarily include the President of the Russian Federation, the Government of the Russian Federation, federal state authorities, and state authorities of constituent entities of the Russian Federation.

The head of state defines the primary objectives and instruments of state policy for combating corruption and approves the measures for their implementation. For this purpose, since 2008 the President of the Russian Federation has been regularly approving the National Anti-Corruption Plan.⁵ Furthermore, the head of state determines the competence of the federal executive authorities supervised by him with respect to combating corruption, and prescribes the modalities for compliance with applicable restrictions, prohibitions, and requirements, as well as for the fulfillment of obligations established to that end.⁶

⁵ See Decree of the President of the Russian Federation No. 460 dated 13 April 2010 (as amended on 13 March 2012) “On the National Anti-Corruption Strategy and the National Anti-Corruption Plan for 2010–2011.” *Sobraniye Zakonodatelstva Rossiyskoy Federatsii (SZ RF)* [Collection of Legislation]. 2010. No. 16. Art. 1875; Decree of the President of the Russian Federation No. 478 dated 16 August 2021 (as amended on 26 June 2023) “On the National Anti-Corruption Plan for 2021–2024.” *Sobraniye Zakonodatelstva Rossiyskoy Federatsii (SZ RF)* [Collection of Legislation]. 2021. No. 34. Art. 6170. (In Russ.).

⁶ Decree of the President of the Russian Federation No. 613 dated 8 July 2013 (as amended on 26 October 2023) “On Anti-Corruption Measures” (including “The Procedure for Publishing Information on Income, Expenses, Property and Property-Related Liabilities of Certain Categories of Persons and Their Family Members on Official Websites of Federal State Bodies, Public Authorities of the Federal Territory ‘Sirius,’ the Audit Chamber of the Federal Territory ‘Sirius,’ the Territorial Election

The Government of the Russian Federation allocates anti-corruption functions among federal executive bodies under its supervision. The Government adopts anti-corruption legal acts, including Decree No. 96 dated 26 February 2010, which approved the rules for conducting anti-corruption expertise of normative legal acts and draft normative legal acts, the methodology for conducting anti-corruption expertise of normative legal acts and draft normative legal acts.⁷ The Administration of the Government of the Russian Federation plays a direct role in implementing anti-corruption measures. In particular, the Personnel Department of the Government of the Russian Federation maintains and administers the register of persons dismissed due to loss of trust on the official website of the unified system.⁸

The Ministry of Labor and Social Protection of the Russian Federation, under the Regulation approved by Government Decree No. 610 of 19 June 2012, serves as the federal executive body responsible for formulating and implementing state policy; developing the regulatory and legal framework for the state civil service; designing, implementing, and providing methodological support for corruption-prevention measures in organizations and monitoring compliance with those measures; and performing the functions of the federal authority for civil service management, including forming state orders for professional development programs for federal civil servants and organizing anti-corruption awareness initiatives.

Commission of the Federal Territory “Sirius,” State Authorities of Constituent Entities of the Russian Federation and Organizations, and for Providing This Information to Nationwide Mass Media for Publication”). *Sobraniye Zakonodatelstva Rossiyskoy Federatsii (SZ RF) [Collection of Legislation]*. 2013. No. 28. Art. 3813. (In Russ.).

⁷ Decree of the Government of the Russian Federation No. 96 dated 26 February 2010 (as amended on 20 April 2024) “On Anti-Corruption Expert Examination of Normative Legal Acts and Draft Normative Legal Acts.” *Sobraniye Zakonodatelstva Rossiyskoy Federatsii (SZ RF) [Collection of Legislation]*. 2010. No. 10. Art. 1084. (In Russ.).

⁸ Decree of the Government of the Russian Federation No. 228 dated 5 March 2018 (as amended on 12 July 2023) “On the Register of Persons Dismissed Due to Loss of Trust” (including “Regulations on the Register of Persons Dismissed Due to Loss of Trust”). *Sobraniye Zakonodatelstva Rossiyskoy Federatsii (SZ RF) [Collection of Legislation]*. 2018. No. 12. Art. 1678. (In Russ.).

A distinctive feature of legal relations as an element of the administrative-legal mechanism for combating corruption is that they encompass not only all spheres of state administrative activity (administrative-political, economic, socio-cultural), but also activities related to the exercise of executive and administrative powers by local self-government bodies. It should be noted that the exercise of powers by certain officials of public authorities is particularly susceptible to corruption risks and therefore requires additional regulation, which has been codified at the federal level.⁹

III. Anti-Corruption Administrative and Legal Forms and Methods in Public Law Enforcement of Internal State Sovereignty

Administrative-legal forms and methods that contain all the basic elements of the relevant administrative-legal mechanism should be identified as comprehensive legal means of combating corruption. In the theory of administrative law, the forms and methods of public administration play an essential role, since they reflect the specific features and signs of the functioning of executive authorities. In legal scholarship, the term “anti-corruption technologies” has recently been used to denote a system of methods and tools for implementing anti-corruption regulations during the formulation of legal norms and their enforcement” (Khabrieva, 2016, p. 194). However, this concept requires further scholarly clarification, since the term “technology” has only recently been incorporated into legal scholarship.

Understanding the place and role of administrative and legal forms and methods in the mechanism for combating corruption is facilitated by examining their etymology. Form (Latin *forma*, “appearance”) denotes the mode of existence of content — inseparable from and expressive

⁹ Section III. “Other positions of the federal civil service, the replacement of which is associated with corruption risks” of Decree of the President of the Russian Federation dated 18 May 2009 No. 557 (as amended on 26 February 2024) “On approval of the list of positions of the federal civil service, in which federal civil servants are required to provide information on their income, property and property obligations, as well as information on income, property, and property-related obligations of one’s spouse and minor children.” SPS “Consultant-Plus.” (In Russ.).

of it – while method (Greek *methodos*, “way of inquiry”) denotes a manner of theoretical investigation or practical implementation (Ozhegov and Shvedova, 1994). In management scholarship, the form of management is traditionally considered as an external expression of public administration, and the method is a special technique (method, means) that is used by the subject of public administration to influence the object of management. In the theory of administrative law, back in the Soviet period, the legal content of most forms of public administration was substantiated. Yu.M. Kozlov emphasized that “forms of managerial activity represent its external manifestation, a way of expressing the content of managerial activity in specific conditions. All forms have a certain legal aspect, which is seen as their direct connection with the legal forms of state activity, law enforcement and protection of law” (Kozlov, 1977, pp. 26–27).

The modern science of administrative law has fully accepted this approach despite the variety of terms used to denote legal forms of public administration, including such as “administrative and legal form.”¹⁰ According to A.B. Zelentsov, the administrative-legal form means “the legal expression of specific actions and decisions, the order (procedure) of the activities of public authorities and other subjects of administrative law in the process of public administration” (Zelentsov, 2003, p. 6). Yu.N. Starilov regards the legal form of management as “an externally expressed and legally formalized action of a public authority (or official), carried out within its competence and causing certain legal consequences” (Starilov, 2016, p. 529). Thus, countering corruption as a managerial activity is conducted through specific, legally defined forms that constitute elements of the corresponding administrative-legal mechanism.

In ensuring the internal state sovereignty of the Russian Federation, the issuance of anti-corruption legal acts by state authorities plays a predominant role; these acts take several distinct forms. First, measures aimed at preventing and combating corruption and minimizing its

¹⁰ In the scientific and educational scholarship on administrative law, similar terms are used: “the legal form of the exercise of executive power,” “the legal form of managerial activity,” “the legal form of public administration,” etc.

negative consequences are enshrined in anti-corruption plans and programs approved by the President of the Russian Federation,¹¹ federal government agencies,¹² government agencies of the constituent entities of the Russian Federation,¹³ and local governments.¹⁴ It is important to note that at present, anti-corruption plans and programs are in effect not only in public authorities, but also in all commercial and non-profit organizations, regardless of their form of ownership. These documents have actually become the basis for the daily consistent implementation of anti-corruption policy at all levels of public authority and management.

Another type of anti-corruption managerial legal act is anti-corruption standards of conduct for state and municipal employees. These standards constitute regulatory rules – restrictions, prohibitions, and requirements – designed to cultivate intolerance of corruption among public servants. The procedure for approving anti-corruption standards in the form of an official legal act¹⁵ should be considered optimal, which makes them mandatory. It is questionable whether it is advisable to

¹¹ Decree of the President of the Russian Federation dated 16 August 2021 No. 478 “On the National Anti-Corruption Plan for 2021–2024,” 16 August 2021, No. 0001202108160035 (as amended and supplemented). Official Internet Portal of Legal Information. Available at: www.pravo.gov.ru. (In Russ.).

¹² Decree of the Ministry of Education and Science of the Russian Federation dated 14 December 2021 No. 475-r “On approval of the program on anti-corruption education of the population for 2021–2024.” SPS “ConsultantPlus.” Available at: https://www.consultant.ru/document/cons_doc_LAW_407618 (not published officially) [Accessed 13.05.2025]. (In Russ.).

¹³ Decree of the Mayor of Moscow dated 15 February 2021 No. 75-RM “On approval of the Anti-Corruption Plan in Moscow for 2021–2024.” Official portal of the Mayor and the Government of Moscow. Available at: <https://www.mos.ru/eco/anticorruption/normativnye-pravovye-akty-i-inye-akty-v-sfere-protivodeistviya-korrupcii/regionalnoe-zakonodatelstvo/view/249542220> (not published officially) [Accessed 13.05.2025]. (In Russ.).

¹⁴ Order of the Tula City Administration dated 13 December 2021 No. 1/4486-r “On the Anti-Corruption Plan in the Administration of the Tula Municipality for 2022–2024.” Official portal of the Tula City Administration. Available at: https://tula-r71.gosweb.gosuslugi.ru/ofitsialno/dokumenty/dokumenty-all_90.html (not published officially) [Accessed 13.06.2025]. (In Russ.).

¹⁵ Decree of the Governor of the Orenburg Region dated 5 February 2014 No. 59-CC “On approval of the Standard of anti-corruption behavior of a State civil servant of the Executive Authority of the Orenburg Region” (as amended and supplemented). (In Russ.).

formalize such standards with a document of a recommendatory nature, for example, a memo or a specific guide.¹⁶

Administrative regulations for the performance of functions and provision of services should be attributed to a separate type of anti-corruption legal acts of management. By establishing the content, procedure, rules, and sequence of actions of public authorities in exercising their powers, these legal acts significantly reduce corruption risks in the process of public administration. Certain administrative regulations are directly related to the direct exercise of the powers of the State or municipal authorities to prevent corruption.¹⁷

Individual anti-corruption acts occupy a special place in the administrative and legal mechanism for combating corruption, as they are legal facts that cause the emergence, modification or termination of relevant administrative and legal relations. Individual anti-corruption acts are personalized and have a law enforcement character, as they are aimed at implementing the norms of anti-corruption regulations. With the help of such acts, specific situations related to the prevention of corrupt behavior, the identification of a corruption offense, and the prosecution of the perpetrator are resolved. For example, an order imposing disciplinary sanctions on a civil servant for committing a corruption offense constitutes such an act.

¹⁶ Anti-corruption standards (recommendations for federal government civil servants of the Ministry of Finance of the Russian Federation). Official website of the Ministry of Finance of the Russian Federation. Available at: https://minfin.gov.ru/ru/document?id_4=312277-antikorrupsionnye_standarty_pamyatka_dlya_federalnykh_gosudarstvennykh_grazhdanskikh_sluzhashchikh_minfina_Rossii (not officially published) [Accessed 13.06.2025]. (In Russ.).

¹⁷ Order of the Committee on Social Policy of St. Petersburg dated 26 September 2012 No. 217-r "On Approval of the Administrative Regulations of the Committee on Social Policy of St. Petersburg for the performance of State functions" (Supplement entitled "Administrative Regulations of the Committee on Social Policy of St. Petersburg for the performance of the state function of ensuring the implementation of anti-corruption measures in the Committee on Social Policy of St. Petersburg, under the jurisdiction of the Committee on Social Policy of St. Petersburg, state unitary enterprises of St. Petersburg and state institutions, including autonomous institutions under the jurisdiction of the Committee on Social Policy of St. Petersburg"). Official website of the Administration of St. Petersburg. Available at: <https://www.gov.spb.ru/gov/otrasl/trud/gosuslugi/reglaments> [Accessed 13.06.2025]. (In Russ.).

Another administrative-legal form of countering corruption is the administrative-legal agreement, which typically governs “horizontal” managerial relations — that is, interactions between authorities or bodies operating at the same hierarchical level. In the administrative and legal mechanism for combating corruption, contracts are used to prevent corruption. The most effective here is an official contract that sets out in a consolidated form, among other conditions, the duties and responsibilities of a government civil servant also in the field of combating corruption.

Summing up the consideration of administrative and legal forms of combating corruption, some attention should be paid to such a form as anti-corruption actions of legal nature. Such anti-corruption actions are based on the provisions of the legal acts of the administration and entail the emergence, modification or termination of administrative and legal relations related to the exercise of their powers by authorized officials, state and municipal employees. An example of such actions is the notification by a government civil servant of an employer’s representative about a personal interest that may lead to a conflict of interest.

Consideration of the administrative and legal mechanism for combating corruption will be incomplete without studying the administrative and legal methods included in it. The categories of form and method within this mechanism should be regarded as inextricably linked. As noted earlier, a method is a set of methods, techniques, and operations for practical or theoretical mastering of reality. As part of the study of the administrative and legal mechanism for combating corruption, it is of both scientific and applied interest to identify the relationship between the categories “method” and “measure.” This is primarily necessary because the first category is practically not used in anti-corruption legislation. In turn, the category of appears in almost all significant legal acts against corruption.

So what is a measure? There are very different approaches to understanding this category: philosophical, sociological, political, legal, etc. Without going into details of analyzing all the scientific approaches that reveal the phenomenon of *a measure*, we will focus solely on the legal aspects. For example, I.D. Yagofarova believes that a regulatory

measure should be interpreted as a measure to restrict the external freedom of subjects of legal activity (legal conduct) (Yagofarova, 2009, p. 10).

According to E.A. Kulikova, a measure in law is “a qualitative and quantitative characteristic of legal reality that describes the state and dynamics of legal phenomena both from the inside – from the standpoint of the content and meaning of these phenomena, and from the outside – from the standpoint of the action and boundaries of phenomena in objective reality, while speaking in all its diversity of meanings” (Kulikov, 2013, p. 9). In other words, in the broadest sense, a legal measure can be determined as a specific legal means of influencing human behavior.

Some authors include a diverse array of institutions in the system of measures to prevent corruption in public service, such as administrative responsibility, anti-corruption expertise of regulatory legal acts, personnel management, psychological interventions, and conflict of interest prevention (Melnikova and Krizhanovsky, 2015). According to the authors, the measures listed above are not correlated in nature. It is incorrect to put legal responsibility, anti-corruption expertise, personnel work, and psychological work on a par. All this suggests that many researchers do not put sufficient theoretical depth into the terminology used. The measure is, in fact, a specific way of countering corruption, applied within the framework of larger methods.

Considering the prevailing doctrinal approaches in Russian administrative law, the authors propose to include the following anti-corruption methods, along with specific accompanying measures:

a) Anti-corruption expertise of legal acts in public administration, aimed at identifying and eliminating corruption-causing factors;

b) Anti-corruption monitoring in public administration, focused on identifying and analyzing the causes and conditions that lead to corruption offenses, as well as ensuring the development, implementation, and enhancement of anti-corruption plans and programs;

c) Anti-corruption propaganda, education, and awareness, which involves conducting informational and explanatory work within society regarding anti-corruption issues and fostering legal awareness about anti-corruption among the population and individual citizens;

d) Digital methods of combating corruption, which leverage modern information technologies, including internet resources, state and municipal information systems, and artificial intelligence.

The role and importance of administrative and legal forms and methods of combating corruption in modern conditions is significantly increasing due to the fact that corruption normally disrupts the activities of public authorities; it can become a destabilizing factor not only in the functioning of the state apparatus, but also in ensuring internal sovereignty in general. The Russian Federation has already established a system of law-making and law enforcement aimed, among other things, at combating corruption and its various manifestations. The administrative and legal mechanism for combating corruption is an integral part of public law support for the internal state sovereignty of the Russian Federation, which is an optimal combination of law-making and law enforcement based on a sufficient level of legal culture, allowing stable and sustainable functioning of public authority and public administration in the country, ensuring a balance of public and private interests, the rights and freedoms of citizens in the context of new challenges and threats (Zubarev and Troshev, 2024). Public law enforcement of internal state sovereignty is a complex system consisting of separate, interrelated and interdependent elements grouped into subsystems (Sitnik and Polyakov, 2024). The administrative and legal mechanism for combating corruption is organically interconnected with the value-oriented subsystem, the subsystems of normative regulation and law enforcement, the institutional competence subsystem, the subsystem of legal education and enlightenment, as well as control and supervision (Vedyashkin and Zaitsev, 2024, p. 26).

IV. Conclusion

Corruption in the modern world has increasingly been utilized as a tool of external influence by hostile countries to undermine national sovereignty. The image of Russia as an extremely corrupt state is being purposefully formed. Ensuring internal State sovereignty is directly related to the implementation of anti-corruption measures in the public administration system. Corruption in the new conditions destroys the

foundations of the functioning of public authorities, sharply reduces the authority and trust in government, and negates the economic results of various reforms implementation.

Currently, an administrative and legal mechanism for combating corruption has been formed, which is a set of administrative and legal means aimed at preventing, detecting and suppressing corruption offenses, minimizing their negative consequences for society and the state. This mechanism is directly implemented by authorized public authorities and their officials at the federal level, at the level of constituent entities of the Russian Federation, as well as at the level of municipalities.

The long-term positive effect of putting into practice the administrative and legal mechanism for combating corruption will be not only a general reduction in the number of corruption offenses in public administration, but also a significant strengthening of the internal state sovereignty of the Russian Federation.

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The Balance between Objective Justice and Disputed Justice within the Framework of the Attributive Approach: A Comparative Study

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Abstract: The study aims to explain a new type of justice in the framework of the attributional approach, which combines the logic of the attribution and the logic of the material preference of the legislator while making a balance between this type and the traditional type — disputed justice that is achieved when applying the national attributive rule of a mechanical nature with rigid and neutral application. Until the use of the concept of objective justice as a corrective means of Iraqi national dispute rules by considering it as an attributive goal, the basis of attributive justice aims not only to reach out to a framework of engaging the legal relationship with a legal system, but also to search for the best result that can be applied to resolve the dispute. Accordingly, this study aims to establish the necessary reform rules from which the legislator will start in the field of Iraqi attributive rules. Therefore, we recommend the Iraqi legislator include the rule of the harmful act as evaluation means, which is one of the most trusted laws, by making several amendments including Art. 19, 22, and 27 of the Civil Code to avoid any legal issues during the trials in the Iraqi courts.

Keywords: attributive Rules; Civil Code; disputed justice; Iraqi legislator; legal system; objective justice

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Contents

I. Introduction	997
II. Definition of Disputed Justice and Objective Justice within the Framework of the Attributional Approach	998
II.1. The Content of Disputed Justice	999
II.2. The Content of Objective Justice	1001
III. The Concept of Balance between Disputed and Objective Justice	1002
V. The Difference Between the Two Types of Humiliating Justice	1004
IV.1. Explanation of Relying on Disputed Justice to Objective Justice	1008
IV.2. The Rule of Courts	1013
V. Conclusion	1018
References	1020

I. Introduction

It is well-known that the rule of attribution is called general and neutral in the attribution, and that the goal of these rules is to achieve disputed justice that is achieved by engaging the legal relationship to a legal system of a country regardless of its content of the objective or the result of resolving the dispute. There is no doubt that this type of justice has its nature of the syndrome with the rule of the attributive rule since its establishment. Yet, with time, jurisprudential endeavors and judicial attitudes have appeared with legislative progress to develop the concept of traditional justice, which is directed towards the mechanism of developing the attributive rule by searching for a job or the purpose of the bases of the attribution in order to conclude the dilemma of “the mechanism of focus,” which could lead to a blind choice without taking into account the considerations that must be based on the choice.

Just thinking about refraining from the traditional mechanism adopted in the attributive rule is considered in itself a major challenge facing the legal system of any country, whether by the national legislator, who seeks to reach objective justice as the optimal purpose of private international law by amending the existing rules of traditional attribution or by the national judiciary by forming advanced judicial jurisprudence that seeks to adapt the rules of attribution to reach the modern concept of justice represented by “objective justice.” Therefore,

the issue of balance between the two types of justice is an important issue, which is about achieving “the fairest law” or “the most just law.”

This paper focuses on making an in-depth and detailed discussion to clarify the criteria for balancing disputed and objective justice. Given the status of private international law, the procedure of this balancing may result in adding a new aspect of private international law by considering this balance as the core of the attributional approach of this law. By the same token, this balance may result in clarifying the problem of this approach – i.e., fluctuation and fuzziness in dealing with the rule of dispute.

The research aims to pave the way for a step in the process of the Iraqi dispute rules by reading these in various models of laws and reading the methods adopted in resolving the disputes by the court either by amending the existing ones or enacting new rules to keep pace with the comparative attributive development. This also applies to the Iraqi judiciary. In the present article, we are trying to display its foundations and means through which it can develop the attributive process in the absence of the necessary legislative treatment.

To reach the goal of the study, it is required to use several methods in an integral manner, which is represented by the inferential and comparative analytical approaches for the purpose of inferring the jurisprudential, legal, and judicial data to reach the application of objective justice as an objective purpose of Iraqi dispute rules.

To understand the topic of research in all aspects, we divided this paper into two main parts as follows: The first one focuses on the definition of disputed justice and objective justice within the framework of the attributional approach. The second part is about the mechanism of balance between disputed justice and objective justice.

II. Definition of Disputed Justice and Objective Justice within the Framework of the Attributional Approach

In general, justice in the philosophy of domestic law and international law is one and constant concept that does not change even if the methods of expressing it change. The attributive justice can appear

in two forms, but each one has a specific function and characteristics, which requires us to define them here. Therefore, we will explain the content of disputed justice and the content of objective justice.

II.1. The Content of Disputed Justice

To determine the concept of disputed justice, the concept must be rooted in philosophical terms because each scholar sees justice from a certain angle. For example, there are philosophers who differentiate between the concept of justice and justice itself, as this distinction goes back to the ancient Greek philosophers, especially Aristotle. This differentiation was established later at the attempt of modern legal jurisprudence by distinguishing between the legal form of justice and justice fundamental justice, fairness. The idea of justice is related to a legal rule, while the idea of justice is related to legal standards, and this is what we will explain later. Justice is based on the idea of equality, which is accustomed to the predominant situation, while justice is based on real equality, which is accustomed to special circumstances and even realistic particles. Therefore, justice is generally characterized by kindness, humanity, and mercy from the rigidity of the laws in some cases. It is also the gateway of the law to the requirements of mercy and humanity, even if it sacrifices the requirements of justice (Ashoosh, 1992).

Justice then is characterized by an emotional personal nature, and it has been represented in humanity in the laws. That is, it seeks to reduce the rigidity and stress of the legal rule. Therefore, there is a flexible personal factor that shows its impact on the conscience of individuals, which may call for thinking about the risk of control by the judiciary. That can be explained by saying that the characteristics of the public legal rule, whose impact is also reflected in justice, do not extend its effects to justice. The public means that the rule in its application applies to everyone and does not issue a specific consequence in particular or for people defined by themselves. Yet, it is comprehensive in that all those who meet their conditions. As for abstraction, it means that the rule is established at the time of being enacted in situations that do not look at people and facts themselves. When justice comes to

fill a vacuum present in the legislation or to reduce the strength and solidity of the law, it does not defend a specific issue in itself, rather it means defending a right or the individuals (Fattah, 2016, p. 64). Justice does not interfere with its intervention to the extent of simple details. Therefore, justice prefers if you will, and this increase and kindness are dictated by good will under the impact of the power of emotion, mercy, and compassion. Thus, it is one of the requirements of legislation and it can come with a new rule or an unprecedented principle, and justice is incapable of doing that (Tallies, 1924).

Accordingly, when applying the philosophical concept of justice to the attributional approach, it is clear to us that the purpose of the basis of attribution is closer to achieving justice that does not care about the realistic circumstances separately, but it is an application of the law. Therefore, disputed justice finds its existence with the presence of rules called “the rules of dispute” and their purpose is to contribute to providing a solution that can be expected, fair, and independent from the court that hears the dispute (Audit, 2003, p. 289). The same result can be reached on the characteristics of the bases of attributional rules and their generalization and abstraction. Besides the characteristics of the bases of attribution, in particular from neutral and patriotism and being double-sided and indirect rules, they do not give a solution to the dispute. Rather, they are guidelines that indicate the law must be applied to the case. Then, its mission ends with that. Also, its philosophy is based on defining the closest law related to the legal status and from the point of view of the national legislator regardless of the content of this law or the effects of its application. It is on what is described by a part of jurisprudence rules that are satisfied with assigning the relationship in an automatic way to the most related laws according to the legislative policy of the State of the judge regardless of the material outcomes resulting from this application. It can also lead to the application of the national law on international private relations by ignoring the basic feature that distinguishes this international relationship (Haddad, 2005, p. 91).

Therefore, we can define disputed justice as the kind of “justice that appears when achieving the best equality between the rules of attribution types from the perspective of the legislator and the judge,

which requires ensuring the continuity of individual legal statuses in the international private relations and respecting the legitimate expectations of the parties without sacrificing the interests of others, the interests of the State, or social and basic moral values in the judge's State."

II.2. The Content of Objective Justice

It has become clear that the existence of disputed justice is engaged to the existence of the rule of dispute in terms of establishment, so we can say that this type of justice is the traditional type, which was necessary for interventional reform of the rules of dispute to make it "teleological" targets more than being mechanical rules with an automated application. Therefore, jurisprudence tried to create an advanced type of attributional justice called objective justice, but this type is not an independent concept of disputed justice. Rather, it is derived from it. Thus, it is considered a new concept or perception of the concept of justice in general within the scope of international private relations. We can define objective justice in its legal framework as a set of legal principles that the human mind extracts from the reality of the life of humanity and the nature of social relations that suggests realistic rational solutions reflecting good materialistic results and fair to the legal provisions based on texts at times and the mind at other times.

When the concept of objective justice falls within its legal framework on the attributional approach, it is clear to us that this type of justice is directed toward achieving certain results. Therefore, the English jurisprudence calls these rules (Oriented Rules — Result) the rules that are directed towards the results, so we expect the emergence of objective justice in a dispute through two following aspects. The first aspect (theoretical aspect) argues that objective justice can be achieved when the legal relationship is applied to a specific objective and objective judgment that the parties to the relationship may want to reach. Also, the task of deeply thinking of the best or most appropriate material result is sponsored by the judge or the parties themselves. When competition is absent, the means of attribution can reveal the material outcomes. That is, the attribution will be from the law that includes the favorite

objective result. The second side (practical aspect) is achieved by the rule of attribution, which reflects the legislator's desire for a specific material result. When the attribution stops, objective justice is achieved.

Here we can say that objective justice in private international law is a type of corrective justice,¹ because it aims to correct the course of the legal relationship or the legal rule in the field of protecting individual freedom for the purpose of protecting the weak party or equality in personal status issues, for example. Therefore, we can say that objective justice is a legislative or judicial tool that aims to reform social relations and to serve specific purposes. When the judge applies the rules of attribution, the law is driven by objective motives, not by a personality decided by the legislator.

Therefore, objective justice can be defined within the framework of the attributional approach as follows, "justice that is achieved through the attributive method to reach the best result in the relevant law, either through the direct application of the most relevant law, or the use of specialized rules that suit the ideas assigned to ensure the achievement of the interests that these ideas seek to."

III. The Concept of Balance between Disputed and Objective Justice

The research in the mechanism of balance requires us to explain the concept of this balance and its purpose and to explain the difference between the two types of attributional justice that have a role in clarifying the reasons that called on the jurists in the transformation of the application from the framework of disputed justice to the scope of objective justice. This is what we will explain in this topic through three main points.

We can say that the balance between the two types of justice is the conduct of a kind of suitability between the legal life of development and change, on the one hand, and continuing to work in the traditional approach, on the other hand, through the usual technical means that the

¹ Corrective justice is a form of justice that aims to restore the right of the abused people, and it is a response to a specific damage or injury committed by the abuser. Its primary goal is to correct things by giving the affected party what it deserves, and it is necessary to preserve a fair society.

legislator resorts to for resolving the dispute between laws. This can be one of the purposes of private international law. Therefore, discussing this issue raises an important question: given the fact that the legal relationship includes a foreign component that gives it a technical characteristic that requires the stability of legal relations for individuals as well as achieving the principle of coexistence between countries and facilitating the need for international commercial transactions, which kind of attributional justice can achieve these considerations?

In fact, the conduct of this balance normally leads to a special identity of private international law by considering the budget process as the “DNA” of the attributional approach in private international law. In addition, providing such a balance leads to an important problem that the attributional approach suffers from, which is fluctuation and blurriness in dealing with the rule of dispute.

The first jurisprudential attempt to distinguish between the two types of justice by the German Professor Gerhard Kegel in the mid-20th century appeared in the Hague Academy. The purpose of this distinction was to confront the crisis of private international law within the framework of the attributional approach, which was dominated by the traditional concept giving priority to a mechanism of bilateral and neutral attribution as the attempt to use new attributive methods that produce access to another type of justice called objective justice. That happens by making the concept of interest part of the legislative drafting of the dispute rule (Kegel, 1964). This attempt was influential in the judicial positions as the French Court of Cassation issued the first judicial decision that translates the considerations of the interest by refraining from the traditional attributive determinants that seek to achieve justice in the traditional concept by the use of determinants of objective content to reach objective justice.

The proliferation of the attributive rule with a materialistic form increased frequently in France and other European countries in the early 1950s with the use of a means of multiple attributive rules. Thus, the officer’s application of these rules will lead to the desired result. Then, we find that the application of the enforced law has not been a goal similar to attributive rules. Yet, its material content has become the goal that moves and directs the attribution.

IV. The Difference Between the Two Types of Humiliating Justice

Before starting to clarify the differences between these types of justice, we need to make it clear that there is a driving force that was behind the emergence of both types — i.e., the flexibility of the national legislator and the lack of exclusivity of international private disputes by allowing the implementation of foreign law. The most important goal that the rules of the dispute of the private international law seek is to achieve justice. Behind the philosophy of the rules of dispute, there is a fundamental issue, which is the national legislator gives up part of the sovereignty in favor of a foreign law to be applied in a relationship with a foreign component. This tolerance of the national legislator aims to reach attributive justice.²

We find the basis of this requirement in taking a more tolerant system towards foreign laws and abandoning the idea of nationalism that looks at the legal scope as the private property that is confined only to members of a specific group or country, which in turn constitutes an obstacle to the growing international relations (de Boer, 1996). However, this situation may require the implementation of foreign law since it is the most appropriate and fair foreign legal system to the rule of legal relations that are attached to a foreign component (Bogdan, 2011). Indeed, denying the need to implement a foreign law leads to denying the status of justice in foreign law, while knowledge of comparative legal systems and its application is the first function of private international law (Fauvarque-Cosson, 1987, p. 112). An opinion on jurisprudence goes to say that the privacy of private international law is that the judge can implement another law other than the national law, which confirms that the implementation of foreign law (that may be the fair law) is a

² In fact, the growing movement of individuals, money, commodities, services, and commercial relations across the borders. The development of these relations and the emergence of ties with a foreign component has developed a sense of the movement between the borders that the implementation of the law of the country that they have moved to does not agree with what they have seen in their country, which necessitated finding a solution to this issue. These solutions represent rejecting the idea of the absolute application of the judge's law and allowing foreign law to be applied to these relations with a foreign element. *See* Albustani (2009, p. 51).

fundamental base for international litigation (Fauvarque-Cosson, 1987, p. 183).

As for the differences between the two types, they can be clarified through several pillars.

First, precedence in the judgment of the rule of dispute, the way it is established for precedence justice in the judgment of the rule of dispute, as it is necessary to work in accordance with disputed justice — that is, through the search for the most relevant law to the dispute regardless of the considerations related to the material content of the disputing laws. However, this precedence gives the original characteristic of disputed justice and gives the exceptional characteristic of objective justice in the application. Therefore, such material considerations will interfere in resolving the dispute of laws (Kegel, 1964).

However, we note that with regard to the advanced legal systems, the issue of applied succession of attributive justice has almost disappeared. Because of these regulations, the issue of applying objective justice has become the original in order to present legal concepts in it to the current of change or what is called the legislative situation that made the legal rule a reformist tool of a specific purpose, especially in the scope of international private relations. Yet the late legal systems, such as Iraq, still adhere to the rules of traditional attribution that are not compatible with the rapid developments taking place in the global legal scene within the scope of private law.

Second, the functional approach of both types. The role of disputed justice is the concentration of the legal relationship through an abstract mechanical mechanism characterized by neutrality. Its goal is to achieve a fair balance in the distribution of the legislative specialist. If this goal is achieved, it is possible to say that disputed justice has been achieved, which may happen through dispute settlements with a foreign element according to the appropriate law regardless of the content of laws except after applying the rule of dispute. That is why it is clear that the concept of disputed justice is closer to the concept of justice because justice is based on the form of justified equality (formal), which is accustomed to the dominant situation and justice is generally, and abstract is the same as any legal rule and is characterized by hardness and extremism.

As for objective justice, it is concerned with the content of the laws with the intent to reach a material result that will lead to the mechanisms of attribution. This means that the difference between the two types is taking into account the type of solution because disputed justice does not pay attention to the solution given to the dispute if it is appropriate or fair, and this is contrary to objective justice. Therefore, they always seek a kind of kindness, humanity, and mercy from the severity of the laws in some cases. It is the gateway of the law to the requirements of mercy and humanity, even if it sacrifices the requirements of justice.

Therefore, it can be said that there are many issues that can help us to distinguish between two types of justice: first, the material end — the material purpose can be clarified as the intended value in achieving legal certainty, protecting the weak party, and defending the public interest — i.e., protection of the legislative policy; second, it is related to the means of achieving objective justice, such as the multiplicity of attribution rules, the distinctive performance standard, the standard of the most trusted bond, and other means. Pairing between the two issues (the material goal and the means) through the legislator and the judge by forming legal rules with a design that guarantees the achievement of objective justice using attributive rules that include the achievement of the target interests by the legislator, which can be public or private interests. That can happen also through the authorization of the specialized court of a specific law that provides the intended protection in the event of a legislative deficiency. Third, the attributive approach aims to achieve legislative appropriateness, but through a special perception of this concept, which is achieved by choosing the most relevant and fair law. The intended justice here is “disputed justice,” which allows to choose the most engaged law to the legal relationship spatially. In order to solve the problems of the dispute of laws, the approach confirms that each legal relationship has a specific spatial center, so the relationship must be analyzed, determining its nature, to focus it on a specific place. Then, applying the law of that place in its matter, and the status of the relationships in this way is the place where it is achieved all or most of these consequences (Sadiq, 1974). It has been clear that this method involves analyzing the nature of legal relations to know its place and then defining the best appropriate laws for them (Albustani, 2009, p. 84).

The legislative appropriateness here is dominated by the characteristic of neutrality and focuses on choosing in the sense that the judge cannot exclude a law that is not appropriate because he does not know the content of this law in the first place except after being applied. His choice may not be intended for itself without any focus on achieving a specific result or goal (Ancel, 1955, p. 256). The selection process targets the overall legal rules in the competent legal system, not a specific law, nor a specific rule (Foussard et al., 2022, p. 489).

As for the legislative appropriateness from the perspective of objective justice, it is achieved through consistency and proportionality between the stability of individual relations across borders and the provision of safety regarding their expectations regarding the law that must be applied in the event of a dispute between them by choosing the most appropriate law for their rule when adopting the attributive rules used as objective attributive determinants of a material purpose. The attributive approach has become a more specific function, so its task is no longer engaging in the legal relationship with a legal system only. Rather, the search for the best material result that can be applied to resolve the dispute, through the process of choosing the legal rule and not the choice of the legal system (Foussard et al., 2022, p. 491).

Indeed, the legislative appropriateness within the framework of objective justice is close to the principle of realism, which is the compatibility between the law and the social, economic, and political reality. Here the legal rule translates it without violating the generalization and abstraction that characterizes the legal rule in general. Through this principle, a new characteristic of legislative continuity is highlighted in the rule of attribution as it leads to harmony or the effectiveness of the base of the attribution and its compatibility with the reality and developments of daily life. This was a reason for the increasing codification of the bases of attribution with the material end in countries that pursue the legislative intervention approach, such as the European countries, the legislation in national laws or international agreements. We see that the legislation that lacks automation, which is represented by the attributive development and keeping pace with the comparative legislative developments, leads to the conquest of itself as long as it is used by traditional attributive means.

IV.1. Explanation of Relying on Disputed Justice to Objective Justice

In fact, there are many reasons that justify justice from achieving disputed justice to objective justice, and these reasons can be explained in two issues. First, the subjective reasons are related to the disputed approach, and the other is related to the material reasons that were a cause for choosing a specific legal rule in particular.

First: Self-causes

The problems that were the cause of the crisis that the disputed approach suffers from are the stagnation, impartiality, and concentration of the class of attribution. The main idea revolves around that the traditional rules cannot deal with the content of the laws with sufficient flexibility because the legislator undertakes the lead of the attribution rule, and the judge is obligated to implement the law indicated by this rule. Thus, these rules of a subjective nature ignore the legal relationship. In addition, the rules of attribution are only a mechanical tool for choosing the appropriate law to the ruling of the relationship between the laws through the comparison mechanism. For example, this can be seen in Art. 27 of the Iraqi Civil Code, which includes rigid attribution by identifying the determinant of the harmful act as a rigid attribution determinant.³ However, the state of rigidity can be eliminated through the use of the evaluation means of the base of the attribution, which starts from a social focus of facts and conditions without relying on the material or geographical focus. This is done through the work of the principle of neighborhood.⁴

This appears in the form of exceptions, which is considered a corrective means of what may be generated by material or geographical attribution from an unfair result. Therefore, it can be applied to all assumptions in a way that achieves the goal of the dispute base, respects the expectations of the parties, achieves the protection of their legitimate

³ The first paragraph of Art. 27 states that: “1 — non-contractual obligations shall apply to the law of the State in which the incident occurred for the commitment.”

⁴ The principle of neighborhood means that method that depends on assigning jurisdiction to the most reliable laws related to the relationship subject (Lagarde, 1986, p. 77).

interests across the borders, and ensures the provisions that are issued in the field of responsibility arising from the harmful act in an executive future with which the goal of civil responsibility is achieved. This is the reparation of harm, and these goals in their entirety represent a practical application of objective justice.⁵

On the other hand, this problem coincides with the attributive rules for personal status issues, especially the bases of attribution related to inheritance. The Iraqi legislator has adopted Art. 22 of the Iraqi Civil Code, which states that “inheritance issues are applied in accordance with the law of the inheritance at the time of the person’s death” on the mechanism that aims to engage the legal relationship to one automatic legal system regardless of any social consideration or the conditions of that happen accidentally. In other words, there is no sacrifice of the law of citizenship of the dead for the interest of the law of residency — i.e., the law according to which the person has lived, died, and left money and properties in. This is what makes the choice of an automatic focus. To get out of this problem, the legislation had to be included in a corrective means of multiple optional attributive determinants represented by the law of the heritage at the time of death, the law of the usual residence, and the place of the whereabouts of the money. However, this pluralism is a precaution: when certain conditions are not available to implement the first determinant, the second determinant should be taken into consideration, and so on.

The rules of attribution may suffer from an important problem represented by the legislative deficiency through the lack of legislative treatment and the legislative silence on many issues. The bases of attribution do not include special attributive items for some issues. In this situation, the judge may apply a law through his/her diligence, and this law may not achieve the desired justice represented in the protection of certain parties or specific situations. However, it may happen only from the perspective of the judge for the most relevant law of the dispute. Therefore, we remain in the same circle of the problem

⁵ You notice this attributive trend in Art. 133 of the Swiss Special Law and the third paragraph of Art. 4 and the second paragraph of Article Five of the European Convention on Human Rights (ECHR) regarding the law that must be applied to the non-contractual obligations of Rome 2 of 2007.

given the fact that the chosen law can be part of the focus system. For example, in matters of a personal status — e.g., the crippled marriage — which appears in the form of an incorrect marriage from the viewpoint of the State of which both parties are citizens, yet it is correct according to the law of the judge of the dispute. Modern law has included an attributive solution in the case of depending on the factor of residency as a personal attributive determinant for the certificate of marriage and in the State of the subject/citizen. Undoubtedly, this helps in making the parties of the dispute submit their lawsuit before the court whose law is originally in the dispute, which in turn helps in limiting the problems resulting from this marriage.⁶

This is also what the recent decisions of the French Court of Cassation for the year 2020 demonstrated have done. This Court preferred to implement the law of the place of marriage, which is the same law of residency on the implementation of the judge's law (the French law). The Court it decided that the registration of the marriage certificate outside France in the absence of the wife is not contrary to the French public order as long as the marriage was concluded with the consent of the spouses as one of the objective conditions for the marriage according to Art. 3 of the Franco-Moroccan agreement of 10 August 1981 related to the statute of the persons, family, and judicial cooperation. Therefore, the marriage certificate concluded according to Moroccan law (the wife's law) does not contradict the French public order, which appears to be the trend to ensure the stability of social relations at the international level and to unify the individual's personal status to avoid counting him divorced under the law of another State. Accordingly, it is possible to benefit from the idea of the most accurate law to solve the problem of crippled marriage since the Iraqi law does not clearly include that situation (Ahmed, 2023).

The solution to this problem may be reached through the pairing of the means of multiple determinants and the possibility of granting the possibility of choosing between these determinants, which is known as “the most suitable law.” This method is often directed towards protecting the interest of the weak party in the legal relationship, such

⁶ As in the third paragraph of Art. 18 of the Austrian Cartel Act of 1972.

as being “a child, a harmed party, a wife, a worker.” Undoubtedly, this method can be very flexible because it has different mechanisms of attribution that can make choosing fair solutions easily. The will that is given by the legislator to choose can be directed towards the individuals themselves within predetermined rules according to the rule of dispute. Then, we may encounter the “capability of legislative option,” so this may be directed towards the specialized judge. Therefore, if the process of choosing is entitled only by the judge, we will be encountering the “objective judicial choosing capacity” (Ancel, 1955, p. 258).

We can give several examples in this regard, such as Chapter 50 of the Tunisian International Private Law by saying: “The judge applies the best law to prove the child’s filiation between: 1 – personal law of required person or law of the residency 2 – personal law of the required person or its residency 3 – The personal law of the child or a law of the residency while the dispute over the filiation is subject to the law in which it was established. Also, Art. 68 of the Private International Law of Switzerland states that “the establishment, development, and competition of the parent-child relationship is governed by the law of the State in which the child habitually resides.” However, if the father or mother is not residing in the regular residence State, and if the child and parents are citizens of the State, the law of that State applies.” However, the Iraqi legislator relied on the attributive method on this issue. Para. 4 Art. 19 of the Civil Code states that “Matters related to legitimate parentage, guardianship, and all other duties between parents and children are governed by the law of the father.” Here, we note that this article is unable to determine the law that must be applied after a dispute occurs as a result of the father’s change of nationality, which leads to the lack of certainty and legal safety. In this situation, is the law that must be applied according to the father’s nationality at the time of marriage, birth, or filing the lawsuit? Therefore, we suggest redrafting the Article to be compatible with the interest of the child (the weakest party) by applying the law that is more suitable. Also, this can ensure the interest of the Iraqi child if the child is a party to the lawsuit by including the same base in another way of attribution, which is unilateral attribution. This can also be one of the means of objective attribution that aims to consider material provisions in the judge’s law,

which achieves the interests of the states or the individuals alike by considering the social impact of the rules of dispute.

Second: Material reasons

Establishing the material purpose in drafting the rules of dispute means confirming the primary goal or principle on which these rules are based. It helps to achieve justice and stability in resolving disputes. The consolidation of the material end in drafting the rules of dispute includes clarifying the basic purpose behind the existence of these rules, such as achieving justice, facilitating dispute resolution, and ensuring social stability. This can happen by defining the basic principles and values that direct the drafting of these rules, which contributes to a deeper understanding of their purpose and applying them more effectively. The material goals may vary within the rule of dispute. Some of these are about the necessity of resolving the dispute and not leaving the dispute under the pretext of contradiction with the rule of dispute with the problem of “ignorance of foreign law” because the final resolution of the dispute constitutes a guarantee of fair litigation and one form of the human rights. When resorting to the traditional method of solving this problem, the specialized court intends to implement its national law as one of the solutions provided by the legislation and the jurisprudence and judicial attitudes within the scope of international law.⁷

This in turn leads to a change of the law that must be applied, and the basis of this application is that the law of the court is not a strange law on the offered dispute because it is related to it. That happens when the legislator grants the international judicial jurisdiction to its courts to adjudicate the dispute that includes a foreign factor. In this case, the court uses the principle of necessity to engage between the dispute and its court. In this case, the law of the specialized court can achieve the base of the attribution in the application of the relevant laws with the international private legal relationship. In addition, this shall not violate the expectations of the parties and let them avoid the rejection of their lawsuit when it is impossible to prove that the foreign law is

⁷ These solutions are represented in the rejection of the lawsuit, or the request submitted by the litigants — or applying of the most relevant law to its provisions to the law that could not be proven — or applying the court’s law. For details, see Sourani (2013, p. 35).

fair (Jaber, 2019). This is why it is considered a fair solution.⁸ For this reason, this solution has become the predominant principle in many legislations. Although the justifications are removed, it is not always possible to rely directly to the law of the judge because there might not be enough power between the relationship and the judge's law that qualifies this law to apply.⁹

IV.2. The Rule of Courts

The judge's law may not be appropriate to the ruling of the relationship. Therefore, for the purpose of achieving the goal of the national attribution base, the judge's law must not be applied directly, but this can be considered a solution after exhausting the following trends: a) applying the most relevant law to the provisions that were not disclosed, b) searching for the most relevant laws that are engaged to the issue after confirming that the current law was unable to be implemented, c) looking for the law that needs to be implemented according to the rule of attribution in the law of the judge, such as implementing the law of the homeland or the law of citizenship.

Therefore, we see that the Iraqi legislator can reach one of these laws through the principle of the most trusted bonds of the "principle of the neighborhood," which facilitates access to appropriate and fair solutions by engaging the legal relationship with the legal system of the State with which it has a strong bond. This principle achieves the hope of that the assigned law is objective and appropriate. In order to reach this result, it is preferable for the Iraqi legislator to seek to draft the rule of dispute for the ignorance of the foreign law in the manner of

⁸ As is the solution in the second paragraph of Art. 16 of the Swiss Private International Law Act, which states that: "Swiss law applies if it is not possible to prove the content of foreign law." Also, Chapter 32 of the Tunisian Private International Law that states "if it is impossible to prove the content of the foreign law, the Tunisian law is implemented."

⁹ For example, as if an international contract between an Italian and Swiss contract is concluded and this contract is implemented in the two countries together, it is an event that the parties pleaded before the French judiciary, and the latter concluded that the Swiss law is the competent, so the litigants did not succeed in proving its content, so the application of the French law here with its precautionary competence is justified.

multiple attributions with successive characteristics by organizing the determinants of the chain of transmission in a sequence.¹⁰ The most relevant law is applied to the case after the foreign law, which cannot be proven, but if this is not possible, the next regulating attribution of the judge's law is to be resorted to.

The material reason that objective justice seeks to reach is the phenomenon of specializing in the rules of private international law, which means that each part of the relationship requires an independent law. This means that there are different kinds of attribution and multiple and specialized regulations of attribution. This phenomenon aims to enable the rules of attribution to reach a level of appropriateness of the assigned ideas presented in a specific dispute and reach a fair solution. In fact, this can be a result of the parties of the dispute, legislative drafting, or the estimated mechanism of the judge of dispute.

The first method represents the submission of the parties of an international contract to more than a specialized law.¹¹ The rule of the attribution for international contracts in Art. 25 of the Iraqi Civil Code does not state the possibility of the voluntary determination of the attributive partitioning. In the second method, the national legislator may resort to partitioning the types of attribution, e.g., a variety of attributive ideas, and assigning each of them to the specialized law, such as the non-contractual responsibility. Therefore, some laws are divided into ideas assigned to this rule into multiple types (e.g., harmful act, enrichment, electronic damage, such as assaulting the right to digital privacy, and so on), such as Art. 4–12 of the Second Rome Regulation regarding applying the law on the non-contractual obligations. Perhaps the reason for this specialization is the desire to keep pace with the developments that have affected the attributed ideas that made it diverse, distinctive, and multiple (i.e., not confined to traditional

¹⁰ When the legislator sets a serial arrangement for the determinants of the support and associates it with an objective standard, it reveals to the addressees with the rule of dispute, his intention is to a strict ruling on the method of achieving the legislative policy of the court that is confused despite the existence of the possibility of choosing from the determinants It restricts the scope of choice alone, but also its content (Jorge, 1988, p. 83).

¹¹ Art. 3-1 of the Rome Agreement.

attribution ideas). On the other hand, the competent law may not be compatible with the original rule of attribution to all these types. Therefore, the legislator tends to assess these varieties with multiple rules of attribution to reach a fair solution that is compatible with the nature of the dispute. While we see that other legislations are still using individuality and comprehensiveness in the rule of dispute, this rule expands to govern all these items, e.g., the case in Art. 27 of the Iraqi Civil Code regarding the law that must be applied to non-contractual responsibility, so the Iraqi judge is forced to use this text, which leads to achieving formal justice only. This is why we recommend that the Iraqi legislator use the method of dividing the types of attribution or using the flexible formula method because it allows the judge the capacity of estimation in choosing the appropriate law by surrounding the circumstances for each case separately. This method is compatible with the privacy of electronic disputes in particular and leads to ultimately reaching the desired goal, which is objective justice.

The third method is determined by the role of the national judiciary in the assignment of specialization as in the case in related matters or the so-called “procedural engagement.” This engagement in general is an engagement between two procedures or more, which would subject the engaged procedure to the same procedural rule as the original procedure, so the court’s specialization extends to the original procedure in order to unify the ruling issued and to prevent the contradiction of the rulings in the related matters (Abu Elwafa, 1954). We find the applications of procedural engagement in several issues. For instance, the initial issues are defined as the issues in which they must be ruled in the beginning for the purpose of ruling in the original case that is under the specialization of the ruling court (Salama, 2008, p. 335). The role of the judiciary appears through the use of the authority to divide the issue and distribute the attribution. Perhaps the reason for this is the necessity of resolving the dispute in a way that consists of the expectations of the opponents by following a specific method. However, the characteristics of justice here may differ according to the method followed by the judiciary. This method may aim to achieve the disputed formal justice if the attribution is directed towards the application of the law of the judge, which comes from the procedural appropriation that is

based on the performance of justice and the guarantee of the litigation unit based on the existence of an engagement between the cases in order to prevent the dispute of rulings. In addition, the jurisdiction in favor of the law of the judge would achieve the intellectual homogeneity of private international law, which is based on unifying solutions to the dispute of laws that should not differ according to whether the issue was presented originally or primarily.¹²

However, in the other direction, the court can use the partitioning method in solutions and separate the idea of the initial case and the original case in defining the specialized law to reach material justice through the lack of pre-determination of the specialized law. However, the determination is according to the concrete material results that are achieved through the application of the law of the judge or the foreign law. In this case, the initial case is attributed to the legal system that arranges the best result. Regarding the legislative deficiency that the Iraqi rules suffer from of not assigning a rule for attribution for initial issues, it is possible to benefit from this judicial trend of partitioning the resolutions and using this method while formulating the rule of the initial cases by relying on the most relevant law in determining the specialized law, which might be the Iraqi or a foreign law – whichever is relevant to achieve the targeted material outcome by using the multi-choice regulations.

In light of the developments that afflicted the rules of attribution and its continuous endeavor to reach objective justice without limiting disputed justice, all the basic theories in the international law on this reformist movement, including the referral, had to be affected after the referral. After the referral was seeking to achieve a specific type of justice for the parties of dispute, which is the attributive formulating disputed justice, through the attribution to the law of the judge and recognizing the first-class referral in consideration of the idea of a reserve settlement (Pigeonniere, 1924), taking into account the idea of public order (Buruianã, 2016), or by relying on the idea of coordination between different legal systems (Audit, 2003; Batiffol and Lagarde, 1993).

¹² For more about the justifications for resorting to the judge's law in these issues, see Salama (2008, p. 351).

Whatever the perception that the court relies on to implement its law in the case of the first referral, this leads to the goal of the court in the application of its national law considering its application compared to the application of a foreign law, which calls for the protection of some national interests that require it to be surrounded by rules of a protectionist nature. However, it later became an instrumental tool of a functional nature by relying on an analytical approach in light of a high interpretation of each of the rules of dispute separately. Therefore, the aim of the referral is to hold the jurisdiction of the most appropriate law for the disputed subject whether it is the law of the court or the law of a third country (Sadiq, 1974, p. 319). Thanks to the jurist Francescakis (1958, p. 203) in taking the functional analysis of the referral where the theory depends on the goals of the disputed rule and focuses on the search of whether the referral corresponds with the basis of the rule of the dispute in question or not. Within the framework of the functional perspective, there is nothing to prevent from taking the second-degree referral. If its endorsement achieves the considerations and the goals on which the rule of the attribution is based on the judge of dispute. Therefore, achieving the functions of the national attribution rules is one in the position of referring its types according to the modern foundations in the interpretation of resorting to referral (Khalid, 2014).

Therefore, we call on the Iraqi legislator, who rejects the idea of referral, to adopt a more flexible approach with a goal based on referral or rejection whenever it seems appropriate with restriction in this with the Iraqi national and international interests of individuals by respecting the goals that the Iraqi dispute rule aims to achieve and not implementing automatically the judge's law because relying on this mechanism leads to a contradiction with the function of Iraqi dispute rules within the scope of its coordination with the rules of foreign attribution and reaching the coexistence between the various legal systems. Indeed, the referral here serves the interest of foreign law through its rejection of the judicial jurisdiction and in return does not serve Iraqi law because it will apply the latter even after the Iraqi dispute rule rejects the jurisdiction of it in the first place. The Iraqi law will be implemented in this case as a reserve law and not the most appropriate law for the ruling of the incident subject to the dispute.

V. Conclusion

The author of this research has reached the following conclusions.

1. The concept of material justice is the intended meaning of studies on justice, and the philosophical difference in the meaning is a difference in the way it appears. Yet, it has one meaning and a fixed core that does not change. What changes are the methods of their appearance. There is a fundamental difference between legal justice and justice in the fundamental meaning, and that justice resulting from the rules of attribution, in its current traditional form, is justice described as formalism, which we compared with abstract legal justice. The rules of attribution were previously used in order to achieve justice, but the traditional understanding of this vocabulary wasted the opportunity to achieve justice in the objective goal (material).

2. Getting out of the traditional approach to the work of the rules of attribution represents a major challenge for the Iraqi legislator and the Iraqi judge, and the judicial diligence alike in order to reach the modern concept of justice under study.

3. To reach the material purpose, one needs several means, including legislative drafting, relying on the multiple determinants that are either in the form of the choice regulations or successive regulations or through the most proper ties.

4. The specialized court has an important role in reaching objective justice through the estimated mechanism granted to the specialized court. Therefore, discretionary authority takes place as a result of an implicit agreement between the legislator and the judiciary. The judiciary seeks the legislator from its report to bring about and give the nature of harmony or balance between the changing reality and the restrictions of the text in order to keep pace with the new developments. Also, regardless of the perfection of the legislation and the formulation of the rules of attribution, the legislator will keep being unable to find solutions for all of the offered disputes before the court. As a result, the rule of the judiciary will rise in developing the rule of attribution and make it work with reality.

We also have some recommendations to follow:

1. We recommend the Iraqi legislator include the rule of the harmful act as an evaluation means, which is one of the most trusted laws,

by adding another paragraph to the text of Art. 27 of the Civil Code to be as follows: “If it becomes clear from the circumstances that the relationship is on a strong bond with the law of another country, the judge may implement the law of that State.

2. We suggest that the text of Art. 22 of the Iraqi Civil Code be formulated as follows: “The inheritance law shall apply at the time of the person’s death, the law of another State (law of residence), or the law of the State in which he left the property.”

3. We suggest that the Iraqi legislator add a text to the first paragraph of Art. 19 of the Iraqi Civil Code, and it will be formulated as follows: “It is due in the objective conditions in the validity of the marriage to the law of each of the spouses. However, if the spouses do not hold the Iraqi citizenship, the most related law is applied to the dispute.”

4. We suggest amending the text of Para. 4 Art. 19 of the Iraqi Civil Code, so that it will be formulated as follows: “The judge applies the most appropriate law to prove the child’s filiation between: 1 – personal law of the defendant or the law of residency; 2 – personal law of the child or the law of residency; 3 – the Iraqi law is applied alone if the child is Iraqi or one of his parents is Iraqi at the time of birth.

5. We suggest that the Iraqi legislator (should) add a text that addresses this issue and be formulated as follows: “In all cases in which it is decided that a foreign law is to be implemented, the most relevant law to the issue is applied if the existence of foreign law or its meaning is not proven. Otherwise, Iraqi law is applied.”

6. We call upon the Iraqi legislator to use the method of partitioning of the types of attribution or the use of the flexible formula method, especially regarding Art. 27 because it allows the judge the capacity of estimation in choosing the appropriate law by surrounding the circumstances for each issue separately. This is appropriate to the privacy of electronic disputes and leads to ultimately reaching the desired goal, which is objective justice.

7. Taking advantage of this judicial trend of partitioning the solutions and using this method when drafting the rule for preliminary issues in Iraqi law by using the most relevant law to determine the specialized law, which can be an Iraqi or a foreign law, is the most relevant to achieving the required material results using that regulation of multiple choices.

8. We recommend that the Iraqi legislator amend Art. 31 of the Iraqi Civil Code as follows: “Renvoi shall not be accepted, whether it leads to the application of Iraqi law or the law of another state, unless the law expressly provides otherwise.”

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The Right to Family in National Constitutions

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Abstract: Constitutions are dynamic instruments that adapt to changes in society. A family plays a key role in social stability, generation continuity and national development. Worldwide, the constitutions increasingly recognize the family as a particular legal institution that needs state protection. The aim of the review is to make a comparative study of the concept of the family and its protection and support in the national constitutions of seventy countries. The author analyzes how different legal systems define, regulate and implement the right to family life. By means of comparative analysis, the study distinguishes three family models: traditional (marriage-centric), dynamic (with different types of family units) and neutral (protection through universal human rights). This shows that, despite consensus on the balance between traditional values and changing social conditions, there are still significant differences in the legal interpretation of the right to family. The review notes progress in recognizing the right to family life in the constitutions, but the practical implementation also depends on national legislation and legal mechanisms to ensure the family protection and support.

Keywords: Constitution; right to a family; family protection and support; state policy; family life

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Contents

I. Introduction	1024
II. Methodology	1026
III. Concepts of the Family in Constitutions	1027
IV. Implementation of Constitutional Family Protection and Support	1030
V. Conclusion	1035
References	1035

I. Introduction

The Constitution serves as a basis for the core values. It establishes the fundamental principles that guide the legal framework and the formation of social norms. Constitutions are living instruments; their general norms can sometimes accommodate social changes that once, when the constitution was adopted, were not even foreseen. Constitutional acts provide the basis for national legislation and, at the same time, demonstrate the state recognition of international standards. Due to their abstract nature and system-forming role in the legal system, the constitutional provisions need to be developed through the adoption of the relevant legal framework (Herzmann, 2019). In cases where direct implementation of constitutional norms is inevitable due to the lack of legislative specificity, an expansive interpretation of these norms is required. Thus, texts produced decades — or even centuries — ago can be adapted to suit contemporary circumstances.

Today, families require special legal protection across the world. Modern constitutional concepts of the family life have a greater impact on the recognition of the importance and implementation of the family life support and protection. By means of constitutions, countries influence changes in society's attitude towards the family and its role in the national development.

A family unit is crucial to the nation continuity, being both the basis of demographic stability and state security (Rybakov et al., 2025). Thus, the Basic Law for the Federal Republic of Germany (1949), Art. 6, recognizes the fundamental role of family life in social stability as it states, "Marriage and family shall enjoy the special protection of the

state.”¹ The constitutional protection of the right to family life can affirm the importance of the family as the foundation of the society; furthermore, the constitution should provide behavioral norms. It also helps to form moral and cultural values. The constitutional frameworks include comprehensive family policies, as countries recognize strategic importance of supporting family units. Article 226 of the Constitution of Brazil (1988) not only protects a traditional family union between a man and a woman, but also distinguishes stable unions between partners, reflecting changing social realities: “The community formed by a parent and their descendants is likewise considered a family unit.”²

On the other hand, there is ongoing debate as to whether provisions serving moral purposes should be incorporated into constitutions. Given that constitutional values are intended to be universal, and respect for the family may not meet that criterion, enshrining a right to family life in the constitution could be perceived as advancing a particular ideological position (Martinez Munoz, 2022). Nevertheless, an increasing number of countries are amending their constitutions to strengthen the right to family, its support and protection, indicating the evolving legal priority. Thus, in 2008 amendments to the Constitution of Albania (1998) added norms on the right to family: “Everyone has the right to get married and have a family” (Art. 53). Constitutional developments illustrate a shift in national legal systems from treating family matters as purely private concerns to recognising them as issues of public policy that require state protection and support. The constitutional evolution reflects a broader societal transformation where family life has emerged as a distinct constitutional value — rather than merely one of many social welfare objectives as in the past — warranting a dedicated legal framework and active governmental intervention.

In the context of the Constitutional Law, it is difficult to separate the idea of the right to family from other related rights as it includes family protection and support, the rights of family members, the rights

¹ Art. 6 of the Basic Law for the Federal Republic of Germany, 1949. Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0039 [Accessed 18.03.2025].

² Art. 226 of Constitution of Brazil, 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm [Accessed 18.03.2025].

of women and the rights of children. This study has no intention to cover all these topics, it will try to focus only on constitutional recognition of the right to family and family support and protection.

II. Methodology

The review relies on the comparative legal method to analyze constitutional provisions regarding the right to family and its protection and support in different jurisdictions. The author employs the methodological approach that combines qualitative content analysis of constitutional texts and a comparative case study to outline the trends in the Constitutional Law. The review focuses on the diverse sample of seventy countries that were carefully selected to ensure representation across various geographical regions as well as different legal traditions such as civil law, common law and mixed systems. It includes the following countries: Albania, Algeria, Andorra, Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Ecuador, Eswatini, Finland, France, Georgia, Germany, Honduras, Hungary, Iceland, Iran, Ireland, Italy, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Malawi, Malta, Mexico, Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Paraguay, Peru, Poland, Portugal, Russian Federation, Rwanda, Romania, Serbia, Slovakia, Slovenia, South Africa, Spain, Switzerland, Tajikistan, Tanzania, Turkey, Uruguay, Vietnam.

The countries were selected based on whether their constitutions contain explicit provisions relating to the family. The data collection process involved examining primary sources including full constitutional texts obtained from official databases. For its analytical framework, the study uses content analysis to identify constitutional references to keywords — “family,” “marriage,” “family protection,” and “family support” — and to classify provisions by the nature of the state’s obligations (protection, support, or both).

III. Concepts of the Family in Constitutions

Most constitutions provide a general definition of *family*. Some definitions refer to the family as the “basic,” “primary,” “natural” or “fundamental” group or unit of the society (e.g., under Art. 13, The Constitution of Andorra (1993), Art. 67, The Constitution of the Portuguese Republic (1976); Art. 27, The Constitution of the Kingdom of Eswatini (2005); Art. 17, The Constitution of the Republic of Cameroon (1972). Some other legal acts refer to the family as “a moral institution with inalienable and inherent rights, prior and superior to all positive law” (e.g., The Constitution of Ireland (1937)).³ In most cases, the constitutional concept of the family is closely linked to the provisions regulating marriage (e.g., Art. 22, The Constitution of Eritrea (1997); Art. 22, The Constitution of the Republic of Cyprus (1960); Art. 35, The Constitution of the Republic of Armenia (1995); Art. 48, The Constitution of the Republic of Moldova (1994); Art. 33, The Constitution of the Republic of Tajikistan (1994)). The Constitution of Costa Rica (1949) defines *marriage* as “an essential basis of the family”⁴ (Art. 52); The Constitution of Italy (1947) defines the family as “a natural society founded on marriage” (Art. 29).

In most constitutional provisions, *marriage* is regarded as a heterosexual unit between a man and a woman. The traditional definition of marriage is often reaffirmed in subsequent constitutional revisions, reflecting the ongoing institutionalization of certain family models at the legal level. The constitutional enshrinement of such marriage models serves not only to recognize the right to marry, but also to define the permissible boundaries of family formation under national law (Herzmann, 2019). The Constitution of Georgia (1995) regards marriage as “a union of a woman and a man for the purpose of founding a family” (Art. 30). The Constitution of Kenya (2010) points out “the right to marry a person of the opposite sex” of all adults (Art. 45). The

³ Art. 41 of the Irish Constitution (Bunreacht na hÉireann). Available at: <https://www.citizensinformation.ie/en/government-in-ireland/irish-constitution-1/constitution-introduction/> [Accessed 18.03.2025].

⁴ Constitución Política De La República De Costa Rica, 1947. Available at: <https://www.cso.go.cr/legislacion/constitucion.aspx> [Accessed 18.03.2025].

amendments of 2020 to the Basic Law of Hungary (2011) protected the institution of marriage as “the union of a man and a woman” (Art. L), the Constitution of Democratic Republic of the Congo (2005) reminds that “each individual has the right to marry with the person of their choice, of the opposite sex, and to establish a family” (Art. 40). Such legal understanding of marriage is intended to support traditional family forms (Choudhry and Herring, 2019).

Some constitutional acts explicitly prohibit the establishment of non-traditional forms of family. For instance, the Constitution of Burundi (2018) guarantees freedom of marriage as well as the right to choose a partner, specifying that “marriage between two people of the same sex is forbidden” (Art. 29). Rwanda recognized only “a civil monogamous marriage between a man and a woman” (Green and Kabata, 2021).⁵

The contemporary social realities, characterized by pluralistic family units, call for non-restrictive constitutional interpretations that take this diversity into account. Nevertheless, approaches to such constitutional provisions demonstrate significant divergences between legal systems, especially with regard to the recognition and conceptualization of family relationships. While a traditional marriage remains central to many constitutions, alternative family forms are increasing. Several constitutions distinguish other forms of partnership, such as cohabitation or non-marital family units. Namely, the Federal Constitution of the Swiss Confederation (1999) provides an even broader notion of the family unit as a “community of adults and children” (Art. 42); the Constitution of Brazil (1997) clarifies that “the community formed by a parent and his/her descendants shall also be considered a family unit” (Art. 226). The Basic Law of Hungary (2011) explicitly recognizes that family ties are also based on the relationship between parents and children (Art. L). Such a definition can be said to include the existence of intergenerational family relationships that may be based either on blood ties or family adoption. The Constitution of South Africa (1996) provides a particularly progressive example, extending protection to “various forms of family” in recognition of the country’s diverse cultural traditions and family structures (Section 28).

⁵ The Constitution of Rwanda, 2003, Art. 17.

Thus, the widespread use of constitutional provisions that simultaneously guarantee the right to family and the right to marry is quite natural, as a similar relationship between these rights is enshrined in key international legal instruments.⁶ Such legal continuity shows that, in the constitutions of different countries, the family – as the basic unit of society – is linked to the legal regulation of marriage, thereby forming a unified set of supplementary guarantees.

Some constitutional texts, such as the Austrian Federal Constitutional Law (1920) and the Constitution of the Netherlands (1815) do not contain any specific provisions referring to family life (Churchill et al., 2024). The Constitution of France (1958) contains no explicit provisions on family policy or family support. Article 34, however, makes only an indirect reference to marriage by assigning to Parliament the authority to legislate on matrimonial property regimes. This issue is also not enshrined in the French Declaration of the Rights of Man and the Citizen of 1789 (Naldini and Long, 2017).

A number of constitutions mention the right to family only in the context of the right to education or citizenship (e.g., Art. 75 Para. 19, the Constitution of Argentina (1853), Art. 76, the Constitution of Denmark (1953). Several constitutions show progressive development in principles guaranteeing equality for children regardless of their parents' marital status. This legal transformation represents an inevitable stage of constitutional development, as family norms gradually adapt to changing social constructions (e.g., the Constitution of Andorra (1993); the Constitution of Spain (1978)), as well as parental rights in relation to family life, regardless of the marital status of the parents (e.g., Bulgaria, Czech Republic, Moldova, Ireland).

In the context of child protection in Mexico⁷ and Colombia,⁸ existing regulations contain explicit references to biological ties. These norms have created a particular landscape of different models of constitutional concepts for family protection in Latin America (Herrera, 2011, pp. 85–94):

⁶ The Universal Declaration of Human Rights, 1948 (Art. 16). Available at: <https://www.ohchr.org/en/universal-declaration-of-human-rights> [Accessed 18.03.2025].

⁷ Constitution of Mexico, 1917, Art. 4.

⁸ Constitution of Colombia, 1991, Art. 42.

a) a restrictive model in which only “traditional” men and women are recognized as having the right to marry or to enter into *de facto* civil partnership (Art. 112, the Constitution of Honduras (1982);

b) an intermediate model in which the constitution protects all forms of the family but recognizes only marriage between a man and a woman (Art. 42, the Constitution of Colombia (1991); Art. 67, the Constitution of Ecuador (2008);

c) a broad model in which the constitution recognizes the right to marry or to enter into *a de facto* civil partnership (Art. 226, the Constitution of Brazil (1988); Art. 67, the Constitution of Ecuador (2008).

These constitutional reforms have been complemented by legislative developments across Latin America responding to changes in family structure, composition, and membership, including reforms on divorce, recognition of consensual unions (*de facto* couples), and joint parental custody (Espejo and Lathrop, 2019).

IV. Implementation of Constitutional Family Protection and Support

Family protection and support is gradually becoming an integral part of the legal system, deeply rooted in the constitutional meaning of the family as a fundamental social institution. The constitutional protection of the family manifests itself through various implementation mechanisms, ranging from explicit guarantees to judicial interpretation. In many constitutional texts, the distinction between the term “protection” and “support” of the family remains ambiguous, although in the constitutional practice there are two concepts (Putniņa, 2020). The family protection is an international standard, enshrined in the most important international documents. The constitutional obligation to protect and support the family can be recognized as a recent task of public authorities. At the national level, the right to family protection and support is enshrined in constitutions either by explicitly mentioning the guarantees of this right in constitutional texts or by direct implementation of the norms by national (constitutional) courts. In Belarus, constitutional family policy is implemented through various

normative legal acts and is declared in the Constitution: “Marriage, family, maternity, paternity and childhood are under the protection of the State” (Art. 32).

Constitutional texts include provisions to create favorable conditions for increasing the birth rate, to protect motherhood and childhood, and to strengthen the family as an institution. Due to their general nature and their role in the legal system, constitutional norms usually require legislative revision. When their direct application is required, in the absence of legislative elaboration, constitutional norms need more interpretation. It can be assumed that the concept of “protection” refers to a form of legal protection, while “support” should refer to specific measures of assistance. Unfortunately, the constitutional texts do not provide grounds for such an assumption. The terms “protection” and “support” are often found side by side, in the same constitutional norms. Moreover, many constitutional texts provide for “special protection” without distinguishing between “ordinary” and “special” protection. Nevertheless, the special nature of protection is conditioned by the status of the family as a cornerstone of society as it is stated in the Constitution of Poland (1997), “marriage as the union of a man and a woman, the family, motherhood and parenthood are under the protection and patronage of the Republic of Poland” (Art. 18).

Some constitutions ground family protection in a guarantee of the right to respect for private and family life, as in the Constitution of Bosnia and Herzegovina (1995), namely, “The right to private and family life, home” (Art. II Para. 3f) (see also the Constitution of the Republic of Iceland (1944); the Constitution of Monaco (1962), the Constitution of Malta (1964); the Constitution of Sweden (1974).

The notion of family support is rarely explicitly recognized as a right; it more commonly appears as part of the state’s supervisory powers or its general duty to assist families. Thus, family support is under the special protection of family guarantees. Some constitutions contain only general provisions, recognize certain forms of family support, or adopt a selective approach targeting specific families and their members. Provisions on family support are typically scattered throughout constitutional texts and relate to specific areas such as

children's rights, parenthood, social protection, employment benefits, health care, and education.

Thus, constitutions do not establish a comprehensive family support system, but rather set out the contours that must be supplemented by ordinary legislation. The Constitution of the People's Republic of China (1982) states, "Marriage, family, mother and child shall be under the protection of the State" (Art. 49); Art. 18 of the Constitution of Rwanda (2003) provides: "The family, being the natural foundation of Rwandan society, is protected by the State... The State puts in place appropriate legislation and organs for the protection of the family, particularly the child and mother, in order to ensure that the family flourishes" (Green and Kabata, 2021). The Constitution of Kyrgyzstan (2010) states: "Family, paternity, maternity and childhood shall be the subject of care of the entire society and preferential protection by law" (Art. 36).

The constitutional right to family logically gives rise to corresponding obligations, creating a stable system of state guardianship over this unit of society. This legal doctrine imposes requirements on public authorities, mandating specific actions to sustain family. Constitutional provisions on family rights cluster around three themes: (a) comprehensive family protection (e.g., Argentina, Colombia); (b) parental rights and duties (e.g., Brazil, Costa Rica, Paraguay, Armenia); and (c) equality of children irrespective of parents' marital status (e.g., Peru, Uruguay):

a) Comprehensive family protection: The Constitution of Argentina (1853, Art. 14-bis) provides that "The State shall grant... full protection of the family; protection of the welfare of the family; economic compensation to families and access to decent housing." The Constitution of Colombia (1991, Art. 42) states that "the State and society guarantee the integral protection of the family."

b) Rights and duties of parents: The Constitution of Brazil (1988, Art. 229) provides that "parents have a duty to assist, raise and educate their minor children." The Constitution of Costa Rica (1949, Art. 53) provides that "parents have the same obligations to their children born out of wedlock as to those born in it." The Constitution of Paraguay (1992, Art. 53) provides that "parents have the right and the obligation to assist, to feed, to educate, and to shelter [amparar] their minor

children.” The Constitution of Armenia (1995, Art. 36) provides that “parents shall have the right and obligation to take care of the rearing, education, health, and comprehensive and harmonious development of their children.”

c) Equality of children regardless of parental marital status: The Constitution of Peru (1993, Art. 6) states, in part, “It is the right and duty of parents to nourish, educate, and protect their children. Children have the duty to respect and aid their parents. All children have the same rights and duties. Any mention of the civil status of parents or of the nature of their relationship to the children in civil records or any other identification documents is prohibited.” The Constitution of Uruguay (1966, Art. 42) provides that “parents have the same duties toward children born outside of wedlock as toward children born within it. Maternity, regardless of the condition or circumstances of the mother, is entitled to the protection of society and to its assistance in case of destitution.”

The constitutional provisions on the family lay down a complex governance model with coordinated policy measures at various administrative levels. This support system combines assistance programs aimed at protecting the family through resources allocation, capacity development and family welfare strategies. Some constitutions connect cash benefits with standards such as a guarantee of human dignity (The 1831 Constitution of Belgium), a basic living wage (The 1999 Constitution of Finland) or a decent standard of living for an individual and his family (The 1994 Constitution of Moldova).

The constitutions clearly outline the basic standards of living in order that countries must guarantee to their citizens. They include basic needs, from basic food and clothing to adequate housing, as well as affordable health care and comprehensive social security. The Constitution of Italy (1947) provides family members with the necessary care: “the Republic protects mothers, children and the young by adopting necessary provisions” (Art. 31); the Constitution of Mexico (1917) declares: “Any family has the right to enjoy a decent and respectable house. The law will set the instruments and supports necessary to achieve such objective” (Chapter I Art. 4); the Constitution of the Portugal (1976) guarantees: “everyone shall possess the right for

themselves and their family to have an adequately sized dwelling that provides them with hygienic and comfortable conditions and preserves personal and family privacy” (Art. 65).

In other constitutions the criterion is based on special circumstances related to the family (Cassidy et al., 2018), such as maternity, large family or parenting: “Maternity, childhood and family shall be protected by the State”;⁹ the need for care or loss of breadwinner: “the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children”;¹⁰ widowhood or orphanhood: “the Confederation and Cantons shall endeavor to ensure that every person is protected against the economic consequences of old-age, invalidity, illness, accident, unemployment, maternity, being orphaned and being widowed”;¹¹ “the State shall ensure special protection for children who are orphaned, abandoned or deprived of a normal family environment in any way”;¹² “the State shall provide special protection to persons who are doubly vulnerable” (Art. 35 of the Constitution of Ecuador (2008)). The Constitution of Azerbaijan (1995) guarantees the right to social security and obliges the family “initially to render assistance to those in their family who need it” (Art. 38).

Finally, in some countries generally guaranteed rights to social protection or social security are explicitly directed at family, mothers and parents. They include more specific measures that are further outlined in the national legislation. In diverse constitutional systems, the enumeration of socio-economic rights — whether as precise provisions or broad principles — creates an expectation of state intervention and establishes a binding, not merely discretionary, obligation on the state to realize those guarantees (Choudhry and Herring, 2019). Thus, the effective family support and protection requires clear constitutional definitions that accommodate changing family structures while preserving core social values and specific mechanisms for translating constitutional principles into actionable policies.

⁹ Art. 38 of the Constitution of the Russian Federation, 1993.

¹⁰ Section 19 of the Constitution of Finland, 1999.

¹¹ Art. 41 of the Constitution of Switzerland, 1999.

¹² Art. 69 of the Constitution of Portugal, 1976.

V. Conclusion

This in-depth comparative review of constitutional provisions reveals several key findings about how countries conceptualize, define, and provide support for family units. Providing a precise legal definition of “family life” as a constitutional concept is impracticable given its inherently broad scope and the diverse forms of family relationships it covers. Comparative analysis reveals the limited explicit recognition of this right in constitutional texts or high court rulings, with its protections typically emerging implicitly through adjudication in family-related cases. The conceptualization of the right to family and its support and protection remains fundamentally contingent on legal traditions, societal norms, religious doctrines and political ideologies. While principles of human dignity, personal autonomy, and equal treatment have progressively informed constitutional recognition of the right to family, no international consensus exists regarding either the definitional boundaries of “family” or the scope of its legal protection within constitutional framework.

The study identifies three predominant constitutional approaches to the right to family and its support and protection: traditional models emphasizing marriage-based family structures, “progressive” systems recognizing diverse family forms, and neutral systems that address family issues indirectly through universal human rights protection. Of particular note is the growing trend in some countries (Armenia, Belarus, and the Russian Federation) to transform family support and protection from a general social-policy matter into a specific constitutional state obligation. Finally, while enshrining the right to family life is an important achievement, its effectiveness depends on supplementary legislation and robust legal oversight to ensure that these fundamental protections serve their intended purpose.

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