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Anti-Corruption Legislation in Vietnam: Barriers in Practical Application

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ABSTRACT

Corruption has persisted as one of the most complex and enduring challenges in human society. Since the mid-twentieth century, it has evolved into a widespread global issue, exerting harmful effects not only on economic growth but also on social ethics, political stability, and cultural values. Across many nations, corrupt behavior erodes institutional integrity, weakens citizen confidence, and impedes sustainable development. This study examines the nature, scope, and consequences of corruption, highlighting recent trends in Vietnam. Although the Vietnamese government has made consistent efforts through legislative reform and institutional restructuring, the practical outcomes remain below expectations. The central limitation lies in the lack of comprehensive enforcement and the inadequate deterrent effect of existing sanctions. By combining theoretical interpretation with empirical observation, the article argues that an effective anti-corruption strategy must focus on strengthening legal enforcement and ensuring equality before the law. Strict and impartial punishment of corrupt officials, particularly those holding Party or governmental positions, is essential to restore public trust and reinforce state legitimacy. The study thereby contributes to the ongoing academic and policy dialogue on promoting the rule of law and enhancing the efficiency of anti-corruption governance in transitional political systems.

INTRODUCTION

Corruption and efforts to prevent it have existed throughout the long course of human civilization. Across historical periods, corruption has not only reflected the moral decline of individuals but also exposed structural weaknesses in the exercise of public authority, creating systemic harm to political, economic, and cultural life. Since the latter half of the twentieth century, this phenomenon has evolved into a global crisis that undermines social morality, weakens institutional credibility, and poses serious threats to sustainable development.

During the past thirty years, numerous countries and international organizations have launched extensive strategies and programs aimed at reducing corruption. These initiatives include reforming legal frameworks, enhancing transparency in state management, strengthening the role of oversight by civil society, and expanding international cooperation in the investigation and prosecution of corruption cases. However, the practical outcomes remain limited. In many developing and transitional economies, corruption continues to adapt in increasingly complex forms, penetrating both public and private sectors. Such persistence erodes citizen trust, obstructs fair competition, and hinders the pursuit of inclusive and sustainable growth.

In the context of Vietnam, corruption has exhibited complicated and persistent characteristics, negatively affecting multiple dimensions of social life. Acknowledging its serious consequences, the Communist Party of Vietnam identified corruption as one of the four primary risks threatening the stability of the political system and the success of national renovation.[1] This recognition reflects the Party's consistent awareness of the fundamental importance of anti-corruption, linking it closely to the mission of building a socialist rule of law state and advancing a socialist-oriented market economy.

According to the National Strategy on Anti-Corruption to 2020, the prevention and control of corruption constitute a collective responsibility of the entire political system under the leadership of the Party. The strategy emphasizes the coordination among state agencies, social organizations, and citizens, while underlining the accountability of leaders of public institutions. Anti-corruption work is considered both an urgent and long-term mission, closely tied to the objectives of socio-economic reform and institutional modernization.[2]

Despite the visible progress achieved through legislation and enforcement, manifestations such as bureaucracy, abuse of authority, and harassment by certain officials still appear, particularly at the grassroots level. These problems diminish the moral authority of the Party, weaken public confidence, and highlight that corruption in Vietnam is not only a legal challenge but also a question of political ethics and administrative integrity.

In this situation, the Communist Party of Vietnam has repeatedly affirmed that combating corruption is a shared task of the entire political system under unified Party leadership.[3,4] The campaign must be implemented comprehensively, mobilizing the strength of governmental institutions, social organizations, trade unions, and the people at large. It must also be associated with the broader goals of socio-economic transformation, political stability, and the consolidation of national unity in building a socialist rule of law state during the new phase of development.

From this perspective, the study of Vietnam's anti-corruption legal framework, particularly in relation to obstacles in practical implementation, bears profound theoretical and practical relevance. Understanding the weaknesses within the institutional mechanism is essential for formulating solutions that improve the effectiveness and coherence of the legal system.

1 CPV. (2001). The 9th National Delegate Congress. Hanoi: The Truth.

2 CPV. (2021). The 13th National Delegate Congress. Hanoi: The Truth.

3 CPV. (2016). The 12th National Delegate Congress. Hanoi: The Truth.

4 CPV. (2021). The 13th National Delegate Congress. Hanoi: The Truth.

Such efforts will not only strengthen the rule of law but also advance the broader objective of sustainable development and national modernization.

1. LITERATURE REVIEW

1.1 Economic and investment environment impacts of corruption

Many works have focused on clarifying the relationship between corruption, economic growth, and investment in the context of Vietnam's transition to a socialist-oriented market economy. Anh, Minh, & Tran (2016) argue that corruption is a negative factor that reduces the efficiency of resource allocation, distorts market signals, and limits growth rates.[5] The authors demonstrate that although Vietnam has issued many legal regulations on transparency and integrity in public service, the effectiveness of enforcement is limited due to the lack of independent inspection and monitoring mechanisms.

Bai, Jayachandran, Malesky & Olken (2017) use empirical evidence on Vietnamese enterprises to show that corruption in the licensing, inspection, and access to capital processes is a major barrier to private sector development.[6] Despite the presence of anti-corruption legislation in the business environment, weak enforcement imposes significant "informal costs" on firms, which reduces incentives for innovation and long-term investment.

Nguyen, Tran, & Truong (2024) approach this issue at the local level, emphasizing that corruption levels in localities are closely linked to investment performance.[7] In provinces with high levels of corruption, firms tend to scale down operations and reduce investment, despite preferential policies. This reflects a clear gap between the anti-corruption legal framework and enforcement effectiveness in the context of local governance.

Notably, research by Huy, Khanh, Viet & Cuong (2025) assesses the large-scale anti-corruption campaign in Vietnam in the recent period.[8] The results show that the Government's strong measures have temporarily increased investor confidence, but have not created a sustainable impact on the business environment. The lack of consistency in law enforcement and the instability of the institutional framework make businesses still hesitant to expand investment.

Thus, studies in this area agree on the view that the effectiveness of anti-corruption law enforcement has a direct impact on market confidence and national competitiveness, and at the same time point out the need to strengthen independent enforcement and monitoring mechanisms to minimize informal costs in the economy.

1.2 Institutions, politics, and law in anti-corruption

The second research area focuses on analyzing the institutional, political, and legal aspects in the process of planning and implementing anti-corruption policies in Vietnam. Bui Hai Thiem (2019) is one of the pioneering scholars who pointed out that anti-corruption reforms in Vietnam are strongly influenced by political factors,[9] in which the Communist Party of Vietnam

5 Anh, N. N., Minh, N. N., Tran, N. B. (2016). Corruption and economic growth, with a focus on Vietnam. Crime, Law and Social Change, 65(4), 307-324. https://mpra.ub.uni-muenchen.de/84728/.

6 Bai, J., Jayachandran, S., Malesky, E. J., Olken, B. A. (2017). Firm growth and corruption: Empirical evidence from Vietnam. Oxford University Press on behalf of Royal Economic Society. The Economic Journal, 129(618), 651-677. https://doi.org/10.1111/ecoj.12560.

7 Nguyen, T. M., Tran, Q. T., Truong, T. T. T. (2024). Local corruption and corporate investment in an emerging market. Asia and the Global Economy,4(2), 100087. https://doi.org/10.1016/j.aglobe.2024.100087.

8 Huy, V. H., Khanh, H., Viet, H., Cuong, N. (2025). Investment under anticorruption: Evidence from the high-profile anticorruption campaign in Vietnam. Emerging Markets Review, 69. https://doi.org/10.1016/j.ememar.2025.101360.

9 Bui, H. T. (2019). The politics of anti-corruption and integrity system reform in Vietnam. In Hu-

plays a central role in guiding and controlling the implementation process. The author argues that although the legal framework has been expanded with the Law on Anti-Corruption (2018) and guiding documents, the concentration of power and the lack of independence of supervisory agencies remain the main barriers to practical effectiveness.[10]

Nguyen & Nguyen's research (2025) takes an institutional analysis approach, emphasizing that although the Vietnamese legal system on anti-corruption is comprehensive in terms of structure, it is "institutionally dependent", meaning that the effectiveness of the law depends on the level of political commitment and the ability of the administrative apparatus to operate.[11] The lack of a mechanism to ensure the independence of the courts, the procuracy, and the investigation agencies makes anti-corruption laws not as effective as expected.

Dung & Thanh (2023) extend the issue to the field of corruption in the private sector, pointing out that current laws do not have strong enough tools to control bribery between enterprises or between the private sector and the public sector.[12] Although Vietnam has criminalized the liability of legal entities, the mechanism for investigation, prosecution, and protection of whistleblowers is still weak, leading to an "imbalance" between regulations and practical application.

In addition, Giang (2024) analyzes the "furnace" campaign from a political economy perspective, arguing that this is both a political measure and a test of the effectiveness of the legal system.[13] The results show that this campaign contributes to strengthening integrity in the public sector, but at the same time reflects that anti-corruption in Vietnam is still closely tied to political power and cannot become a purely legal process.

Forde (2022) adds a theoretical perspective when viewing corruption in Vietnam as a "power accumulation structure" associated with a cronyism mechanism.[14] The author argues that although the law in this context is regularly reformed, it is difficult to achieve real effectiveness because it is dominated by group interests and lacks accountability.

In general, studies in this group agree on the argument that institutional and political barriers are the underlying cause of the failure of anti-corruption laws in Vietnam to be fully effective.

1.3 Law enforcement, media, and regional comparisons

The third research area extends to issues of law enforcement, the role of media, regional comparisons, and historical legal inheritance.

Nguyen and Nhan (2024) focus on the role of investigative journalism, considering it an important tool for monitoring and detecting corruption.[15] However, the study also found that press freedom and journalists' access to information are still constrained by the legal framework, making it difficult to investigate and report on corruption.

man rights and peace in Southeast Asia series 4: Challenging the norms (pp. 55–72). East Asia and the Pacific.

10 National Assembly. (2018). Law on Anti-Corruption (Law No. 36/2018/QH14). Hanoi.

11 Nguyen, N. A., Nguyen, D. N. (2025). Anti-corruption in Vietnam – an institutional analysis. Cogent Social Sciences, 11(1). https://doi.org/10.1080/23311886.2025.2460320.

12 Dung, N. D., Thanh, N. T. (2023). Private Sector Corruption in Vietnam: From Legislation to its Impact on the Economy. International Journal of Professional Business Review, 8(2), e01490. https://doi.org/10.26668/businessreview/2023.v8i2.1490.

13 Giang, N. K. (2024). The political economy of Vietnam's anti-corruption campaign. In Singh, D., Ha, H. T. (Eds.), Southeast Asian affairs 2024 (pp. 375–390). Singapore: ISEAS Publishing. https://doi.org/10.1355/9789815203516-023.

14 Forde, A. (2022). Vietnamese Patterns of Corruption and Accumulation: Research Puzzles. Journal of Contemporary Asia, 53(2), 253-266. https://doi.org/10.1080/00472336.2022.2037010.

15 Nguyen, D. Q., Nhan, H. (2024). The watchdog navigates to bark: investigative reporting on corruption in Vietnam. Media Asia, 51(4), 570-593. https://doi.org/10.1080/01296612.2024.2312658.

Maslen's (2025) report, conducted by Transparency International, provides a comprehensive overview of corruption patterns and anti-corruption policies in Vietnam.[16] The report found that Vietnam has made significant progress in lawmaking, but enforcement, asset transparency, and whistleblower protection remain major weaknesses. At the regional level, Nobumichi Teramura & Luke Nottage (2025) compared anti-corruption provisions in East Asian and South Asian investment treaties, finding that although Vietnam has adapted many regulations to international standards, it still lacks an effective internalization mechanism.[17]

In particular, Van, Van, Minh & Trong (2024) approach the issue from a legal historical perspective, analyzing the crime of bribery in the Hong Duc Code and considering it a typical legal precedent for current regulations on public service integrity.[18] This study affirms that the Vietnamese legal tradition has always attached great importance to the ethics of officials and transparency in the performance of public duties, but in the modern context, this factor has not been effectively transformed into a legal enforcement mechanism.

1.4 Research gap

Synthesizing studies in this group shows that, although Vietnam has made much progress in perfecting the law and raising social awareness, the gap between legal regulations and practical effectiveness remains a big challenge. The lack of coordination between state agencies, the media, and civil society means that the law has not really played its role in preventing, detecting, and handling corrupt acts.

The three research areas above have provided a comprehensive view of the issue of corruption and anti-corruption laws in Vietnam. The works all agree that barriers in the practice of law enforcement originate from institutional, political, and social factors, in which the effectiveness of the law depends on the level of transparency, independence of the judicial system, and monitoring mechanisms.

However, the current gap lies in the lack of in-depth empirical studies on the effectiveness of new legal regulations, as well as the relationship between anti-corruption, social trust, and improving the investment environment. The topic "Anti-Corruption Legislation in Vietnam: Barriers in Practical Application" aims to overcome that gap by analyzing institutional, legal, and behavioral barriers in the practice of anti-corruption law enforcement in Vietnam, contributing to perfecting the legal foundation and promoting transparency and integrity in national governance.

2. METHODOLOGY

2.1 Documentary analysis and synthesis

Objective: The purpose of this method is to clarify the theoretical foundations and the current system of legal regulations and policy frameworks concerning the prevention and control of corruption in Vietnam.

Data Sources: The study draws upon a variety of normative and institutional documents, including the Law on Anti-Corruption adopted in 2018 and its guiding decrees and circulars. Supplementary materials comprise annual and thematic reports of the Government Inspectorate, the Ministry of Justice, and the Judicial

16 Maslen, C. (2025). *Vietnam: Corruption and anti-corruption* (U4 Helpdesk Answer 2025:21). Bergen: Transparency International and U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute. https://knowledgehub.transparency.org/assets/uploads/helpdesk/Vietnam-Corruption-and-anti-corruption_250903_113041.pdf.

17 Teramura, N., Nottage, L. (2025). Corruption-related provisions in East and South Asian investment agreements: An empirical analysis. Journal of International Economic Law, 28(2), 157-183. https://doi.org/10.1093/jiel/jgaf013.

18 Van, L. N., Van, A. D., Minh, A. P., Trong, A. P. (2024). The Crime of Accepting Bribes in the Hong Duc Code and Its Significance as a Model for Contemporary Criminal Law in Vietnam. International Journal of Law and Society, 7(3), 112-117. https://doi.org/10.11648/j.ijls.20240703.13.

Committee of the National Assembly. In addition, analytical and comparative data are collected from international organizations such as the United Nations Development Program, the Organization for Economic Co-operation and Development, and the World Bank.

Approach: The analysis focuses on the systematization of relevant legal provisions, the interpretation of fundamental concepts, the clarification of the scope and objectives of anti-corruption legislation, and the identification of core policy orientations. The findings are then compared with international standards and best practices to determine the level of harmonization between Vietnam's legal framework and global approaches to integrity and transparency.

2.2 Legal reality analysis

Objective: This method aims to identify and interpret the main barriers that arise in the practical implementation of anti-corruption laws and policies.

Practical Data: Empirical evidence is gathered from representative cases that have been tried in court or subjected to administrative sanctions, inspection and audit findings, official conclusions of the State Audit Office, and independent evaluations prepared by social organizations, professional associations, and policy experts.

Method: Through detailed analysis of judicial judgments, inspection reports, and law enforcement assessments, the study identifies recurring patterns and systemic obstacles that hinder the effectiveness of anti-corruption mechanisms. These include inconsistencies and loopholes in the legal framework, conflicts of interest within administrative structures, insufficient coordination among competent authorities, and inadequate mechanisms for the protection of whistleblowers and informants.

2.3 Comparative legal method

Objective: The purpose of the comparative legal approach is to evaluate the Vietnamese anti-corruption framework in relation to selected foreign models, thereby identifying both its advantages and limitations.

Method: The comparison is conducted on the basis of specific criteria such as the transparency of asset declaration mechanisms, the independence of investigative bodies, the effectiveness of whistleblower protection, and the participation of civil society in monitoring public integrity. The institutional differences and their practical implications are analyzed to draw lessons for improving Vietnam's anti-corruption system and ensuring greater coherence between legal provisions and implementation outcomes.

3. FINDINGS AND DISCUSSION

3.1 Findings

3.1.1 Current landscape of corruption in Vietnam

Corruption in Vietnam remains a pervasive and complex reality that cuts across sectors and levels of authority. Wherever material incentives intersect with non-material interests, opportunities for rent seeking and illicit gain tend to arise. The Political Report of the Ninth National Congress identified corruption as a serious national problem, a conclusion that still frames contemporary assessments of risks to governance and development in the country.[19]

The spectrum of corrupt conduct is diverse. It includes embezzlement, bribery, diversion and misuse of public assets, fraudulent appropriation of property from the state and citizens, and abuse of position or power to create artificial obstacles for private gain. Other recurrent patterns include the creation of unauthorized funds and the use of budget resources contrary to legal provisions for

19 CPV. (2021). The 13th National Delegate Congress. Hanoi: The Truth.

particularistic benefits. Such practices have been documented across public finance and procurement, land administration, taxation, banking, customs, commercial activities, education, health services, the justice chain, and the administration of social programs, among other domains.[20]

In terms of scale, corruption appears at the level of individuals and groups, in both sporadic and structured forms. The measurable loss to the public purse can reach very large magnitudes, with some cases causing damage amounting to hundreds or thousands of billions of Vietnamese dong. The intangible harm is even more serious. Corruption erodes public trust, weakens the moral authority of public institutions, and undermines confidence in the reform trajectory pursued by the Communist Party of Vietnam.

3.1.2 Evolution of anti-corruption efforts

Vietnam has treated anti-corruption as a core governance priority since the early years of the revolutionary state. President Ho Chi Minh warned that greed is an internal enemy and must be confronted decisively.[21] In recent decades, the Party, the State, and the people have consistently characterized corruption as a grave national threat and have acted to contain it through a mix of prevention, detection, and sanctioning measures.[22]

Policy directions and legal instruments have been repeatedly articulated in Party resolutions, statutes, executive regulations, and institutional guidance. Public communication through mass media and scholarly and professional forums has made corruption and anti-corruption a regular item in central and sectoral reporting. The issue is also a subject of daily public debate, reflecting the expectations and frustrations of citizens in both urban and rural settings.

Over time, Vietnam has moved from foundational enactments to more comprehensive institutional reforms. The Law on Anti-Corruption and the Law on Thrift Practice and Waste Combat were important milestones, followed by the establishment of the Central Steering Committee on Anti-Corruption. A theme resolution of the Third Conference of the Tenth Central Committee offered a frank appraisal of constraints, clarified objectives and guiding views, and set out measures and implementation responsibilities in a structured way. The Law on Anti-Corruption of 2018 represents a major update. It came into effect on 1 July 2019 and expanded the scope of asset and income declaration, mandated publicity of declarations, clarified leadership accountability when corruption occurs in agencies and units, and strengthened the consequences for dishonest declarations, including possible dismissal.[23] These innovations aim to improve transparency, reinforce personal responsibility in declaration and control of conflicts, and elevate the role of leaders in building integrity-centered organizations.

The political determination behind these reforms is to shape four conditions that reduce the space for wrongdoing. The goal is that people do not need to engage in corruption, cannot easily do so, do not want to do so, and do not dare to do so. Despite this broad approach, outcomes have not yet matched expectations. Official assessments still describe corruption and waste as serious and widespread in several sectors and levels of administration, with complex modalities and negative social effects that diminish public confidence.[24]

20 WB. (2005). Legal corruption. World Bank. https://web.archive.org/web/20150505185227/http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf.

21 Minh, H. C. (1995). Complete episode, episode 5. Hanoi: National Politics.

22 CPV. (2016). The 12th National Delegate Congress. Hanoi: The Truth.

23 National Assembly. (2018). Law on Anti-Corruption (Law No. 36/2018/QH14). Hanoi.

24 Politburo. (2022). Ten-year review of anti-corruption and control of negative practices from 2012 to 2022. Tasks and solutions for the coming period. Hanoi.

3.1.3 Why results remain below expectations

The shortfall does not imply an absence of effort. Rather, it indicates that the strength, continuity, and coherence of policy implementation have not always been adequate to produce transformative outcomes. Objective factors identified in recent research point to the rapid diversification of economic activities that has exceeded the regulatory and oversight capacity of existing institutions. Weaknesses in the system of checks and balances, combined with incomplete mechanisms for transparency and accountability, have enabled conflicts of interest and abuse of authority to persist in practice.[25]

Another key limitation lies in the structural complexity of corruption itself. Contemporary studies reveal that corruption is no longer confined to the public sector but increasingly manifests in non-state domains and at the intersection between public and private interests. This blurred boundary complicates traditional control models that rely solely on administrative or criminal sanctions. In sectors such as public procurement, land management, banking, and health care, forms of collusive corruption often occur through networks that involve both state officials and private actors, making detection and accountability far more difficult.[26]

At the same time, normative inconsistencies within the legal system have constrained deterrence capacity. The coexistence of overlapping regulations, discretionary enforcement, and limited coordination among supervisory bodies has allowed certain acts of misconduct to fall outside the scope of effective sanctioning. The persistence of waste, embezzlement, and regulatory capture demonstrates that enforcement must be integrated with preventive measures, ensuring that behavioral norms are internalized across the entire administrative system rather than addressed only through isolated punitive actions.[27]

Equally important is the challenge of cultivating an integrity culture in the public service. Despite improvements in political education and ethics training, the incentive structure within many institutions remains insufficient to encourage honest behavior or reward compliance. Inadequate protection for whistleblowers, limited citizen oversight, and weak linkage between performance evaluation and integrity standards reduce the effectiveness of moral and institutional deterrents. Thus, the effectiveness of anti-corruption policy depends not only on law enforcement but also on building a comprehensive system of incentives, accountability, and civic participation that reinforces transparency and collective responsibility.

3.1.4 Strategic orientation and breakthrough priorities

In the near term, a breakthrough strategy should prioritize two achievable conditions while longer-term structural reforms continue to mature. The priority is to reduce the desire to engage in corruption by fostering a social environment where integrity is a valued norm and corrupt conduct is a source of shame, community disapproval, and legal consequence. The second priority is to increase the risk calculus against corruption so that the likelihood and severity of punishment decisively outweigh expected gains. Three mutually reinforcing measures are central:

(1) Promote ethical standards and a public

25 Van, L. N., Van, A. D., Minh, A. P., Trong, A. P. (2024). The Crime of Accepting Bribes in the Hong Duc Code and Its Significance as a Model for Contemporary Criminal Law in Vietnam. International Journal of Law and Society, 7(3), 112-117. https://doi.org/10.11648/j.ijls.20240703.13.

26 Doan, H. N. (2025). Corruption in the non-state sector in Vietnam today and some solutions for the coming period. Journal of Communist. https://www.tapchicongsan.org.vn/web/guest/kinh-te/-/2018/1115802/tham-nhung-trong-khu-vuc-ngoai-nha-nuoc-tai-viet-nam-hien-nay-va-mot-so-giai-phap-phong%2C-chong-thoi-gian-toi.aspx.

27 Vu, V. H. (2025). An explanation of corruption, waste and negative practices and solutions for the current stage. State Management Journal. https://www.quanlynhanuoc.vn/2025/05/15/luan-giai-ve-tham-nhung-lang-phi-tieu-cuc-va-giai-phap-phong-chong-tham-nhung-lang-phi-tieu-cuc-trong-giai-doan-hien-nay/.

culture that recognizes integrity as a social good. This involves education in civic values, visible rewards for honest public service, and community-based condemnation of corrupt acts.

(2) Deepen democratic practices and community oversight in line with grassroots democracy regulations. Citizens need safe channels to raise concerns, robust legal protection for whistleblowers, and a credible expectation that reports will lead to impartial investigation.

(3) Apply strict and impartial sanctions whenever corruption is detected, with special emphasis on officials and Party members who hold public power. Public disclosure of outcomes, full recovery of illicit gains, and consistent discipline are essential to restore trust and deter future violations.

These priorities echo the official ten-year review of anti-corruption and negative practice control from 2012 to 2022, which called for stronger responsibility of leaders, an integrity culture across the system, and tighter coordination among inspection, audit, investigation, prosecution, adjudication, and enforcement bodies to close enforcement gaps and improve deterrence quality and speed.[28]

3.1.5 Implementation focus

Effective implementation begins with example setting by public officials and Party members. Primary Party organizations should cultivate an internal climate of openness and accountability, with genuine self-criticism and peer review, so that warning signs are identified early and addressed promptly. When violations occur, procedures must be predictable, evidence-based, and firm for all subjects, with no tolerance for selective enforcement.

Citizen oversight, investigative journalism, and professional monitoring by social organizations can amplify detection capacity and reinforce norms against wrongdoing. Public awareness campaigns that highlight the social costs of corruption and celebrate clean governance can convert millions of eyes and ears into an integrity network that constrains misconduct through social disapproval as well as through legal consequences. Historical experience shows that firm punishment of bribery and embezzlement has long underpinned public service ethics in Vietnam. The contemporary legal order should continue this principle by tailoring modern sanctions to present-day economic realities while safeguarding due process and equality before the law.

Over the long run, sustained progress also requires continued work on the other two conditions that are more resource-intensive. Expanding inclusive development and improving public service delivery can reduce the perceived need for illicit rents. Consolidating a rule of law state with strong transparency, fit-for-purpose procedures, and real-time data systems can make corruption much harder to perform and much easier to detect. These structural investments take time, but the interim breakthrough measures described above can cool the problem while the broader system matures.

3.2 Discussion

The results show that the barriers to the practical application of anti-corruption laws in Vietnam stem from the complex interaction between institutional structures, economic incentives, and social norms of integrity. In other words, the current normative framework has made significant progress in form, but its enforcement effectiveness is still limited by the independence of law enforcement actors, the ability of public oversight, and mechanisms to reduce opportunities for profiteering in high-risk processes. This discussion highlights three main axes, including economic impacts and market signals, institutional and political-legal conditions, and the role of social media and regional comparisons. From there, it proposes a reform logic towards increasing the probability of detection, ensuring the certainty of sanc-

28 Politburo. (2022). Ten-year review of anti-corruption and control of negative practices from 2012 to 2022. Tasks and solutions for the coming period. Hanoi.

tions, and reducing the opportunities for violations in sensitive stages.

On the economic impact axis, empirical evidence confirms that corruption creates informal costs and distorts market signals, thereby reducing investment and innovation by firms. Using Vietnamese firm data, show that informal costs in licensing, inspection, and access to capital are significant barriers to scale growth and long-term investment by the private sector, even though anti-corruption regulations are present in the business environment, but are not enforced strongly enough to eliminate incentives for illegal payments.[29]

At the macro level, argued that corruption reduces resource allocation efficiency and stunts growth through price signal distortions and wasted public investment, while transparency and integrity regulations are difficult to be effective in the absence of credible independent monitoring mechanisms.[30] At the local level, the negative relationship between corruption and investment performance is quite consistent when policy incentives are offset by institutional risks, causing firms to shrink operations and delay capital expansion.[31] These observations reinforce the argument that to encourage sustainable investment, it is necessary to move from campaign-based signaling to process standardization, because political nudges only create temporary trust if they are not institutionalized into predictable and consistent processing chains.[32]

Regarding the institutional and political-legal axis, many studies converge on the assessment of the institutional dependence of anti-corruption laws. Bui Hai Thiem (2019) analyzes that integrity reform in Vietnam is strongly influenced by political factors, in which the leading role of the Party is both a driving force and a limit when designing mechanisms for power control and accountability.[33] According to the institutional analysis approach, Nguyen and Nguyen point out that the effectiveness of the law depends significantly on the level of political commitment and the operational capacity of the administrative apparatus, in the context of the lack of guarantees of independence of the courts, the procuracy, and the investigation agency.[34] On that basis, Forde sketches corruption as a power accumulation structure associated with cronyism, where group interests can undermine the substantive impact of normative reforms despite the high frequency of law amendments.[35]

From the political economy perspective, Giang asserts that the anti-corruption campaign has strengthened public sector integrity, but at the same time shows that anti-corruption is still closely tied to political power and has not yet operated as a purely legal process, which requires further institutionalization of the process to reduce dependence on episodic impulses.[36]

29 Bai, J., Jayachandran, S., Malesky, E. J., Olken, B. A. (2017). Firm growth and corruption: Empirical evidence from Vietnam. Oxford University Press on behalf of Royal Economic Society. The Economic Journal, 129(618), 651-677. https://doi.org/10.1111/ecoj.12560.

30 Anh, N. N., Minh, N. N., Tran, N. B. (2016). Corruption and economic growth, with a focus on Vietnam. Crime, Law and Social Change, 65(4), 307-324. https://mpra.ub.uni-muenchen.de/84728/.

31 Nguyen, D. Q., Nhan, H. (2024). The watchdog navigates to bark: investigative reporting on corruption in Vietnam. Media Asia, 51(4), 570-593. https://doi.org/10.1080/01296612.2024.2312658.

32 Huy, V. H., Khanh, H., Viet, H., Cuong, N. (2025). Investment under anticorruption: Evidence from the high-profile anticorruption campaign in Vietnam. Emerging Markets Review, 69. https://doi.org/10.1016/j.ememar.2025.101360.

33 Bui, H. T. (2019). The politics of anti-corruption and integrity system reform in Vietnam. In Human rights and peace in Southeast Asia series 4: Challenging the norms (pp. 55–72). East Asia and the Pacific.

34 Nguyen, N. A., Nguyen, D. N. (2025). Anti-corruption in Vietnam – an institutional analysis. Cogent Social Sciences, 11(1). https://doi.org/10.1080/23311886.2025.2460320.

35 Forde, A. (2022). Vietnamese Patterns of Corruption and Accumulation: Research Puzzles. Journal of Contemporary Asia, 53(2), 253-266. https://doi.org/10.1080/00472336.2022.2037010.

36 Giang, N. K. (2024). The political economy of Vietnam's anti-corruption campaign. In Singh, D., Ha, H. T. (Eds.), Southeast Asian affairs 2024 (pp. 375-390). Singapore: ISEAS Publishing. https://doi.

The third axis relates to enforcement, communication, and social norms. The role of investigative journalism is seen as an important discovery channel, but is limited by the legal framework on access to information and occupational risks, making the monitoring capacity of society not yet at the level necessary to create effective preventive pressure.[37] The overview report of Transparency International and U4 noted that Vietnam has made significant progress in lawmaking, but bottlenecks remain in the disclosure of income and assets, whistleblower protection mechanisms, and the consistency of enforcement in the field.[38]

From a regional comparative perspective, analysis of anti-corruption provisions in East Asian and South Asian investment agreements shows that Vietnam has significantly adapted to international standards but lacks an effective internalization mechanism to convert external commitments into domestic enforcement capacity.[39]

From the legal tradition, the study of bribery in the National Dynasty Penal Code of the Hong Duc period shows that the foundation of public service ethics and the spirit of deterrence have long been codified, suggesting lessons on designing sanctions stratified by public service status and the level of damage to maximize the overall deterrent effect.[40] It is also worth noting the World Bank's argument on legal corruption in a broad sense, according to which institutional loopholes can create space for self-interested behavior within a weak legal framework, blurring the line between legal wrongdoing and deviation from governance standards, thereby challenging purely norm-based prevention efforts.

From the three axes of analysis above, the policy logic can be reinterpreted in the direction of balancing strong deterrence and reducing opportunities and incentives:

First, increasing the probability of detection through data technology and risk-based auditing is a fundamental breakthrough. It is necessary to merge the asset declaration database with tax, land, business registration, and financial transaction data, and deploy random checks with a frequency large enough to change the risk expectations of potential violators.

Second, ensuring the certainty of sanctions rather than just increasing the nominal penalty. Certainty is reflected in the time-bound processing process, transparency in the criteria for quantifying damages, and the mechanism for recovering assets of unaccounted origin according to international judicial cooperation standards. Comparative experience with the internalization of anti-corruption provisions in investment treaties shows that deterrence depends on cross-border enforcement of illicit assets and complex ownership structures, which Vietnam needs to improve soon through a network of mutual legal assistance and internationally compatible anti-money laundering regulations.[41]

Third, reduce opportunities for profiteering by redesigning processes in high-risk areas such as land, public procurement and licensing. The focus is on digitizing the entire procedural lifecycle, making real-time progress milestones, document lists, bid prices and contractor se-

org/10.1355/9789815203516-023.

37 Nguyen, D. Q., Nhan, H. (2024). The watchdog navigates to bark: investigative reporting on corruption in Vietnam. Media Asia, 51(4), 570-593. https://doi.org/10.1080/01296612.2024.2312658.

38 Maslen, C. (2025). Vietnam: Corruption and anti-corruption (U4 Helpdesk Answer 2025:21). Bergen: Transparency International and U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute. https://knowledgehub.transparency.org/assets/uploads/helpdesk/Vietnam-Corruption-and-anti-corruption_250903_113041.pdf.

39 Teramura, N., Nottage, L. (2025). Corruption-related provisions in East and South Asian investment agreements: An empirical analysis. Journal of International Economic Law, 28(2), 157-183. https://doi.org/10.1093/jiel/jgaf013.

40 Luong, P. V., Van, V. H. (2019). Study of the Laws under the Feudal Dynasties of Vietnam. Addaiyan Journal of Arts, Humanities and Social Sciences, 1(7). https://aipublisher.org/article_id=87.

41 Teramura, N., Nottage, L. (2025). Corruption-related provisions in East and South Asian investment agreements: An empirical analysis. Journal of International Economic Law, 28(2), 157-183. https://doi.org/10.1093/jiel/jgaf013.

lection results public, so that electronic audit trails become a soft but continuous deterrent mechanism.

One point to emphasize is that the measure of anti-corruption effectiveness should shift from perception to verifiable behavioral indicators. Observable variables such as the rate of timely settlement, the difference between the estimated and winning bid prices, the rate of randomly verified declarations, and the rate of return on assets recovered allow for monitoring the progress of reforms at local and sectoral levels. When results are published periodically, competition for integrity can develop, creating incentives for improvement from within the apparatus.

Empirical evidence on the impact of anti-corruption campaigns on investment confidence suggests that the signaling effect is real but short-lived without changes in operating rules. Huy et al. note that improved confidence does not translate into sustained investment growth when enforcement consistency is limited, reinforcing the need to institutionalize predictable, non-discriminatory standards for handling violations and with independent monitoring mechanisms.[42]

Thus, an effective anti-corruption strategy for Vietnam needs to synchronize the two components. The institutional component is to strengthen the relative independence of supervision and investigation, data interconnection and standardization of case handling procedures. The behavioral component is to reduce opportunities and incentives through process redesign, public service performance management and integrity standards communication. When both components are operated together, the conditions of not wanting to be corrupt and not daring to be corrupt will reach a threshold large enough to create a sustainable effect, narrowing the gap between legal documents and enforcement, thereby strengthening the rule of law and restoring social trust.

CONCLUSION

Power inherently carries the risk of being distorted or abused. Corruption is often viewed as an intrinsic flaw that accompanies the possession of power. For this reason, it is essential to construct a comprehensive mechanism that supervises and limits the exercise of authority. Every form of power must be placed under effective institutional control, ensuring that authority is always linked to accountability. The principle must be that the greater the authority one holds, the heavier the corresponding responsibility becomes. In order to realize this principle, inspection, supervision, and oversight mechanisms must be reinforced to guarantee that all power is exercised in a lawful, transparent, and responsible manner. The process of delegation and decentralization must always go hand in hand with clear assignment of duties and enforceable accountability. Officials who display indications of misconduct or engage in corrupt practices should be promptly transferred, demoted, or dismissed. Leaders who allow corruption to occur within their agencies must also bear direct responsibility and face strict disciplinary actions. These measures are designed to ensure that power is effectively constrained by institutional rules, figuratively “locking authority within the cage of regulations”, as expressed in Party documents.

Particular attention should be given to monitoring how senior officials, especially heads of agencies, use their authority. Internal collective supervision within leadership structures must be strengthened. At the same time, the decision-making processes of those who exercise power should be made public, allowing both officials and citizens to participate in lawful supervision. The struggle against corruption is an arduous and enduring endeavor. Yet, from the progress and lessons of recent years, particularly since the Twelfth National Congress,

42 Huy, V. H., Khanh, H., Viet, H., Cuong, N. (2025). Investment under anticorruption: Evidence from the high-profile anticorruption campaign in Vietnam. Emerging Markets Review, 69. https://doi.org/10.1016/j.ememar.2025.101360.

there is firm ground for optimism. With strong political determination from the Party and the State, the coordinated participation of Party committees, public authorities, and the entire political system, along with active engagement from society, the anti-corruption movement has achieved visible progress. Continued perseverance and institutional refinement will enable Vietnam to gradually contain and repel corruption, contributing to the creation of a cleaner and stronger Party and State that meet the aspirations of the people and the demands of national development.

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MEDIATION EQUITY MODEL: Legal Framework for Strengthening Mediation Institutions as an Alternative Dispute Resolution in Indonesia's Tourism Sector

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ABSTRACT

The relationship between employers and workers in the context of industrial relations in Indonesia's tourism sector is often vulnerable to disputes. This sector, as one of the pillars of the national economy, faces complex interests between workers who seek to protect their rights and employers who focus on maximizing profits. With the increasing development of the tourism sector post-pandemic, issues such as layoffs and dissatisfaction with working conditions are becoming more prominent. These disputes have become urgent issues, especially considering the tourism sector's characteristics that are susceptible to economic fluctuations. The dispute resolution process through bipartite negotiations, as regulated in Law Number 2 of 2004, often encounters deadlocks, necessitating the need for tripartite mechanisms such as mediation as a non-litigation dispute resolution option. The characteristics of industrial relations mediation, although designed to seek solutions impartially, face various obstacles in their implementation, including a lack of skilled human resources and financial support. Through an in-depth study of the applicable regulations, existing mediation practices, and the challenges faced, this research proposes concrete steps to improve the effectiveness of mediation in resolving industrial relations disputes in the tourism sector. The results of this study are expected to contribute to the creation of a harmonious and sustainable industrial climate in Indonesia's tourism sector.

INTRODUCTION

The relationship between employers and workers within the framework of industrial relations is one of the relationships prone to disputes.[1] The tourism sector in Indonesia, as one of the economic pillars, is an economic sector with characteristics that make it susceptible to industrial relations disputes between workers and employers. This is due to the complexity of the relationship, which involves differing interests between the two parties. Workers often seek protection of their rights, while employers strive to maximize profits in a competitive and dynamic business context. With the increasing demand for tourism post-pandemic, these disputes are becoming more apparent, especially concerning issues such as termination of employment (TOE) and dissatisfaction with working conditions.[2]

Industrial relations disputes in the tourism sector are becoming an increasingly pressing

1 Sudiarawan, K. A., Martana, P. A. (2019). Implikasi hukum pengaturan upah minimum sektoral Kabupaten Badung terhadap pelaku usaha pada sektor kepariwisataan di Kabupaten Badung Provinsi Bali. Supremasi Hukum: Jurnal Penelitian Hukum, 28(1), 33-56.

2 Sari, A. A., Dewi, A. A., Arthanaya, I. W. (2021). Perlindungan hukum karyawan terkait pengurangan gaji akibat pandemi Covid-19 pada hotel dan restaurant di area Seminyak. Jurnal Analogi Hukum, 3(3), 382-387.

issue to address, given the sector's vulnerability to economic fluctuations and job uncertainty. The tourism sector, which encompasses various industries such as hotels, restaurants, and transportation, often faces challenges in maintaining harmonious relations between workers and employers. Worker dissatisfaction with working conditions, wages, and minimal legal protection can trigger disputes that potentially disrupt company operations and harm all parties involved. Along with the development of the business world closely linked to the tourism sector, it is crucial to have an effective and efficient dispute resolution mechanism. With a good dispute resolution mechanism in place, industry players can focus more on improving the quality of their services.[3]

In the context of industrial relations dispute resolution, in every industrial relations dispute, the prevailing laws and regulations mandate that the worker/laborer or the labor union/worker union and the employer must first attempt to resolve the issue through bipartite negotiation, as stipulated in Articles 6 and 7 of Law Number 2 of 2004 concerning the Settlement of Industrial Relations Disputes (UU PPHI)[4]. This process aims to reach a mutually beneficial agreement, where both parties can convey their interests and expectations before moving to the next stages of dispute resolution. However, resolving industrial relations disputes through this bipartite mechanism often reaches a deadlock, where both parties fail to achieve the desired agreement. When bipartite negotiations between the worker and the employer do not reach an agreement, proven by a final report stating that the bipartite negotiation has failed, the parties can then resolve their dispute through tripartite mechanisms such as mediation, conciliation, or arbitration, as regulated in Articles 8 to 54 of the UU PPHI, which can be an option in dispute resolution aimed at providing a fair solution for all parties involved.[5]

Mediation, as one of the dispute resolution methods, is a negotiation that has a unique characteristic because it involves a neutral mediator from a government agency.[6] The resolution of disputes through mediation is carried out by a mediator located in every office of the agency responsible for manpower affairs at the Regency/City level. This mediation process is designed to broker the conflict and seek a joint solution without siding with either party. Although mediation is expected to reduce tension, there are still weaknesses in the institutional arrangement and the implementation of mediation itself. Many obstacles arise in the implementation of mediation, including a lack of skilled human resources and adequate financial support to optimally run the process. Previous research by the author titled "Mediation Equity Model: Legal Framework for Strengthening Mediation Institutions as an Alternative Dispute Resolution in Indonesia's Tourism Sector", which took the tourism area of Mandalika, West Nusa Tenggara as its research location, showed that various weaknesses and constraints still exist in the implementation of Industrial Relations Mediation as a choice for resolving disputes between workers and employers in the tourism sector.

There is similar previous research that has been conducted on the topic of industrial relations mediation, which includes: "Paradigmatic Problems of Industrial Relation Dispute Settlement on the Perspective of Pancasila Industrial Relations", by Aries Harianto[7] – Journal of Law and Legal Reform, Year 2024; "Konsep Penyelesaian Perselisihan Hubungan Industrial Antara Serikat Pekerja Dengan Perusahaan Melalui Combined Process (Med-Arbitrase)" (The Con-

3 Sellang, K., Ahmad, J., Mustanir, A. (2022). Strategi dalam peningkatan kualitas pelayanan publik: Dimensi, konsep, indikator dan implementasinya. Qiara Media, 12.

4 Indonesia. (2004). Law Number 2 of 2004 concerning The Settlement of Industrial Relations Disputes. Government of Indonesia.

5 *Ibid.*

6 Arsalan, H., Putri, D. S. (2020). Reformasi hukum dan hak asasi manusia dalam penyelesaian perselisihan hubungan industrial. Jurnal HAM, 11(1), 39-49.

7 Harianto, A. (2024). Paradigmatic Problems of Industrial Relation Dispute Settlement in the Perspective of Pancasila Industrial Relations. Journal of Law and Legal Reform, 5(1), 27–37.

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The above-mentioned studies generally aim to dissect the resolution of industrial relations disputes, mediation specifically, and the development of mediation as a mechanism for resolving industrial relations disputes. This research offers novelty compared to previous studies because it focuses on the tourism sector, adapting to the dominant characteristics of disputes that occur in this sector. Furthermore, this study also attempts to map the normative weaknesses of mediation regulation, referring to the existing Industrial Relations Dispute Settlement Law (UU PPHI) and related regulations, as well as mapping the empirical constraints of mediation implementation, by conducting field research in Indonesia's tourism hubs, based on the existing conditions on the ground. This subsequently serves as the basis for formulating a strengthened mediation as an effective and efficient non-litigation option for resolving disputes in the tourism sector in the future.

Although industrial relations mediation in Indonesia has been widely discussed academically, existing studies have mostly focused on the manufacturing, plantation, or general labor sectors. This study specifically examines the effectiveness and institutional challenges of mediation in the tourism industry. This sector is characterized by seasonal workers, informal work arrangements, and vulnerability to economic shocks, which still have limitations. In addition, empirical studies that integrate the normative framework of the Industrial Relations Dispute Resolution Law with the reality on the ground in tourism centers such as Bali, Mandalika, and Lombok are still rare. This indicates a significant research gap, a need to understand the extent to which the current mediation framework functions in resolving disputes in the tourism sector, and to identify the legal and institutional reforms needed to improve its effectiveness.

Therefore, given the lack of effectiveness in the implementation of a norm concerning the effectiveness of industrial relations dispute settlement in the tourism sector, it is necessary to formulate an institutional strengthening of mediation to enhance the effectiveness of industrial relations dispute settlement in the tourism sector. This research includes 3 problem formulations, which are:

1. What are the characteristics of the Industrial Relations Disputes currently occurring in the Tourism Sector?
2. Is the current Institutional Arrangement for Industrial Relations Mediation, which refers to the Industrial Relations Dispute Settlement Law (UU PPHI), representative enough to be used as an option for resolving industrial relations disputes in the Tourism Sector?
3. What is the formulation for Institutional Strengthening of Mediation as an effective Non-Litigation Option for Resolving Industrial Relations Disputes in the Tourism Sector?

8 Mantili, R. (2021). Konsep Penyelesaian Perselisihan Hubungan Industrial Antara Serikat Pekerja dengan Perusahaan Melalui Combined Process (Med-Arbitrase). Jurnal Bina Mulia Hukum, 6(1), 1-12.

9 Dermawan, F. A., & Sarnawa, B. (2021). Peran Dinas Tenaga Kerja Dalam Proses Mediasi Penyelesaian Permasalahan Hubungan Industrial. Media of Law and Sharia, 2(1), 45–54.

10 Arsalan, Op. Cit.

METHODOLOGY

This research adopts a normative legal study approach, supplemented by field research (empirical) to produce a comprehensive analysis. The normative design focuses on literature review, utilizing the conceptual approach and the statutory approach to identify the normative weaknesses of industrial relations mediation regulations, particularly in Law Number 2 of 2004 concerning the Settlement of Industrial Relations Disputes (UU PPHI) and related implementing regulations. The primary data for this section consists of statutory regulations, supported by secondary data such as legal literature, journals, and court decisions. Meanwhile, the empirical design uses a factual approach through field research aimed at mapping the obstacles and implementation practices of mediation on the ground. Primary empirical data is collected through in-depth interviews.

The location for the field research is focused on Indonesia's tourism hubs, taking case studies in the Manpower and Transmigration Office of West Nusa Tenggara Province and the Manpower Office of Bali Province, chosen due to the high volume of industrial relations dispute cases in the tourism sector. Primary data collection is conducted through structured interviews with a total of 6 (six) respondents divided into three categories: 2 Industrial Relations Mediators (1 from each Office), 2 Representatives of Trade/Labor Unions (actively handling Termination of Employment and Rights Disputes in the hotel/tourism sector), and 2 Representatives of Employers (HRD/Legal) from tourism companies (5-star hotels) that have undergone the mediation process. This data collection is scheduled to be phased between June and September 2024. The collected data from both approaches will then be analyzed qualitatively, presented in a descriptive-analytical form, with the final goal of formulating a Mediation Institution Reinforcement Model (Mediation Equity Model) as an effective and efficient non-litigation dispute resolution option in the tourism sector.

1. CHARACTERISTICS OF INDUSTRIAL RELATIONS DISPUTES IN THE TOURISM SECTOR

Initially, the relationship between employees and employers was purely civil in nature. However, due to the existence of a superior-subordinate relationship or a power dynamic, it became highly vulnerable to exploitation, regardless of its form. Given this condition, the state needs to be present in resolving the disputes that occur in the employment relationship through the dispute resolution mechanism regulated in the Industrial Relations Dispute Settlement Law (UU PPHI).

The relationship between employees and employers is a power relationship because there is one who holds power (the employer) and one who is subjected to it (the employee). The disparity in industrial society resulting from the unequal relationship between the bourgeoisie and the proletariat leads to industrial conflict. Furthermore, industrial relations are closely tied to the interests of both employees and employers, which consequently creates the potential for disagreements and even disputes between the two parties.[11]

In an industrial relations dispute, there are three main parties involved in the scope of resolution: the employees (labor union), the employer, and the government. Industrial relations disputes can manifest in various forms, which are then categorized into several classifications of disputes within the Industrial Relations Dispute Settlement Law (UU PPHI).

In general, the provision of Article 1 point 1 of the Industrial Relations Dispute Settlement Law (UU PPHI) defines an industrial relations dispute as: Differences of opinion resulting in conflict between the employer or association of employers and the employee/worker or labor

11 Karsona, A. M., Putri, S. A., Mulyati, E., Kartikasari, R. (2020). Perspektif penyelesaian sengketa ketenagakerjaan melalui Pengadilan Hubungan Industrial dalam menghadapi Masyarakat Ekonomi ASEAN. Jurnal Poros Hukum Padjadjaran, 1(2), 158-168.

union/trade union due to a dispute of rights, dispute of interest, dispute over termination of employment, and a dispute between labor unions/trade unions within the same company.

The types of disputes referred to are regulated in Article 2 of the Industrial Relations Dispute Settlement Law (UU PPHI), which includes, but is not limited to:

1. Dispute of Rights (Perselisihan Hak): "A dispute arising from the non-fulfillment of rights, resulting from differences in the implementation or interpretation of the provisions of laws and regulations, employment agreements (work contracts), company regulations, or collective labor agreements" (Article 1, point 2).
2. Dispute of Interest (Perselisihan Kepentingan): "A dispute arising in the employment relationship due to a lack of consensus regarding the creation, and/or amendment of working conditions stipulated in the employment agreement, company regulations, or collective labor agreement" (Article 1, point 3).
3. Dispute over Termination of Employment (Perselisihan Pemutusan Hubungan Kerja – PHK): "A dispute arising from a lack of consensus regarding the termination of the employment relationship by one of the parties" (Article 1, point 4).
4. Dispute Between Labor Unions/Trade Unions Within One Company (Perselisihan antar serikat pekerja/serikat buruh dalam satu perusahaan): "A dispute between a labor union/trade union and another labor union/trade union within only one company, due to a lack of consensus concerning membership, the exercise of rights, and trade union obligations" (Article 1, point 5).

In a practical context, referring to the field research conducted, especially in the tourism sector, a phenomenon was also found where industrial relations disputes within the tourism context are dominated by disputes over Termination of Employment and Disputes of Rights. This aligns with the conceptual definition of these two types of disputes, which emphasize the non-fulfillment of rights that should be obtained by the employees as regulated in the laws and regulations and the autonomous rules applicable within the company (Employment Agreements, Company Regulations, Collective Labor Agreements) for disputes of rights. Furthermore, there is a rampant condition of termination of employment based on various disputed reasons/grounds, as well as the fulfillment of severance pay and other economic rights following the termination of employment at the company.

This phenomenon is supported by data indicating that, nationally, based on a survey conducted by the Ministry of Manpower of the Republic of Indonesia in 2020 (during the pandemic period), approximately 88% of companies were impacted, resulting in losses to company operations.[12] The tourism sector, with its characteristic high sensitivity to market changes and crises, serves as a clear example of the high number of Termination of Employment (PHK) and Rights disputes. The survey from the Indonesian Ministry of Manpower in the same year, which indicated 88% of companies were impacted by the pandemic, is directly reflected in this sector. Many hotels, restaurants, and travel agencies were compelled to implement efficiency measures, often resulting in mass layoffs. This situation was also evident in subsequent years, consistently showing a trend where PHK disputes remain the most dominant type of dispute in the tourism sector, followed by Rights disputes, which have an overlapping character.

On the other hand, the general labor condition in Indonesia, referencing data reports from the Ministry of Manpower of the Republic of Indonesia, also shows a similar situation, where there were 7,566 industrial relations dispute cases throughout 2024, dominated by Termina-

12 Dananjaya, N.S., Sudiarawan, K.A., dkk. (2023). Penerapan keunggulan karakteristik penyelesaian sengketa secara non litigasi dalam penyelesaian perselisihan hubungan industrial. (Laporan Penelitian Hibah Unggulan Udayana). LPPM Universitas Udayana.

tion of Employment (PHK) disputes as the most frequently reported type, totaling 5,192 cases.[13]

Table 1. Number of Industrial Relations Disputes by Type in 2023

TYPE OF DISPUTE	NUMBER OF DISPUTE
Termination of Employment Dispute (PHK)	7.275
Rights Dispute	2.554
Interest Dispute	387
Dispute between the Labor Union	51

Source: <databoks.katadata.co.id>

The phenomenon of the high number of disputes is closely related to the need for effective, efficient, and fair industrial relations dispute resolution mechanisms for the parties involved. These disputes must go through the settlement mechanism regulated in the Industrial Relations Dispute Settlement Law (UU PPHI). Its success, therefore, becomes one of the proving grounds for the dispute resolution mechanism set out in the UU PPHI, particularly at the stage of bipartite negotiation, the tripartite mechanism, or through resolution via the Industrial Relations Court. The high number of Termination of Employment (PHK) disputes, reaching 5,192 cases in 2024, proves that the PHK process does not always run smoothly. Even though companies often claim PHK is carried out for efficiency, workers' rights, such as severance pay, long service award pay, and compensation for rights, are frequently not fulfilled in accordance with the Labor Law and its derivative regulations. Aside from PHK, Disputes of Rights are also a major problem, with 2,033 cases in 2024. These include disputes related to unpaid overtime wages, allowances, or bonuses not provided as stipulated. In the context of tourism, where working hours are often irregular and dependent on seasons, these kinds of disputes are very common.

On the other hand, it was also found that the number of disputes that were submitted to and resolved by the Industrial Relations Court over the past five (5) years is still considered high. This indirectly indicates that there are still various weaknesses in the current non-litigation mechanisms for resolving industrial relations disputes in Indonesia.

Table 2. Number of Disputes in the Industrial Relations Court (PHI)

YEAR	NUMBER OF DISPUTES IN THE IRC (PHI) (UP TO DECISION)
2020	1231
2021	1114
2022	1478
2023	1255
2024	876

Source: Directory of Decisions of the Supreme Court of the Republic of Indonesia

The table above shows data on the number of disputes submitted to (up to the point of decision) the Industrial Relations Court in 2020, reaching 1,231 cases,[14] in 2021, it reached 1,114 cases,[15] and in 2022, it experienced a surge, reaching 1,478 cases.[16] Meanwhile, in 2023, 1,255 cases were recorded as resolved at the Industrial Relations Court.[17] Meanwhile, in 2024, a total of 876 cases were recorded.[18] His situation indicates that resolution through non-litigation

13 Databoks. (2023). Ini Banyaknya Perselisihan Hubungan Industrial di Indonesia pada 2023. https://databoks.katadata.co.id/datapublish/2024/03/20/ini-banyaknya-perselisihan-hubungan-industrial-di-indonesia-pada-2023.

14 Direktori Putusan Mahkamah Agung. (2020). https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/mahkamah-agung/kategori/phi/tahunjenis/putus/tahun/2020.html.

15 Ibid. (2021). https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/mahkamah-agung/kategori/phi/tahunjenis/putus/tahun/2021.html.

16 Ibid. (2022). https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/mahkamah-agung/kategori/phi/tahunjenis/putus/tahun/2022.html.

17 Ibid. (2023). https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/mahkamah-agung/kategori/phi/tahunjenis/putus/tahun/2023.html.

18 Ibid. (2024). https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/mahkamah-agung/kategori/phi/tahunjenis/putus/tahun/2024.html

channels, including mediation, still harbors various issues that make it difficult to maximize its potential as a preliminary dispute resolution mechanism at the company level.

Based on the description above, and concerning the existing characteristics of industrial relations in Indonesia, the analysis of data and field research indicates that Termination of Employment (PHK) Disputes and Rights Disputes are the two types of disputes that currently dominate industrial relations conflict in Indonesia. A similar condition is observed in the tourism sector, which is also predominantly affected by the same types of disputes. The overlapping nature of these two dispute types, combined with the highly dynamic Indonesian labor environment where the regulatory standing of the parties (employees and employers) remains unequal, implies a potential increase in both the quantity and complexity (quality) of disputes, including those in the tourism sector as a continuously growing part of the business world.

2. INSTITUTIONAL REGULATION OF INDUSTRIAL RELATIONS MEDIATION: THE PERSPECTIVE OF THE UU PPHI

The Industrial Relations Dispute Settlement Law (UU PPHI), as the formal law for industrial dispute resolution, stipulates that if bipartite negotiation fails, one or both parties must register the dispute with the local agency responsible for manpower/labor affairs, attaching proof that attempts at resolution through bipartite negotiation have been made. After receiving the registration from one or both parties, the local labor agency is obligated to offer the parties the option to agree on a resolution through conciliation or arbitration. If the parties fail to make a choice for resolution through conciliation or arbitration within 7 (seven) working days, the labor agency shall delegate the dispute resolution to a mediator, covering all four types of disputes.

The three stages mentioned above are in accordance with the provisions of Article 6, paragraph (1) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (UU ADR)[19], which stipulates that civil disputes or differences of opinion may be resolved by the parties through alternative dispute resolution based on good faith.[20] In the industrial relations dispute settlement system, these stages are known as the tripartite mechanism, involving a third party outside of the disputing parties. This tripartite resolution mechanism constitutes the structure of the Indonesian labor system, involving the government or a third party that is required to be protective and supportive.[21] This is crucial because the parties in these industrial relations disputes have unequal positions: the employee is identified with a weak position, while the employer is identified with a stronger social and economic position, with the worker depending on the employer for income to meet their living needs.[22] This situation is thus philosophically intended to be safeguarded by the characteristic presence of a third party in dispute resolution through the tripartite mechanism.

The Tripartite Mechanism under the Industrial Relations Dispute Settlement Law (UU PPHI) is regulated in several related provisions, including: Resolution through Mediation (Articles 8 to 16), Resolution through Conciliation (Articles 17 to 28), and Resolution through Arbitration (Articles 29 to 54). In addition to the UU PPHI, the tripartite mechanism via mediation is specifically regulated through Minister of Manpower and Transmigration Regulation No. 17 of

19 Indonesia. (1999). Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution. Government of Indonesia.

20 Irawan, N. (2023). Studi Yuridis Normatif Implementasi Regulasi Perselisihan Hubungan Industrial. Jurnal Ketenagakerjaan, 18(1), 49.

21 Hidayat, R. (2023). Kepastian Hukum Putusan Tripartit Dalam Penyelesaian Perselisihan Hubungan Industrial Berdasarkan Undang-Undang Nomor 2 Tahun 2004 Tentang Penyelesaian Perselisihan Hubungan Industrial. Dalam SeNaSPU: Seminar Nasional Sekolah Pascasarjana (Vol. 1, No. 1, hlm. 177).

22 Irawan, N. op.cit.

2014 concerning the Appointment and Dismissal of Industrial Relations Mediators and Mediation Procedures.[23] The tripartite mechanism via conciliation is specifically regulated through the Minister of Manpower and Transmigration Regulation No. PER.10/MEN/V/2005 concerning the Appointment and Dismissal of Conciliators and Conciliation Procedures.[24]

The following section will outline some of the weaknesses in the current industrial relations dispute settlement regulations applicable in Indonesia, referencing the UU PPHI and its related implementing regulations. This discussion will specifically focus on the mediation mechanism as the second (subsequent) stage that the parties may pursue in an industrial relations dispute after bipartite negotiation has been declared a failure.

a) Definition (Meaning) of Industrial Relations Mediation

Article 1 point 11 of the Industrial Relations Dispute Settlement Law (UU PPHI) stipulates that Industrial Relations Mediation, hereinafter referred to as mediation, is the resolution of disputes of rights, disputes of interest, disputes over termination of employment, and disputes between labor unions/trade unions within only one company through deliberation facilitated by one or more neutral mediators. Furthermore, Article 1 point 12 of the UU PPHI stipulates that an Industrial Relations Mediator, hereinafter referred to as the mediator, is a government employee of the agency responsible for manpower/labor affairs who meets the requirements to be a mediator established by the Minister, whose duty is to conduct mediation and has the obligation to provide a written recommendation to the disputing parties to resolve disputes of rights, disputes of interest, disputes over termination of employment, and disputes between labor unions/trade unions within only one company. Based on these regulations, the operational definition of mediation and industrial relations mediators in the UU PPHI emphasizes the resolution of disputes through deliberation facilitated by a neutral third party who must be a government employee in the field of manpower, meets the mediator's requirements, and has the obligation to provide a written recommendation to the disputing parties. The emphasis on the mediator being (limited to) a government employee in the manpower sector and their obligation to provide a written recommendation without strong binding power results in the institutional role of the mediator being weakened.

b) The Status of the Recommendation in Industrial Relations Mediation

Referring to the provisions of Article 13 of the Industrial Relations Dispute Settlement Law (UU PPHI), it is stipulated that:

If a settlement agreement for the industrial relations dispute is not reached through mediation, then:

a. The mediator issues a written recommendation;
b. The written recommendation referred to in letter a must be submitted to the parties within a maximum period of 10 (ten) working days from the first mediation session;
c. The parties must have provided a written response to the mediator, stating whether they agree or reject the written recommendation, within a maximum period of 10 (ten) working days after receiving the written recommendation;
d. The party that does not provide its opinion, as referred to in letter c, is deemed to reject the written recommendation;
e. if the parties agree to the written recommendation as referred to in letter a, then within a maximum period of 3 (three)

23 Ministry of Manpower and Transmigration of the Republic of Indonesia. (2014). Regulation No. 17 of 2014 on the Appointment and Dismissal of Industrial Relations Mediators and Mediation Procedures. Government of Indonesia

24 Ministry of Manpower and Transmigration of the Republic of Indonesia. (2005). Regulation PER.10/MEN/V/2005 on the Appointment and Dismissal of Conciliators and Conciliation Procedures. Government of Indonesia.

working days from the date the written recommendation is agreed upon, the mediator must have finished assisting the parties in drafting a Joint Agreement (Perjanjian Bersama) to be subsequently registered at the Industrial Relations Court within the District Court in the jurisdiction where the parties entered into the Joint Agreement, to obtain a certificate of registration.

Furthermore, Article 14 paragraph (1) of the UU PPHI stipulates that: "If the written recommendation as referred to in Article 13 paragraph (2) letter a is rejected by one or both parties, then the parties or one of the parties may continue the dispute resolution to the local Industrial Relations Court at the District Court".

The regulation concerning the mediator's obligation to issue a written recommendation when no agreement is reached, without being accompanied by a regulation regarding the binding power of the recommendation, results in the parties (especially the party in the strong position) treating/using the recommendation merely as a formality so that the dispute resolution can then be escalated to the Industrial Relations Court. The party in the weak position (the employee) is disadvantaged both technically and in terms of the increasingly lengthy time required for dispute resolution.

c) Regulation of Mediator Duties

Based on the provisions of Article 6 of Minister of Manpower and Transmigration Regulation No. 17 of 2014 (Permenakertrans No. 17/2014), the Mediator is tasked with:

a. Fostering industrial relations;
b. Developing industrial relations; and
c. Settling Industrial Relations Disputes out of court.

In carrying out their duties, especially in the out-of-court settlement of industrial relations disputes through mediation, cooperation with the Labor Inspector (Pengawas Ketenagakerjaan) is highly necessary, so the institutional relationship between the mediator and the labor inspector in dispute resolution needs to be strengthened (not limited to mere coordination).

d) Regulation of Mediator Obligations

Based on the provisions of Article 8 of Permenakertrans No. 17/2014, the Mediator has the following obligations in resolving Industrial Relations Disputes:

a. To request the parties to negotiate before the Mediation process is carried out
b. To summon the disputing parties:
c. To lead and regulate the course of the Mediation session;
d. To assist the parties in drafting a Joint Agreement, if an agreement is reached;
e. To issue a written recommendation, if an agreement is not reached;
f. To create minutes of the Industrial Relations Dispute settlement;
g. To maintain the confidentiality of all information obtained;
h. To prepare a report on the results of the Industrial Relations Dispute settlement to the Director General or the Head of the Provincial Agency, or the Head of the relevant Regency/City Agency; and
i. To record the results of the Industrial Relations Dispute settlement in the Industrial Relations Dispute registration book.

Regarding the mediator's obligations, reinforcement is needed so that the mediator is obliged to facilitate and encourage the Parties to explore and uncover their interests, seek the best settlement options for the Parties, and work together to settle.

e) Regulation of Mediator Posts and Jurisdiction

Based on the provisions of Article 11 of Minister of Manpower and Transmigration Regulation No. 17 of 2014 (Permenakertrans No. 17/2014), the Mediator is posted at the: a. Ministry; b. Provincial Agency (Dinas Provinsi); c. Regency/City Agency (Dinas Kabupaten/Kota).

Furthermore, Article 12 of Permenakertrans No. 17/2014 stipulates that:

(1) The Mediator posted at the Ministry, as referred to in Article 11 letter a, is authorized to:
   a. Conduct Mediation for Industrial Relations Disputes that occur in more than 1 (one) provincial territory; and
   b. Provide technical assistance, supervision, and monitoring of Industrial Relations Dispute settlement carried out by Mediators at the Provincial Agency and/or Regency/City Agency.

(2) The Mediator posted at the Provincial Agency, as referred to in Article 11 letter b, is authorized to:
   a. Conduct Mediation for Industrial Relations Disputes that occur in more than 1 (one) regency/city within 1 (one) province;
   b. Conduct Mediation for Industrial Relations Disputes delegated by the Ministry or Regency/City Agency;
   c. Conduct Mediation for Industrial Relations Disputes at the request of a Regency/City Agency that does not have a Mediator; and
   d. Provide technical assistance, supervision, and monitoring of Industrial Relations Dispute settlement carried out by Mediators at the Regency/City Agency.

(3) The Mediator posted at the Regency/City Agency, as referred to in Article 11 letter c, is authorized to:
   a. Conduct Mediation for Industrial Relations Disputes that occur in the relevant regency/city;
   b. Conduct Mediation for Industrial Relations Disputes delegated by the Ministry or Provincial Agency.

The regulation regarding the placement of mediators at the Ministry, Provincial Agency, and Regency/City Agency, each with its respective authority, without regulating the proportional number of mediators in each region (regency), implies difficulties for employees when a dispute occurs. This is particularly true when a Regency/City Agency does not have a mediator, leading to the case being transferred to the Provincial Agency (where the provincial capital may be far from the regency/city where the dispute occurred). These various regulations indicate that there are weak points in the institutional and procedural formulation of industrial relations mediation as one of the resolution options between employees and employers, in reference to the currently applicable UU PPHI as the formal law.

3. LEGAL FRAMEWORK FOR STRENGTHENING INSTITUTIONAL MEDIATION IN INDUSTRIAL RELATIONS DISPUTE SETTLEMENT IN THE TOURISM SECTOR IN THE FUTURE

Based on the discussion in the previous sub-chapter, there are various regulatory weaknesses that consequently imply an imbalance in the position of the parties, particularly for workers, which this study attempts to counterbalance through the Tripartite Equity Model, a component of the IRS Equity Model. The following is an elaboration of the formulation of the principle of balance in regulating the position of the parties, particularly the worker, in the tripartite mechanism, as formulated through the Tripartite Equity Model.

The following describes several forms of strengthening that can be carried out on mediation institutions with a focus on efforts to provide dispute resolution mechanisms that are able to place both workers and employers in a balanced position. The forms of strengthening mediation institutions referred to include the following:

a) Regulation Regarding The Good Faith of the Parties in Mediation Implementation

Based on the analysis of industrial relations cases and supported by empirical research, the weakness in regulating the mediation stage

within the tripartite industrial relations dispute settlement mechanism lies in the lack of good faith from the parties, especially the party with the dominant position, in maximizing mediation as a dispute settlement mechanism. This consequently implies the difficulty of mediation being implemented in accordance with the procedures and provisions regulated in the legislation. Conceptually, mediation is a "good faith" procedure where the disputing parties submit suggestions on how the mediator can resolve the dispute, since they are unable to do so themselves.[25] In contract law, good faith emphasizes honesty in achieving a common goal, which must be upheld by the parties.[26]

The UU PPHI does not specifically regulate the absence of parties and the legal consequences if a party fails to act in good faith during mediation. However, Article 13 paragraph (1) point b of Permenakertrans 17 of 2014 regulates the mediator's work procedures, one of which is: preparing a written summons for the parties to attend, with due consideration of the timing, so that the Mediation session can be held no later than 7 (seven) working days from receiving the delegation of duties to settle the dispute. Furthermore, paragraph (3) stipulates that if the applicant party that registered the dispute fails to attend after being duly and properly summoned 3 (three) times, the Industrial Relations Dispute registration shall be deleted from the dispute registration book. Paragraph (4) stipulates that if the respondent party fails to attend after being duly and properly summoned 3 (three) times, the Mediator shall issue a written recommendation based on the existing data.

This condition creates the potential for the party in the stronger position (the company), with unlimited access to capital and resources, to ignore this stage due to weak regulation or to treat it merely as a formality to be completed before the dispute is eventually channeled for resolution through the Industrial Relations Court.

Based on these conditions, it is crucial to regulate the good faith of the parties in carrying out mediation and the legal consequences if the parties fail to act in good faith during mediation. This will strengthen the position of the worker, as the weaker party, when settlement through mediation is chosen after the failure of bipartite negotiation. Based on this, a regulatory formulation regarding the good faith of the parties in the UU PPHI is needed, which minimally regulates: The Parties and/or their legal representatives are obliged to pursue mediation with good faith; Matters that can be declared as lack of good faith by the parties or one of the parties in the implementation of mediation; and the legal consequences if the parties or one of the parties fails to act in good faith in the implementation of mediation. In the context of the absence of one party in the mediation process, it is important to note that the information provided by the party that attends in good faith becomes information deemed correct by the mediator and is placed as a determining element in drafting the mediator's recommendation.

Regulating the good faith of the parties in the implementation of mediation will imply institutional strengthening in the regulation of industrial relations mediation. By regulating the good faith of the parties in mediation, it is expected to be able to balance the positions of the parties and prevent certain conditions, such as negligence or the perception of formality, which were previously potentially exploited by the party in the stronger position.

b) Strengthening the Status of The Industrial Relations Mediator's Recommendation

Article 13 paragraph (2) of the UU PPHI stipulates that if an agreement for the settlement of the industrial relations dispute is not reached through mediation, then:

25 Kesek, S. (2015). Studi Komparasi Penyelesaian Perselisihan Hubungan Industrial Melalui Mediasi dan Konsiliasi. Dedikasi: Jurnal Ilmiah Sosial, Hukum, Budaya, 31(2), 133.

26 Safrida, S., Kamello, T., Purba, H., Sembiring, R. (2024). Asas Itikad Baik Dalam Perjanjian Kerja Bersama Antara Pengusaha Dengan Serikat Pekerja ditinjau dari Hukum Perjanjian. Inspiring Law Journal, 2(1), 59.

a. The mediator shall issue a written recommendation;
b. The written recommendation referred to in letter a must be delivered to the parties no later than 10 (ten) working days from the first mediation session;
c. The parties must provide a written response to the mediator, stating whether they agree or reject the written recommendation, no later than 10 (ten) working days after receiving the written recommendation;
d. The party that does not provide its opinion as referred to in letter c shall be deemed to reject the written recommendation;
e. If the parties agree to the written recommendation referred to in letter a, then no later than 3 (three) working days from the date the written recommendation is approved, the mediator must complete assisting the parties in creating a Joint Agreement, which is then registered at the Industrial Relations Court within the District Court in the legal area where the parties executed the Joint Agreement, to obtain a certificate of registration.

Furthermore, Article 14 paragraph (1) of the UU PPHI stipulates that: "if the written recommendation referred to in Article 13 paragraph (2) letter a is rejected by one or both parties, then the parties or one of the parties may continue the dispute settlement to the Industrial Relations Court within the local District Court".

The regulation in Article 13 paragraph (2) of the UU PPHI was subsequently deemed not to provide legal certainty, leading to a judicial review by five workers before the Constitutional Court. The Constitutional Court (MK), in its Decision Number 68/PUU-XIII/2015[27], granted the judicial review of Law Number 2 of 2004 concerning the Industrial Relations Dispute Settlement (UU PPHI). The decision mandates that mediators assisting in industrial relations dispute settlement must issue a record of the mediation results (risalah hasil mediasi). According to the Constitutional Court, Article 13 paragraph (2) letter a of the UU PPHI does not provide legal certainty. "The article a quo does not provide fair legal guarantee, protection, and certainty, as well as equal treatment before the law for the Applicants as guaranteed in Article 28D paragraph (1) of the 1945 Constitution".[28] Therefore, the phrase "*written recommendation*" in Article 13 paragraph (2) letter a of the UU PPHI is contradictory to the 1945 Constitution, unless interpreted as: "if an agreement for the settlement of the industrial relations dispute is not reached through mediation, the mediator shall issue a written recommendation in the form of a record of settlement through mediation".

Based on the description above, the issue of legal uncertainty regarding the phrase "written recommendation" in the UU PPHI has been clarified through the Constitutional Court Decision, providing a clearer meaning related to the fulfillment of the formal requirements for filing a lawsuit to the Industrial Relations Court, namely by including the written recommendation in the form of a mediation record. Indirectly, this change in terminology has two different functions: on one hand, it serves as a formal requirement for filing a lawsuit in the Industrial Relations Court, and on the other hand, it can be utilized to institutionally strengthen the status of the mediation results.

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27 Constitutional Court of the Republic of Indonesia. (2015). Decision No. 68/PUU-XIII/2015 on the Judicial Review of Law No. 2 of 2004 concerning the Settlement of Industrial Relations Disputes. Retrieved from https://www.mkri.id/.

28 Mahkamah Konstitusi Republik Indonesia. (2015). MK: Mediator hubungan industrial harus terbitkan risalah mediasi. https://www.mkri.id/index.php?page=web.Berita&id=12141.

ly, this change in terminology has two different functions: on one hand, it serves as a formal requirement for filing a lawsuit in the Industrial Relations Court, and on the other hand, it can be utilized to institutionally strengthen the status of the mediation results.

If analyzed more deeply, the regulation of the legal status of the recommendation as a product of mediation still shows a weakness when one party refuses to implement it. The party in the stronger position tends not to follow the recommendation or even treats it as a formality requirement to be met before taking the dispute to the Industrial Relations Court (PHI). Therefore, it is necessary to strengthen the regulation of this product of mediation (recommendation), especially when mediation fails, and the parties reject the mediator's recommendation.

The clarification of the recommendation's terminology in the form of a mediation record as a requirement for fulfilling formal prerequisites, as stipulated in the Constitutional Court Decision, can be utilized institutionally to strengthen the status of the mediator's recommendation in industrial relations dispute settlement. The mediation record, which is a prerequisite under the UU PPHI for filing a lawsuit against the PHI, should not just be a formality (vide Article 14 paragraph (1) UU PPHI). It should be one of the factors considered by the judge in deciding the case. This is crucial because strengthening the regulation regarding the legal status of the written recommendation in the form of a record will institutionally strengthen the dispute settlement process. Through this regulation, the disputing parties are expected to view the recommendation not merely as a prerequisite to proceed to court, but as a material element for the panel of judges to consider when the dispute enters the litigation stage.

This is important because strengthening the regulations regarding the legal standing of written recommendations in the form of minutes in the settlement of industrial relations disputes through mediation will strengthen mediation as an institutional dispute resolution mechanism. The formulation in the PPHI Law, which stipulates that the minutes of mediation results from industrial relations mediators are one of the considerations of the panel of judges in making decisions, is one form of strengthening the standing of the results of settlements through mediation in the settlement of industrial relations disputes. Through this regulation, it is hoped that the disputing parties will consider recommendations in the form of mediation minutes not only as a formality for proceeding to court, but also become one of the considerations for the panel of judges in deciding when the dispute enters the litigation stage in the Industrial Relations Court.

c) Strengthening Regulations Regarding Mediator Obligations

Article 9 of Ministerial Regulation No.17 of 2014 stipulates that a Mediator in resolving Industrial Relations Disputes has the following obligations:

Ketentuan Pasal 9 Permenakertrans 17 Tahun 2014 mengatur bahwa Mediator dalam menyelesaikan Perselisihan Hubungan Industrial mempunyai kewajiban:

a. To request that the parties negotiate before the Mediation process is carried out;
b. To summon the disputing parties;
c. To lead and manage the Mediation session;
d. To assist the parties in drafting a collective agreement, if an agreement is reached;
e. To make written recommendations, if an agreement cannot be reached;
f. To prepare minutes of the Industrial Relations Dispute resolution;
g. To maintain the confidentiality of all information obtained;
h. To report the results of the Industrial Relations Dispute resolution to the Director General or the Head of the Provincial Office, or the Head of the Regency/City Office concerned; and
i. To record the results of the Industrial Relations Dispute resolution in the Indus-

trial Relations Dispute registration book.

The stipulations concerning the Mediator's obligations in the Ministry of Manpower and Transmigration Regulation (Permenakertrans), as outlined above, require several regulatory enhancements in an effort to strengthen mediation (the position of the mediator) institutionally in the process of resolving industrial relations disputes. Enhancements to the regulation of obligations that can be implemented include:

a. Clarifying the rights and obligations of the Parties in accordance with the prevailing laws and regulations;
b. Tracing and exploring the interests of the Parties; and
c. Seeking various best resolution options for the Parties;
d. Facilitating and encouraging the Parties to cooperate in the dispute resolution.

Based on the results of field research through interviews with industrial relations mediators, several forms of the above enhancements will open up opportunities for the mediator to be more active in facilitating the dispute resolution process between the parties (while maintaining neutrality), particularly in efforts to help the parties resolve their dispute by maximizing agreements that prioritize a win-win solution.

d) Strengthening The Regulation Related to Mediator Authority

Article 10 of Permenakertrans No. 17 of 2014 regulates the mediator's authority, which includes:

(1) The Mediator in resolving Industrial Relations Disputes has the authority to:
   a. Request the parties to provide verbal and written statements
   b. Request documents and letters related to the dispute from the parties;
   c. Present witnesses or expert witnesses in Mediation if necessary;
   d. Request necessary documents and letters from the Provincial Office or Regency/City Office, or related institutions; and
   e. Reject the power of attorney of the disputing parties if they do not possess a specific power of attorney.

(2) In addition to the authorities referred to in paragraph (1), the Mediator is authorized to reject the parties and/or holders of the power of attorney if there is an indication of hindering the Mediation process.

(3) The Mediator, before conducting the Mediation process, can invite the disputing parties for clarification of the problem or Industrial Relations Dispute faced by the parties.

(4) The clarification, as referred to in paragraph (3) is carried out to obtain information and/or complete dispute data from the parties, the results of which are recorded in the clarification minutes.

The regulation of the Mediator's authority as stipulated above still provides an opening for the parties, especially the employers, to leverage their strong position when participating in mediation as a dispute resolution option. There is a need for regulation concerning the mediator's authority to determine that a party or one of the parties is not acting in good faith in the implementation of mediation, along with the legal consequences that arise when the parties or one of the parties lacks good faith. Furthermore, based on several current field conditions, it is also important to strengthen the regulation regarding the mediator's authority to directly request documents from the company, along with the legal consequences for companies that are unwilling to submit data or documents related to the dispute, as well as the regulation of the mediator's authority to be able to collaborate with other related industrial relations institutions in the context of resolving the dispute.

e) Regulation of The Position and Availability of Industrial Relations Mediators in the Nearest Company

Territory Article 11 of Permenakertrans No. 17 of 2014 stipulates that the Mediator is located at:

a. The Ministry;
b. The Provincial Office;
c. The Regency/City Office.

Article 12 of the Permenakertrans then regulates that:

(1) A Mediator located at the Ministry, as referred to in Article 11 letter a, is authorized to:
   a. Conduct Mediation for Industrial Relations Disputes occurring in more than 1 (one) provincial area; and
   b. Provide technical assistance, supervision, and monitoring of the resolution of Industrial Relations Disputes carried out by Mediators at the Provincial Office and/or Regency/City Office.
(2) The mediator located at the Provincial Office as referred to in Article 11 letter b, is authorized to:
   a. Conduct Mediation for Industrial Relations Disputes occurring in more than 1 (one) regency/city within 1 (one) province;
   b. Mediation for Industrial Relations Disputes upon delegation from the Ministry or the Regency/City Office;
   c. Conduct Mediation for Industrial Relations Disputes upon request from a Regency/City Office that does not have a Mediator; and
   d. Provide technical assistance, supervision, and monitoring of the resolution of Industrial Relations Disputes carried out by Mediators at the Regency/City Office.
(3) A Mediator located at the Regency/City Office, as referred to in Article 11 letter c, is authorized to:
   a. Conduct Mediation for Industrial Relations Disputes occurring in the relevant regency/city;
   b. Conduct Mediation for Industrial Relations Disputes upon delegation from the Ministry or the Provincial Office.

The regulation of the mediator's position at the Ministry, Provincial Office, and Regency/City Office, each with their respective authorities, without regulating the proportionate number of mediators in each region (regency) has implications for difficulties for the worker when a dispute occurs, especially when the Regency/City Office does not have a mediator, thus delegating the case to the Province (the provincial capital is far from the regency/city where the dispute occurred). This needs to be addressed through strengthening the institutionalization of industrial relations mediation, particularly concerning the regulation of the proportionate number of mediators at the Regency/City Office, Provincial Office, and Ministry. This regulation plays an important role in ensuring the availability of mediators in every regency/city so that the parties, especially workers who are generally economically weak, can be helped by the availability of a mediator in the nearest company area, making it more effective and efficient in terms of cost, energy, and time.

f) Regulation of Professional Mediators and Independent Mediation Institutions

In other countries, mediation remains the preferred method of resolution. Similar to Indonesia, which mandates mediation as a compulsory resolution method, other countries like the United States and Singapore also do the same. However, these two countries offer the availability of professional mediators and independent mediation institutions. This is done to add a variety of options so that both workers and employers can choose according to their needs.

In Singapore, for instance, mediators are usually provided by the Minister of Manpower with the assurance that these individuals are long-experienced and neutral. The same applies to the United States with its Federal Mediation and Conciliation Service, which provides similar services. In Indonesia, this ought to be emulated to encourage the trust of the disputing parties in utilizing mediation and avoiding the fairly lengthy litigation process.

Based on the description above, it can be seen that the institutional strengthening of mediation as one of the options for resolving

industrial relations disputes in the tripartite mechanism can be achieved by strengthening the regulation related to the good faith of the parties in the execution of mediation, strengthening the regulation related to the mediator's recommendation, strengthening the regulation related to the mediator's obligations and authority, strengthening the regulation related to the position and availability of mediators in the nearest company territory, the regulation of professional mediators, and the regulation of independent mediation institutions. Strengthening the mediation institution, with a focus on efforts to balance or equalize the position of the parties, especially workers, is expected to maximize the advantages of mediation as one of the main options in resolving industrial relations disputes, including in resolving disputes that occur in the tourism sector.

CONCLUSION

The conclusion of this research indicates that Termination of Employment (PHK) disputes and rights disputes currently dominate industrial relations conflicts in Indonesia. According to the latest data from 2024, the number of PHK disputes and disputes ofver rights reached 7,225 cases. This condition is linear with the existing conditions in the tourism sector, which indicates that the disputes that occur are also dominated by the same types of disputes. This condition reflects the imbalance between the spirit of efficiency desired by companies and the fulfillment of workers' rights. This then gives rise to the potential for an increase in industrial relations disputes within the framework of employment relations, both in terms of quantity and quality. Regarding the dispute resolution mechanism, particularly the regulation of industrial relations mediation, based on an analysis of the Industrial Relations Dispute Settlement Law (UU PPHI), its implementing regulations as formal law for the resolution of industrial relations disputes, and by observing the existing conditions in the practical context of industrial relations dispute resolution currently occurring in Indonesia (particularly in the tourism sector), it was found that workers are still placed in a weak (unbalanced) position when they have to go through the dispute resolution mechanism in the PPHI system. This imbalance of position is also one of the weaknesses when workers use industrial relations mediation as a medium or means of resolving disputes that occur in companies. This study proposes the Mediation Equity Model as a framework to strengthen the legal basis of industrial relations mediation. The model seeks to enhance the position of workers and maximize the inherent advantages of mediation in resolving industrial disputes. It is constructed through the formulation and mapping of regulatory shortcomings, particularly within the Industrial Relations Dispute Settlement Law (UU PPHI), and supported by empirical findings from field research, with a specific focus on mediation practices in the tourism sector.

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LEGAL IMPLICATIONS OF RENEWABLE ENERGY TECHNOLOGIES: A Comparative Legal Analysis

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ABSTRACT

The paper will discuss legal aspects of renewable energy technologies by comparing India, the United States, and Germany. It integrates both case law analysis and a framework of Policy evaluation to identify three determinative factors in the outcome of renewable energy: regulatory certainty, institutional capacity, and market integration. The results indicate that investors are confident in predictable and enforceable regulations, as seen in Germany, through stable feed-in tariffs, in contrast to the uncertainty of the U.S. tax incentives and the poor enforcement of Renewable Purchase Obligations in India. Institutional strength is highly connected to project acceleration, and delays in the U.S and Indian cases as compared to a relatively consistent regulatory framework in Germany. Reduction of cost comes with competition mechanisms like auctions, but their efficiency depends on an open and enforceable legal framework. The paper concludes that cost-effective, socially legitimate, and investor-friendly renewable energy transitions cannot be attained without the presence of adaptive and coherent legal frameworks that are based on the principles of enforceability, institutional robustness, and policy coherence.

INTRODUCTION

Renewable energy technologies are also leading the struggle to reach sustainable energy systems in the world. They provide very high benefits to the environment and economy as greenhouse gas (GHG) emissions abatement and offset expenditure in the long term.[1] Nevertheless, transition is not only technically feasible, but it is institutionalized in the complex law, institutional, and policy frameworks, and differs across jurisdictions. The global shift to sustainable energy systems would not be possible without renewable energy technologies. They have significant environmental, economic, and social advantages, thus requiring to reduction in the emission of GHG and addressing climate change.[2] The global energy transition involves wind and solar PV technologies as renewable energy technologies that can provide two-thirds of the global energy needs, and emissions of GHG can be reduced to a significant degree.[3] Renewable energy offers great economic and environmental rewards, such as savings in cost, decreased cost of lifecycle, and decreased GHG emissions.[4] The energy transition requires the development of renewable resources technologies, i.e., solar, wind, biogas, and biomass. Moreover, these technologies have to be effectively incorporated into the energy systems to make the most of them.[5] Besides, facilitating regulation systems is invaluable in accelerating the development of renewable energy technologies. A change in the following structures can trigger the necessary pace of moving towards renewable energy.[6] Although these are the advantages, there are drawbacks to widespread adoption of renewable resources technologies, such as technological, economic, and social obstacles.[7] The current reaction to the dynamic inverters that operate the Renewable Energy Sources (RES) in the power grid creates potential legal issues in trying to integrate renewable energy technologies into the power grid, since the inverters and protection systems' design has to respond to the dynamic nature of the RES.[8] There are also difficulties in the asynchronous ability to tie converter-based RES, such as wind and solar, to the grid that result in low delivery of vital power system functions, such as inertia and strength, and require viable approaches to assessment and definite requirements to achieve safe integration.[9] Tax subsidies, regulatory limits, and energy storage are also important policy factors in overcoming the challenges relating to incorporating renewable resources, especially in the optimal

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3 Gielen, D., Boshell, F., Saygin, D., Bazilian, M. D., Wagner, N., Gorini, R. (2019). The role of renewable energy in the global energy transformation. Energy Strategy Reviews, 24, 38-50. https://doi.org/10.1016/j.esr.2019.01.006.

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exploitation of solar and wind energy resources in the existing grid infrastructure.[10]

The legal framework surrounding the adoption of renewable energy is very fragmented and uneven across jurisdictions, even though this energy source has become central to the sustainability of the globe. The literature on the subject often gives us descriptive explanations of treaties, incentives, and policies, but seldom offers a comparative systematic assessment of their efficacy. Regulatory certainty, institutional capacity, and market integration are also critical issues that have not been adequately researched yet despite their decisive influence on determining the confidence of the investments, the timing of projects, as well as cost effectiveness. The existence of weak enforcement in India, fragmentation in the United States of America, and competition restrictions to competition dynamics within the European Union in Germany highlight institutional gaps, indicating that comparative legal analysis and evidence-based policy suggestions are necessary. The paper will critically examine the legal issues surrounding renewable energy technologies by conducting a comparative analysis of India, the United States, and Germany by applying the case law analysis and policy evaluation frameworks to determine the best practices, gaps in the institutions, and policy recommendations that enhance sustainable, cost-effective, and investor-friendly transitions in the energy system. To achieve this goal, the paper will focus on the following research questions (RQ):

RQ 1. What is the relationship between regulatory certainty, institutional capacity, and market integration, and the effectiveness of renewable energy laws in India, the United States, and Germany?

RQ 2. What are the similarities and differences between comparative case law and policy regimes in these jurisdictions, and what are their implications on investor confidence, project acceleration, and reduction in costs?

RQ 3. What evidence-based legal and policy actions can be advocated to reinforce the governance of renewable energy uses and promote sustainable, socially acceptable, and investor-friendly transitions?

The paper is organized as follows: Section 1 describes the international and national frameworks; Section 2 discuss intellectual property rights in renewable energy; Section 3 take into account the environmental regulation and compliance; Section 4 discuss contractual and commercial consideration; Section 5 case studies; Section 6 take into consideration a discussion.

METHODOLOGY

The study adopts a comparative legal framework and discusses the legal implications as regards renewable energy technologies. This framework is a combination of the doctrinal analysis of the law and the courts and policy appraisal model; therefore, there is a need to have a unified and thorough process of appraisal of the law in various jurisdictions. Amicus Solar Pvt. Ltd. v. State of Maharashtra in India, the litigation over the Cape Wind Project in the United States, and litigation in the Energiewende system of Germany are high-profile cases. These cases show the similarities, such as the judicial emphasis in conducting an environmental impact analysis, and differences, such as the enforceability of renewable purchase requirements in India and the conflict of federal and state competencies in the U.S.

The policy evaluation framework compares the legal and institutional background to three criteria: regulatory certainty, institutional capacity, and market integration. The comparative evidence suggests that the U.S. is characterized as being very incentive-based and has consistency issues. India has high statutory goals and an inability to execute them the same way. Germany has a subsidy-to-auction transi-

10 Tietje, C., Brouder, A., Nowrot, K. (2006). Philip C. Jessup's Transnational Law Revisited, 55; Utama, M., Irsan, I. (2018). General overview on selecting and drafting construction contract disputes resolution. Sriwijaya Law Review, 2(2), 152. https://doi.org/10.28946/slrev.vol2.iss2.129.pp152-169.

tion that is firmly founded on EU competition legal principles. Utilizing a fusion of judicial reasoning and policy examination, the research will offer a systematic inter-jurisdictional examination, best practices, common traps, and remedies to be repatriated to share renewable energy across the globe.

1. INTERNATIONAL AND NATIONAL LEGAL FRAMEWORKS

1.1. International level

The international legal framework of renewable energy technology is a complex of rules established by agreements and protocols to stimulate the technology related to renewable energy. In 1992, the UN Framework Convention on Climate Change (UNFCCC) highlighted the need to stabilize GHG in the atmosphere as well as sustainable development.[11] The Energy Charter Treaty (ECT)1994 was signed in order to promote global cooperation in the field of energy.[12] It aims at establishing a legal framework of energy commerce, protection of investment, and dispute resolution among the member states. The ECT gives the investors in fossil fuels the opportunity to challenge the environmental and climate policies, and thus stall massive climate action.[13] The uniform interpretation and application of the provisions of the ECT by the arbitral tribunals and domestic courts have not been consistent, thus leading to the absence of legal clarity in the settlements of investor-state disputes.[14] In 2009, the law of the International Renewable Energy Agency (IRENA) was passed to make greater use of all the renewable resources in a sustainable manner. The IRENA assists the states to move to renewable energy and is used as a platform of international cooperation and storage of knowledge regarding renewable energy.[15] IRENA helped to access renewable data, policy, capacity-building, and technology transfer (TT).[16] In the year 2009, the Kyoto Protocol was imposed on the industrialized countries to cut GHG emissions.[17] In 2015, the SDGs emphasized the significance of renewable energy in SDG7.[18] In accordance with the SDGs, the Paris Agreement of 2015 aims at reducing global warming to levels that are lower than the pre-industrial levels,[19] and in addition to this, it suggests that countries should contribute, financially assist developing countries, TT, and capacity-building.[20] All these treaties and agreements are aimed at promoting cooperation between countries and ensuring the implementation of renewable energy technologies.

1.2. National legal framework

Implementation of renewable energy is facilitated by a complicated system of national laws and regulations in different nations. The legal frameworks for the adoption of renewable energy are varied and vary in various countries, as there are different social, political, and economic backgrounds.

11 United Nations. (1992). *United Nations Framework Convention on Climate Change*.

12 Energy Charter Secretariat. (1994). *Energy Charter Treaty*.

13 Verbeek, B.-J. (2023). The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises? Business and Human Rights Journal, 8(1), 97-102. https://doi.org/10.1017/bhj.2022.39.

14 Verburg, C. (2019). Modernising the Energy Charter Treaty: An opportunity to enhance legal certainty in investor-state dispute settlement. The Journal of World Investment & Trade, 20(2–3), 425-454. https://doi.org/10.1163/22119000-12340144.

15 International Renewable Energy Agency. (2009). *Statute of the International Renewable Energy Agency (IRENA)*.

16 Prysiazhniuk, Y. Y. (2023). Legal activity of the international renewable energy agency. Uzhhorod National University Herald. Series: Law, 2(76), 251-256. https://doi.org/10.24144/2307-322.2022.76.2.40.

17 United Nations. (1997). *Kyoto Protocol to the United Nations Framework Convention on Climate Change.*

18 Fonseca, L. M., Domingues, J. P., Dima, A. M. (2020). Mapping the sustainable development goals relationships. Sustainability, 12(8), 3359. https://doi.org/10.3390/su12083359.

19 United Nations. (2015). *Paris Agreement.*

20 Michaelowa, A., Shishlov, I., Brescia, D. (2019). Evolution of international carbon markets: Lessons for the Paris Agreement. WIREs Climate Change, 10(6). https://doi.org/10.1002/wcc.613.

1.2.1. United States (US)

The policy of renewable energy in the US is constituted by both federal and state policies.[21] At the federal level, there is the Energy Policy Act of 2005 that provides loan guarantees and tax credits to facilitate energy production among the different sectors, which include renewable energy.[22] It facilitates the development of clean energy technologies, including the Investment Tax Credit and the Production Tax Credit. The credits can be used together to lower the initial cost of installing and keeping up the new RES operational, which makes the clean energy projects more cost-effective and promotes investment in renewable energy infrastructure.[23] The unpredictability in the US renewable energy investment climate is caused by the absence of long-term power purchase agreements and dependency on the changing tax incentives, which leads to uncertainty in investment. This may be stabilized by a national renewable portfolio standard, which would require long-term contracts for renewable energy projects.[24] Offshore renewable energy development in the US is managed by federal policies that differ from state policies. These policies are aimed at the permission, research, and innovation to facilitate technologies such as offshore wind energy.[25] Also, the Progressive energy storage technologies, including the electrochemical batteries, are important in order to incorporate the renewable energy into the grid. The federal rules (especially FERC Order 841)[26] are supposed to enable a structure of participation in the energy storage market, yet further detailed design changes are required to achieve efficient integration.[27] In addition to this, the solar energy policies in the US comprise federal incentives and several state-based initiatives. The challenges are permission procedures, funding processes, and interconnection standards, which differ greatly among states.[28] Renewable energy is greatly affected by the state's politics, policies, and prices. Policies on renewable energy are influenced by factors like professionalism of the legislature and political affiliations of the governor and the legislators.[29]

1.2.2. India

The legal system in India has developed a renewable energy system to address the challenges and facilitate the normal development of renewable energy. The Electricity Act 2003[30] transformed the power sector by offering reforms, but failed to mention renewables specifically, which slowed down the goal of achieving 175 GW of installed capacity by 2022 in India.[31]

21 Saurer, J., Monast, J. (2020). Renewable energy federalism in Germany and the United States. Transnational Environmental Law, 1-28. https://doi.org/10.1017/s2047102520000345.

22 Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005). [in United States]

23 Weschenfelder, F., de Novaes Pires Leite, G., Araújo da Costa, A. C., de Castro Vilela, O., Ribeiro, C. M., Villa Ochoa, A. A., Araújo, A. M. (2020). A review on the complementarity between grid-connected solar and wind power systems. Journal of Cleaner Production, 257, 120617. https://doi.org/10.1016/j.jclepro.2020.120617.

24 Mendicino, L., Menniti, D., Pinnarelli, A., Sorrentino, N. (2019). Corporate power purchase agreement: Formulation of the related levelized cost of energy and its application to a real life case study. Applied Energy, 253, 113577. https://doi.org/10.1016/j.apenergy.2019.113577.

25 Portman, M. (2010). Marine renewable energy policy: Some US and international perspectives compared. Oceanography, 23(2), 98-105. https://doi.org/10.5670/oceanog.2010.49.

26 Federal Energy Regulatory Commission. (2018). Order No. 841: Electric storage participation in markets operated by regional transmission organizations and independent system operators. [in United States]

27 Sakti, A., Botterud, A., O'Sullivan, F. (2018). Review of wholesale markets and regulations for advanced energy storage services in the United States: Current status and path forward. Energy Policy, 120, 569-579. https://doi.org/10.1016/j.enpol.2018.06.001.

28 Weismantle, K. (2014). Building a better solar energy framework. St. Thomas Law Review, 26. https://api.semanticscholar.org/CorpusID:166715796.

29 Yi, H., Feiock, R. C. (2014). Renewable energy politics: Policy typologies, policy tools, and state deployment of renewables. Policy Studies Journal, 42(3), 391-415. https://doi.org/10.1111/psj.12066.

30 Electricity Act, No. 36 of 2003 (India).

31 Dubey, B., Agrawal, S., Sharma, A. K. (2023). India's renewable energy portfolio: An investigation of the untapped potential of RE, policies, and incentives favoring energy security in the country. Energies, 16(14), 5491. https://doi.org/10.3390/en16145491.

Renewable energy is another important player in the energy economy development of the country, as it aims to utilize technologies such as blockchain to achieve transparent energy transitions and peer-to-peer trading to empower prosumers.[32] The Indian government has also put in place a number of policies and frameworks that facilitate the integration of renewable resources, including the Renewable Purchase Obligation and Renewable Energy Certificate.[33] These policies provide incentives to generate RES and also to conform to the regulations of the state and central policymaking.[34] Proper regulation is essential in incorporating renewable energy into the electricity market. The framework should enable the forecasting, planning, and managing of imbalances to provide grid stability and access to renewable sources in the market.[35] In spite of the development, a number of obstacles hinder the wide adoption of renewable resources technologies. These are technical, economic, market-related and institutional challenges. It is necessary to solve these obstacles with the help of policy interventions and improvements of the current legal framework.[36] India has achieved a lot with regard to renewable energy and especially solar and wind energy industries have been very successful in the country. These efforts are still supported by the government which provides the financial, institutional, and educational assistance to ensure the energy security and economic prosperity of the country.[37] The policies of the renewable energy in India match the international sustainability and mitigation of climate change. Presence in international regimes like the UNFCCC will boost the country in the development of renewable energy technologies in addition to responding to world environmental issues.[38]

2. INTELLECTUAL PROPERTY RIGHTS (IPR) IN RENEWABLE ENERGY

IPRs are important in the encouragement of innovativeness in the renewable energy industry. They offer a framework of the law that secures investments of companies and people in new technologies, knowing that inventors can enjoy the fruits of their labor. This insurance encourages additional R&D, and it is essential to improve the technologies of renewable energy. The renewable energy has been affected by the IPR. Firstly, the high IPR protection is a great stimulus to the procurement of renewable energy since it encourages companies to invest in renewable energy technologies. The higher the protection rights, the more renewable energy production will be resulted in, which will enhance sustainability.[39] Moreover, IPR affects the

32 Gupta, H., Singh, N. K. (2023). Climate Change and Biodiversity Synergies: A Scientometric Analysis in the Context of UNFCCC and CBD. Anthropocene Science, 2(1), 5-18. https://doi.org/10.1007/s44177-023-00046-4.

33 Central Electricity Regulatory Commission. (2022). *Renewable Purchase Obligation (RPO) and Renewable Energy Certificate (REC) Regulations.* [in India]

34 Goyal, M., Jha, R. (2009). Introduction of Renewable Energy Certificate in the Indian scenario. Renewable and Sustainable Energy Reviews, 13(6–7), 1395-1405. https://doi.org/10.1016/j.rser.2008.09.018.

35 Barpanda, S. S., Saxena, S. C., Rathour, H., Dey, K., Pawan Kumar, K. V. N. (2015, November). Renewable energy integration in Indian electricity market. 2015 IEEE PES Asia-Pacific Power and Energy Engineering Conference (APPEEC). https://doi.org/10.1109/appeec.2015.7381034.

36 Ghosh, D., Shukla, P. R., Garg, A., Ramana, P. V. (2002). Renewable energy technologies for the Indian power sector: Mitigation potential and operational strategies. Renewable and Sustainable Energy Reviews, 6(6), 481-512. https://doi.org/10.1016/s1364-0321(02)00015-1.

37 Shyam, B., Kanakasabapathy, P. (2017, December). Renewable energy utilization in India—Policies, opportunities and challenges. 2017 International Conference on Technological Advancements in Power and Energy (TAP Energy). https://doi.org/10.1109/tapenergy.2017.8397311.

38 Chaudhary, A., Krishna, C., Sagar, A. (2014). Policy making for renewable energy in India: Lessons from wind and solar power sectors. Climate Policy, 15(1), 58-87. https://doi.org/10.1080/14693062.2014.941318.

39 Tee, W.-S., Chin, L., Abdul-Rahim, A. S. (2021). Determinants of renewable energy production: Do intellectual property rights matter? Energies, 14(18), 5707.

performance of innovation; an example of this is in China where it was shown that government subsidies in combination with strong IP protection increase the performance of renewable energy enterprises in creative performance. This will aid in R&D as well as increase the ability of companies to innovate.[40] Moreover, the IP protection is a significant aspect of the economic growth, especially in the open economies. It promotes and implements new technologies because it is a secure investment environment.[41] In addition to this, IPRs introduce certain barriers and facilitators; even though IPRs tend to enhance innovation, they may have certain barriers particularly in the use of renewable energy in the developing countries. IRPs are also reliant on the efficiency of R&D and other economic aspects such as the trade openness.[42] Moreover, just like renewable energy, IPRs in agriculture have been observed to maintain innovation and change in technology. They give economic stimulus that promotes R&D and facilitates the innovation of new technologies, including the plant breeder rights in Canada.[43] Later, IPRs also play a vital role in manufacturing industries as far as sustainable innovation is concerned. They assist in unlocking sustainable innovations but occasionally can postpone their dissemination.[44] The main types of IPRs are the following: patents, copyrights, trademarks and trade secrets. Patents protect the novelty by providing the inventor with what is known as an exclusive right which is the right to prevent any other party to produce, use, or sell the invention during a specified period, normally twenty years. Patents in the renewable energy industry provide a high patronage value to companies. Firms that have good patent portfolios, meaning that they have strong patents protection capabilities, are more likely to be overvalued in the market.[45] One of the indicators of technological innovation in renewable energy is patents. Renewable energy technologies have a positively affecting rate of innovation due to the supportive policies of public policies favoring R&D and patenting activities.[46] Other than patenting, software and digital innovations in renewable energy technologies can be safeguarded by copyright. They assist in ensuring that the financial worth of these innovations is guaranteed by avoiding unauthorized reproduction and distribution.[47] The trademarks assist the companies dealing with renewable energy to distinguish their products and to establish brand loyalty. The successful trademark can strengthen market share and consumer trust on renewable energy products.[48]

https://doi.org/10.3390/en14185707.

40 Xu, X., Chen, X., Xu, Y., Wang, T., Zhang, Y. (2022). Improving the innovative performance of renewable energy enterprises in China: Effects of subsidy policy and intellectual property legislation. Sustainability, 14(13), 8169. https://doi.org/10.3390/su14138169.

41 Gould, D. M., Gruben, W. C. (1996). The role of intellectual property rights in economic growth. Journal of Development Economics, 48(2), 323-350. https://doi.org/10.1016/0304-3878(95)00039-9.

42 Li, J., Omoju, O. E., Zhang, J., Ikhide, E. E., Lu, G., Lawal, A. I., Ozue, V. A. (2020). Does Intellectual Property Rights Protection Constitute A Barrier To Renewable Energy? An Econometric Analysis. National Institute Economic Review, 251, R37-R46. https://doi.org/10.1017/nie.2020.5.

43 Horbulyk, T. M. (1993). Intellectual property rights and technological innovation in agriculture. Technological Forecasting and Social Change, 43(3–4), 259-270. https://doi.org/10.1016/0040-1625(93)90055-c.

44 Eppinger, E., Jain, A., Vimalnath, P., Gurtoo, A., Tietze, F., Hernandez Chea, R. (2021). Sustainability transitions in manufacturing: The role of intellectual property. Current Opinion in Environmental Sustainability, 49, 118-126. https://doi.org/10.1016/j.cosust.2021.03.018.

45 Kim, D., Kim, N., Kim, W. (2018). The effect of patent protection on firms' market value: The case of the renewable energy sector. Renewable and Sustainable Energy Reviews, 82, 4309-4319. https://doi.org/10.1016/j.rser.2017.08.001.

46 Johnstone, N., Haščič, I., Popp, D. (2009). Renewable energy policies and technological innovation: Evidence based on patent counts. Environmental and Resource Economics, 45(1), 133-155. https://doi.org/10.1007/s10640-009-9309-1.

47 Graham, S. J. H. (2008). Chapter 5 Beyond patents: The role of copyrights, trademarks, and trade secrets in technology commercialization. In Advances in the Study of Entrepreneurship, Innovation & Economic Growth (pp. 149-170). Emerald (MCB UP). https://doi.org/10.1016/s1048-4736(07)00005-7.

48 Amernick, B. A. (1991). Basic distinctions between patents, copyrights, trade secrets, and trademarks. In Patent Law for the Nonlawyer (pp. 5-10). Springer US.

3. ENVIRONMENTAL REGULATIONS AND COMPLIANCE

The environmental laws contribute significantly to the development of renewable resources projects. These laws strive to create some form of balance between the need to have clean energy and the need to save the environment. Offshore Renewable Energy Projects in the US had environmental and regulatory obstacles, especially in the offshore industry, such as the requirement of detailed Environmental Impact Statements (EIS) and the lack of certainty in determining the ecological impact of new technologies. Regulatory frameworks also engage several agencies and involve much participation by the masses and stakeholders to deal with the physical and biological effects of such projects.[49] The scientific uncertainty and complexity of EIA have prompted delays and opposition among the citizens in Spain. Regulatory improvements should be made to improve the ease of EIAs, increase the participation of the people, preserve the marine biodiversity, and promote the development of renewable energy.[50] In Japan and the EU, the EIA process has been cited as a hindrance to large-scale renewable energy projects, and reforms have been called to bring a balance between protecting the environment and developing the projects. These processes are important in reduction of climate change by ensuring they are streamlined to help with socio-economic problems.[51] The environmental laws of the EU have made a positive impact in embracing and embracing renewable energy technologies. Nevertheless, such regulations should be tangibly combined with environmentally-friendly technologies to make the most of the use of renewable energy. Large-scale renewable projects should have sufficient environmental and social impact evaluation. Such evaluations should take into account ecosystem services and climate resilience to achieve the sustainable potential of renewable energy.[52] An increase in renewable energy infrastructure results in land use alteration, which has the potential to cause harmful effects to ecosystems.[53] The importance of ecosystem services in China has been recognized in a multi-level legal system with both centralized and decentralized structures. These are lawful instruments, such as land use differentiation, payment of ecosystem services, and litigation on the part of the public interest, which are designed to both protect the ecosystems and encourage renewable resources.[54] The EU has had legal problems in the integration of renewable energy objectives with conservation directives, e.g., the Habitats and Birds Directives.[55,56] The absence of coordination between these instructions may slow down the implementation of renewable energy projects. The solution to these

https://doi.org/10.1007/978-1-4684-7829-7_2.

49 Daughdrill, W. H. (2009). Assessing the role of environmental and regulatory issues on offshore renewable energy projects in the United States. Volume 4: Ocean Engineering; Ocean Renewable Energy; Ocean Space Utilization, Parts A and B. https://doi.org/10.1115/omae2009-79097.

50 Salvador, S., Gimeno, L., Sanz Larruga, F. J. (2018). The influence of regulatory framework on environmental impact assessment in the development of offshore wind farms in Spain: Issues, challenges and solutions. Ocean & Coastal Management, 161, 165-176. https://doi.org/10.1016/j.ocecoaman.2018.05.010.

51 Schumacher, K. (2017). Large-scale renewable energy project barriers: Environmental impact assessment streamlining efforts in Japan and the EU. Environmental Impact Assessment Review, 65, 100-110. https://doi.org/10.1016/j.eiar.2017.05.001.

52 Rastegar, H., Eweje, G., Sajjad, A. (2024). The impact of environmental policy on renewable energy innovation: A systematic literature review and research directions. Sustainable Development, 32(4), 3859-3876. https://doi.org/10.1002/sd.2884.

53 Kim, J. Y., Koide, D., Ishihama, F., Kadoya, T., Nishihiro, J. (2021). Current site planning of medium to large solar power systems accelerates the loss of the remaining semi-natural and agricultural habitats. Science of The Total Environment, 779, 146475. https://doi.org/10.1016/j.scitotenv.2021.146475.

54 You, M. (2016). Withdrawn: Assessment of multi-level legal mechanisms for the protection of ecosystem services in China. Ecosystem Services, 100348. https://doi.org/10.1016/j.ecoser.2016.02.009.

55 European Union. (1992). *Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive).*

56 European Union. (2009). *Directive 2009/147/EC on the conservation of wild birds (Birds Directive).*

goals is the proposal of adaptive management strategies and detailed plans for renewable energy.[57] The rapid development of RES, especially in such regions as the western US, has been associated with great ecological problems. These are habitat-breaking and the displacement of species. These challenges need to be tackled with effective legal strategies and mitigation activities in order to proceed with the development of sustainable energy.[58]

4. CONTRACTUAL AND COMMERCIAL CONSIDERATIONS

A number of contractual agreements and commercial arrangements are involved in the renewable energy industry to make the projects successful and to be developed successfully. It is necessary to have a number of contractual agreements and commercial arrangements. These contracts provide clarity among the parties, risk reduction, and easy investment. Firstly, PPAs are the long-term agreements between producers and consumers of renewable energy, where the former usually sell the electricity to utilities or big corporations at a fixed rate. Such deals play a vital role in getting the funding and a stable flow of revenue to the renewable energy projects. To give an example, in the US, PPAs are becoming increasingly popular among privately owned companies to purchase the renewable power. Such agreements are useful in ensuring that companies attain the objectives of sustainability and offer financial stability to the developers of the project.[59] The Corporate PPAs are becoming more popular as corporations strive to decrease their impact on the environment. They enable companies to gain access to renewable energy at a competitive cost and balance between cost and long-term sustainability objectives.[60] Moreover, other ownership structures and financing provisions are employed in the renewable energy sector, such as project finance, limited partnerships, and sale/ leaseback. These are the structures that assist in the management of risk and investment.

Moreover, utility proprietors occasionally directly possess and fund renewable energy undertakings, which have the advantage of saving expenses and being able to operate undertakings compared to acquiring influence of power produced by independent generators.[61] In addition, consumer co-ownership will also be necessary, in which the consumer (co-)ownership models include community investment in renewable energy projects, where local participation and acceptance are encouraged.[62] Also, there is the issue of regulatory and commercial hurdles, including the regulatory environment, which is very much influencing the feasibility and attractiveness of the renewable energy projects. To develop and run such projects, policies and market structures should be in place. Similarly, RECs

57 van Hees, S. (2018). Large-scale water-related innovative renewable energy projects and the habitats and birds directives: Legal issues and solutions. European Energy and Environmental Law Review, 27(1), 15-36. https://doi.org/10.54648/eelr2018002.

58 Agha, M., Lovich, J. E., Ennen, J. R., Todd, B. D. (2020). Wind, sun, and wildlife: Do wind and solar energy development 'short-circuit' conservation in the western United States? Environmental Research Letters, 15(7), 075004. https://doi.org/10.1088/1748-9326/ab8846.

59 Baines, S., Wrubell, S., Kennedy, J., Bohn, C., Richards, C. (2019). How To PPA: An examination of the regulatory and commercial challenges and opportunities arising in the context of private power purchase agreements for renewable energy. Alberta Law Review, 389. https://doi.org/10.29173/alr2580.

60 Mendicino, L., Menniti, D., Pinnarelli, A., Sorrentino, N. (2019). Corporate power purchase agreement: Formulation of the related levelized cost of energy and its application to a real life case study. Applied Energy, 253, 113577. https://doi.org/10.1016/j.apenergy.2019.113577.

61 Wiser, R., Kahn, E. (1996). Alternative windpower ownership structures: Financing terms and project costs. Office of Scientific and Technical Information (OSTI). https://doi.org/10.2172/272563.

62 Holstenkamp, L. (2019). Financing consumer (co-) ownership of renewable energy sources. In Energy Transition (pp. 115–138). Springer International Publishing. https://doi.org/10.1007/978-3-319-93518-8_6.

are contractual documents that represent the environmental value of producing renewable energy. They are applied to address the regulatory requirements and to assist the renewable energy markets.[63]

Common techniques of obtaining long-term contracts with independent power-producing units are auctions, which are known to provide a competitive price and simple procedures. A good auction design involves establishing clear guidelines and contractual provisions, which provide healthy competition and good delivery of projects.[64] Hybrid stochastic and robust optimization models are advanced contracting strategies that can be used to address the risks involved in the generation of renewable energy and market uncertainties. The hybrid approach that stochastic programming is used together with robust optimization assists energy trading firms in Brazil in developing optimal contracting strategies when markets are characterized by uncertainties.[65] Contracts related to renewable energy are associated with special risks and liabilities because such projects are complicated, and the regulatory environment changes over time. The risk management of developing renewable energy projects on polluted premises includes a combination of property and commercial general liability cover and site contamination liability cover. The strategy is good when tackling the long-term risks that are not diminishing in the long run.[66] The significance of dispute resolution in the energy sector is because the WTO offers a legalized dispute settlement system to minimize uncertainty and enhance the utility of the results of dispute resolution. The features of this mechanism include clear substantive rules, procedural rules, and independent legal bodies, legal precedents.[67] Other countries adopt different methods of resolving renewable energy disputes, together with global dispute settlement, which is the WTO. China has also taken an initiative in the dispute trade in renewable energy by using the domestic courts and the WTO dispute settlement mechanism to deal with the anti-dumping and countervailing measures. The design of a construction contract may avoid conflicts, and the mediation, arbitration, and other methods of Alternative Dispute Resolution (ADR) may play an important role in efficient conflict resolution.[68] International arbitration has emerged as one of the popular ways of settling disputes in the energy industry, and there is a just and effective way of reducing the risks that relate to international business dealings.

5. CASE STUDIES

To exemplify the legal issues and aspects of renewable energy technologies. The case studies provided below provide a crucial perspective on the legal issues of renewable energy technologies, especially in new economies such as India, Germany, and the US. Striking a balance between the contractual requirements, regulatory adherence, and just following penalties in the renewable energy project implementation is important towards ensuring project implementation success.

63 Picardi, B. (2016). Renewable energy and policy mechanisms: A case study of renewable energy certificates in India. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.2778629.

64 de Barros Correia, T., Tolmasquim, M. T., Hallack, M. (2020). Guide for designing contracts for renewable energy procured by auctions. Inter-American Development Bank. https://doi.org/10.18235/0002583.

65 Picardi, B. (2016). Renewable energy and policy mechanisms: A case study of renewable energy certificates in India. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.2778629.

66 Neuman, S., Hopkins, C. D. (2009). Renewable energy projects on contaminated property: Managing the risks. Environmental Claims Journal, 21(4), 296-312. https://doi.org/10.1080/10406020903361381.

67 Moon, D. (2004). Risk considerations in legalized dispute settlement (DS) mechanisms. Korean Journal of International Relations, 44(5), 61-84. https://doi.org/10.14731/kjis.2004.12.44.5.61.

68 Utama, M., Irsan, I. (2018). General overview on selecting and drafting construction contract disputes resolution. Sriwijaya Law Review, 2(2), 152. https://doi.org/10.28946/slrev.vol2.iss2.129.pp152-169.

5.1. The legal battle over solar energy in India – Amicus Solar and the enforcement of solar obligations

India has put a lot of investment in renewable energy, especially solar power, to address climate change.[69] Through the various programs, the Indian government has established lofty goals for the establishment of solar energy systems in the nation. Among them is the National Solar Mission program that promotes the production and utilization of solar energy in generating power. The Indian case of Amicus Solar Pvt. Ltd. v. State of Maharashtra is an example of the court tussle over the solar energy mandate.[70] This was a case of RRPOs being put in place where some entities are bound to purchase a minimum percentage of their energy as renewable energy. The case brought out the difficulties associated with the implementation of RPOs, especially the regulatory and legislative difficulties in compliance by the state agencies, as well as in the case of individual entities. The problems encompassed the interpretation of the RPO requirements, the consequences of failure to comply, and the role of the regulatory bodies in implementing the required targets on renewable energy.[71] The case has shown the importance of a sound legal and regulatory framework to help in promoting renewable energy in India and explicit and binding obligations of stakeholders.

5.2. Cape Wind Project (United States)

The Cape Wind Project would be constructed on the Horseshoe Shoal in Nantucket Sound, and the aim was to install 130 wind turbines, which would produce around 420 megawatts of power.[72] The project can satisfy nearly three-quarters of the electrical needs of Cape Cod and the neighboring islands.[73] This project was also met with serious legal risks, such as environmental lawsuits, local stakeholders' opposition, and the federal and state jurisdiction. The project cast doubts over whether the current regulatory frameworks sufficed in the regulation of offshore wind energy, EIA, and the balancing of the interests of the locals and the national interests in renewable energy.[74] The Cape Wind project continued to encounter legal hurdles in 2010 following a series of challenges by different groups of people, such as environmentalists, local towns, and the Wampanoag tribe.[75] The delays and ultimate failure that Cape Wind witnessed show the necessity to have more efficient regulatory structures and an activity plan on how to engage the masses on renewable energy development projects. It is a warning of what to expect in future projects in the United States and the world over.[76]

69 Girard, B., Sareen, S. (2024). Change everything so that (almost) nothing changes? Investigating the territorial distribution of solar energy subsidies in rural India. Environmental Sociology, 1-12. https://doi.org/10.1080/23251042.2024.2372890.

70 Amicus Solar Pvt. Ltd. v. State of Maharashtra, (2015). [in India].

71 Kar, S. K., Sharma, A., Roy, B. (2016). Solar energy market developments in India. Renewable and Sustainable Energy Reviews, 62, 121-133. https://doi.org/10.1016/j.rser.2016.04.043.

72 Alliance to Protect Nantucket Sound v. U.S. Department of the Army, 288 F. Supp. 2d 64 (D.D.C. 2003). [in United States]

73 Rodgers, M., Olmsted, C. (2008). The Cape Wind Project in context. Leadership and Management in Engineering, 8(3), 102-112. https://doi.org/10.1061/(asce)1532-6748(2008)8:3(102).

74 The Cape Wind Offshore Wind Energy Project. (2011). In Collaborative Modeling and Decision-Making for Complex Energy Systems (pp. 157–181). World Scientific. https://doi.org/10.1142/9789814335201_0006.

75 National Geographic. (n.d.) Case study: Cape Wind Project. https://education.nationalgeographic.org/resource/case-study-cape-wind-project/.

76 Larson, M. J. (2011). Cape wind: Lessons from environment and energy conflict. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.1872859.

5.3. German Energiewende and Feed-in Tariffs(FITs)

The Energiewende (Energy Transition) is a comprehensive policy project to convert the nation into a low-carbon economy that is based on renewable energy, and a significant part of this is wind and solar energy.[77] The Energiewende legal framework involved the establishment of the FITs to promote investment in renewable energy.[78] Nevertheless, there were some pitfalls with these policies, including the controversy about the cost burden on the consumer, the effect on the energy market, and the legal reforms to facilitate the galloping development of renewables. There were also legal difficulties when the EU regulations came into being, and on the state aid and competition law.[79] Although Energiewende has been rather effective in augmenting the renewable energy capacity, it has caused considerable legal and policy controversies regarding energy market reform, the position of subsidies, and how renewables fit into the energy grid.[80] These examples emphasize the significance of stipulating the contractual commitments and contingencies of the renewable energy projects, especially in certain complicated regulatory settings.[81] They also indicate the necessity of governments to streamline the process of regulations in a way that would make renewable energy projects run on time.

6. DISCUSSION

It is observed that in a systematic comparative assessment, the success of the law of renewable energy is determined by the interplay of regulatory certainty, institutional capacity, and the integration of the market; however, each jurisdiction has different tracks.

6.1. Regulatory certainty and investor confidence

As the German experience of feed-in tariffs (FITs) shows, long-term legal stability can lead to a great deal of investment in renewables, though with controversy on the costs to consumers.[82,83] On the contrary, the intermittent nature of tax incentives in the United States makes it a fluctuating investment environment that puts off long-term investments in capital.[84] Even in good statutory frameworks, India is characterized by a lack of fair application of Renewable Purchase Obligations (RPOs), which destroys investor confidence.[85] According to Johnstone, Hascic, and Popp (2009), and other scholars, stable legal incentives have a direct correlation with the activity of patenting and innovation in the renewables and energy sector; Li et al. (2020) warn that excessive protection of intellectual property rights impedes diffusion in developing nations. This is an indication that clarity and enforceability, rather than the exis-

77 Leiren, M. D., Reimer, I. (2018). Historical institutionalist perspective on the shift from feed-in tariffs towards auctioning in German renewable energy policy. Energy Research & Social Science, 43, 33-40. https://doi.org/10.1016/j.erss.2018.05.022.

78 Erneuerbare-Energien-Gesetz [EEG] [Renewable Energy Sources Act] (2017). [in Germany]

79 Nordensvärd, J., Urban, F. (2015). The stuttering energy transition in Germany: Wind energy policy and feed-in tariff lock-in. Energy Policy, 82, 156-165. https://doi.org/10.1016/j.enpol.2015.03.009.

80 Haas, T., Sander, H. (2016). Shortcomings and perspectives of the German Energiewende. Socialism and Democracy, 30(2), 121-143. https://doi.org/10.1080/08854300.2016.1183996.

81 European Commission v. Federal Republic of Germany, Case C-405/16 P (2019). [in European Union]

82 Leiren, M. D., Reimer, I. (2018). Historical institutionalist perspective on the shift from feed-in tariffs towards auctioning in German renewable energy policy. Energy Research & Social Science, 43, 33-40. https://doi.org/10.1016/j.erss.2018.05.022.

83 Nordensvärd, J., Urban, F. (2015). The stuttering energy transition in Germany: Wind energy policy and feed-in tariff lock-in. Energy Policy, 82, 156-165. https://doi.org/10.1016/j.enpol.2015.03.009.

84 Yi, H., Feiock, R. C. (2014). Renewable energy politics: Policy typologies, policy tools, and state deployment of renewables. Policy Studies Journal, 42(3), 391-415. https://doi.org/10.1111/psj.12066.

85 Kar, S. K., Sharma, A., Roy, B. (2016). Solar energy market developments in India. Renewable and Sustainable Energy Reviews, 62, 121-133. https://doi.org/10.1016/j.rser.2016.04.043.

tence of laws, are influential in the determination of investor behavior.

6.2. Institutional capacity and project acceleration

The problem of institutional weakness comes up as a setback. The Amicus Solar Pvt. Ltd. v. State of Maharashtra case provides an example of the inability to adhere to the RPOs due to the lack of proper enforcement of the regulations and its impact on the project timeline.[86] On the same note, the long court battle over the Cape wind Project shows a divided jurisdictional power in the U.S.[87,88] Conversely, the Energiewende in Germany was aided by consistent institutions, but was limited by the EU competition law.[89] The literature tends to believe that the enforcement of the institution takes a back seat to the policy design, although case studies show that institutional strength is vital in ensuring timely project delivery.[90] Delays can be reduced by regulatory streamlining, such as statutory deadlines on Environmental Impact Assessments (EIAs), which would raise the cost of projects.[91]

6.3. Market integration and cost Reduction

The cost-efficiency of the deployment of renewable energy is also influenced by market mechanisms. German Competitive auctions have shown that there is downward pressure on renewable energy tariffs[92,93] whereas the Renewable Energy Certificate (REC) system in India has failed because of poor compliance and poor enforcement.[94,95] The use of storage technologies in the U.S. has been inconsistently integrated because of the fragmented state-federal regulation.[96] Despite the broad praise of auctions in the literature of scholarship in terms of efficiency gains,[97] not much is said about the legal enforceability of auctions and their correspondence to supranational law. One of the comparative lenses implies that a legal coherence in the design of the auction is as important as economic competitiveness in guaranteeing sustainable cost savings.

86 Ibid.

87 Rodgers, M., Olmsted, C. (2008). The Cape Wind Project in context. Leadership and Management in Engineering, 8(3), 102-112. https://doi.org/10.1061/(asce)1532-6748(2008)8:3(102).

88 Larson, M. J. (2011). Cape wind: Lessons from environment and energy conflict. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.1872859.

89 Leiren, M. D., Reimer, I. (2018). Historical institutionalist perspective on the shift from feed-in tariffs towards auctioning in German renewable energy policy. Energy Research & Social Science, 43, 33-40. https://doi.org/10.1016/j.erss.2018.05.022.

90 Saurer, J., Monast, J. (2020). Renewable energy federalism in Germany and the United States. Transnational Environmental Law, 1-28. https://doi.org/10.1017/s2047102520000345.

91 Schumacher, K. (2017). Large-scale renewable energy project barriers: Environmental impact assessment streamlining efforts in Japan and the EU. Environmental Impact Assessment Review, 65, 100-110. https://doi.org/10.1016/j.eiar.2017.05.001.

92 Nordensvärd, J., Urban, F. (2015). The stuttering energy transition in Germany: Wind energy policy and feed-in tariff lock-in. Energy Policy, 82, 156-165. https://doi.org/10.1016/j.enpol.2015.03.009.

93 Haas, T., Sander, H. (2016). Shortcomings and perspectives of the German Energiewende. Socialism and Democracy, 30(2), 121-143. https://doi.org/10.1080/08854300.2016.1183996.

94 Goyal, M., Jha, R. (2009). Introduction of Renewable Energy Certificate in the Indian scenario. Renewable and Sustainable Energy Reviews, 13(6–7), 1395-1405. https://doi.org/10.1016/j.rser.2008.09.018.

95 Picardi, B. (2016). Renewable energy and policy mechanisms: A case study of renewable energy certificates in India. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.2778629.

96 Sakti, A., Botterud, A., O'Sullivan, F. (2018). Review of wholesale markets and regulations for advanced energy storage services in the United States: Current status and path forward. Energy Policy, 120, 569-579. https://doi.org/10.1016/j.enpol.2018.06.001.

97 Kilinc-Ata, N. (2016). The evaluation of renewable energy policies across EU countries and US states: An econometric approach. Energy for Sustainable Development, 31, 83-90. https://doi.org/10.1016/j.esd.2015.12.006.

6.4. Balancing environmental and social interests

The other theme that is common in different jurisdictions is the harmony between environmental conservation and renewable growth. The literature tends to criticize EIAs due to delays in their processes, but it tends to understate the democratic and justice-promoting aspect of EIA.[98] The case of Cape Wind litigation demonstrates the effects of insufficient engagement of stakeholders,[99] whereas EU directives indicate the tension between biodiversity protection and renewable implementation.[100] A comparative approach indicates that in the case of a legal process of streamlining and participation, environmental assessments can simultaneously protect the ecosystems and promote the uptake of renewables.[101]

6.5. Critical engagement with existing scholarship

In a closer examination of the literature available on renewable energy law, it can be observed that much of it is descriptive as opposed to being evaluative. It is common practice to list categories of policies, including feed-in tariffs, renewable energy certificates, tax incentives, etc. in studies, but there is seldom a systematic comparison of their enforceability and effectiveness in the long run across jurisdictions. As an illustration, Johnstone, Hascic, and Popp (2009) highlight the beneficial connection between policy support and patenting activity, but pay little focus on the legal certainty and enforceability of such measures, which the present study states as the key factors in investor confidence.[102] On the same note, Goyal and Jha (2009) show promise of REC in India, but emphasize without addressing the chronic non-compliance with the scheme, which undermines its utilization in reality.

The literature on institutional capacity also has contradictions. Dubey, Agrawal, and Sharma (2023) highlight a boisterous statutory targets of India, but the cases, including Amicus Solar Pvt. Ltd. v. State of Maharashtra, have shown that enforcement mechanisms are weak and thus cannot support the expectation of the state. Weschenfelder et al. (2020) observe the incentives offered by the government, especially the taxes, in stimulating renewable development in the United States, yet the time-consuming Cape Wind Project litigation demonstrates the potential risks of split federal, state authority,[103] which is not sufficiently emphasized by current analyses. Germany, in contrast, is often portrayed as a success story because of its Energiewende and feed-in tariff system,[104] although the legal conflict caused by EU competition law[105] is of-

98 Salvador, S., Gimeno, L., Sanz Larruga, F. J. (2018). The influence of regulatory framework on environmental impact assessment in the development of offshore wind farms in Spain: Issues, challenges and solutions. Ocean & Coastal Management, 161, 165-176. https://doi.org/10.1016/j.ocecoaman.2018.05.010.

99 Rodgers, M., Olmsted, C. (2008). The Cape Wind Project in context. Leadership and Management in Engineering, 8(3), 102-112. https://doi.org/10.1061/(asce)1532-6748(2008)8:3(102).

100 Sakti, A., Botterud, A., O'Sullivan, F. (2018). Review of wholesale markets and regulations for advanced energy storage services in the United States: Current status and path forward. Energy Policy, 120, 569-579. https://doi.org/10.1016/j.enpol.2018.06.001.

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103 Rodgers, M., Olmsted, C. (2008). The Cape Wind Project in context. Leadership and Management in Engineering, 8(3), 102-112. https://doi.org/10.1061/(asce)1532-6748(2008)8:3(102).

104 Leiren, M. D., Reimer, I. (2018). Historical institutionalist perspective on the shift from feed-in tariffs towards auctioning in German renewable energy policy. Energy Research & Social Science, 43, 33-40. https://doi.org/10.1016/j.erss.2018.05.022.

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ten overlooked in scholarly research as a critical limitation, which is the focus of the current study. There are contradictions in environmental regulation literature, also. An example of this is by Schumacher (2017), who criticizes the idea of EIA due to delays in the procedure; however, these descriptions do not reflect the democratic and participatory merit of Environmental Impact Assessment. Entering this paper will show that procedural rigor, coupled with legislative schedules and participation of local communities, can simultaneously protect the environment and increase the uptake of renewable sources, thus resolving the efficiency and legitimacy dilemma.[106]

By filling such gaps and contradictions, the study will add to the literature by showing that law does not display only such policy tools but is a more structural determinant of renewable energy transitions. Comparative examination of India, the US, and Germany demonstrates that such variables as regulatory certainty, institutional strength, and policy instruments' enforceability are the tools that cannot be ignored and are frequently forgotten in the current literature.

CONCLUSION

This comparative study confirms that law is not a passive context but an active factor that determines the results of renewable energy. The divergent cases of India, the US, and Germany show that regulatory certainty, institutional capacity, and market integration are the determining variables influencing the success of renewable energy transitions. To minimize the identified gaps, it is possible to promote a number of evidence-based recommendations.

One, the jurisdictions should focus on regulatory certainty to improve investor confidence. This would entail enforcing RPOs bindingly in India, whereas harmonized creation of renewable portfolio standards would reduce policy volatility in the US. The predictability of incentive plans on the long term (FITs, competitive auctions, tax credits, etc.) needs to be preserved across the jurisdictions to reduce sudden inversion and the loss of trust, and a disincentive to invest capital.

Second, institutional capacity is critical for the acceleration of projects. By setting up statutory deadlines on environmental approvals, delays would be minimized, and costs related to litigation would be reduced. Moreover, the regulatory bodies have to be given enough institutional freedom to be left alone to perform their task without the interference of politics, to ensure that any dispute is resolved in time, as well as the enforcement of contracts.

Third, to realize cost-cutting, it needs more coherent market integration. The efficiency and transparency of auction rules, which can be enforced across borders, would make the auction systems more efficient and cost-effective. Moreover, greater enforcement of the Renewable Energy Certificate schemes would increase the liquidity in the market, as well as, where feasible, linking the schemes with carbon trading systems, which would help in efficient allocation of resources.

Lastly, balanced development necessitates legal structures that assist in acknowledging environmental protection as well as social legitimacy. Costly post-approval disagreements can be avoided by using participatory models of EIA, whereby the local communities are involved during the initial phases of project design. In the same vein, integrating biodiversity guidelines with renewable implementation strategies would prevent the occurrence of conflicting regulations, which would otherwise interfere with a smooth implementation of projects.

This research has highlighted how such recommendations can be advanced by emphasizing the fact that adaptive legal innovation based on enforceability, institutional strength, and policy consistency is necessary to create re-

106 Schumacher, K. (2017). Large-scale renewable energy project barriers: Environmental impact assessment streamlining efforts in Japan and the EU. Environmental Impact Assessment Review, 65, 100-110. https://doi.org/10.1016/j.eiar.2017.05.001.

newable energy systems that are cost-effective, socially acceptable, and appealing to investors.

It represents a continuation of the main part of the text. It briefly and shortly sums up the results of the research, describes the main idea of the given research, scientific novelty, and its value, describes the main findings and possible recommendations, and creates interest and further perspective for continuing the research.

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PARTIES TO THE MEDICAL SERVICES CONTRACT AND THEIR CORE OBLIGATIONS (Primarily under Georgian and German Law)

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ABSTRACT

Creating a legal framework to regulate contractual relations between patients and healthcare providers, or improving the existing one, is the main task of any legal system. In this process, it is necessary to take into account the specifics of legal relations, analyze the challenges in practice, and based on them, determine the rights and obligations of the parties on a fair basis.

This article analyzes the legal and factual situation of the parties to a medical service contract, the challenges they face, and ways to overcome them. Special attention is paid to the issue of providing medical services to minors and patients who cannot make informed decisions, and the scope of participation of their parents, legal representatives, and relatives in this process.

In addition, the article discusses the main obligations of the medical service provider. Of course, the specific rights and obligations of the parties are determined in each case

based on their needs and an individual contract. However, in this case, the legal and ethical obligations common to any medical service contract are analyzed, namely the obligation of the medical service provider to inform the patient, take care of him, protect confidentiality, and maintain medical records.

The article is mainly prepared according to Georgian and German law, although for comparison, common law doctrine and the experience of other countries (including post-Soviet ones) are often used.

INTRODUCTION

The regulation of relations between the patient and the medical service provider has great importance both for the parties themselves and for the state.[1] The World Health Organization (WHO) emphasizes in its constitution that health care includes not only the existence of an effective health system, but also the ability to access it,[2] which is only possible under the conditions of a relevant legal order.

In practice, the relationship between the physician and the patient is primarily regulated by a medical services contract.[3] However, the formation of a specialized legal framework governing such contracts remains a significant challenge for Georgia, a country with a developing legal system. The legal doctrine in this field is still in the process of formation,[4] which in practice often leads to ambiguity and creates a risk of unjustified infringement of the parties' interests.

Considering the above, the main research question of this article is what fundamental legal principles and obligations should underlie the medical services contract in order to ensure high-quality medical care, contractual fairness, and equality between the parties. It should be taken into account that, in most cases, a patient's decision to seek medical assistance is driven by the need to avoid a threat to their life or health. Consequently, in practice, the patient is effectively compelled to accept the contractual terms offered by the medical service provider, which are often aimed at transferring contractual risks to the patient and minimizing the physician's liability. Therefore, it is essential to determine which obligations constitute the core duties of the parties to a medical services contract, which may not be excluded or limited by agreement, and what mechanisms should be established to ensure the genuine protection of the patient's autonomy.

The above is particularly important in the case of minors and patients who lack the capacity to make informed decisions, in whose treatment process third parties are actively involved. In this regard, it is important to clarify to what extent a minor has the authority to decide independently on the receipt of medical services, and to what extent the parents, legal representatives, or relatives should be involved in the treatment process. It is also necessary to determine whether the consent of one parent is sufficient for the treatment of a minor, and how the medical service provider should act if the requirements of the patient's legal representative do not correspond to the needs of treatment. These issues are also important in the case of patients who cannot make informed decisions.

It should be noted that, in the course of medical treatment, particular importance is attached to the patient's informed consent, the

1 Blanchard, C. N. (1921). Medical Law. Loyola Law Journal (New Orleans), 2(3), 17.

2 World Health Organization. (2006). Constitution of the World Healthcare Organization. https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1.

3 Labariega Villanueva P.A. (2005). Medical Attention Contract. Juridical Nature. Mexican law review, January-June. <http://info8.juridicas.unam.mx/cont/mlawr/3/arc/arc9.htm#N*.

4 Rusiashvili, G., Kvantaliani, N., Zarandia, T. (2022). Concept of the Journal of Medical Law and Management. Journal of Medical Law and Management, 1, 4.

duty of care, the obligation of confidentiality, and the maintenance of medical documentation. Accordingly, one of the main parts of this study is to determine the content and scope of these obligations.

Accordingly, this study aims to address the above-mentioned questions and to develop recommendations for improving the legal framework governing the relationship between the patient and the medical service provider, based on an analysis of their legal and factual status and a comparative examination of Georgian and foreign, primarily German, law.

The scientific novelty of the present study lies in its examination of the need to recognize the medical services contract as a distinct legal category, approached through both dogmatic and comparative legal analysis, with particular consideration of the German model. The study of this need is important not only for Georgia, but also for other countries whose laws do not separately regulate the medical service contract as a special type of contract. The novelty of the study is also manifested in the fact that, for the first time, an integrated analysis is made of the issue of the weak pre-contractual status of the patient, the authority of minors, and the legal protection of patients lacking the capacity to make informed decisions.

Accordingly, the study has considerable theoretical and practical significance. From a theoretical perspective, it examines, through a comparative legal approach, the subjects of the medical services contract, their interests, and their core obligations, issues that have not yet been fully explored in Georgian law. From a practical standpoint, the results of the research may serve as supporting and interpretative material for the refinement of judicial practice and the improvement of the legal framework.

LITERATURE REVIEW

Georgian legal doctrine is not distinguished by an abundance of scholarly research on patient rights or medical law. The existing literature mainly focuses on the problem of compensation for damage caused by medical malpractice.[5] Accordingly, less attention has been devoted to the contractual relationship between the patient and the medical service provider, and the existing studies address only specific elements of this relationship (e.g., informed consent, the protection of minors, and similar aspects).[6] Particularly few studies examine specific issues of medical law from a comparative legal perspective.[7] The German legal doctrine is comparatively more developed in this field. Following the 2013 legislative reform, paragraphs 630a–630h were added to the German Civil Code (BGB), thereby establishing a distinct legal framework for the medical services contract. German law regards the medical services contract as a specific type of agreement, as its performance depends on the provision of the service itself rather than the achievement of a particular result.[8] According to the prevailing view, a doctor is not a guarantor of results.[9] In this relationship, both legislation and legal doctrine place particular emphasis on the physician's obligations of patient information,[10]

5 Pepanashvili, N. (2016). Compensation for Damage Caused by a Medical Institution (Doctoral Dissertation). 1-240. https://press.tsu.ge/data/image_db_innova/samartal/nino_pepanashvili.pdf; Kvantaliani, N. (2014). Patient Rights and the Grounds of Civil Liability of Physicians. World of Lawyers.

6 Chavleshivili, G. (2023). Informed consent in the medical treatment of minors. Journal of Medical Law and Management, 2(3), 84-103; Gelashvili, I. (2024). Protection of patients lacking the capacity to give consent. Journal of Medical Law and Management, 2(5), 58-82.

7 Bichia, M. (2019). Features of Protecting the Patient's Personal Autonomy and of Giving Informed Consent (Georgian and European Approaches). Law and the World, 12, 51-67.

8 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1149-1150.

9 Prütting, J. (2023). Germany. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 68). Kluwer Law International.

10 Buchner, B. (2020). Informed consent in Germany. In Vansweevelt, T., Glover-Thomas, N. (Eds.), Informed consent and health: A global analysis (pp. 216-234). Edward Elgar Publishing. https://doi.org/10.4337/9781788973427.00018. https://doi.

care,[11] confidentiality, and the maintenance of medical documentation.[12]

The relationship between the patient and the medical service provider is regulated through judicial precedents in common law countries. For example, in the United Kingdom, several landmark cases have played a decisive role in this regard, including: Bolam v. Friern Hospital Management Committee (1957), Bolitho v. City and Hackney Health Authority (1997), Cassidy v. Ministry of Health (1957), and others. These precedents established the substantive content of the physician's obligations and the standards for assessing their fulfillment. At the international level, the specification of physicians' duties began with the Nuremberg Code, which first articulated the concept of informed consent. This was followed by the adoption of the International Code of Medical Ethics in 1949, which established standards of professional ethics.[13] Patient rights were further reinforced by the 1981 Lisbon Declaration on the Rights of the Patient[14] and the 1997 Oviedo Convention,[15] both of which are discussed in the present article.

In view of the above, the present study represents an attempt to conduct a comparative legal analysis of issues that have thus far been addressed only fragmentarily in Georgian legal literature, taking into account relevant foreign experience. Such an approach contributes to the institutional strengthening of medical law in Georgia at both the academic and practical levels. The comparison of Georgian law, as that of a post-Soviet transitional country, with European legal approaches is of interest for further research not only within the European context but also in the broader study of post-Soviet legal systems.

METHODOLOGY

The central methodological basis of this research is the comparative legal method. The study primarily compares the Georgian and German models. The choice of the German model is justified by the fact that, among the continental European legal systems (e.g., France, Italy, and others), it is the one most closely aligned with Georgian law. It is noteworthy that the Georgian Civil Code was developed based on the reception of the German Civil Code (BGB). Consequently, the German model is the most compatible with the Georgian legal system, which makes this comparison both scientifically sound and contextually relevant.

The study also uses the normative-dogmatic method, which allows for the interpretation of existing legal norms on the basis of a systematic framework of legal dogmatics.

The inductive and deductive methods enable the transition from general principles to specific cases and, conversely, the derivation of general conclusions from the analysis of individual instances.

The systematic and logical analysis methods are applied to determine the interrelation of contractual elements, specifically, to examine the obligations of patient information, care, confidentiality, and medical documentation within a unified framework.

org/10.4337/9781788973427.00018

11 Hagenloch, U. (2024). Medical Law News in Germany. Important Trends in German Judicial Practice in the First Half of 2022. Journal of Medical Law and Management, 1. 1-21.

12 Lytvynenko, A. A. (2020). A Right of Access to Medical Records: The Contemporary Case Law of the European Court of Human Rights and the Jurisprudence of Germany. Athens Journal of Law, 6(1), 103-122. https://doi.org/10.30958/ajl.6-1-6.

13 World Medical Association. (2022). WMA International Code of Medical Ethics. https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/.

14 World Medical Association. (1981). Declaration of Lisbon on the Right of the Patient. https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/.

15 Council of Europe. (1997). Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. https://rm.coe.int/168007cf98?utm_source=chatgpt.com.

1. PATIENT

According to German law, a patient is a person to whom a healthcare provider has promised to provide medical services.[16] He or she can only be a human,[17] not an animal, as the regulation of animal treatment does not fall within the scope of medical law.[18]

Georgian legislative acts provide different definitions of the term "patient",[19] which may be considered a legislative gap. In order to ensure a uniform standard, it is advisable to establish the definition provided for in Article 4 of the Law of Georgia on "Patient Rights". According to this norm, a patient is any person who, regardless of his or her health condition, uses needs or intends to use the services of the healthcare system.

The provider of medical services has legal, moral, and ethical obligations towards the patient,[20] which mainly serve, on the one hand, to protect the patient's right to life and health, and on the other hand, to ensure his or her autonomy.[21]

Patient autonomy is the right of the patient to determine independently all matters related to the provision of medical care.[22] In practice, the main barrier to the full realization of this right is the patient's weak pre-contractual position. Considering that receiving medical services is often essential to protect the patient's life and health, the patient is practically compelled to agree to the contractual terms offered by the medical service provider, which makes the patient the weaker party to the contract.

In order to improve patients' rights, amendments were made to the German Civil Code in 2013.[23] This reform mainly recognized the principles previously established in German case law,[24] most of which concerned the obligation to inform patients[25] and created a legislative basis for the protection of patients' rights.

Post-Soviet countries are trying to balance the dominant position of medical service providers with different mechanisms. For example, the Code of Administrative Offenses of the Russian Federation provides for administrative liability for including conditions in contracts that violate the legally established rights of consumers, including patients.[26]

In Georgia, the function of controlling the content of the terms of a medical service contract is primarily carried out by the courts.[27] To define the rights and obligations of the parties and eliminate legal uncertainty, it would be advisable to regulate the medical service contract as a special type of contract under the Civil Code, as is the case in other European countries (e.g., Germany).[28] This would contribute to the

16 Bakradze, F. (2022). GCC's – 630a-630h paragraphs – Medical service contract. Journal of Medical Law and Management, 1, 112.

17 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1149-1150.

18 Hagenloch, U. (2024). Medical Law News in Germany. Important Trends in German Judicial Practice in the First Half of 2022. Journal of Medical Law and Management, 1, 3.

19 Law of Georgia on Health Care (1997). Article 3(r). Legislative Herald of Georgia. https://new.matsne.gov.ge/ka/document/view/29980?publication=58; Law of Georgia on Patients' Rights (2000). Article 4(d). Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=15.

20 Prütting, J. (2023). Germany. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 74). Kluwer Law International.

21 Wellman, C. (2005). Medical Law and Moral Rights. Springer, 195. https://doi.org/10.1007/1-4020-3752-X.

22 Law of Georgia on Health Care (1997). Article 3(a). Legislative Herald of Georgia. https://new.matsne.gov.ge/ka/document/view/29980?publication=58.

23 Prütting, J. (2023). Germany. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 70). Kluwer Law International.

24 Hagenloch, U. (2023). Important trends in German judicial practice in the field of medical law in 2021. Journal of Medical Law and Management, 2, 1.

25 Hagenloch, U. (2023). Patient information in Germany. Journal of Medical Law and Management, 2(3), 3.

26 Matytsin, D. E., Plaksunova, T. A. (2020). The content of the contract for the provision of paid medical services: Theoretical and applied analysis. Issues of Private Law Regulation: History and Modernity, 19(4), 91. https://doi.org/10.15688/lc.jvolsu.2020.4.12.

27 Supreme Court of Georgia, Chamber of Civil Cases. (April 30, 2025). Decision № AS-1280-2023.

28 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-

codification of private legal relations within a single act and enhance the standard of protecting the equality of the parties' rights.

1.2 Minor patient

Public interest is high when it comes to the treatment of minors. The question of whether a minor has the right to receive medical services independently remains a subject of legal debate.[29] In this regard, ambiguity also exists in Georgian law.

Article 41 paragraph 3 of the Law of Georgia on "Patients' Rights" grants a minor over the age of 16 (who, in the opinion of the medical service provider, is capable of adequately assessing his or her own state of health) the right to give informed consent or refusal to medical treatment, whereas under Article 14 of the Civil Code of Georgia, a person under the age of 18 is deemed to have limited legal capacity. Accordingly, any transaction concluded by him or her is subject to approval[30] by the legal representatives.[31]

Thus, a minor needs the consent of a legal representative to receive medical services.[32] The exception is such personal and sensitive issues defined by law, in which parents' intervention may further worsen the minor's condition. For comparison, the institution of "Gillick Competence" is established in the common law doctrine, according to which a minor is entitled to independently make a decision on receiving medical services if he or she has the ability to properly understand the issue.[33]

According to the prevailing view, a parent or other legal representative must act in the best interests of the minor.[34] If, in the opinion of the medical service provider, the decision of the parent or other representative does not serve the best interests of the patient, he or she may apply to the court, or in cases of emergency, act based on medical necessity.[35] The same rule applies in the absence of a parent or other legal representative.[36]

In the case of Glass v. the United Kingdom (2004), the European Court of Human Rights found a violation of the right to respect for private and family life. The Court held that the doctors, considering the minor to be in a terminal stage, administered a strong dose of morphine to the patient against the mother's wishes. Although this may have been medically justifiable, the Court's finding of a violation was grounded in the fact that the doctors acted unilaterally, without seeking judicial authorization, despite the parent's refusal.[37]

Regarding the treatment of a minor, it also remains to be clarified whether the consent of both parents is required. In this context, there is a tension between, on the one hand, the parents' right to be equally involved in matters concerning the treatment of their minor children and, on the other hand, the need to reduce medical bureaucracy. This dilemma is resolved by German doctrine, according to which the consent of both parents is required only in cases of interventions of particular complexity and importance, determined in advance; otherwise,

Article Commentary. C.H. Beck & Nomos, 1149-1162.

29 George, R. (2024). Medical Decision-Making about Children. In Wards of Court and the Inherent Jurisdiction. Hart Publishing, 123. <http://dx.doi.org/10.5040/9781509972173.ch-008.

30 Gelashvili, I. (2024). Protection of patients lacking the capacity to give consent. Journal of Medical Law and Management, 2(5), 61.

31 Hagger, L. (2009). Parental Responsibility and Children's Health Care Treatment. Responsible Parents and Parental Responsibility. Hart Publishing, 185-186.

32 Gelashvili, I. (2024). Protection of patients lacking the capacity to give consent. Journal of Medical Law and Management, 2(5), 61.

33 Chavleshivili, G. (2023). Informed consent in the medical treatment of minors. Journal of Medical Law and Management, 2(3), 97-98.

34 Hoppe, N., Moia, J. (2014). Medical Law and Medical Ethics. Cambridge University Press, 122.

35 Stetsenko, S. G. (2006). Medical error and accidents in the practice of healthcare institutions: Legal aspects. Expert-Criminalist, 2, 31.

36 Chavleshivili, G. (2023). Informed consent in the medical treatment of minors. Journal of Medical Law and Management, 2(3), 95.

37 European Court of Human Rights. (2004). Decision in the case of Glass v. the United Kingdom.

the consent of one parent/legal representative is presumed.[38] This is a practical and effective way to solve the problem. Accordingly, the view regarding the advisability of reflecting the above approach in Georgian legislation should be supported.[39]

1.3 Patient lacking the capacity to make informed decisions

People may find themselves in situations where they are deprived of the ability to express their will,[40] in which they are unable to independently make decisions related to treatment.[41] From a private law perspective, a patient lacking the capacity to make informed decisions may be compared to a young minor (a person under the age of seven). The difference is that in this case, the person is incapacitated due to age,[42] while a patient lacking the ability to make informed decisions may also be an adult who, due to an accident or mental condition, is deprived of the ability to express a true will.[43]

In the United Kingdom, the treatment of patients in this category is regulated by a special legal act – the Mental Capacity Act 2005. It sets out the relevant criteria for assessing a person's decision-making capacity and establishes that, in the absence of such capacity, any intervention must be carried out in the patient's best interests, taking into account his or her past wishes, beliefs, and the views of relatives.[44]

In Georgia, the norms related to the treatment of patients lacking the capacity to make informed decisions are not consolidated in a single legal act. Decisions concerning the treatment of patients in this category are made taking into account the will they expressed in the past (when they had the capacity to make informed decisions), and in the absence of such will, based on the informed consent of their relative or legal representative.[45] In case of a conflict between the decisions of a relative and a legal representative, the will of the legal representative has priority. The involvement of relatives in decisions concerning the provision of medical services to the patient depends on their priority.[46] The decision of a patient's legal representative or relative is binding on the medical service provider to the extent applicable in the case of a minor, as discussed above.

2. MEDICAL SERVICE PROVIDER

The provider of medical services is a natural or legal entity[47] that performs any manipulation or procedure on a patient for diagnosis, treatment, prevention, or medical rehabilitation.[48] The interest existing in legal doctrine toward the medical service provider as a party to the contract is conditioned by the high social significance of medical services. In view of the above, certain obligations are imposed on the medical service provider, which ensure the provision of quality treatment and the protection of contractual equality between the parties.

38 Hagenloch, U. (2023). Patient information in Germany. Journal of Medical Law and Management, 2(3), 42-43.

39 Chavleshivili, G. (2023). Informed consent in the medical treatment of minors. Journal of Medical Law and Management, 2(3), 95.

40 Levy, S. (2009). Cultural Influences on Medical Law. Medicine and Law, 28(4), 595-596.

41 Hajek, O. (2003). Lord Denning and Medical Law. Common Law Review, 5, 27.

42 Chanturia, L. (2011). General part of civil law. Samartali, 180.

43 Koniaris, V. Th., Konstantinidou, E. S. (2023). Greece. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 132). Kluwer Law International.

44 Hoppe, N., Moia, J. (2014). Medical Law and Medical Ethics. Cambridge University Press, 112.

45 Law of Georgia on Health Care (1997). Article 11. Legislative Herald of Georgia. https://new.matsne.gov.ge/ka/document/view/29980?publication=58.

46 Law of Georgia on Patients' Rights (2000). Article 4 (v and e). Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=13.

47 Mulheron, R. (2017). Duties in Contract and Tort. In Principles of Medical Law. Oxford University Press, 104-105.

48 Law of Georgia on Patients' Rights (2000). Article 4 (v and z). Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=15.

2.1 Obligation to inform the patient

Informing the patient is part of the concept of informed consent,[49] which was first declared in the Nuremberg Code of 1947.[50] Later, this principle was reflected in the Lisbon Declaration on the Rights of the Patient, adopted by the World Medical Association in 1981.[51] Informing the patient, as a mandatory prerequisite for any medical intervention, is also provided for in the Oviedo Convention of 1997.[52]

The duty to inform means that, before medical services are provided, the patient must receive clear and complete information about the planned preventive, diagnostic, treatment, and rehabilitation services, as well as about alternative options, possible risks, expected effectiveness, the consequences of refusing treatment, the available resources, the ways these services can be received, their costs and reimbursement methods, the patient's rights and duties, and the identity and professional background of the medical provider. After treatment begins, the patient must also be informed about the results of medical tests, the diagnosis, the progress of treatment, and the likely prognosis.[53]

It is essential that patients are informed in terms they can easily understand,[54] without long or confusing sentences. The information should be clear, concise, and easy to follow.[55] For example, according to the recommendations of the Coalition for Reducing Bureaucracy in Clinical Trials, the information provided to obtain informed consent should not exceed 1,000 words.[56]

The duty to inform is also established in German law.[57] Its content is defined in Section 630e of the German Civil Code, according to which the healthcare provider is obliged to inform the patient of all essential circumstances necessary for obtaining consent.[58] This primarily concerns purely medical issues. However, the scope of information to be provided to the patient is practically the same in both Georgian and German law.

The duty to inform does not exist if the patient has refused to receive the information, if there is a justified doubt that giving such information would seriously harm the patient's health (unless the patient insists on being informed),[59] or if urgent medical intervention is needed.[60]

2.2 Duty of care

The term "duty of care" is not expressly provided for in Georgian legislation. however,

49 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1155.

50 Myronova, G. (2022). The Doctrine of the Patient's Personal Autonomy in Absolute Legal Relations: Directions of Improvement of the Legislation of Ukraine. In Ukrainian Healthcare Law in the Context of European and International Law (p. 101). Springer. https://doi.org/10.1007/978-3-031-05690-1_6.

51 World Medical Association. (1981). Declaration of Lisbon on the Right of the Patient. https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/.

52 Council of Europe. (1997). Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. https://rm.coe.int/168007cf98?utm_source=chatgpt.com.

53 Law of Georgia on Patients' Rights (2000). Article 18(1). Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=15.

54 Dughishvili, G. (2022). Informed consent in medicine. Journal of Medical Law and Management, 1, 126.

55 Nys, H. (2024). European Union Health Law. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 17). Kluwer Law International.

56 Coalition for Reducing Bureaucracy in Clinical Trials. (2021). Recommendations of the Coalition for Reducing Bureaucracy in Clinical Trials. https://bureaucracyincts.eu/.

57 Bakradze, F. (2022). GCC's – 630a-630h paragraphs – Medical service contract. Journal of Medical Law and Management, 1, 114.

58 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1154-1155.

59 Law of Georgia on Patients' Rights (2000). Article 20. Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=15.

60 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§ 1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1155-1156.

its content derives from the patient's right to treatment and care,[61] as well as from the duty of diligence established under Article 316(2) of the Civil Code of Georgia.[62] In medical law, the duty of care represents the obligation of the healthcare provider to exercise, toward the patient, a degree of caution consistent with a high professional standard, such as would be demonstrated by another competent doctor practicing in the same field.[63] It includes the core duties of the healthcare provider, which are: looking after the patient, making a diagnosis, referring to another specialist (if necessary), providing treatment, and giving guidance.[64] A special feature of the duty of care is that both the medical institution and the treating doctor owe it separately to the patient.[65]

In practice, it is particularly important to determine in which cases the duty of care is considered to have been breached. In common law countries (for example, the United Kingdom), the 'Bolam standard' is applied for this assessment. According to this standard, a doctor's liability is evaluated based on whether he or she acted in accordance with a reasonably accepted and authoritative professional practice.[66] If the doctor's conduct is consistent with the practice accepted by a responsible and competent group of specialists, he or she is not obliged to compensate for any damage.[67] The "Bolam standard" was further refined in the case of Bolitho v. City and Hackney Health Authority (1997), decided by the House of Lords in the United Kingdom, where it was established that, in addition to compliance with professional standards, the doctor must also justify why a particular method of treatment was chosen.[68]

In Georgia, the "Bolam standard" is not directly applied; however, judicial practice also links the determination of a doctor's liability to actions inconsistent with professional standards and to the failure to achieve medical objectives.[69] A similar approach is established in German law.[70] This demonstrates a shared understanding of the content of the duty of care across different legal systems.

2.3 Duty of confidentiality

Information related to medical services concerns the most private sphere of a person, namely his or her life and health.[71] Therefore, safeguarding its confidentiality is a fundamental duty of the healthcare provider.[72] This duty derives from the fundamental right to respect for private and family life[73] and continues to apply even after the patient's death.[74]

In the European Union, the General Data

61 Law of Georgia on Patients' Rights (2000). Chapter II. Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=15.

62 Vashakidze, G., Gelashvili, I., Baghishvili, E., Rusiashvili, G., Aladashvili, A., Meskhishvili, K., Mots'onelidze, N., Batlidze, G., Jorbenadze, S., Gatserelia, A., Svanadze, G., Robakidze, I. (2019). Commentary on the Civil Code of Georgia, Book III, Chanturia, L. (Ed.), 25.

63 Hoppe, N., Moia, J. (2014). Medical Law and Medical Ethics. Cambridge University Press, 48.

64 Davies, C. E., Shaul, R. Z. (2010). Physicians' legal duty of care and legal right to refuse to work during a pandemic. CMAJ: Canadian Medical Association Journal, 182(2), 167. https://doi.org/10.1503/cmaj.091628.

65 Devereux, J., Beran, R. G. (2022). Medical Negligence Law in Australia. In Medical Liability in Asia and Australasia (p. 11). Springer. https://doi.org/10.1007/978-981-16-4855-7.

66 House of Lords. (1957). Decision in the case of Bolam v. Friern Hospital Management Committee.

67 Bryden, D., Storey, I. (2011). Duty of care and medical negligence. Continuing Education in Anaesthesia, Critical Care & Pain, 11(4), 125. https://doi.org/10.1093/bjaceaccp/mkr016.

68 House of Lords. (1997). Decision in the case of Bolitho v. City and Hackney Health Authority.

69 Supreme Court of Georgia, Chamber of Civil Cases. (March 13, 2025). Decision №AS-962-2024.

70 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1149-1150.

71 Hoppe, N., Moia, J. (2014). Medical Law and Medical Ethics. Cambridge University Press, 16.

72 World Medical Association. (2022). WMA International Code of Medical Ethics. https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/.

73 Hoppe, N., Moia, J. (2014). Medical Law and Medical Ethics. Cambridge University Press, 21.

74 European Court of Human Rights. (2006). Decision in the case of L.L. v. France.

Protection Regulation (GDPR) has been in force since 25 May 2018, which, among other issues, regulates the processing of health-related data.[75] In order to approximate Georgian legislation to the regulations provided for by the GDPR, on 14 June 2023, the Parliament of Georgia adopted the Law of Georgia on Personal Data Protection,[76] which classified health-related data as a special category of data and introduced monetary fines for its unlawful processing.[77] For comparison, under Section 203 of the German Criminal Code, breach of confidentiality is subject to criminal liability.[78]

In practice, keeping information confidential is especially difficult when, because of the patient's health condition, other people take part in treatment decisions. In such cases, it is important to keep a balance between protecting the patient's privacy and avoiding unnecessary bureaucracy.

It should be noted that confidentiality is not absolute and may be limited in certain cases.[79] For example, the European Court of Human Rights did not find a violation in a case where medical staff shared information about a patient's HIV-positive status with another hospital employee to protect safety.[80]

In Georgia, disclosing confidential information is allowed in certain cases: if the patient has given consent; if keeping the information secret puts the life or health of another identified person at risk; if the data is used for teaching or research purposes in a way that does not reveal the patient's identity; if the information concerns possible violence against women or domestic violence and there is a risk of repetition (in this case it is shared only with the relevant state authorities);[81] if there is a reasonable suspicion of a disease subject to mandatory registration, the information is shared with other medical staff involved in treatment; if disclosure is required for forensic examination; or if law enforcement requests it under a court decision.[82]

The duty of confidentiality is not only a guarantee of privacy; it also helps build trust between doctor and patient,[83] which is an important factor for the success of medical care.

2.4 Duty to produce medical documentation

In Georgia, doctors and other healthcare personnel are required to keep records in medical documentation in accordance with the established rules. The rules for keeping medical documentation are approved by a subordinate legal act – a ministerial order.[84] In Germany, the obligation to produce medical records is defined in Section 630f of the Civil Code. [85] It should be noted that the purpose of keeping medical records in Georgia and other countries

75 Prütting, J. (2023). Germany. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 76). Kluwer Law International.

76 Parliament of Georgia. (2019). Explanatory note to the draft law on Personal Data Protection. https://info.parliament.ge/file/1/BillReviewContent/222087?.

77 Law of Georgia on Personal Data Protection (2023). Definitions, Article 3(b–g). Processing of special category data without the grounds provided by this Law, Article 68. Legislative Herald of Georgia. https://matsne.gov.ge/document/view/5827307?publication=5.

78 German Criminal Code (1998). Violation of private secrets. Section 203. Federal Ministry of Justice. https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

79 Herring, J. (2022). Medical Law and Ethics (9th ed.). Oxford University Press, 305.

80 European Court of Human Rights. (2003). Decision in the case of Y v. Turkey.

81 Law of Georgia on Patients' Rights (2000). Article 20(1). Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/16978?publication=15.

82 Law of Georgia on Medical Practice (2001). Confidentiality of Information. Article 48. Legislative Herald of Georgia. https://matsne.gov.ge/ka/document/view/15334?publication=32.

83 Semyonov-Tal, K. (2024). Keeping medical information safe and confidential: A qualitative study on perceptions of Israeli physicians. Israel Journal of Health Policy Research, 13, 2. https://doi.org/10.1186/s13584-024-00641-9.

84 Law of Georgia on Health Care (1997). Article 43. Legislative Herald of Georgia. https://new.matsne.gov.ge/ka/document/view/29980?publication=58.

85 Dannemann, G., Schulze, R. (2020). German Civil Code. Volume I: Books 1-3(§§1-1296), Article-by-Article Commentary. C.H. Beck & Nomos, 1149-1150.

is essentially the same and is related to the following objectives:

(1) Ensuring that the patient is informed at every stage of treatment, which, as already noted, is one of the doctor's main duties;

(2) Ensuring an uninterrupted treatment process. Medical documentation enables the doctor to review the patient's history and continue consistent treatment, which is especially important in the event of a change of doctor;

(3) Ensuring that healthcare personnel carry out their professional activities to a high standard. Knowing that the provided medical service is subject to documentation and control encourages doctors to deliver treatment using the best methods;[86]

(4) Assessing the quality of treatment and providing evidence for both parties, which is especially important for determining the liability of the medical service provider;[87]

(5) Ensuring epidemiological and public health. Producing medical documentation helps record statistics on the spread of diseases, which is important for planning preventive measures;

(6) Supporting medical research and education, which largely depends on the availability of individuals' medical data (in a depersonalized form);[88]

(7) The effective functioning of the health insurance system and control of payments, important for avoiding unnecessary medical procedures and optimizing costs.

Thus, producing medical documentation is not only an administrative requirement. It has an important means for ensuring high-quality care and protecting the interests of parties.

CONCLUSION

In Georgia, the legal norms regulating the relationship between the patient and the medical service provider are spread across different acts. It is advisable to consolidate them into a single legal framework, which will promote the establishment of a unified approach, the traceability of norms, and reduce the risks of conflict between them.

In practice, an important problem is that, compared to the medical service provider, the patient has less ability to negotiate the terms that are favorable to him or her (negotiation power).[89] As a result, the patient usually accepts the terms offered to receive medical services. Considering this, it is important that the rights essential for the patient in receiving medical services be established by law through imperative rather than discretionary norms, which excludes the possibility of limiting them by contract. This is essential for safeguarding patient autonomy and balancing the dominant position of the medical service provider. Such an approach may also prove useful for other post-Soviet countries with transitional legal systems, where the legislation and doctrine regulating the relationship between the patient and the physician are still in the process of formation.

With regard to the parties to a medical service contract, it is unclear whether a minor patient over the age of 16 has the authority to conclude the contract independently. Article 41, paragraph 3 of the Law of Georgia on "Patient

86 Prütting, J. (2023). Germany. In Nys, H. (Ed.), International Encyclopedia of Laws: Medical Law (p. 83). Kluwer Law International.

87 Abdelkader, Y. (2025). Towards a Special Compensation System Aligned with the Unique Nature of Civil Liability for Medical Applications of Genetic Engineering. Law and World, 34, 45. https://doi.org/10.36475/L.A.W.14.

88 Council of Europe. (1997). Recommendation No. R (97) 5 of the Committee of Ministers to Member States on the Protection of Medical Data. Adopted by the Committee of Ministers on 13 February 1997 at the 584th meeting of the Ministers' Deputies. https://rm.coe.int/16804da198.

89 Dobrijevic, G., Stanisic, M., Masic, B. (2011). Sources of negotiation power: An exploratory study. South African Journal of Business Management, 42(2), 35-36. https://doi.org/10.4102/sajbm.v42i2.493.

Rights" and Articles 14 and 63 of the Civil Code of Georgia are in conflict. According to the first of them, informed consent expressed by a minor patient over the age of 16 is sufficient to receive medical services, if, in the opinion of the medical service provider, he or she properly understands his or her health condition, while the second of them additionally requires the consent of a parent/legal representative. From the perspective of protecting the best interests of the minor, it is advisable that the above-mentioned conflict of norms be resolved in favor of the regulation established by the Civil Code. An opposite view, which is recognized in common law doctrine, is that a minor may be considered competent if he or she has sufficient ability to adequately perceive and understand the essence of the specific matter.[90]

Another issue is whether the consent of only one parent or legal representative is sufficient. According to the German approach, the consent of both parents or legal representatives is required only in cases involving particular risks.[91] Specifying this matter is also important for Georgian law.

With regard to the treatment of a patient lacking decision-making capacity, it is advisable to apply the rules that govern the treatment of minors (a person under the age of seven), with the difference that in this case, greater importance is attached to respecting the patient's past wishes and views.

To make healthcare accessible and protect patient rights, the medical service provider must, no matter what type of medical intervention is performed, inform the patient, provide proper care, keep information confidential, and keep medical records. If these duties are violated, legal liability arises.

The content of the obligation to inform the patient is similar in Georgian and German law and covers both medical and administrative issues. Its purpose is to address the information asymmetry between the doctor and the patient and to ensure the full realization of patient autonomy.

The duty of care holds a central place in the treatment process. It means that the medical services given to the patient must be of good quality and follow accepted medical practice. This duty applies once the medical provider has agreed to treat the patient.[92]

In the relationship between the parties, confidentiality and the duty to produce medical records play an important role. Confidentiality ensures the protection, within the limits defined by law, of information disclosed both during and after the treatment process. Producing medical records helps provide consistent treatment and makes it easier to check the accuracy of the services delivered, which is important for determining responsibility and protecting the rights of the parties.

90 Chavleshivili, G. (2023). Informed consent in the medical treatment of minors. Journal of Medical Law and Management, 2(3), 97-98.

91 Hagenloch, U. (2023). Patient information in Germany. Journal of Medical Law and Management, 2(3), 42-43.

92 House of Lords. (1951). Decision in the case of Cassidy v. Ministry of Health.

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სამედიცინო მომსახურების ხელშეკრულების მხარეები და მათი ძირითადი ვალდებულებები, უპირატესად, ქართული და გერმანული სამართლის მაგალითზე

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აბსტრაქტი

პაციენტისა და სამედიცინო მომსახურების გამწევის სახელშეკრულებო ურთიერთობების მომწესრიგებელი სამართლებრივი ჩარჩოს შექმნა ან არსებულის გაუმჯობესება ნებისმიერი მართლწესრიგის ძირითადი ამოცანაა. ამ პროცესში აუცილებელია სამართლებრივი ურთიერთობის სპეციფიკის გათვალისწინება, პრაქტიკაში არსებული გამოწვევების ანალიზი და მათზე დაყრდნობით მხარეთა უფლება-მოვალეობების სამართლიან საფუძველზე განსაზღვრა.

წინამდებარე სტატიაში გაანალიზებულია სამედიცინო მომსახურების ხელშეკრულების მხარეების სამართლებრივი და ფაქტობრივი მდგომარეობა, მათ წინაშე არსებული გამოწვევები და მათი დაძლევის გზები. განსაკუთრებული ყურადღება ეთმობა არასრულწლოვანი და გაცნობიერებული გადაწყვეტილების მიღების უნარის არმქონე პაციენტისათვის სამედიცინო მომსახურების გაწევის საკითხს და ამ პროცესში მათი მშობლების, კანონიერი წარმომადგენლების, ნათესავების მონაწილეობის ფარგლებს.

ამასთან, სტატიაში განხილულია სამედიცინო მომსახურების გამწევის ძირითად ვალდებულები, ცხადია, მხარეთა კონკრეტული უფლება-მოვალეობები თითოეულ შემთხვევაში, მათი საჭიროებების მიხედვით, ინდივიდუალური ხელშეკრულების საფუძველზე განისაზღვრება, თუმცა მოცემულ შემთხვევაში გაანალიზებულია ის სამართლებრივი და ეთიკური ვალდებულებანი, რომელიც საერთოა ნებისმიერი სამედიცინო მომსახურების ხელშეკრულებისთვის, კერძოდ, სამედიცინო მომსახურების გამწევის მიერ პაციენტის ინფორმირების, მასზე ზრუნვის, კონფიდენციალურობის დაცვისა და სამედიცინო ჩანაწერების წარმოების ვალდებულება.

სტატია, ძირითადად, მომზადებულია ქართული და გერმანული სამართლის მიხედვით, თუმცა შედარებისთვის ხშირადაა გამოყენებული პრეცედენტულ-სამართლებრივი დოქტრინა და სხვა ქვეყნების (მათ შორის, პოსტსაბჭოთა) გამოცდილება.

საკვანძო სიტყვები: სამედიცინო სამართალი, სამედიცინო მომსახურების ხელშეკრულების მხარეები, პაციენტის წარმომადგენლობა, ექიმის ძირითადი ვალდებულებები.

შესავალი

პაციენტისა და სამედიცინო მომსახურების გამწევის ურთიერთობების რეგულირება დიდი მნიშვნელობის მქონეა, როგორც თავად ამ ურთიერთობის სუბიექტთათვის, ისე სახელმწიფოსათვის.[1] მსოფლიო ჯანდაცვის ორგანიზაცია (World Health Care Organization) თავის კონსტიტუციაში ხაზგასმით აღნიშნავს, რომ ჯანმრთელობის დაცვა თავის თავში მოიაზრებს არამხოლოდ ეფექტიანი ჯანდაცვის სისტემის არსებობას, არამედ მასზე წვდომის შესაძლებლობას,[2] რაც მხოლოდ რელევანტური სამართლებრივი წესრიგის პირობებშია შესაძლებელი.

პრაქტიკაში ექიმისა და პაციენტის ურთიერთობები ძირითადად სამედიცინო მომსახურების ხელშეკრულების საფუძველზე რეგულირდება,[3] თუმცა თავად ამგვარი ხელშეკრულებების მომწესრიგებელი სპეციალური სამართლებრივი ბაზის შექმნა საქართველოსთვის, როგორც განვითარებადი სამართლებრივი სისტემის მქონე ქვეყნისათვის, დღემდე მნიშვნელოვან გამოწვევად რჩება. ჩამოყალიბების პროცესშია იურიდიული დოქტრინაც,[4] რაც პრაქტიკაში ხშირად იწვევს ბუნდოვანებასა და ქმნის მხარეთა ინტერესების უსაფუძვლო შელახვის რისკს.

აღნიშნულის გათვალისწინებით, წინამდებარე სტატიის უმთავრესი კვლევითი კითხვაა, თუ რა ძირითად სამართლებრივ პრინციპებსა და ვალდებულებებს უნდა ეფუძნებოდეს სამედიცინო მომსახურების ხელშეკრულება, რათა უზრუნველყოფილი იქნეს სამედიცინო მომსახურების მაღალი ხარისხი, სახელშეკრულებო სამართლიანობა და მხარეთა თანასწორუფლებიანობა. გასათვალისწინებელია, ის გარემოება, რომ პაციენტის მიერ სამედიცინო დაწესებულებისთვის მიმართვა, უმეტეს შემთხვევაში, გამოწვეულია იმ საფრთხის თავიდან აცილების აუცილებლობით, რაც მის სიცოცხლესა და ჯანმრთელობას ემუქრება, შესაბამისად პრაქტიკაში იგი, ფაქტობრივად, იძულებულია დათანხმდეს სამედიცინო მომსახურების გამწევის მიერ შემოთავაზებულ სახელშეკრულებო პირობებს, რომლებიც ძირითადად სახელშეკრულებო რისკების პაციენტზე გადასვლასა და ექიმის პასუხისმგებლობის მაქსიმალურად გამორიცხვას ისახავს მიზნად. ამდენად დასაზუსტებელია: 1. თუ რა წარმოადგენს სამედიცინო მომსახურების ხელშეკრულების მხარეთა ძირითად ვალდებულებებს, რომელთა გამორიცხვა ხელშეკრულებით დაუშვებელია და 2. რა მექანიზმებით უნდა მოხდეს პაციენტის ავტონომიის რეალური დაცვა.

ზემოაღნიშნული განსაკუთრებით მნიშვნელოვანია არასრულწლოვანი და გაცნობიერებული გადაწყვეტილების უნარის არმ-

1 Blanchard, C. N. (1921). Medical Law. *Loyola Law Journal (New Orleans)*, *2*(3), 17.

2 World Health Organization. (2006). Constitution of the World Health Care Organization. https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1

3 Labariega Villanueva P.A. (2005). Medical Attention Contract. Juridical Nature. Mexican law review, January-June. http://info8.juridicas.unam.mx/cont/mlawr/3/arc/arc9.htm#N*

4 რუსიაშვილი, გ., კვანტალიანი, ნ., & ზარანდია, თ. (2022). სამედიცინო სამართლისა და მენეჯმენტის ჟურნალის კონცეფცია. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 1, 4.

ქონე პაციენტების შემთხვევაში, რომელთა მკურნალობის პროცესში აქტიურად მონაწილეობენ მესამე პირები. ამ თვალსაზრისით მნიშვნელოვანია დაზუსტდეს, რამდენად აქვს არასრულწლოვანს სამედიცინო მომსახურების მიღების საკითხის დამოუკიდებლად გადაწყვეტის უფლებამოსილება; რა ფარგლებში უნდა იყვნენ ჩართულნი მკურნალობის პროცესში პაციენტის მშობლები, კანონიერი წარმომადგენლები ან ნათესავები; რამდენადაა საკმარისი ერთ-ერთი მშობლის თანხმობა არასრულწლოვნის მკურნალობისთვის; როგორ უნდა იმოქმედოს სამედიცინო მომსახურების გამწევმა, თუ პაციენტის კანონიერი წარმომადგენლის მოთხოვნები არ შეესაბამება მკურნალობის საჭიროებებს. ეს საკითხები მნიშვნელოვანია გაცნობიერებული გადაწყვეტილების უნარის არმქონე პაციენტების შემთხვევაშიც.

აღსანიშნავია, რომ სამედიცინო მომსახურების პროცესში განსაკუთრებით მნიშვნელოვანია პაციენტის ინფორმირება, მასზე ზრუნვა, კონფიდენციალურობის დაცვა და სამედიცინო დოკუმენტაციის წარმოება. შესაბამისად, კვლევის ერთ-ერთი მთავარ ნაწილია, ასევე, ამ ვალდებულებათა შინაარსისა და ფარგლების დადგენა.

ამდენად, ნაშრომის მიზანია პაციენტისა და სამედიცინო მომსახურების გამწევის სამართლებრივი და ფაქტობრივი მდგომარეობის ანალიზის, ასევე, ქართული და უცხოური, უპირატესად გერმანული სამართლის შედარების საფუძველზე პასუხი გასცეს ზემოაღნიშნულ კითხვებს და წარმოაჩინოს შესაბამისი რეკომენდაციები პაციენტისა და სამედიცინო მომსახურების გამწევის მარეგულირებელი სამართლებრივი ჩარჩოს დასახვეწად.

წინამდებარე საკითხების კვლევის მეცნიერული სიახლე მდგომარეობს იმაში, რომ იგი სამედიცინო მომსახურების ხელშეკრულების ცალკე სამართლებრივ კატეგორიად ჩამოყალიბების საჭიროებას აყენებს დოგმატურ და შედარებით-სამართლებრივ ჭრილში, გერმანული მოდელის ანალიტიკური გათვალისწინებით. ამ საჭიროების კვლევა მნიშვნელოვანია არამხოლოდ საქართველოსთვის, ასევე სხვა ქვეყნებისთვის, რომელთა სამართალი სამედიცინო მომსახურების ხელშეკრულებას, როგორც ხელშეკრულების სპეციალურ სახეს ცალკე არ აწესრიგებს. კვლევის სიახლე ვლინდება აგრეთვე იმით, რომ პირველად ხდება პაციენტის სუსტი წინასახელშეკრულებო მდგომარეობის, არასრულწლოვანთა უფლებამოსილების და გაცნობიერებული გადაწყვეტილების უნარის არმქონე პაციენტთა სამართლებრივი დაცვის საკითხის ინტეგრირებული ანალიზი.

ამდენად, კვლევა დიდი თეორიული და პრაქტიკული მნიშვნელობისაა. თეორიული თვალსაზრისით იგი შედარებით-სამართლებრივი მიდგომის საფუძველზე განიხილავს სამედიცინო მომსახურების ხელშეკრულების სუბიექტებს, მათ ინტერესებსა და ძირითად ვალდებულებებს, რაც ქართულ სამართალში ბოლომდე არ არის გამოკვლეული. პრაქტიკული თვალსაზრისით კვლევის შედეგები შესაძლოა გახდეს დამხმარე და განმარტებითი მასალა სასამართლო პრაქტიკისა და სამართლებრივი ჩარჩოს დახვეწისთვის.

ლიტერატურის მიმოხილვა: ქართული იურიდიული დოქტრინა პაციენტისა და სამედიცინო სამართლის კვლევითი ნაშრომების სიუხვით არ გამოირჩევა, არსებული ლიტერატურა კი, ძირითადად, ეხება მცდარი სამედიცინო ქმედებით გამოწვეული ზიანის ანაზღაურების პრობლემას.[5] შესაბამისად, პაციენტისა და სამედიცინო მომსახურების სახელშეკრულებო ურთიერთობებს ნაკლები ყურადღება ეთმობა და არსებული კვლევებიც მხოლოდ ამ ურთიერთობის კონკრეტულ ელემენტებს შეეხება (მაგ.: ინფორმირებული თანხმობა, არასრულწლოვანთა დაცვა და სხვ.).[6]

5 პეპანაშვილი, ნ. (2016). სამედიცინო დაწესებულების მიერ მიყენებული ზიანის ანაზღაურება, სადისერტაციო ნაშრომი. 1-240 https://press.tsu.ge/data/image_db_innova/samartal/nino_pepanashvili.pdf; კვანტალიანი, ნ. (2014). პაციენტის უფლებები და ექიმის სამოქალაქო სამართლებრივი პასუხისმგებლობის საფუძვლები, იურისტების სამყარო.

6 ჩავლეიშვილი, გ. (2023). ინფორმირებული თა-

განსაკუთრებით მცირეა იმ ნაშრომთა რიცხვი, რომელიც სამედიცინო სამართლის ცალკეულ საკითხებს შედარებით-სამართლებრივ ჭრილში განიხილავს.[7] შედარებით მდიდარია გერმანული დოქტრინა, 2013 წლის საკანონმდებლო რეფორმით გერმანიის სამოქალაქო კოდექსს დაემატა 630a-630h-ე პარაგრაფები, რომლებმაც ცალკე მოაწესრიგა სამედიცინო მომსახურების ხელშეკრულება. გერმანული სამართალი სამედიცინო მომსახურების ხელშეკრულებას განიხილავს, როგორც სპეციფიკურ ხელშეკრულებას, ვინაიდან მისი შესრულება დამოკიდებულია მომსახურების პროცესზე და არა შედეგზე.[8] გაბატონებული შეხედულებით ექიმი არ არის შედეგის გარანტი.[9] ამ ურთიერთობაში კანონმდებლობა და დოქტრინა წინა პლანზე აყენებს პაციენტის ინფორმირების,[10] ზრუნვის,[11] კონფიდენციალურობისა და სამედიცინო დოკუმენტაციის წარმოების ვალდებულებს.[12]

პაციენტისა და სამედიცინო მომსახურების გამწევის ურთიერთობები სასამართლო პრეცედენტების გამოყენებით რეგულირდება საერთო სამართლის ქვეყნებში. მაგალითად, გაერთიანებულ სამეფოში ამ მიმართულებით განსაკუთრებით ცნობილი საქმეებია: Bolam v. Friern Hospital Management Committee (1957), Bolitho v. City and Hackney Health Authority (1997), Cassidy v. Ministry of Health (1957) და სხვა. ამ პრეცედენტებით დამკვიდრდა ექიმის მიერ შესასრულებელი ვალდებულებების შინაარსი და მათი შესრულების შეფასების სტანდარტები. საერთაშორისო დონეზე, ექიმის ვალდებულებების კონკრეტიზაცია ჯერ კიდევ ნიურნბერგის კოდექსიდან დაიწყო, რომელშიც ჩამოყალიბდა ინფორმირებული თანხმობის კონცეფცია. ამას მოყვა სამედიცინო ეთიკის საერთაშორისო კოდექსის მიღება 1949 წელს, რომელმაც დაადგინა პროფესიული ეთიკის სტანდარტები.[13] პაციენტის უფლებები კიდევ უფრო განმტკიცდა 1981 წლის ლისაბონის დეკლარაციითა[14] და 1997 წლის ოვიედოს კონვენციებით,[15] რაც წინამდებარე სტატიაშია განხილული.

აღნიშნულის გათვალისწინებით, წინამდებარე ნაშრომი წარმოადგენს ქართულ იურიდიულ ლიტერატურაში მხოლოდ ფრაგმენტულად განხილული საკითხების შედარებით-სამართლებრივი კვლევის მცდელობას უცხოური გამოცდილების გათვალისწინებით, რაც ხელს შეუწყობს საქართველოში სამედიცინო სამართლის ინსტიტუციურ გაძლიერებას როგორც სამეცნიერო, ისე გამოყენებით დონეზე. ქართული, როგორც პოსტსაბჭოთა გარდა-

ნხმობა არასრულწლოვანთა სამედიცინო მომსახურებისას. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 84-103; გელაშვილი, ი. (2024). თანხმობის გაცხადების უნარის არმქონე პაციენტის დაცვა. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(5), 58-82.

7 ბიჭია, მ. (2019). პაციენტის პირადი ავტონომიის დაცვისა და ინფორმირებული თანხმობის გაცემის თავისებურებები (ქართული და ევროპული მიდგომები). „სამართალი და მსოფლიო“, 12, 51-67.

8 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1149-1150.

9 Prütting, J. (2023). Germany. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical Law* (p. 68). Kluwer Law International.

10 Buchner, B. (2020). Informed consent in Germany. In T. Vansweevelt & N. Glover-Thomas (Eds.), *Informed consent and health: a global analysis* (pp. 216–234). Edward Elgar Publishing. https://doi.org/10.4337/9781788973427.00018.

11 ჰაგენლოხი, უ. (2024). სამედიცინო სამართლის სიახლეები გერმანიაში მნიშვნელოვანი ტენდენციები გერმანულ სასამართლო პრაქტიკაში 2022 წლის პირველ ნახევარში. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 1, 1-21.

12 Lytvynenko, A., A. (2020). A Right of Access to Medical Records: The Contemporary Case Law of the European Court of Human Rights and the Jurisprudence of Germany. *Athens Journal of Law, 6*(1), 103-122 https://doi.org/10.30958/ajl.6-1-6.

13 World Medical Association. (2022). WMA International Code of Medical Ethics. https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/.

14 World Medical Association. (1981). Declaration of Lisabon on the Raight of the Patient, https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/.

15 Council of Europe. (1997). Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. https://rm.coe.int/168007cf98?utm_source=chatgpt.com.

მავალი ქვეყნის, სამართლის შედარება ევროპულ მიდგომებთან საინტერესოა როგორც ევროპული, ისე პოსტსაბჭოთა ქვეყნების სამართლის შემდგომი კვლევისთვისაც.

მეთოდოლოგია: კვლევის ცენტრალური მეთოდოლოგიური საფუძველია შედარებით-სამართლებრივი მეთოდი. ნაშრომში ძირითადად შედარებულია საქართველოსა და გერმანიის მოდელები. გერმანული მოდელის შერჩევა განაპირობა იმ გარემოებამ, რომ იგი ყველაზე ახლოს დგას ქართულ სამართალთან კონტინენტური ევროპის სხვა ქვეყნებთან შედარებით (მაგ.: საფრანგეთი, იტალია და სხვ.). აღსანიშნავია, რომ საქართველოს სამოქალაქო კოდექსი გერმანიის სამოქალაქო კოდექსის რეცეფციის საფუძველზეა შექმნილი. ამდენად, გერმანული მოდელი ქართული სამართლისთვის ყველაზე მარტივად შეთავსებადია, რაც შედარებას მეცნიერულად გამართლებულს და კონტექსტურად შესაბამისს ხდის.

კვლევაში ასევე გამოყენებულია ნორმატიულ-დოგმატური მეთოდი, რაც შესაძლებლობას იძლევა მოქმედი სამართლებრივი ნორმების ინტერპრეტაცია განხორციელდეს იურიდიული დოგმების სისტემურ საფუძველზე.

ინდუქციურ-დედუქციური მეთოდები უზრუნველყოფენ ზოგადი პრინციპებიდან კერძო შემთხვევებზე გადასვლას და პირიქით — კერძო შემთხვევების ანალიზიდან ზოგადი დასკვნების გამოტანას.

სისტემური და ლოგიკური ანალიზის მეთოდები გამოიყენება სახელშეკრულებო ელემენტთა ურთიერთკავშირის განსაზღვრისთვის — კერძოდ, პაციენტის ინფორმირების, ზრუნვის, კონფიდენციალურობისა და სამედიცინო დოკუმენტაციის წარმოების ვალდებულებების ერთიან სისტემაში განხილვის მიზნით.

1. პაციენტი

გერმანული სამართლის თანახმად პაციენტი არის პირი, რომელსაც მკურნალი შეჰპირდა სამედიცინო მომსახურების გაწევას.[16] იგი შეიძლება იყოს მხოლოდ ადამიანი[17] და არა ცხოველი, რომელთა მკურნალობის რეგულირება არ განეკუთვნება სამედიცინო სამართლის სფეროს.[18]

საქართველოს საკანონმდებლო აქტებში ტერმინი „პაციენტი“ სხვადასხვაგვარადაა განმარტებული,[19] რაც შესაძლოა საკანონმდებლო ხარვეზად ჩაითვალოს. ერთიანი სტანდარტის უზრუნველსაყოფად მიზანშეწონილია „პაციენტის უფლებების შესახებ“ საქართველოს კანონის მე-4 მუხლით გათვალისწინებული დეფინიციის დამკვიდრება. ამ ნორმის თანახმად პაციენტი არის ნებისმიერი პირი, რომელიც, მიუხედავად მისი ჯანმრთელობის მდგომარეობისა, სარგებლობს, საჭიროებს ან აპირებს ისარგებლოს ჯანმრთელობის დაცვის სისტემის მომსახურებით.

პაციენტის მიმართ სამედიცინო მომსახურების გამწევს გააჩნია როგორც სამართლებრივი, ისე მორალური და ეთიკური ვალდებულებები,[20] რომლებიც ძირითადად ემსახურებიან, ერთი მხრივ, პაციენტის სიცოცხლისა და ჯანმრთელობის უფლების დაცვას, მეორე მხრივ კი, მისი ავტონომიის უზრუნველყოფას.[21] პაციენტის ავტონომია

16 ბაქრაძე, ფ. (2022). გსკ-ის 630a-630h-ე პარაგრაფები – სამედიცინო მომსახურების ხელშეკრულება. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 1, 112.

17 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1149-1150.

18 ჰაგენლოხი, უ. (2024). სამედიცინო სამართლის სიახლეები გერმანიაში მნიშვნელოვანი ტენდენციები გერმანულ სასამართლო პრაქტიკაში 2022 წლის პირველ ნახევარში. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 1, 3.

19 შეად. საქართველოს კანონი „ჯანმრთელობის დაცვის შესახებ“ (1997). მუხლი 3(რ). პარლამენტის უწყებანი. https://new.matsne.gov.ge/ka/document/view/29980?publication=58; საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). მუხლი 4(დ). საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=15.

20 Prütting, J. (2023). Germany. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical Law* (p. 74). Kluwer Law International.

21 Wellman, C. (2005). Medical Law and Moral Rights. Springer. 195 https://doi.org/10.1007/1-4020-3752-X.

არის პაციენტის უფლება, დამოუკიდებლად განსაზღვროს მისთვის სამედიცინო დახმარების აღმოჩენის ყველა საკითხი.[22] პრაქტიკაში, ამ უფლების სრულყოფილი რეალიზაციისათვის, ძირითადი პრობლემაა, პაციენტის სუსტი წინასახელშეკრულებო მდგომარეობაა. იმ გარემოების გათვალისწინებით, რომ ხშირად სამედიცინო მომსახურების მიღება აუცილებელია პაციენტის სიცოცხლისა და ჯანმრთელობის დასაცავად, იგი პრაქტიკულად იძულებულია დათანხმდეს სამედიცინო მომსახურების გამწევის მიერ შემოთავაზებულ სახელშეკრულებო პირობებს, რაც მას ხელშეკრულების სუსტ მხარედ აქცევს.

პაციენტის უფლებების გაუმჯობესების მიზნით, 2013 წელს გერმანიის სამოქალაქო კოდექსში შევიდა ცვლილებები.[23] ამ რეფორმით ძირითადად, გერმანულ სასამართლო პრაქტიკაში იქამდე დამკვიდრებული პრინციპების აღიარება მოხდა,[24] რომლებიც მეტწილად შეეხო პაციენტის ინფორმირების ვალდებულებას[25] და შეიქმნა საკანონმდებლო საფუძვლები პაციენტების უფლებათა დაცვისთვის.

სამედიცინო მომსახურების გამწევის დომინირებული მდგომარეობის დაბალანსებას პოსტსაბჭოთა ქვეყნები განსხვავებული მექანიზმებით ცდილობენ. მაგალითად, რუსეთის ფედერაციის ადმინისტრაციულ სამართალდარღვევათა კოდექსი, ითვალისწინებს ადმინისტრაციულ პასუხისმგებლობას ხელშეკრულებაში ისეთი პირობების ჩართვისთვის, რომლებიც არღვევს მომხმარებლის, მათ შორის პაციენტის კანონით დადგენილ უფლებებს.[26]

საქართველოში სამედიცინო მომსახურების ხელშეკრულების პირობების შინაარსის კონტროლის ფუნქციას ძირითადად სასამართლო ახორციელებს.[27] მხარეთა უფლება-მოვალეობების დაკონკრეტებისა და ბუნდოვანების აღმოფხვრის მიზნით მიზანშეწონილია, სამედიცინო მომსახურების ხელშეკრულება, როგორც ხელშეკრულების სპეციალური სახე, სხვა ევროპული ქვეყნების მსგავსად (მაგ., გერმანია),[28] სამოქალაქო კოდექსით დარეგულირდეს, რაც, ხელს შეუწყობს კერძოსამართლებრივი ურთიერთობების ერთ აქტში კოდიფიკაციასა და მხარეთა უფლებრივი თანასწორობის დაცვის სტანდარტის ამაღლებას.

1.1. არასრულწლოვანი პაციენტი

საზოგადოებრივი ინტერესი გამორჩეულად მომეტებულია, როცა საქმე ეხება არასრულწლოვანის მკურნალობას. საკითხი იმის შესახებ, თუ რამდენადაა უფლებამოსილი არასრულწლოვანი დამოუკიდებლად მიიღოს სამედიცინო მომსახურება, დღემდე სამართლებრივი დისკუსიის საგანია.[29] ამ თვალსაზრისით ბუნდოვანება არსებობს ქართულ სამართალშიც. „პაციენტის უფლებების შესახებ“ საქართველოს კანონის 41-ე მუხლის მე-3 პუნქტი უფლებას ანიჭე-

22 საქართველოს კანონი „ჯანმრთელობის დაცვის შესახებ“ (1997). მუხლი 3(ა). პარლამენტის უწყებანი. https://new.matsne.gov.ge/ka/document/view/29980?publication=58.

23 Prütting, J. (2023). Germany. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical Law* (p. 70). Kluwer Law International.

24 ჰაგენლოხი, უ. (2023). მნიშვნელოვანი ტენდენციები გერმანიის სასამართლო პრაქტიკაში სამედიცინო სამართლის მიმართულებით 2021 წელს. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2, 1.

25 ჰაგენლოხი, უ. (2023). პაციენტის ინფორმირება გერმანიაში. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 3.

26 Матыцин, Д. Е., & Плаксунова, Т.А. (2020). Содержание Договора Об Оказании Платных Медицинских Услуг: Теоретико-Прикладной Анализ. Вопросы Частноправового Регулирования: История И Современность, 19(4), 91 https://doi.org/10.15688/lc.jvolsu.2020.4.12.

27 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2025 წლის 30 აპრილის გადაწყვეტილება № ას-1280-2023 სამოქალაქო საქმეზე.

28 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1149-1162.

29 George, R. (2024). Medical Decision-Making about Children. In *Wards of Court and the Inherent Jurisdiction*. Hart Publishing. 123 http://dx.doi.org/10.5040/9781509972173.ch-008.

ბს 16 წელზე მეტი ასაკის არასრულწლოვანს (რომელიც ამავდროულად, სამედიცინო მომსახურების გამწევის შეხედულებით, სწორად აფასებს საკუთარი ჯანმრთელობის მდგომარეობას) განაცხადოს ინფორმირებული თანხმობა ან უარი სამედიცინო მომსახურების მიღებაზე, მაშინ, როდესაც საქართველოს სამოქალაქო კოდექსის მე-14 მუხლის თანახმად, 18 წელს მიუღწეველი პირი შეზღუდული ქმედუნარიანობის მქონეა. შესაბამისად, მის მიერ დადებული გარიგება მერყევად ბათილია[30] და საჭიროებს კანონიერი წარმომადგენლის მოწონებას.[31] ამდენად არასრულწლოვანს სამედიცინო მომსახურების მისაღებად ესაჭიროება კანონიერი წარმომადგენლის თანხმობა.[32] გამონაკლისია კანონით განსაზღვრული ისეთი პირადი და მგრძნობიარე საკითხები, რომლებშიც მშობლის ჩარევამ შესაძლოა უფრო მეტად გააუარესოს არასრულწლოვანის მდგომარეობა. შედარებისთვის, პრეცედენტულ-სამართლებრივ დოქტრინაში დამკვიდრებულია „გილიკური ქმედუნარიანობის“ (Gillick Competence) ინსტიტუტი, რომლის თანახმად არასრულწლოვანი უფლებამოსილია დამოუკიდებლად მიიღოს გადაწყვეტილება სამედიცინო მომსახურების მიღების თაობაზე, თუ აქვს საკითხის სწორად გააზრების უნარი.[33]გაბატონებული შეხედულებით მშობელი ან სხვა კანონიერი წარმომადგენელი უნდა ხელმძღვანელობდეს ბავშვის საუკეთესო ინტერესებით.[34] იმ შემთხვევაში, თუ სამედიცინო მომსახურების გამწევის შეხედულებით მშობლის ან სხვა წარმომადგენლის გადაწყვეტილება არ ემსახურება პაციენტის საუკეთესო ინტერესებს, მას შეუძლია მიმართოს სასამართლოს, ხოლო გადაუდებელი შემთხვევის არსებობისას იმოქმედოს სამედიცინო საჭიროებებიდან გამომდინარე.[35] იგივე წესი მოქმედებს მშობლის ან სხვა კანონიერი წარმომადგენლის არყოფნის დროსაც.[36]

საქმეზე Glass v. the United Kingdom (2004) ადამიანის უფლებათა ევროპულმა სასამართლომ დაადგინა პირადი და ოჯახური ცხოვრების პატივისცემის უფლების დარღვევა, ვინაიდან ექიმებმა არასრულწლოვანს, რომელიც მათი შეხედულებით სიკვდილისწინა სტადიაში იმყოფებოდა, დედის სურვილის საწინააღმდეგოდ პაციენტს გაუკეთეს ტკივილგამაყუჩებელი (მორფინის ძლიერი დოზა), რაც შესაძლოა მიზანშეწონილი იყო სამედიცინო გარემოებებიდან გამომდინარე, თუმცა სასამართლოს მიერ დარღვევის დადგენის მოტივაციას წარმოადგენდა ის გარემოება, რომ ექიმებმა მშობლის უარის მიუხედავად, თვითნებურად, სასამართლოსთვის მიმართვის გარეშე განახორციელეს ჩარევა.[37]

არასრულწლოვანის მკურნალობასთან დაკავშირებით, ასევე დასაზუსტებელია, თუ რამდენადაა საჭირო მისი ორივე მშობლის თანხმობა. ამ კონტექსტში ერთმანეთს უპირისპირდება მშობლების უფლება – თანაბრად იყვნენ ჩართული არასრულწლოვანი შვილების მკურნალობასთან დაკავშირებულ საკითხებში და, მეორე მხრივ, სამედიცინო ბიუროკრატიის შემცირების აუცილებლობა. ამ დილემას ორიგინალურად წყვეტს გერმანული დოქტრინა, რომლის თანახმად ორივე მშობლის თანხმობა საჭიროა მხოლოდ განსაკუთრებული სირთულითა და

30 გელაშვილი, ი. (2024). თანხმობის გაცხადების უნარის არმქონე პაციენტის დაცვა. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(5), 61.

31 Hagger, L., (2009). *Parental Responsibility and Children's Health Care Treatmen. Responsible Parents and Parental Responsibility.* Hart Publishing. 185-186.

32 გელაშვილი, ი. (2024). თანხმობის გაცხადების უნარის არმქონე პაციენტის დაცვა. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(5), 61.

33 ჩავლეიშვილი, გ. (2023). ინფორმირებული თანხმობა არასრულწლოვანთა სამედიცინო მომსახურებისას. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 97-98.

34 Hoppe, N., & Moia, J. (2014). *Medical Law and Medical Ethics*, Cambridge University Press. 122.

35 Стеценко, С.Г. (2006). Врачебная ошибка и несчастные случаи в практике работ учреждений здравоохранения: правовые аспекты. Эксперт-криминалист, 2, 31.

36 ჩავლეიშვილი, გ. (2023). ინფორმირებული თანხმობა არასრულწლოვანთა სამედიცინო მომსახურებისას. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 95.

37 European Court of Human Rights. (2004).Decision in the case of Glass v. the United Kingdom.

მნიშვნელობით გამორჩეული ჩარევისას, რომელიც დადგენილია წინასწარ, სხვა შემთხვევაში, მეორე მშობლის/კანონიერი წარმომადგენლის თანხმობა ივარაუდება.[38] აღნიშნული, პრობლემის გადაჭრის პრაქტიკულ და ეფექტიან გზას წარმოადგენს. შესაბამისად, გასაზიარებელია მოსაზრება ზემოაღნიშნული მიდგომის ქართულ კანონმდებლობაში ასახვის მიზანშეწონილობის თაობაზე.[39]

1.2. გაცნობიერებული გადაწყვეტილების მიღების უნარის არმქონე პაციენტი

ადამიანები შეიძლება ჩავარდნენ ისეთ მდგომარეობაში, როცა მოკლებულნი არიან თავიანთი ნების გამოვლენის შესაძლებლობას,[40] რა დროსაც ვერ ახერხებენ მკურნალობასთან დაკავშირებული საკითხების დამოუკიდებლად გადაწყვეტას.[41] კერძოსამართლებრივი თვალსაზრისით გაცნობიერებული გადაწყვეტილების მიღების უნარის არმქონე პაციენტი შეგვიძლია შევადაროთ მცირეწლოვანს. იმ განსხვავებით, რომ მცირეწლოვნების შემთხვევაში პირი ქმედუუნაროა ასაკობრივი ნიშნიდან გამომდინარე,[42] ხოლო გაცნობიერებული გადაწყვეტილების მიღების უნარის არმქონე პაციენტი მცირეწლოვნის გარდა შესაძლოა იყოს ზრდასრულიც, რომელიც უბედური შემთხვევის ან მენტალური მდგომარეობის გამო მოკლებულია ნამდვილი ნების გამოვლენის შესაძლებლობას.[43]

გაერთიანებულ სამეფოში ამ კატეგორიის პაციენტების მკურნალობას არეგულირებს სპეციალური სამართლებრივი აქტი — Mental Capacity Act 2005. იგი განსაზღვრავს შესაბამის კრიტერიუმებს ადამიანის მიერ გადაწყვეტილების მიღების უნარის შესაფასებლად და ადგენს, რომ ამ უნარის არქონის შემთხვევაში ნებისმიერი ჩარევა უნდა განხორციელდეს პაციენტის საუკეთესო ინტერესების დაცვით, მისი წარსული სურვილების, შეხედულებებისა და ახლობლების აზრის გათვალისწინებით. [44]

საქართველოში, გაცნობიერებული გადაწყვეტილების მიღების უნარის არმქონე პაციენტის მკურნალობასთან დაკავშირებული ნორმები არ არის მოქცეული ერთ სამართლებრივ აქტში. ამ კატეგორიის პაციენტების მკურნალობასთან დაკავშირებული გადაწყვეტილება მიიღება მათ მიერ წარსულში (როცა გაცნობიერებული გადაწყვეტილების მიღების უნარი ჰქონდათ) განცხადებული ნების გათვალისწინებით, ხოლო მისი არარსებობისას მათი ნათესავის ან კანონიერი წარმომადგენლის ინფორმირებული თანხმობით.[45] ნათესავისა და კანონიერი წარმომადგენლის გადაწყვეტილებათა კონფლიქტის შემთხვევაში უპირატესია კანონიერი წარმომადგენლის ნება. ნათესავების მონაწილეობა კი პაციენტისათვის სამედიცინო მომსახურების აღმოჩენასთან დაკავშირებული საკითხების გადაწყვეტაში დამოკიდებულია მათ რიგითობაზე.[46] პაციენტის კანონიერი წარმომადგენლის ან ნათესავის გადაწყვეტილება სამედიცინო მომსახურების გამწევისთვის სავალდებულოა იმ ფარგლებში, რა ფარგლებშიც არასრულწლოვანის შემთხვევაში, რაზედაც ზემოთ ვისაუბრეთ.

38 ჰაგენლოხი, უ. (2023). პაციენტის ინფორმირება გერმანიაში. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 42-43.

39 ჩავლეიშვილი, გ. (2023). ინფორმირებული თანხმობა არასრულწლოვანთა სამედიცინო მომსახურებისას. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 95.

40 Levy, S. (2009). Cultural Influences on Medical Law. *Medicine and Law*, 28(4), 595-596.

41 Hajek, O. (2003). Lord Denning and Medical Law. Common Law Review, 5, 27.

42 ჭანტურია, ლ. (2011). სამოქალაქო სამართლის ზოგადი ნაწილი. სამართალი, 180.

43 Koniaris, V. Th., & Konstantinidou, E. S. (2023). Greece. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical Law* (p. 132). Kluwer Law International.

44 Hoppe, N., & Moia, J. (2014). *Medical Law and Medical Ethics*, Cambridge University Press. 112.

45 საქართველოს კანონი „ჯანმრთელობის დაცვის შესახებ“ (1997). მუხლი 11. პარლამენტის უწყებანი. https://new.matsne.gov.ge/ka/document/view/29980?publication=58.

46 საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). მუხლი 4(ვ და ე). საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=13.

2. სამედიცინო მომსახურების გამწევი

სამედიცინო მომსახურების გამწევი არის ფიზიკური ან იურიდიული პირი,[47] რომელიც პაციენტს, მისი დიაგნოსტიკის, მკურნალობის, პროფილაქტიკის ან სამედიცინო რეაბილიტაციის მიზნით, უტარებს ნებისმიერ მანიპულაციასა და პროცედურას.[48] იურიდიულ დოქტრინაში არსებული ინტერესი სამედიცინო მომსახურების გამწევის, როგორც ხელშეკრულების სუბიექტისადმი, განპირობებულია სამედიცინო მომსახურების მაღალი სოციალური მნიშვნელობით. აღნიშნულის გათვალისწინებით სამედიცინო მომსახურების გამწევზე ვრცელდება დამატებითი ვალდებულებები, რომლებიც უზრუნველყოფენ მკურნალობის მაღალი ხარისხით ჩატარებასა და მხარეთა სახელშეკრულებო თანასწორობის დაცვას.

2.1. პაციენტის ინფორმირების ვალდებულება

პაციენტის ინფორმირების ვალდებულება ინფორმირებული თანხმობის კონცეფციის ნაწილია,[49] მისი დეკლარირება პირველად განხორციელდა ნიურნბერგის კოდექსში 1947 წელს,[50] მოგვიანებით ეს პრინციპი აისახა მსოფლიო მედიკოსთა ასოციაციის მიერ 1981 წელს მიღებულ ლისაბონის დეკლარაციაში „პაციენტის უფლებების შესახებ“.[51] პაციენტის ინფორმირებულობა, როგორც ნებისმიერი სამედიცინო ჩარევის სავალდებულო წინაპირობა გათვალისწინებულია ოვიედოს 1997 წლის კონვენციითაც.[52]

ინფორმირების ვალდებულება გულისხმობს, რომ პაციენტს სამედიცინო მომსახურების გაწევამდე უნდა მიეწოდოს სრულყოფილი ინფორმაცია განზრახული პროფილაქტიკური, დიაგნოსტიკური, სამკურნალო და სარეაბილიტაციო მომსახურების, ასევე ალტერნატიული ვარიანტების, მათი თანმხლები რისკის, შესაძლო ეფექტიანობის, მათზე უარის თქმის მოსალოდნელი შედეგების, სამედიცინო მომსახურების არსებული რესურსების, მათი მიღების სახეების, საფასურისა და ანაზღაურების ფორმების, პაციენტის უფლებებისა და მოვალეობების, სამედიცინო მომსახურების გამწევის ვინაობისა და პროფესიული გამოცდილების შესახებ, ხოლო სამედიცინო მომსახურების დაწყების შემდეგ პაციენტს უნდა ეცნობოს მისი სამედიცინო გამოკვლევების შედეგების, დიაგნოზის, მკურნალობის მიმდინარეობისა და სავარაუდო პროგნოზის თაობაზე.[53]

ამასთან აუცილებელია, რომ პაციენტის ინფორმირება განხორციელდეს მისთვის გასაგები ენით,[54] გრძელი და ბუნდოვანი წინადადებების გარეშე, ინფორმაცია უნდა იყოს მარტივად აღქმადი.[55] მაგალითად,

47 Mulheron, R. (2017). Duties in Contract and Tort. In *Principles of Medical Law*. Oxford university press. 104-105.

48 საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). მუხლი 4(ვ და ე). საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=15.

49 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1155.

50 Myronova, G. (2022). The Doctrine of the Patient's Personal Autonomy in Absolute Legal Relations: Directions of Improvement of the Legislation of Ukraine. In *Ukrainian Healthcare Law in the Context of European and International Law* (p. 101). Springer. https://doi.org/10.1007/978-3-031-05690-1_6.

51 World Medical Association. (1981). Declaration of Lisabon on the Raight of the Patient, https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/.

52 Council of Europe. (1997). Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. https://rm.coe.int/168007cf98?utm_source=chatgpt.com.

53 საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). მუხლი 18(1). საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=15.

54 დუღაშვილი, გ. (2022). ინფორმირებული თანხმობა მედიცინაში. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 1, 126.

55 Nys, H. (2024). European Union Health Law. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical*

კლინიკურ კვლევებში ბიუროკრატიის შემცირების კოალიციის (The Coalition for Reducing Bureaucracy in Clinical Trials) მიერ შემუშავებული რეკომენდაციების თანახმად, ინფორმირებული თანხმობის მისაღებად პაციენტისთვის მისაწოდებელი ინფორმაცია არ უნდა აღემატებოდეს 1000 სიტყვას.[56]

ინფორმირების ვალდებულება დამკვიდრებულია გერმანულ სამართალშიც.[57] მისი შინაარსი განსაზღვრულია გერმანიის სამოქალაქო კოდექსის 630e პარაგრაფით, რომლის თანახმად, მკურნალობის გამწევი პირი ვალდებულია პაციენტს უგამონაკლისოდ აუხსნას თანხმობის მისაღებად აუცილებელი არსებითი გარემოებები,[58] რაც უპირატესად წმინდა სამედიცინო საკითხებს გულისხმობს, თუმცა პაციენტისთვის მისაწოდებელი ინფორმაციის მოცულობა ქართულ და გერმანულ სამართალში პრაქტიკულად იგივეა.

ინფორმირების ვალდებულება არ არსებობს, თუ პაციენტმა თავად განაცხადა უარი მის მიღებაზე, ან/და თუ არსებობს დასაბუთებული ვარაუდი, რომ აღნიშნული სერიოზულ ზიანს მიაყენებს პაციენტის ჯანმრთელობას (გარდა იმ შემთხვევისა, თუ პაციენტი დაჟინებით მოითხოვს მის ინფორმირებას),[59] ან/და ადგილი აქვს გადაუდებელი სამედიცინო ჩარევის საჭიროებას.[60]

2.2. ზრუნვის ვალდებულება

ტერმინ „ზრუნვის ვალდებულებას“ საქართველოს კანონმდებლობა არ ითვალისწინებს, თუმცა მისი შინაარსი გამომდინარეობს პაციენტის მკურნალობისა და მოვლის უფლებიდან.[61] ასევე, საქართველოს სამოქალაქო კოდექსის 316-ე მუხლის მე-2 ნაწილით გათვალისწინებული გულისხმიერების ვალდებულებიდან.[62] „ზრუნვის ვალდებულება“ სამედიცინო სამართალში წარმოადგენს სამედიცინო მომსახურების გამწევის ვალდებულებას, პაციენტის მიმართ გამოიჩინოს მაღალი პროფესიული სტანდარტით დაცული სიფრთხილე, ისეთი როგორსაც ამ დარგში მოღვაწე, სხვა კომპეტენტური ექიმი გამოიჩენდა.[63] იგი აერთიანებს სამედიცინო მომსახურების გამწევის ძირითად მოვალეობებს, ესენია: პაციენტის მოვლა, დიაგნოზის დასმა, სხვა სპეციალისტთან გადამისამართება (საჭიროების შემთხვევაში), მკურნალობა და ინსტრუქტაჟი.[64] ზრუნვის ვალდებულებისთვის დამახასიათებელია, რომ იგი პაციენტის მიმართ ერთმანეთისგან დამოუკიდებლად გააჩნიათ სამედიცინო დაწესებულებასა და მკურნალ ექიმს.[65]

პრაქტიკაში განსაკუთრებით მნიშვნელოვანია დადგინდეს, რა შემთხვევაში ითვლება ზრუნვის ვალდებულება დარ-

Law (p.17). Kluwer Law International.

56 Coalition for Reducing Bureaucracy in Clinical Trials. (2021). Recommendations of the Coalition for Reducing Bureaucracy in Clinical Trials. https://bureaucracyincts.eu/.

57 ბაქრაძე, ფ. (2022). გსკ-ის 630a-630h-ე პარაგრაფები – სამედიცინო მომსახურების ხელშეკრულება. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 1, 114.

58 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1154-1155.

59 საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). მუხლი 20. საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=15.

60 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1155-1156.

61 საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). თავი II. საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=15.

62 ვაშაკიძე, გ., გელაშვილი, ი., ბაღიშვილი, ე., რუსიაშვილი, გ., ალადაშვილი, ა., მესხიშვილი, ქ., მოწონელიძე, ნ., ბათლიძე, გ., ჯორბენაძე, ს., გაწერელია, ა., სვანაძე, გ., & რობაქიძე, ი. (2019). საქართველოს სამოქალაქო კოდექსის კომენტარი, წიგნი III (რედ. ჭანტურია, ლ.) 25.

63 Hoppe, N., & Moia, J. (2014). *Medical Law and Medical Ethics*, Cambridge University Press. 48.

64 Davies, C. E., & Shaul, R. Z. (2010). Physicians' legal duty of care and legal right to refuse to work during a pandemic. *CMAJ: Canadian Medical Association Journal*, 182(2), 167 https://doi.org/10.1503/cmaj.091628.

65 Devereux, J., & Beran, R. G. (2022). Medical Negligence Law in Australia. In *Medical Liability in Asia and Australasia (*p. 11). Springer. https://doi.org/10.1007/978-981-16-4855-7.

ღვეულად. საერთო სამართლის ქვეყნებში (მაგალითად, დიდი ბრიტანეთი) აღნიშნულის შესაფასებლად გამოიყენება „ბოლამის სტანდარტი“, რომლის თანახმადაც ექიმის პასუხისმგებლობა ფასდება იმით, მოქმედებდა თუ არა ის გონივრულად მიღებული და ავტორიტეტული პროფესიული პრაქტიკის შესაბამისად.[66] თუ ექიმის ქცევა შეესაბამება „საპატიო და კომპეტენტური სპეციალისტების ჯგუფის მიერ მიღებულ პრაქტიკას“, მაშინ მას არ ევალება ზიანის ანაზღაურება.[67] „ბოლამის სტანდარტი“ უფრო მეტად დაიხვეწა გაერთიანებული სამეფოს ლორდთა პალატის მიერ განხილულ საქმეში – Bolitho v. City and Hackney Health Authority (1997) და დადგინდა, რომ პროფესიულ სტანდარტთან შესაბამისობის გარდა ექიმმა უნდა დაასაბუთოს თუ რატომ აირჩია მკურნალობის კონკრეტული მეთოდი.[68]

საქართველოში „ბოლამის სტანდარტი“ პირდაპირ არ გამოიყენება, თუმცა სასამართლო პრაქტიკა ექიმის პასუხისმგებლობის დადგენას აქაც პროფესიულ სტანდარტთან შეუსაბამო ქმედებასა და სამედიცინო მიზნების მიუღწევლობას უკავშირებს.[69] მსგავსი მიდგომაა დამკვიდრებულ გერმანულ სამართალშიც.[70] აღნიშნული კი განსხვავებულ სამართლებრივ სისტემებში ზრუნვის ვალდებულების შინაარსის ერთიანი გაგების მაჩვენებელია.

2.3. კონფიდენციალურობის ვალდებულება

სამედიცინო მომსახურებასთან დაკავშირებული ინფორმაცია ეხება ადამიანის მეტად პირადულ სფეროს, კერძოდ, მის სიცოცხლესა და ჯანმრთელობას.[71] ამდენად, მისი კონფიდენციალურობის დაცვა სამედიცინო მომსახურების გამწევის ძირითადი ვალდებულებაა.[72] ეს ვალდებულება გამომდინარეობს ადამიანის პირადი და ოჯახური ცხოვრების დაცვის ძირითადი უფლებიდან[73] და პაციენტის გარდაცვალების შემდეგაც მოქმედებს.[74]

ევროკავშირის მასშტაბით, 2018 წლის 25 მაისიდან ძალაშია ზოგადი მონაცემთა დაცვის რეგულაცია (General Data Protection Regulation – GDPR), რომელიც რიგ საკითხებთან ერთად, არეგულირებს ჯანმრთელობასთან დაკავშირებული მონაცემების დამუშავებას.[75] GDPR-ით გათვალისწინებულ რეგულაციებთან დაახლოების მიზნით საქართველოს პარლამენტმა 2023 წლის 14 ივნისს მიიღო საქართველოს კანონი „პერსონალურ მონაცემთა დაცვის შესახებ“,[76] რომელმაც პირის ჯანმრთელობასთან დაკავშირებული მონაცემები განსაკუთრებული კატეგორიის მონაცემებად განსაზღვრა და მისი უსაფუძვლო დამუშავებისთვის ფულადი ჯარიმაც გაითვალისწინა.[77] შედა-

66 House of Lords. (1957).Decision in the case of Bolam v. Friern Hospital Management Committee.

67 Bryden, D., & Storey, I. (2011). Duty of care and medical negligence. *Continuing Education in Anaesthesia, Critical Care & Pain, 11*(4), 125. https://doi.org/10.1093/bjaceaccp/mkr016.

68 House of Lords. (1997). Decision in the case of Bolitho v. City and Hackney Health Authority.

69 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2025 წლის 13 მარტის გადაწყვეტილება №ას-962 – 2024 საქმეზე.

70 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1149-1150.

71 Hoppe, N., & Moia, J. (2014). Medical Law and Medical Ethics, Cambridge University Press. 16.

72 World Medical Association. (2022). WMA International Code of Medical Ethics. https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/.

73 Hoppe, N., & Moia, J. (2014). Medical Law and Medical Ethics, Cambridge University Press. 21.

74 European Court of Human Rights. (2006). Decision in the case of L.L. v. France.

75 Prütting, J. (2023). Germany. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical Law* (p. 76). Kluwer Law International.

76 საქართველოს პარლამენტი. (2019). განმარტებითი ბარათი კანონპროექტზე „პერსონალურ მონაცემთა დაცვის შესახებ“ https://info.parliament.ge/file/1/BillReviewContent/222087?.

77 საქართველოს კანონი „პერსონალურ მონაცემთა დაცვის შესახებ“ (2023). ტერმინთა განმარტება. მუხლი 3(ბ და გ). განსაკუთრებული კატეგორიის მონაცემთა დამუშავება ამ კანონით გათვალისწი-

რებისთვის, კონფიდენციალურობის დარღვევის შემთხვევაში გერმანიის სისხლის სამართლის კოდექსის 203-ე მუხლი ითვალისწინებს სისხლისსამართლებრივ პასუხისმგებლობას.[78]

პრაქტიკაში კონფიდენციალურობის უზრუნველყოფა განსაკუთრებით რთულია, როცა პაციენტის ჯანმრთელობის მდგომარეობის გათვალისწინებით მისი მკურნალობასთან დაკავშირებული საკითხების გადაწყვეტაში მესამე პირები მონაწილეობენ. ამ შემთხვევაში აუცილებელია დაცული იქნეს ბალანსი პაციენტის ინფორმაციის კონფიდენციალურობასა და ზედმეტი ბიუროკრატიული ბარიერების შემცირებას შორის.

აღსანიშნავია, რომ კონფიდენციალურობა არ არის აბსოლუტური და იგი შეიძლება შეიზღუდოს გარკვეულ შემთხვევებში.[79] მაგალითად, ადამიანის უფლებათა ევროპულმა სასამართლომ არ დაადგინა დარღვევა, როდესაც სამედიცინო პერსონალმა საავადმყოფოს სხვა თანამშრომელს გაუზიარა ინფორმაცია პაციენტის აივ დადებითი სტატუსის შესახებ.[80] საქართველოში კონფიდენციალური ინფორმაციის გამჟღავნება დასაშვებია, თუ: მიღებულია პაციენტის თანხმობა, ინფორმაციის გაუმჟღავნებლობა საფრთხეს უქმნის მესამე პირის (რომლის ვინაობაც ცნობილია) სიცოცხლეს ან/და ჯანმრთელობას, სასწავლო ან სამეცნიერო მიზნით პაციენტის შესახებ ინფორმაციის გამოყენებისას მონაცემები ისეა წარმოდგენილი, რომ შეუძლებელია პიროვნების იდენტიფიკაცია, ინფორმაცია ეხება ქალთა მიმართ ძალადობის ან/და ოჯახში ძალადობის შესაძლო ჩადენის ფაქტს და არსებობს ძალადობის განმეორების საშიშროება (ეს ინფორმაცია ეცნობება მხოლოდ შესაბამის სახელმწიფო ორგანოებს), ამას ითვალისწინებს საქართველოს კანონმდებლობა,[81] ასევე, ისეთ შემთხვევებში, როდესაც არსებობს დასაბუთებული ეჭვი სავალდებულო აღრიცხვას დაქვემდებარებულ დაავადებაზე, ინფორმაცია მიეწოდება სამედიცინო მომსახურების მონაწილე სხვა სამედიცინო პერსონალს, ინფორმაციის გამჟღავნება აუცილებელია სასამართლო-სამედიცინო ექსპერტიზისათვის, ინფორმაციის გამჟღავნებას მოითხოვენ სამართალდამცველი ორგანოები (სასამართლოს გადაწყვეტილების შესაბამისად).[82]

კონფიდენციალურობის ვალდებულება არ არის მხოლოდ პირადი ცხოვრების დაცვის გარანტია, იგი ხელს უწყობს ექიმსა და პაციენტს შორის ნდობის ჩამოყალიბებას,[83] რაც მნიშვნელოვანი ფაქტორია სამედიცინო მომსახურების წარმატებისათვის.

2.4. სამედიცინო დოკუმენტაციის წარმოების ვალდებულება

საქართველოში ექიმი და ჯანმრთელობის დაცვის სხვა პერსონალი ვალდებული არიან დადგენილი წესით აწარმოონ ჩანაწერები სამედიცინო დოკუმენტაციაში, რომელთა წარმოების წესი მტკიცდება კანონქვემდებარე აქტით – მინისტრის ბრძანებით.[84] გერმანიაში სამედიცინო დო-

ნებული საფუძვლების გარეშე. მუხლი 68. საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/document/view/5827307?publication=5.

78 German Criminal Code (1998). Violation of private secrets. Section 203. Federal Ministry of Justice. https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

79 Herring, J. (2022). *Medical Law and Ethics* (9th ed.). Oxford University Press. 305.

80 European Court of Human Rights. (2003). Decision in the case of Y v. Turkey.

81 საქართველოს კანონი „პაციენტის უფლებების შესახებ“ (2000). მუხლი 28(1). საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/16978?publication=15.

82 საქართველოს კანონი „საექიმო საქმიანობის შესახებ“ (2001). ინფორმაციის კონფიდენციალობა. მუხლი 48. საქართველოს საკანონმდებლო მაცნე. https://matsne.gov.ge/ka/document/view/15334?publication=32.

83 Semyonov-Tal, K. (2024). Keeping medical information safe and confidential: A qualitative study on perceptions of Israeli physicians. *Israel Journal of Health Policy Research*, 13,2 https://doi.org/10.1186/s13584-024-00641-9.

84 საქართველოს კანონი „ჯანმრთელობის დაცვის შესახებ“ (1997). მუხლი 43. პარლამენტის უწყებანი. https://new.matsne.gov.ge/ka/document/

კუმენტაციის წარმოების ვალდებულება განსაზღვრულია სამოქალაქო კოდექსის 630f პარაგრაფით.[85] აღსანიშნავია, რომ სამედიცინო დოკუმენტაციის წარმოების დანიშნულება საქართველოსა და სხვა ქვეყნებში არსებითად საერთოა და დაკავშირებულია შემდეგი მიზნების რეალიზაციასთან:

(1) პაციენტის ინფორმირების უზრუნველყოფა მკურნალობის ნებისმიერ ეტაპზე, რაც როგორც უკვე აღნიშნა, ექიმის ერთ-ერთი ძირითადი ვალდებულებაა.

(2) შეუფერხებელი მკურნალობის პროცესის განხორციელება. სამედიცინო დოკუმენტაცია შესაძლებლობას აძლევს ექიმს გაეცნოს პაციენტის ისტორიას და გააგრძელოს თანმიმდევრული მკურნალობა, აღნიშნული განსაკუთრებით მნიშვნელოვანია ექიმის შეცვლის შემთხვევაში.

(3) ჯანმრთელობის დაცვის პერსონალის მიერ პროფესიული საქმიანობის მაღალი სტანდარტით განხორციელება. იმის ცოდნა, რომ გაწეული სამედიცინო მომსახურება დოკუმენტირებასა და კონტროლს ექვემდებარება უბიძგებს ექიმს მკურნალობა განახორციელოს საუკეთესო მეთოდით.[86]

(4) მკურნალობის ხარისხის შეფასება და მხარეთა მტკიცებულებებით უზრუნველყოფა, რაც განსაკუთრებით მნიშვნელოვანია სამედიცინო მომსახურების გამწევის პასუხისმგებლობის დადგენისათვის.[87]

(5) ეპიდემიოლოგიური და საზოგადოებრივი ჯანმრთელობის უზრუნველყოფა. სამედიცინო დოკუმენტაციის წარმოება ხელს უწყობს დაავადების გავრცელების სტატისტიკის წარმოებას, რაც მნიშვნელოვანია პრევენციული ღონისძიებების დაგეგმვისთვის.

(6) სამედიცინო კვლევისა და განათლების მხარდაჭერა, რაც მნიშვნელოვნად არის დამოკიდებული რეალური სამედიცინო მონაცემების ხელმისაწვდომობაზე (დეპერსონალიზებული ფორმით).[88]

(7) ჯანმრთელობის დაზღვევის სისტემის ეფექტიანი განხორციელება და გადახდების კონტროლი, რაც მნიშვნელოვანია ზედმეტი სამედიცინო პროცედურის თავიდან აცილებისა და ხარჯების ოპტიმიზაციისთვის.

ამრიგად, სამედიცინო დოკუმენტაციის წარმოება არაა მხოლოდ ადმინისტრაციული მოთხოვნა. იგი მნიშვნელოვანი საშუალებაა მომსახურების მაღალი ხარისხისა და მხარეთა ინტერესების დაცვის უზრუნველსაყოფად.

დასკვნა

საქართველოში პაციენტის და სამედიცინო მომსახურების გამწევის სამართლებრივი ურთიერთობის მომწესრიგებელი ნორმები მოქცეულია სხვადასხვა აქტებში. მიზანშეწონილია მათი ერთ სამართლებრივ ჩარჩოში კონსოლიდაცია, რაც ხელს შეუწყობს ერთიანი მიდგომის დამკვიდრებას, ნორმათა მიკვლევადობას და შეამცირებს კოლიზიის რისკებს.

პრაქტიკაში, მნიშვნელოვანი პრობლემაა ის გარემოება, რომ პაციენტს სამედიცინო მომსახურების გამწევთან შედარებით აქვს ნაკლები შესაძლებლობა, შეთანხმებას მიაღწიოს მისთვის სასურველი პირო-

view/29980?publication=58.

85 Dannemann, G., & Schulze, R. (2020). *German Civil Code Volume I: Books 1–3(§§ 1-1296), Article-by-Article Commentary*. C.H. BECK & Nomos, 1149-1150.

86 Prütting, J. (2023). Germany. In H. Nys (Ed.), *International Encyclopedia of Laws: Medical Law* (p. 83). Kluwer Law International.

87 Abdelkader, Y. (2025). Towards a Special Compensation System Aligned with the Unique Nature of Civil Liability for Medical Applications of Genetic Engineerin. *Law and World, 34*. 45 doi.org/10.36475/L.A.W.14.

88 Council of Europe. (1997). Recommendation No. R (97) 5 of the Committee of Ministers to Member States on the Protection of Medical Data. Adopted by the Committee of Ministers on 13 February 1997 at the 584th meeting of the Ministers' Deputies. https://rm.coe.int/16804da198.

ბებით (Negotiation Power),[89] რის გამოც იგი სამედიცინო მომსახურების მისაღებად ძირითადად ეთანხმება შემოთავაზებულ პირობებს. აღნიშნულის გათვალისწინებით, მნიშვნელოვანია ის უფლებები, რაც პაციენტისთვის არსებითია სამედიცინო მომსახურების მიღებისას დადგენილი იყოს საკანონმდებლო საფუძველზე, იმპერატიული და არა დისპოზიციური ნორმებით, რაც გამორიცხავს ხელშეკრულების საფუძველზე რომელიმე მათგანის შეზღუდვის შესაძლებლობა. აღნიშნული მნიშვნელოვანია პაციენტის ავტონომიის დაცვისა და სამედიცინო მომსახურების გამწევის დომინანტური მდგომარეობის დაბალანსებისთვის. ამგვარი, მიდგომა შესაძლოა გამოსადეგი იყოს სხვა პოსტსაბჭოთა გარდამავალი სამართლებრივი სისტემის მქონე ქვეყნებისთვისაც, რომლებშიც პაციენტისა და ექიმის ურთიერთობების მარეგულირებელი კანონმდებლობა და დოქტრინა ჩამოყალიბების პროცესშია.

სამედიცინო მომსახურების ხელშეკრულების მხარეებთან დაკავშირებით, ბუნდოვანია, აქვს თუ არა 16 წელს გადაცილებულ არასრულწლოვან პაციენტს ხელშეკრულების დამოუკიდებლად დადების უფლებამოსილება. ამ თვალსაზრისით კოლიზიაშია „პაციენტის უფლებების შესახებ“ საქართველოს კანონის 41-ე მუხლის მე-3 პუნქტი და საქართველოს სამოქალაქო კოდექსის მე-14 და 63-ე მუხლები. პირველი მათგანის მიხედვით სამედიცინო მომსახურების მისაღებად საკმარისია 16 წელზე მეტი ასაკის არასრულწლოვანი პაციენტის, მიერ გამოვლენილი ინფორმირებულ თანხმობა, იმ შემთხვევაში თუ სამედიცინო მომსახურების გამწევის შეხედულებით, სწორად აფასებს საკუთარი ჯანმრთელობის მდგომარეობას, მეორე მათგანი კი დამატებით მშობლის/ კანონიერი წარმომადგენლის თანხმობის აუცილებლობაზე მიუთითებს. არასრულწლოვანის საუკეთესო ინტერესების დაცვიდან გამომდინარე, მიზანშეწონილია ზემოაღნიშნული ნორმათა კოლიზია, სამოქალაქო კოდექსით დადგენილი რეგულაციის სასარგებლოდ გადაწყდეს. საპირისპირო მოსაზრებაა დამკვიდრებული პრეცედენტულსამართლებრივი დოქტრინით, რომლის თანახმად, არასრულწლოვანი შეიძლება ჩაითვალოს უფლებამოსილად, იმ შემთხვევაში, თუ მას აქვს საკმარისი უნარი კონკრეტული საკითხის არსის ადეკვატური აღქმისა და გააზრებისათვის.[90]

სხვა საკითხია, თუ რამდენადაა საკმარისი მხოლოდ ერთი მშობლის/კანონიერი წარმომადგენლის თანხმობა. გერმანული მიდგომით, ორივე მშობლის/ კანონიერი წარმომადგენლის თანხმობა საჭიროა მხოლოდ განსაკუთრებული რისკის არსებობის შემთხვევაში.[91] აღნიშნულის დაკონკრეტება მნიშვნელოვანია ქართული სამართლისთვისაც.

გაცნობიერებული გადაწყვეტილების მიღების უნარის არმქონე პაციენტის მკურნალობასთან მიმართებით, მიზანშეწონილია გამოყენებული იქნეს ის ნორმები, რაც ეხება მცირეწლოვნის მკურნალობას, იმ განსხვავებით, რომ ამ შემთხვევაში უფრო დიდი მნიშვნელობა ენიჭება პაციენტის წარსული სურვილებისა და შეხედულებების გაზიარებას.

ჯანმრთელობის დაცვის ხელმისაწვდომობისა და პაციენტის უფლებების დაცვის უზრუნველსაყოფად, სამედიცინო მომსახურების გამწევს მის მიერ განსახორციელებელი სამედიცინო ჩარევის სახის მიუხედავად ეკისრება: პაციენტის ინფორმირების, ზრუნვის, კონფიდენციალურობისა და სამედიცინო დოკუმენტაციის წარმოების ვალდებულება, რომელთა დარღვევა იწვევს სამართლებრივ პასუხისმგებლობას.

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89 Dobrijevic, G., Stanisic, M., & Masic, B. (2011). Sources of negotiation power: An exploratory study. *South african Journal of Business Management*, 42(2), 35-36. https://doi.org/10.4102/sajbm.v42i2.493.

90 ჩავლეიშვილი, გ. (2023). ინფორმირებული თანხმობა არასრულწლოვანთა სამედიცინო მომსახურებისას. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 97-98.

91 ჰაგენლოხი, უ. (2023). პაციენტის ინფორმირება გერმანიაში. სამედიცინო სამართლისა და მენეჯმენტის ჟურნალი, 2(3), 42-43.

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მკურნალობის პროცესში ცენტრალური ადგილი უჭირავს ზრუნვის ვალდებულებას. იგი განსაზღვრავს, რომ პაციენტისთვის გაწეული სამედიცინო მომსახურება იყოს მაღალი ხარისხის და შეესაბამებოდეს საყოველთაოდ აღიარებულ სამედიცინო პრაქტიკას. ზრუნვის ვალდებულება ვრცელდება ხელშეკრულების მოქმედების ეტაპზე, ანუ მას შემდეგ, რაც სამედიცინო მომსახურების გამწევი დათანხმდება მკურნალობის გაწევას.[92]

92 House of Lords. (1951). Decision in the case of Cassidy v. Ministry of Health.

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MARITIME PIRACY: A Maritime Crime with an International Dimension

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ABSTRACT

Maritime piracy is recognized as an international crime, constituting a phenomenon that has posed a continual threat to the security and stability of the international community, undermining both freedom of navigation and the safety of international trade.

Piracy increased markedly in the late twentieth century, becoming prominent in many regions around the globe. Because this crime does not target any one State in particular but endangers the security and integrity of the international community as a whole, pirates have been regarded as enemies of humanity, and their criminal acts are treated as directed against the international community.

The gravity of this offence has compelled the international community to adopt the necessary measures and procedures to prevent, combat, and mitigate it, given its impact on global security and safety. In particular, the repercussions of piracy in the Gulf of Aden and off the coast of Somalia generated a broad international consensus on the need to put an end to this problem and to pool collective efforts in addressing it. A variety of methods and strategies have since been employed by States and international organizations to confront maritime piracy.

The United Nations Security Council (UNSC), in numerous resolutions, has voiced profound concern over the rise

in pirate attacks against vessels off Somalia's shores, which have come to represent a genuine threat to ships' safety and to navigation in that region. This concern has led to the provision of assistance to States that face challenges in dealing with this crime.

INTRODUCTION

The worldwide threat of piracy has existed since ancient times, and it disrupts personal safety and international commerce, which leads to political and security problems for nations. The crime received international recognition during the late twentieth century as media and communication technologies advanced rapidly. Maritime peace and security face an escalating danger that threatens the fundamental bases that support worldwide trade operations across oceanic routes. The international community faces a threat from pirates who attack all ships because they do not discriminate against specific countries, which makes them hostes humani generis—enemies of all humanity—who harm the entire global population. Under international customary law, states can seize pirate vessels on the high seas or in maritime areas outside state jurisdiction, while various international treaties also criminalize this offense. The crime receives criminalization through international customary law because it allows states to seize pirate vessels operating beyond state jurisdictional boundaries on the high seas and in unclaimed maritime territories.

Accordingly, the central question arises: **What is the specific nature of maritime piracy?**

METHODOLOGY

The research employs a doctrinal legal analysis complemented by comparative and case-based methods. The doctrinal approach examines the evolution of the international legal framework on maritime piracy, from the 1958 Geneva Convention on the High Seas to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and subsequent instruments.

To reinforce the theoretical framework with empirical evidence, the study incorporates data and official reports from leading international institutions — including the International Maritime Organization (IMO, 2024), the International Maritime Bureau (IMB, n.d.), and the United Nations Office on Drugs and Crime (UNODC, 2020; 2021; 2023). These sources, such as the IMO's Global Integrated Shipping Information System (GISIS) and UNODC's Global Maritime Crime Programme and Pirates of the Niger Delta reports, provide verified statistical data and analytical insights on piracy trends, enforcement outcomes, and regional security initiatives. In addition, the methodological framework is enriched by recent Scopus-indexed academic research applying quantitative and theoretical approaches to maritime piracy. Spatial and temporal models of piracy hotspots are considered (Tsioufis et al., 2024), along with theoretical interpretations of cyclical piracy dynamics (Frederick Boamah, 2023) and socio-economic perspectives highlighting the vulnerability of fishers and coastal communities (Amali Kartika Karawita, 2019).

This combined doctrinal–empirical–analytical design ensures both normative depth and data-based reliability. Accordingly, the study is structured around two main sections: the conceptual framework of maritime piracy (Section One) and the international efforts to combat this crime (Section Two).

To address this issue, we have decided to explore the conceptual framework of maritime piracy (Section One) and the international efforts to combat this crime (Section Two).

SECTION I: THE CONCEPTUAL FRAMEWORK OF MARITIME PIRACY

Maritime piracy is considered one of the oldest issues that threatens the security and safety of maritime navigation, and it has undergone significant development. Therefore, a specific concept has been assigned to this crime (First Requirement). Additionally, this crime can only occur when its elements are present (Second Requirement).

A) The Concept of Maritime Piracy

Several definitions of maritime piracy have been proposed, including general definitions (Section One) and legal definitions (Section Two), along with an examination of certain regions where maritime piracy is most prevalent (Section Three).

1. The General Definition of Maritime Piracy

Maritime piracy is defined as a maritime crime that involves the robbery and plundering of ships, their crew, or the goods they carry. Many researchers have defined maritime piracy as the commission of one or more acts of violence against individuals and property in maritime facilities.

Maritime piracy is defined as theft committed at sea or sometimes on the shore by an agent not paid by any state or government. Some consider piracy to encompass all acts of violence committed against persons or property without legal justification on the high seas. Others define it as an armed assault carried out by a ship on the high seas, without authorization from any state, to obtain material gains through the seizure of ships, cargo, or persons.[1]

2. The Legal Definition of Maritime Piracy

The 1958 Geneva Convention on the High Seas was the first official framework for international law on maritime piracy. According to Article 15, the Convention defines piracy as having the following parts:

Any act of violence, illegal detention, or depredation perpetrated for personal gain by the crew or passengers of a private vessel or aircraft, aimed at:

- Another ship or plane on the open sea, or people or property on board such a ship or plane;
- Against another ship, plane, person, or thing in a place that is not under the control of any state;
- Any voluntary involvement in the operation of a vessel or aircraft with awareness of its participation in piracy;
- Any action that intentionally incites or helps someone commit the acts described in paragraphs (1) and (2).[2]

Similarly, Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as any of the following acts:

- Any unlawful act of violence, incarceration, or theft committed by passengers or crew members of a private aircraft or ship for their own benefit and directed:
  - ◊ On the open sea, against another ship or plane, or against people or property on board;
  - ◊ Against another ship, plane, person, or piece of property in a place that no state has control over;
- Any voluntary involvement in the operation of a ship or plane while knowing that it is engaged in piracy;
- Any act that incites the commission of one of the actions described in subparagraphs (a) or (b), or that intentionally facilitates their commission.[3]

1 Aamara, L. B. (2014). Maritime piracy in the Gulf of Guinea: Reality and challenges (2003–2013). Master's thesis, University of Algiers 3, Faculty of Political Science and International Relations, 29.

2 Convention on the High Seas. (1958). United Nations Treaty Series, 450, 82. (Reprinted in 2005).

3 United Nations Convention on the Law of the Sea. (De-

It is clear from this article that the location of the offense is a defining element: piracy must occur either on the high seas or in areas beyond the jurisdiction of any state. This principle effectively places the duty of prosecution on all states, in accordance with the principle of universality. Conversely, anti-piracy measures within territorial waters fall under the exclusive jurisdiction of the coastal state; otherwise, such action would constitute unlawful interference with state sovereignty.[4]

It should also be noted that the definition of piracy in Article 101 of UNCLOS is restricted to unlawful acts committed in international waters. Acts of armed robbery at sea that occur within territorial waters are excluded, since international law does not permit the pursuit of pirates into the territorial jurisdiction of a sovereign state. In such cases, the coastal state itself bears sole responsibility for safeguarding its coasts and maritime domain. Moreover, the definition requires the involvement of at least two vessels: one being the victim, and the other serving as the platform from which the pirates launch their attack.[5]

While the 1982 UNCLOS did not substantially innovate upon the definition found in the 1958 Geneva Convention, a slight evolution is discernible. For the first time, it introduced the notion of "private ends" as the motivation behind acts of piracy (Article 101(a)). However, this terminology remains vague and open to multiple interpretations, as "private ends" may be construed flexibly depending on the interpreter's perspective. It would arguably have been more precise for the drafters to specify that such ends are intended to achieve material gain or profit.[6]

The International Maritime Organization (IMO) oversaw the signing of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) in Rome. UNCLOS received partial criticism, which led to this convention being established as a response. According to Article 3(1) of the SUA Convention, the definition of unlawful acts extends beyond piracy and includes:

Any person who unlawfully and intentionally commits an offense through the following actions:

- Seizes or exercises control over a ship by force, threat of force, or intimidation;
- A person who performs violent acts against ship personnel will face prosecution when the act threatens ship navigation safety;
- Someone who damages or destroys a ship or its cargo in a way that could make it dangerous to navigate;
- A person who puts or causes to be put on a ship a device or substance that could destroy or damage the ship and make safe navigation impossible;
- A person who seriously damages maritime navigational facilities or seriously interferes with their operation in a way that endangers safe navigation;
- A person who provides false information that creates a danger to safe navigation;
- A person who harms or takes the life of someone while committing the mentioned offenses;

The SUA Convention provides the necessary legal framework to cover the gaps that UNCLOS leaves regarding territorial application, even though piracy remains unmentioned in its text. The SUA Convention surpasses UNCLOS by protecting unlawful acts which take place in territorial waters, together with archipelagic waters and internal waters as specified in Article 4.

This framework was further reinforced by the 2005 Protocol to the SUA Convention, which expanded the definition of unlawful acts by adding new provisions under Articles 3 bis, 3 ter, and 3 quater. These amendments incorporated additional offenses, thereby enhancing the

cember 10, 1982). 1833 U.N.T.S. 397, Art. 101. Ratified by Algeria under Presidential Decree No. 96-53 (January 22, 1996).

4 Bousna, A. (2014). The law of the sea and the rules applicable to ships in territorial waters. Master's thesis, University of Constantine 1, Faculty of Law, 230-231.

5 Aamara, L. B, op. cit., 30.

6 Ghafaflia, A. Y. (2025). The efforts of the United Nations and Interpol in combating maritime piracy. Journal of Legal and Economic Research, 8(1), 584.

comprehensiveness of the legal regime governing maritime security.

The 1988 Rome Convention, along with its 2005 Protocol, establishes a complete legal framework that protects maritime vessels from all potential forms of attack. The definition establishes boundaries that define both the goals and methods of these activities, thus making it applicable to a wider range of activities. The law protects all attacks against ships, which include those carried out by crew members and passengers against their own vessel. The 1958 Geneva Convention, together with the 1982 UNCLOS, failed to address this issue, which resulted in unclear interpretations of their rules.[7]

3. Manifestations of Maritime Piracy in Selected Regions: The Somali Coast, the Gulf of Guinea, and Southeast Asia as Case Studies

The Somali coastline stretches about 3,700 kilometers, and it overlooks vital international sea routes that connect the Indian Ocean and Arabian Sea to the Red Sea. The organized groups and gangs have proved their ability to control the area successfully. The groups maintain their own intelligence operations, which produce sophisticated maritime piracy activities through their combination of training and weaponry, and operational readiness. The group operates through shallow coastal waters where they use captured vessels as bases to conduct their operations while maintaining multiple armed support ships that carry weapons and fuel, and other necessary supplies. The target vessel detection leads them to send out fast boats, which carry armed personnel who use rifles and occasionally rocket-propelled grenades. The attackers use rope ladders to board their targets while they disguise their vessels as fishing boats to trick their victims and prevent early detection.

These groups use advanced communication equipment, which enables them to gather complete vessel intelligence before they start their attacks. Their operations are not random; rather, they carefully assess the type of ship, its cargo, and prevailing wind conditions. The experts who work in maritime fields say they spend no more than fifteen minutes to take control of the ship they want to capture. The main objective of these criminals involves demanding high ransom payments from victims who want to free their hijacked ships.

The maritime piracy activities that take place in Somali waters, as well as the Red Sea, create major security threats to nations because this waterway operates as a vital shipping route for international trade. The Red Sea creates an important shipping connection between seas and open waters while linking various continents together. The waterway serves as an essential shipping path for oil tankers, which move crude oil from the Arabian Gulf and Iran to international customers, and as a key trade route between Europe and Asia. The region has become dangerous for ships to sail because pirate vessels have increased their numbers and their aggressive behavior. Piracy operations have developed into an important business for various local communities, who now depend on them for their survival. The financial benefits from this activity exceed the dangers that exist when operating at sea. The modern form of piracy has developed into a profitable business enterprise.[8]

The spread of maritime piracy along the Somali coast can be attributed to two main categories of causes:

3.1 Internal causes

The problem of maritime piracy in Somalia emerged around 1991, coinciding with the outbreak of civil war. The central government lost control to insurgent groups, which caused wide

7 Attafi, M. (2020). Combating unlawful acts committed at sea. Doctoral dissertation, University of Boudaou, Faculty of Law, 37-39.

8 Zayed, A. A. (2013). Maritime piracy in international law and state applications: A case study of Somalia. University of Sharjah, Journal for Sharia and Legal Sciences, 10(2), 169-171.

instability to spread across the area. The region of Somaliland established independence through separatist forces, but international bodies refused to acknowledge this new political situation. The situation caused Somalia to transform into a nation that experienced deterioration and widespread insecurity, and lawlessness throughout its entire territory.[9]

The arrival of foreign ships into Somali waters became a major factor because local people viewed these vessels as foreign invaders who took advantage of their maritime territory. The Somali coast faced mounting pressure from foreign fleets that used modern trawling equipment to rapidly exhaust the abundant marine resources of the area. The Somali coastal area became a dumping ground for toxic waste because foreign ships started to dispose of their waste materials in this region. The local fishermen suffered a total loss of their daily fishing activities. The people of the region used basic tools to fight against foreign control, but their efforts led to harsh responses from the invaders. The fishermen reacted to foreign ships destroying their equipment by taking matters into their own hands because international organizations failed to protect them from illegal fishing activities.

3.2 External causes

There are several external factors that contributed, whether directly or indirectly, to the rise and spread of maritime piracy in Somalia. The most significant of these external causes was the American intervention in Somalia under the auspices of the United Nations in 1992. A massive force of 28,150 soldiers, in addition to 2,300 troops from 23 other countries, was deployed to disarm the militias. However, the outcome was the opposite of what many Somalis had hoped for. The confrontations resulted in casualties on both sides and caused extensive human and material losses. Moreover, these events left a profound psychological impact on Somalis, who perceived the intervention as an invasion that must be resisted. Consequently, many resorted to attacking ships on the high seas, which they regarded as a form of national defense.

It can therefore be said that acts of maritime piracy off the Somali coast have had a negative impact on the economies of the states bordering the region, on international trade in general, and on trade within the Arab and African regions in particular. These acts have increased the costs of international commerce due to the rise in commodity and product prices, driven by the additional expenses required for protecting large cargo vessels and by the higher insurance premiums imposed on ships and their cargoes by insurance companies. In addition, the states to which hijacked vessels belong, as well as the shipping companies that own them, are forced to bear the costs of paying ransoms demanded by pirates in exchange for the release of ships and their cargoes, especially oil tankers. Furthermore, victims themselves suffer substantial damages and losses.

To avoid the risk of exposure to maritime piracy in regions where such attacks are widespread, many ships and vessels have altered their routes, diverting instead to the Cape of Good Hope. This rerouting has resulted in increased costs, greater burdens, and longer travel times for voyages to reach their destinations.[10]

The Gulf of Guinea serves as a vital link between regional nations and international markets through its seaport trade operations for importing and exporting goods and services to major worldwide markets. The Gulf region holds substantial natural resources through its extensive marine life deposits and forest products, particularly fish and timber. The lack of strong national regulations for extraction and export makes the Gulf's resources highly susceptible to various forms of exploitation.

The maritime insecurity in this region remains high because pirates continuously conduct attacks, which use innovative techniques to kidnap seafarers. The accumulation of mari-

9 Fakhoury, A. (2015). International legal regime against piracy off the coast of Somalia. Journal of Law, 1, 17.

10 Zayed, A. A, op. cit., 170-171.

time crimes has made it essential to implement a unified strategy for securing the region's seas.

South China Sea piracy has existed since the 16th century through the 19th century. British naval forces, along with other state navies, effectively reduced pirate operations that took place on the South China Sea coastal areas. The end of colonial rule brought piracy back into existence. Most coastal nations inherited insufficient military forces, along with economic and political instability. Multiple scholars have demonstrated that the return of piracy emerges from widespread poverty, together with social inequality, alongside corrupt practices and nepotism, which postcolonial governments failed to address through proper governance and economic growth strategies.

Between 1983 and 2007, about 63% of all reported maritime piracy incidents took place in the Gulf of Guinea. The Gulf of Guinea remains under international scrutiny as a piracy-prone area, even though piracy rates decreased significantly in 2021 because recorded attacks happened every four to five days throughout 2016.[11]

It can therefore be argued that piracy has become a widespread phenomenon in the Gulf of Guinea since 2003–2004, making it undoubtedly the most dangerous region today. The Gulf, surrounded by mangrove forests and difficult-to-penetrate inland waters, is of strategic importance, as it holds the seventh-largest oil reserves in the world and the ninth-largest reserves of natural gas. It supplies the United States with 15% of its oil imports. While maritime traffic is not as dense as in the Strait of Malacca or the Bab el-Mandeb Strait, the Gulf is home to extensive industrial activity, particularly oil extraction, which requires reliable and predictable supply operations (supply vessels). The platforms are located about 20 nautical miles offshore, placing them either within territorial waters or in international waters. The Port Harcourt area, at the mouth of the Bonny River, is the most affected, as the city serves as a major hub for supplies, equipment, and the movement of personnel between offshore platforms and the mainland.[12]

According to the report prepared by the Secretariat of the United Nations Security Council on the main developments, trends, and considerations regarding piracy and armed robbery in the Gulf of Guinea, these activities have evolved in both nature and frequency.

In June 2021, the Global Maritime Crime Programme of the United Nations Office on Drugs and Crime (UNODC) traced the origins of piracy and armed robbery in the Gulf of Guinea to around 2005, when armed groups in Nigeria's Niger Delta began attacking oil and gas infrastructure. At that time, incidents classified as "break-ins and thefts" accounted for 70% of reported cases, and more than 70% of all vessels attacked were support ships operating in the oil and gas sector.

Between 2005 and 2009, only about 15% of reported piracy incidents in the region fell under the category of "kidnapping for ransom". However, the situation changed between 2010 and 2015, as certain pirate groups began to combine kidnapping of individuals with hijacking of ships, targeting primarily tankers carrying refined petroleum products—a pattern known as "oil piracy".

Due to several factors, including the decline in global oil prices, incidents of tanker hijackings gradually decreased over time and had virtually disappeared by 2016.

From 2016 to 2021, pirate groups in the Gulf of Guinea shifted their operational patterns, focusing increasingly on kidnapping for ransom. According to a study conducted by the Global Maritime Crime Programme of the United Nations Office on Drugs and Crime (UNODC)—which compiled data from multiple sources over the 2018–2020 period—this form of piracy peaked in 2020, when reports indicated that nearly 140 individuals were kidnapped at sea.

11 Boamah, F. (2023). The role of the UN Security Council in the fight against piracy in the Gulf of Guinea. Central European Journal of International and Security Studies, 17(3), 67, 72-73.

12 Proutière-Maulion, G. (2013). Globalization, sustainable development and human rights: The example of maritime piracy. Neptunus, 19(3), 3.

The pirate groups of previous years showed different behavior because they attacked all types of vessels without discrimination, while they extended their reach into distant offshore waters. The pirates demonstrated their ability to operate further from shore through multiple reported events, which took place at distances exceeding 200 nautical miles from the coast.

Positive developments became visible during the reporting period, while the previous events took place. The number of piracy and armed robbery incidents at sea, along with ransom kidnappings, decreased from 123 cases in 2020 to 45 cases in 2021. The Interregional Coordination Centre (ICC) for the Regional Strategy implementation of Maritime Safety and Security in Central and West Africa shows that maritime crimes stayed at a steady level during January to March 2021 because 20 piracy incidents took place during this period.

The number of maritime criminal activities has continued to decrease since April 2021 in the Gulf of Guinea, which includes both piracy and armed robbery offenses. For example, the Interregional Coordination Centre (ICC) recorded only nine incidents in the second quarter of 2021, and just eight incidents in the fourth quarter of the same year. The ICC recorded sixteen maritime crime cases during the first half of 2022, which showed a continuing downward trend from the previous year.

The Global Integrated Shipping Information System (GISIS) of the International Maritime Organization (IMO) supported this pattern through its records, which showed thirteen piracy and armed robbery incidents in the Gulf of Guinea from January to July 2022.[13]

The decrease in piracy activities throughout the Gulf of Guinea results from various connected elements. The Nigerian and Togo piracy convictions from July 2021 serve as a deterrent, and the Nigerian Navy has increased its naval patrols. The maritime security partners established better regional cooperation, which led to enhanced surveillance and response capabilities. The EU's Coordinated Maritime Presences (CMP) initiative keeps Spanish, Italian, Portuguese, Danish, and French naval forces stationed in the area, which adds to the deterrent effect of outside naval deployments in the Gulf of Guinea. The navies of Russia, Brazil, Morocco United Kingdom United States, and India maintain regular patrols which have enhanced maritime security and reduced piracy incidents in the Gulf of Guinea. Pirate operations have spread across different global territories, with Southeast Asia becoming the primary area of operation. The ongoing effects of the worldwide financial collapse created conditions that led to increased criminal activities in this area. The attacks targeted the waters of the South China Sea and Malaysia, particularly in the zone stretching from northern Sumatra to the Philippine Islands. The South China Sea serves as a major shipping route that connects the Indian Ocean with the Pacific Ocean. The region contains strategic straits, including the Strait of Malacca and Singapore Strait, and also the Lombok and Sunda Straits of Indonesia. These maritime corridors experience about 8,000 vessels passing through them each year. However, the region's geographic characteristics—its vast number of islands and complex terrain—have made it especially vulnerable to piracy. The natural environment provided ideal conditions for pirates to operate because they could attack quickly and then escape rapidly with their fast boats. International law defines maritime territories through coastal state territorial waters and archipelagic waters, contiguous zones, and related areas, which leave small portions of ocean classified as high seas. The Strait of Malacca operates as a vital international shipping corridor that runs through the territorial waters of three nations, including Malaysia, Singapore, and Indonesia. The geographic location enables pirate vessels to move between different states' waters, which creates challenges for authorities to fight maritime piracy. The situation becomes difficult to enforce because

13 United Nations, Secretary-General. (2022). Report of the Secretary-General to the Security Council: Situation of piracy and armed robbery at sea in the Gulf of Guinea and its underlying causes (S/2022/818).

the involved states have not established particular legal frameworks for enforcement. The states need to agree on joint actions and maintain open communication to fight against piracy in these areas.

Until 1980, piracy existed in East Asia but had not yet reached a large scale. The refugee crisis expanded because Vietnamese and Cambodian people fled their countries during multiple migration waves, which people called the "Boat People". The 1958 Convention on the High Seas required Malaysia and Thailand to begin taking security measures in 1981 as both countries became signatories. The enforcement activities followed the rules stated in Articles 14 and 21 of the Convention. The implemented measures failed to control the increasing crime rate despite their implementation. The International Maritime Bureau (IMB) issued a warning to the global community about increasing maritime piracy incidents, which became more prevalent after 1992, especially in Southeast Asia. The financial crisis of 1997 in Asia made the situation worse than before. The economic crisis in Asia forced many Indonesians to relocate to Singapore because they needed improved financial prospects, so they moved to islands near Singapore, which included Riau Islands and Batam, and Bintan. The free-trade zone in Singapore experienced major population growth during this time, but it faced negative impacts from the regional economic slump. The maritime piracy incident index for the year 2000 showed a significant increase when compared to previous years. The Strait of Malacca experienced 75 pirate attacks along with 119 additional piracy events throughout Southeast Asia during that year. The alarming statistics forced coastal states to increase their maritime security measures while fighting piracy more aggressively. The MALSINDO Regional Agreement came into existence through this initiative when Malaysia joined Singapore and Indonesia to form a partnership in 2004. The agreement established joint naval patrol operations, which led to a significant decrease in piracy activities by 2009 around the Natuna and Anambas and Mangkai, and Tioman Islands.

The operational methods of pirates in Southeast Asia, which people call modus operandi, have undergone continuous development from a legal perspective. Pirate operations start on land before using "mother ships" to move from the territorial waters of states to reach open sea areas. Southeast Asian pirates have adopted Somali piracy methods to increase their operational activities, according to recent reports.[14] (See Table 1.)[15]

4. Examples of Ships Subjected to Maritime Piracy

This section presents two illustrative cases of ships that were subjected to acts of maritime piracy: the *Sirius Star* and the *Maersk Alabama*.

14 Bouhajila, A. (2021). Maritime piracy on the high seas in light of international law of the sea. Doctoral dissertation, University of Frères Mentouri Constantine 1.

15 Maritime Safety Committee. (2021). Reports of incidents in Malacca, January 1995–January 2021. London: International Maritime Organization (GSIS).

Table 1. Recorded Pirate Attacks in the Strait of Malacca (January 1995 – January 2021)

YEAR	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of Attacks	11	12	6	4	41	115	56	31	37	59	16	21	11	2
Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
Number of Attacks	1	0	22	23	21	81	134	20	25	7	44	41	2	867

Source: International Maritime Organization (IMO).

4.1 The hijacking of the Sirius Star:

Maritime piracy off the coast of Somalia reached unprecedented levels in 2008, the year when the massive oil tanker *Sirius Star* was hijacked. That same year, pirates began targeting larger vessels carrying cargoes of far greater value than ever before.

The French luxury yacht Le Ponant, along with its thirty crew members, became a hostage to Somali pirates in April of that year. The military forces of France, who were stationed in Djibouti, moved to the incident location to free the captured crew members. The pirates received a monetary payment, which served as ransom to obtain their release.

The Ukrainian vessel M/V Faina became a victim of Somali pirates who called themselves the Central Regional Coastal Guards on September 25, 2008, during its journey to Mombasa port in Kenya. The ship transported military equipment which had a value of about thirty million dollars, including multiple T-72 tanks and RPG launchers, and anti-aircraft guns. The operation stood out because the pirates usually attacked civilian ships and oil tankers instead of military vessels. The vessel was released only after its owner paid a ransom exceeding 3.2 million U.S. dollars, following threats by the pirates to blow up the ship.

The Sirius Star incident occurred on November 17, 2008, when a group of pirates hijacked the supertanker, which was sailing under the Liberian flag and bound for the United States via the Cape of Good Hope. The hijacking took place approximately 450 nautical miles southeast of Mombasa, near the coast of Kenya.

The Sirius Star tanker operated with a crew of twenty-five people who came from multiple countries, which included Croatia and Britain and the Philippines and Poland, and Saudi Arabia. The tanker served as the second unit within a series of six identical vessels built by Vela International Marine Ltd., which functions as a maritime transport company under Saudi Aramco. The company operates a large fleet of vessels of different types, sizes, and functions, all constructed by Daewoo Shipbuilding & Marine Engineering (DSME), a South Korean shipbuilding corporation.

Vela International functions as a crude oil transportation company that links Ras Tanura Port in Saudi Arabia to European destinations and Gulf of Mexico ports through the Suez Canal and Cape of Good Hope routes. The Sirius Star stood as DSME's 100th supertanker, which they built at their Okpo Shipyard located in South Korea.

4.2 The hijacking of the Maersk Alabama by Somali pirates

The worldwide public drew their attention to the Maersk Alabama hijacking by Somali pirates in April 2009 because it exposed dangerous maritime security weaknesses and revealed multiple economic and political consequences for the surrounding region. A group of pirates operating in Somali waters captured this vessel because they wanted to obtain ransom payments. The international media spotlighted this event because Richard Phillips became a hostage when the ship's captain, which led to a situation that required the United States military to perform a direct rescue operation.

The Maersk Alabama operated as a cargo vessel in Somali waters, which served as a known hotspot for maritime piracy activities. The political instability in Somalia and the widespread poverty across the country have been among the principal causes behind the proliferation of piracy in the region. The current circumstances make vessels operating near Somali waters at high risk of being targeted by attacks.

The Maersk Alabama served as one of the targeted vessels which operated as a container ship built to handle massive amounts of goods through shipping containers. The ship played a vital role in worldwide trade because it could transport various types of cargo including industrial products and consumer goods. The Maersk Alabama followed specific shipping routes that traveled through important global trade routes that connected different international ports. The trade routes faced ongoing pirate threats because criminal organizations

took advantage of Somalia's economic difficulties. The event shows how vital maritime security functions to protect worldwide trade operations from increasing security threats.

The incident began in April 2009, when the Maersk Alabama was sailing from the Port of Oman to Mombasa, Kenya. The hijacking incident, which occurred in the Gulf of Aden, became a major international news story. The ship's American crew became victims of the pirates as they captured the vessel during their assault.

Captain Richard Phillips of the Maersk Alabama received warnings about pirate attacks in Somali waters before he started his voyage. He chose to ignore the advice that was given to him. The next day, the crew detected a distant small boat that carried four armed pirates. The crew tried to defend their ship by firing flares and spraying water, but the pirates managed to board the vessel and take control. The attackers faced resistance from Captain Phillips and his crew members until they managed to capture some of them, who took hostages on the ship's bridge.

The Maersk Alabama hijacking by Somali pirates became the most notorious maritime kidnapping event of the 21st century, which drew worldwide attention because of its intense hostage situation. The legal response to the incident involved rescue operations, judicial proceedings in the United States, and international cooperation in the broader fight against maritime piracy.

The United States government reacted immediately by deploying U.S. naval, air, and ground forces to conduct a rescue mission. Captain Phillips remained captive on a small lifeboat in open waters while the pirates tried to reach the Somali coast. The U.S. Navy forces executed a precise rescue mission on April 12, 2009, which led to the death of three Somali pirates who held the captain hostage and the capture of one pirate alive. The rescue operation brought Captain Phillips back to safety with physical health intact, but his mental state remained severely affected by the traumatic experience.

The surviving pirate, Abduwali Abdukhadir Muse, was apprehended by U.S. forces and brought to the United States to stand trial. He was one of the five pirates involved in the hijacking of the Maersk Alabama. Muse faced trial at a U.S. federal court in New York, where he admitted guilt to piracy and hostage-taking, and robbery charges during his 2010 plea. The federal court delivered a prison sentence to him in the United States in 2011.

The United States government showed its commitment to justice and maritime crime prevention through its naval rescue operation and pirate prosecution. The case shows how international piracy response requires multiple countries to work together because piracy activities span across different national territories and involve various international participants. The analysis requires examination of social and economic factors that sustain piracy activities across international waters.

The Maersk Alabama incident reaffirms the significance of applying international legal principles in combating transnational crimes such as maritime piracy. The prevention of crime requires both effective law enforcement and crime prevention systems to operate together. The United States executed all necessary legal steps through its rescue operation and offender prosecution to show its commitment toward an open and rigorous criminal justice system for handling these serious crimes. The case established a key legal precedent that became part of international law for fighting maritime piracy.

Muse stood with other pirates who faced death or capture during the Maersk Alabama rescue operation. Authorities transferred most of the arrested individuals to courts that held jurisdiction over their crimes because these offenses took place either inside their borders or involved their citizens. The world started paying attention to piracy when the Maersk Alabama got hijacked in 2009 because it showed how dangerous piracy had become in the Gulf of Aden and near Somalia. The hijacking demonstrates how piracy has transformed into a major problem that disrupts worldwide commercial shipping operations.

The international community responded to this threat by increasing its anti-piracy efforts through multiple international naval patrols. The European Union operates Operation Atalanta as its main security initiative to protect shipping operations in this particular area. The creation of an international task force that includes maritime nations like the United States and the United Kingdom represents a major development in this field. The joint initiative focuses on enhancing maritime security through efforts to decrease piracy attacks, which damage worldwide economic systems while protecting seafarers who operate in dangerous maritime zones.

Ship hijackings in international waters, such as the Maersk Alabama incident, create two major problems because they put human lives in danger and violate essential human rights to safety and secure employment. The protection of sailors' rights and the international legal order requires essential measures to increase maritime surveillance and worldwide cooperation against piracy.

International trade route disruptions through criminal activities lead to major financial harm, which affects both state entities and business organizations, thus creating long-term economic damage. The world will experience major economic stability benefits through international collaboration to eliminate piracy, and when nations establish efficient preventive systems.

The Maersk Alabama hijacking by Somali pirates demonstrated why international and domestic legal systems must work together to fight cross-border offenses and protect human rights while combating piracy and hostage situations in international waters. The United States government deployed U.S. Navy special forces to conduct rescue operations because international law permits states to protect their citizens when they face threats from hostage-taking or piracy. The battle against transnational criminal activities depends on international legal frameworks, which define state powers to enforce laws beyond their national limits.

The United States used its domestic court system to handle the Abduwali Abdukhadir Muse trial, which took place within its borders for crimes committed outside its territory. The case demonstrates how international piracy requires worldwide cooperation because it occurs in international waters and affects various international criminal offenses that need a collective response. Operation Atalanta and the international working group established by the EU show how multinational collaboration becomes essential for addressing this threat. The solution to piracy requires maritime stakeholders to work together because piracy disrupts international trade routes.

Piracy continues to be a problem, which has led to debates about creating international courts or national courts that would handle cases of crimes committed in international waters to hold perpetrators accountable. The case shows how piracy crimes get handled through the combined use of international law and domestic criminal law and interstate cooperation. The system achieves victim justice through its dual role of defending global maritime security and protecting the interconnected world from rising security threats.[16]

B) The Elements of the Crime of Maritime Piracy

For the crime of maritime piracy to be established, all of its constituent elements must be present. These include the legal element (Section One), the material element (Section Two), the moral element (Section Three), and finally the international element (Section Four).

16 Taybaoui, O., Rabhi, L. (2022). The relationship between maritime piracy and terrorism. Journal of Rights and Freedoms, 10(1), 439.

1. The Legal Element of the Crime of Maritime Piracy

The *legal element* of any crime refers to the existence of a legal provision that criminalizes the act and prescribes a penalty for it. Maritime piracy is criminalized under public international law, both through its established principles and through international conventions, given that such acts involve assaults on persons and property.[17]

Accordingly, the legal element of the crime of maritime piracy refers to the commission of acts of plunder by a ship's crew or by passengers on board. It makes no difference whether such acts are directed against property or individuals, nor whether they involve physical harm or merely the restriction of the victims' freedom.

However, the mere commission of an act of violence or coercion does not, in itself, constitute piracy. For example, an individual who kills another person on board a ship or steals his property is not considered a pirate but is instead deemed to have violated the laws governing the vessel's flag state. Thus, for coercion to qualify as an element of piracy, it must be directed against another ship, or the ship itself must play a role — whether passive or active — in the acts that constitute piracy.[18]

Article 101 of the 1982 UNCLOS defines piracy as illegal acts of violence or detention or depredation by private ship or aircraft crew members or passengers which target vessels or aircraft or property or persons aboard in high seas areas outside state jurisdiction.

The article defines specific criminal activities that constitute piracy. Any person who knowingly participates in operating a vessel or aircraft that functions as a pirate ship or aircraft commits an unlawful act of violence. Those who provoke or deliberately help in the commission of the acts outlined in subparagraphs (a) or (b) of Article 101 face legal consequences according to this provision.[19]

2. The Material Element of the Crime of Maritime Piracy

The material element of maritime piracy consists of acts of violence or detention, or depredation, which the crew of a ship or aircraft or its passengers carry out. The 1958 High Seas Convention, together with the 1982 UNCLOS, specifically defines these unlawful acts. The illegal acts target persons and property alike, while physical injuries or freedom restrictions remain irrelevant to the definition. The critical factor remains that violent acts must be executed against a ship or aircraft that functions as the criminal instrument. The legal framework of piracy excludes attacks between individuals on board when the ship or aircraft remains uninvolved in the offense, since these incidents become flag state violations.

The crime of maritime piracy exists even if the perpetrator fails to complete the entire act since the attempt to perform the material act stands as sufficient. The material element of piracy reaches completion only when the act of piracy happens on the high seas or in territories that fall outside any state's jurisdiction. According to international law, piracy does not exist when the act occurs in a state's territorial sea or exclusive economic zone because the state holds full jurisdiction over these areas.

To prevent impunity, Article 101, paragraph 3, of UNCLOS criminalizes any act of incitement to commit the offenses specified in paragraphs (a) and (b), as well as the intentional facilitation of such acts. Furthermore, under Article 101, paragraph 2, liability also extends to any person who participates in the commission of acts of piracy.[20]

17 Ibid.

18 Omrani, N. (2013). Maritime piracy and its distinction from similar acts. Journal of Legal and Political Research and Studies, 6, 139.

19 United Nations Convention on the Law of the Sea. (December 10, 1982). 1833 U.N.T.S. 397, Art. 101. Ratified by Algeria under Presidential Decree No. 96-53 (January 22, 1996).

20 Aouacheria, R. (2011). Suppressing maritime piracy in light of international law rules: An evaluative study. Paper presented at the Third International Sympo-

3. The Mental Element of the Crime of Maritime Piracy

This element is one of the most important aspects of crimes in general. It refers to the offender's intention to commit the legally prohibited act, with full awareness and understanding of the crime and its consequences. A group of international criminal law scholars considers maritime piracy to be an intentional crime, where the criminal intent consists of two elements:

3.1 Knowledge

Knowledge refers to the awareness of the facts surrounding the perpetrator, particularly the awareness of the activity the perpetrator is about to engage in (the material element of the crime). The pirate must know that the actions they are committing constitute the crime of maritime piracy. If the pirate commits these acts while believing there is a legal justification for them, criminal intent is not present.

3.2 Intention

Intention means that the perpetrator's will is directed toward achieving the result of their act.[21] Maritime piracy is considered a crime with multiple intents, as the perpetrator aims to steal or plunder property or goods. However, a more severe outcome may occur, such as when pirates murder the crew members, commit acts of torture, pollution, or similar crimes. In such cases, the penalty for the more serious crime is applied.[22]

4. The International Element of Maritime Piracy

The international element is a fundamental condition for the crime to be considered international. There are differing opinions in international legal doctrine regarding its nature. Due to the limitations of various doctrinal approaches in providing a precise standard free from criticism, some scholars have adopted a criterion characterized by development and flexibility, which is found in international law. This criterion is the "international interest" standard, which distinguishes between international legal actions and domestic legal actions. It is a flexible standard that aims to ensure the security, stability, and welfare of the international community.

It is notable that the crime of maritime piracy does not specifically threaten a particular state but instead threatens the security and safety of the entire international community. Therefore, it is free to describe the unlawful conduct as constituting an international crime, as it infringes upon the international interest worthy of protection under international criminal law, which is the safety of maritime shipping activities and navigation. It also poses a threat to international peace and security in the region.[23]

SECTION II: INTERNATIONAL AND REGIONAL EFFORTS TO COMBAT MARITIME PIRACY

Given the severity of the crime of maritime piracy, many efforts have been made at both the international and regional levels to combat and reduce the crime of maritime piracy.

A) International Efforts to Combat Maritime Piracy

International efforts to reduce the crime of maritime piracy are reflected in the efforts of international institutions (First section) and international agreements (Second section).

sium on Maritime Disaster Management, Kingdom of Saudi Arabia, October 8-12, 54-55.

21 Redha, R. D. M. A.-D. A. (2015). The role of the international criminal judge in combating the crime of maritime piracy. Journal of Law, 40, 548.

22 Salimah, S. M. (2014). Maritime piracy. Riyadh: Law and Economics Library, 173.

23 Boukjouta, F. (2013). Maritime piracy between international practice and international law. Master's thesis, University of Algiers 1, Faculty of Law, 32.

1. Efforts of International Institutions to Combat the Crime of Maritime Piracy

Expressing deep concern over the growing prevalence of armed robbery and ship hijackings off the coast of Somalia in recent years, the UNSC issued several resolutions, among them the following:

- Security Council Resolution 1814 (15 May 2008, Session 5893): This resolution served as a preliminary step regarding the issue of maritime piracy. In paragraph 11, it expressed support for the contributions made by certain states and regional organizations to protect humanitarian aid convoys to Somalia. The resolution also emphasized, in its preamble, the importance of building institutions in Somalia to end violence and conflict, identifying these as the root causes of the country's instability. Furthermore, it highlighted the Council's intention to strengthen the effectiveness of arms embargo measures and to take action against those obstructing or undermining legitimate political processes;[24]
- Security Council Resolution 1816 (2 June 2008, Session 5902): This resolution is considered one of the most significant measures adopted by the Security Council in relation to piracy. It authorized states, for a period of six months and with the consent of Somalia's Transitional Federal Government, to enter Somali territorial waters to combat acts of piracy and armed robbery at sea.

Exercising its authority under Chapter VII of the United Nations Charter, the Council decided in paragraph 7 of Resolution 1816 that:[25]

"States which support the Transitional Federal Government of Somalia in their anti-piracy and sea robbery operations and give prior notice to the Secretary-General can perform the following during six months from this resolution: (a) conduct operations in Somalia's territorial waters to stop piracy and sea robbery according to applicable international law provisions for high seas operations; and (b) employ all required methods in Somalia's territorial waters based on applicable international law provisions for high seas operations to combat piracy and armed robbery".[26]

The Security Council passed Resolution 1838 on October 7, 2008, under Chapter VII of the United Nations Charter. It said that countries that care about maritime security need to do something about piracy on the high seas near the Somali coast. The resolution called for the use of naval ships and military planes in accordance with UNCLOS. Western and Asian naval forces heavily deployed their fleets across the Gulf of Aden under the stated purpose of fighting piracy. The deployment endangers Arab national security while potentially turning the Red Sea into an international zone, and it comes with multiple related resolutions.[27]

The Security Council issued over thirty binding resolutions between May 2008 and December 2019 concerning maritime piracy in Somali territorial waters through Chapter VII of the United Nations Charter, while declaring the situation in Somali waters as an international peace and security threat. Through this authority, the Council can assign the task of suppressing such crimes, along with armed force, to particular states. According to some legal experts, the Council took such actions and issued comparable resolutions for other worldwide matters because piracy continued to rise and created a significant hazard to maritime transport and navigation freedom, which harmed major world financial institutions and global economic systems.

The current resolutions, which started in May 2008, state that foreign military action to fight piracy needs written authorization from the Federal Government of Somalia. The So-

24 United Nations. (n.d.). www.un.org.

25 Treves, T. (2009). Piracy, law of the sea, and use of force: Developments off the coast of Somalia. European Journal of International Law, 20(2), 404.

26 United Nations. (n.d.). www.un.org.

27 Aouacheria, R, op. cit., 56-57.

mali Transitional Government gave the United Nations Secretary-General a document that authorized specific states to chase pirates in Somali waters. The Council allows regional organizations to fight illegal activities through its resolutions. The North Atlantic Treaty Organization (NATO) and the European Union established two naval operations named "Ocean Shield" and "Atalanta" under this framework to fight piracy in the Gulf of Aden. The operations have maintained their presence in Somali territorial waters since their start, which marks twelve years of continuous activity.

The Security Council made its decisions regarding the Somali issue based on Chapter VII of the United Nations Charter when it reviewed the list created by the Somali Transitional Government. The Council's coercive measures implementation requires binding cooperation from all UN Member States, although the original list submitted by the Somali Transitional Government specified only certain states. The Somali Government's list of authorized states included a few nations, but the Council took it into account since piracy threatens international peace and security. The International Criminal Tribunal for Rwanda received its establishment through Council resolution in 1995, which mandated full cooperation from all states, while any non-compliance became a security threat to international peace.[28]

Multiple initiatives alongside these measures have proven effective in reducing Somali water piracy attacks, which peaked in 2011 before declining until 2017. The methods designed to fight piracy need to continue to exist, while authorities must work to enhance them as part of their strategy against piracy. The Somali scenario demonstrated the need to boost anti-piracy operations, which work on both sea and land territories. Piracy represents more than just ship attacks since it emerges from economic problems alongside social issues and weak government control.[29]

The UNSC passed multiple resolutions that dealt with maritime piracy in the Gulf of Guinea through Resolution 2018 (2011) and Resolution 2039 (2012). The Security Council under Resolution 2018 (2011) denounced every instance of piracy along with sea-based armed robbery which occurred in the waters surrounding Gulf States. The resolution expressed support for the planned summit of Gulf State leaders who would meet to create a regional security plan while urging member states and regional bodies to establish a joint strategic framework for maritime security in the region. The resolution established the necessity for regional entities to unite their efforts in providing guidance and assistance to vessels traveling through the Gulf while stressing coordination between states, regional organizations, and the shipping and insurance sectors.

The Secretary-General's assessment mission report about Ghana's piracy situation led to the Security Council's adoption of Resolution 2039 (2012). The resolution established the Republic of Ghana as the main entity responsible for fighting against piracy and armed robbery at sea. The Secretary-General received instructions to assist the joint summit organization through UNOWA and UNOCA according to the provisions set out in Resolution 2018 (2011). The Security Council required UNOWA and UNOCA to provide continuous reports about piracy and armed sea robbery activities in the Republic of Ghana for the Security Council's evaluation.[30]

The UNSC passed Resolution No. 2634 of 2022, which became effective after receiving unanimous approval from its 15 members. The Council expressed severe disapproval of all maritime piracy and armed sea robbery acts, including assassinations and kidnappings, and hostage-taking within the Gulf of Guinea. All States in the region need to include these actions as criminal offenses in their national laws while conducting investigations to prosecute and extradite those responsible. The Council

28 Magsood, S. (2020). The Security Council and repression of maritime piracy: The case of Somalia. Transactions on Maritime Science, 9(2), 361.

29 Karawita, A. K. (2019). Piracy in Somalia: An analysis of the challenges faced by the international community. Jurnal Ilmu Sosial dan Ilmu Politik, 23(2), 115.

30 Boamah, F, op. cit., 78-79.

demanded that all member States within the region take immediate national and regional action for the implementation of national maritime security strategies while receiving international assistance to establish a coordinated legal system that targets piracy and armed maritime crimes.

The most recent resolution on this topic was Resolution No. 2039 of 2012, which addressed piracy and armed robbery at sea in the Gulf of Guinea. The Council adopted Resolution No. 2634 as its first resolution in ten years. The Security Council adopted the resolution after six months of negotiations, which Norway and Ghana initiated as joint sponsors.[31]

The IMO, established in 1958 to facilitate cooperation and the exchange of technical information regarding ship safety and the security of those on board, has likewise been attentive to incidents of maritime piracy. Since 1980, when the IMO Council formed a working group composed of 18 States along with several other maritime organizations, the Organization has been engaged in discussions on maritime piracy and its negative impact on shipping. This working group presented a series of recommendations to the IMO Council.

In 1974, the IMO established the Maritime Safety Committee, tasked with collecting data and statistics on piracy and its geographic distribution. The Committee began receiving reports from member States and issuing comprehensive reports on piracy incidents, initially on a semiannual basis, then quarterly, and later monthly. In 1986, the Committee began following up on reports with States whose vessels were subjected to piracy, consistently urging them to submit information on incidents. Subsequently, the Committee issued Circular A.683(17), calling on governments and relevant bodies to mobilize resources for combating maritime piracy.

The IMO General Assembly passed Resolution A.922(22) in November 2001, which included the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships. It also included Resolution A.923(22), which included measures to stop the registration of fake ships. The International Ship and Port Facility Security (ISPS) Code was also created. It changed the International Convention for the Safety of Life at Sea (SOLAS) to include rules that specifically protect ships from armed robbery and piracy.[32]

Thus, it is evident that the IMO, through its numerous resolutions, has consistently sought to combat this phenomenon. It has called upon all States to confront maritime piracy and established the Maritime Safety Committee to monitor navigational security. These efforts, combined with those of maritime offices and other international organizations, represent an ongoing global endeavor to curb this transnational crime.[33]

2. Efforts of International Agreements to Limit Maritime Piracy

International agreements are considered a source of international law and serve as legislation within the international legal system. Accordingly, maritime piracy has been criminalized based on international agreements as follows:

- Under the United Nations system, the Geneva Convention on the High Seas, signed on June 29, 1958, first criminalized maritime piracy on a contractual basis.

This convention is considered the cornerstone that laid the basic principles for the criminalization of maritime piracy in international criminal law. The convention enumerates the acts that constitute maritime piracy, and Articles 14 to 23 of the convention specifically ad-

31 Mohieddine, C. (2024). Continental frameworks for maritime security protection in Africa: Ambitions and challenges. Journal of the Faculty of Politics and Economics, 22, 200.

32 Zahir Ali, J., Labaki, G. (2025). The international community's confrontation of maritime piracy. Journal of Human and Natural Sciences, 6(3), 466.

33 Zahir Ali, J., Labaki, G. (2025). The international community's confrontation of maritime piracy. Journal of Human and Natural Sciences, 6(3), 199.

dress the criminalization of piracy on the high seas and in any area not under the sovereignty of any state, obligating the signatory countries to impose penalties on those who commit such acts.

Among others, the UNCLS, 1982, defines maritime piracy as an illegal act of violence or detention. Article 105 of the Convention addresses the concept of international jurisdiction to punish maritime pirate offenders. It says that any country may, on the high seas or in any other location beyond the authority of any other country, take any pirate ship or arrest the people on board, as well as confiscate any goods discovered on the vessel. The courts of the state that executed the seizure are empowered to rule on the property and set the penalty applied. The state also has the right to choose the method to be followed for the ships, planes, or property, with appropriate consideration to the rights of bona fide third parties. Whether on the high seas, in the territorial sea, or in international waters, these authorities include the right to seek, arrest, imprison, prosecute, and punish offenders of maritime piracy.[34]

B) Regional Efforts to Combat the Crime of Maritime Piracy

Regional initiatives against the crime of marine piracy include the Regional Cooperation Agreement on Combating Piracy and Other Unlawful Acts in Asia (First part), NATO's activities (Second section), and the African Union's involvement in restricting this crime (Third section).

1. The Regional Cooperation Agreement on Combating Maritime Piracy and Other Unlawful Acts in Asia (RECCAP)

The ten member states of the Asian Association of Southeast Asian Nations (ASEAN), as well as China, Japan, South Korea, Sri Lanka, and Bangladesh, met and signed the Regional Cooperation Agreement on Combating Piracy and Other Unlawful Acts Against the Safety of Navigation in the Asia Region (RECCAP Agreement) in response to the growing use of regional organizations for security cooperation globally since the end of the Cold War. Signed in November 2004, this agreement became operative on December 4, 2005.

The goal of this agreement, the first of its kind between countries, is to create a regional framework for coordination and collaboration between the contracting parties in order to stop and prosecute armed robbery and piracy against ships in the region's waters. To ensure that the agreement does not conflict with the rights and obligations of the contracting states under international law, specifically the 1982 UNCLS, UNCLOS, the contracting states must implement it in conformity with their national laws and regulations.

Moreover, the exercise of this right does not provide any contracting state with the power to hunt for or stop pirates in another contracting state's territorial seas. This clause highlights the coastal state's exclusive legal authority over offenses like piracy and other illegal activities carried out inside its territorial waters.

According to the Regional Agreement (RECCAP), the Regional Information. In order to prevent and repress acts of piracy and armed robbery against ships, the Exchange Center was founded, with its headquarters located in Singapore. Its goal is to promote close regional cooperation among the contractual parties. Either direct bilateral collaboration between the center and the contractual parties or reference to the center's bodies is used to carry out this cooperation.

In the fight against maritime piracy and other illegal activities against ships in Asia, especially Southeast Asia, this pact is seen as an effective example of regional collaboration.[35]

34 Redha, R. D. M. A.-D. A, op. cit., 558.

35 Boukjouta, F, op. cit., 180-181.

2. NATO's Efforts to Limit Maritime Piracy

Since October 2008, NATO has conducted three maritime operations in the Horn of Africa region to provide necessary protection for ships. These operations include:

- Operation Allied Provider: Between October and December 2008, NATO launched Operation Allied Provider to protect global food aid ships passing through the Gulf of Aden and off the coast of Somalia in order to deliver humanitarian assistance to Somalia;
- Operation Allied Protector: NATO initiated this operation in 2009 to assist in preventing and disrupting pirate activity in the area, therefore enhancing the safety of international navigation and economic marine routes;
- Operation Ocean Shield: In August 2009, NATO carried out Operation Ocean Shield to assist the countries of the region, at their request, in developing their own capabilities, such as strengthening coastal patrols to combat piracy activities.[36]

3. The Role of the European Union in Limiting the Crime of Maritime Piracy

In 2021, the European Union's efforts to combat maritime piracy included the military mission EUNAVFOR Somalia (Operation Atalanta), which concentrated on disrupting and deterring piracy, particularly off the Horn of Africa. At the same time, the UNODC's Global Maritime Crime Programme (GMCP), supported by the EU, focused on strengthening regional capacities through legal reforms, training for law enforcement and judicial personnel, and developing mechanisms for prosecution and the exchange of evidence in affected regions such as the Gulf of Guinea.

3.1 Military measures and deterrence

- *Operation Atalanta:* The EU Naval Force Somalia continued its counter-piracy mission in the western Indian Ocean and off the Horn of Africa;
- *Disruption:* Military assets were deployed to neutralize suspected pirate groups by rendering them unable to continue their activities once intelligence reports confirmed their operations.

3.2 Capacity-building and legal support

- *Judicial capacity:* With EU funding, the UNODC's GMCP supported partner states by training prosecutors and judges to address maritime crime cases, including through simulated trials and reviews of existing legal frameworks;
- *Law-enforcement training:* The programme provided training for maritime law-enforcement officers in surveillance, interdiction, and operational response, often through the development and implementation of standard operating procedures (SOPs);
- *Legal reform:* Support was extended for regional legal assessments and the preparation of recommendations aimed at improving legislation related to maritime crime;
- *Cooperation:* The EU also assisted in establishing Memoranda of Understanding (MOUs) to facilitate the prosecution of suspects and the transfer of evidence among states.

3.3 Regional focus and additional activities

- *Gulf of Guinea:* Efforts in the Gulf of Guinea were reinforced through regional initiatives such as the Yaoundé Code of Conduct, intended to address piracy, drug trafficking, and other illicit activities;

36 Sultan, M. S. (2011). Maritime security and combating piracy: Security requirements and international responses – Towards a joint international approach to combating maritime piracy. Paper presented at the Third International Symposium on Maritime Disaster Management, Kingdom of Saudi Arabia, October 8-12, 32.

- *Mediterranean:* In 2021, the UNODC launched new projects to strengthen maritime law enforcement and border management capabilities in the Mediterranean, in coordination with EU initiatives such as Operation IRINI.[37]

According to UNODC's 2023 report, EU efforts against maritime piracy include contributing to the Global Maritime Crime Programme (GMCP) and the Support to West Africa Integrated Maritime Security (SWAIMS) program, which focus on capacity-building, legal assistance, and operational coordination. These initiatives involve training law enforcement and justice officials to handle piracy cases, developing legal frameworks, and strengthening regional cooperation in areas like the Gulf of Guinea and the Horn of Africa.

3.4 EU initiatives and their goals:

- Global Maritime Crime Programme (GMCP): The EU partnered with UNODC through this program to counter maritime crime. The training of more than 8,500 maritime officers from 106 nations will help develop operational skills. The plan focuses on developing better surveillance systems and response capabilities, and interdiction methods;
- Support to West Africa Integrated Maritime Security (SWAIMS): This program was designed to improve maritime security in West Africa. The program requires UNODC, together with other agencies, to provide unified regional support through the Yaoundé Architecture system;
- Capacity Building and Legal Support: A key component is strengthening the judicial response to maritime crimes through training for prosecutors, judges, and investigators. The project focuses on creating standardized evidence collection methods and enhancing prosecution success rates;
- Operational Support: The EU supports regional coordination and operational response through initiatives like the Coordinated Maritime Presences (CMP), which facilitates coordination between vessels and coastal states in key maritime areas;
- Addressing Root Causes: The EU supports efforts to eliminate piracy causes in the Horn of Africa through its backing of fishing operations and coastal villages and its support for Somali judicial institutions.38

According to a 2023 UNODC report, the European Union employs a multi-faceted strategy to combat maritime piracy in the Gulf of Guinea, focusing on capacity-building, financial aid, and a non-naval operational presence. The main initiatives involve regional maritime security projects funded with €55 million and legal framework development for piracy prosecution and the Coordinated Maritime Presences concept, and Yaoundé Architecture support and land-based piracy root cause solutions. Read the full UNODC report at unodc.org.[39]

4. The Role of the African Union in Reducing Maritime Piracy

Given the increasing number of maritime piracy attacks along African coastlines, particularly the Somali coast, the African Union has played a significant role by holding the 15th African Union Summit, expressing grave concern over the continuation and expansion of maritime piracy. The Union reaffirmed its support for the efforts of African states to prepare and

37 United Nations Office on Drugs and Crime. (2021). Global Maritime Crime Programme: Annual Report 2021. Vienna, Austria. https://www.unodc.org/unodc/en/data-and-analysis/wdr2021.html.

38 United Nations Office on Drugs and Crime. (2023). Global Maritime Crime Programme: Annual Report 2023. Vienna, Austria. https://www.unodc.org/unodc/en/piracy/index.html.

39 United Nations Office on Drugs and Crime. (2023). Pirates of the Niger Delta: An update on piracy trends and legal finish in the Gulf of Guinea (Part 2). Vienna, Austria. https://www.unodc.org/documents/Maritime_crime/UNODC_GMCP_Pirates_of_the_Niger_Delta_Part_2.pdf.

implement a continental strategy for managing maritime navigation in Africa, as well as participating in the African force against organized crime and legal fisheries.

The Peace and Security Council held its meeting in Addis Ababa in 2010 to discuss the increasing activity of pirates. The Council reaffirmed the African Union's commitment to strengthening and enhancing security, creating a safe and suitable environment for international fishing off the coasts of Somalia and Africa, as well as for global trade. It strongly supported the increase of the African Union mission to Somalia from 4,000 to 12,000 personnel to reduce acts of maritime piracy.

In addition, both East and West Africa have established maritime codes of conduct, which include standards for cooperation between states in combating maritime crimes. The IMO evaluated the Djibouti Code of Conduct, considering it the leading framework as it aims to encourage regional training, information exchange, and emphasizes the need for the development of national legislation. This code was developed to include not only maritime piracy and armed robbery but also any crimes that may appear on monitoring systems, such as smuggling, trafficking in illicit arms, drugs, and the sale of crude oil. In 2013, the countries of West and East Africa signed the Yaoundé Code of Conduct on Maritime Rules of Behavior in Cameroon. This code included similar legal violations with an additional obligation for its members to cooperate in maritime security through information exchange and communication with the relevant parties within the framework of the code. It also granted naval forces of those countries the authority to conduct legitimate activities, apprehend criminals, and prosecute them, while ensuring full care and attention to the maritime crew who may be exposed to crimes, with a commitment to repatriating them to their home countries.[40]

CONCLUSION

In conclusion, we have found that maritime piracy is one of the oldest crimes and a major issue threatening the security and safety of maritime navigation. It has evolved significantly, which has led to concerns within the international community. Maritime piracy is based on the same elements as other crimes; however, it differs from ordinary or domestic crimes in its international element.

Numerous efforts, both at the international and regional levels, have been made to combat and reduce maritime piracy. However, it continues to be widely committed in the seas and oceans.

STUDY RECOMMENDATIONS

This brings us to present the following recommendations:

- The necessity of continuing and strengthening international efforts to combat this phenomenon;
- Encouraging countries to cooperate in all matters related to ensuring maritime security for their ports and ships, to prevent them from becoming launching points for pirates;
- Establishing an international agreement specifically criminalizing maritime piracy;
- Setting binding rules for international cooperation in combating maritime piracy, including providing all available information related to the crime, as well as cooperation in the extradition of criminals.

40 Redha, R. D. M. A.-D. A, op. cit., 555-556.

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CLIMATE JUSTICE ON TRIAL: Role of Nigerian Courts in Connecting the Dots between Climate Change and Violence against Women

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ABSTRACT

While growing scholarship has increasingly explored the gendered impact of climate change, the legal responses remain under-examined, particularly in Nigeria. Globally, climate change is a topical issue. The cause could be natural or man-made. While natural causes demand adaptation strategies, anthropogenic (man-made) ones require mitigation and accountability. Regardless of origin, it affects men and women but disproportionately burdens women and girls due to its intersection with gender inequality, human rights, and social justice. Consequently, it deepens existing inequalities and results in climate injustice. This worsens women's gender-driven bad situation, making it a form of violence against women (VAW). Nigeria has signed agreements on climate change and human rights, which are expected to be reflected in domestic laws. The question is whether these recognize the peculiarities of women and consider climate injustice as VAW.

This work examines the possibility of considering gender climate injustice as VAW and the role of courts in redressing it. It employs doctrinal research methodology from analytical, expository, and normative approaches, relying on primary and secondary sources of data. It found that the extant climate change laws are insufficient and neither gendered nor related to violence, leaving the courts to purposively connect the dots. To achieve substantive justice, it recommends that the courts must embrace the doctrine of 'implicitly guaranteed rights', enunciated by the African Commission on Human and Peoples' Rights in the case of SERAC and Another v Nigeria. Nigerian courts have a critical role in ensuring climate justice by interpreting laws to bridge the gap between environmental harm and its gendered consequences.

INTRODUCTION

Since the formation of the United Nations (UN) in 1945,[1] there have been global commitments to ensure the enjoyment of human rights. The idea that human rights are entitlements of all humans became preserved in the Universal Declaration of Human Rights (UDHR).[2] It set a minimum core standard for the enjoyment of human rights, and since then, the contours have consistently increased, beginning with the first generation-civil and political, to the second generation-socioeconomic to the third generation-developmental rights. Despite the different generations, there is a consensus that all rights are universal, indivisible, interdependent, and interrelated.[3] A learned author illustrates it in demonstrating that one can only enjoy the right to life, a civil and political right, if there is access to the right to health goods and services, a socioeconomic right.[4] These standard minimums are imbibed at the regional levels, for instance, in Africa, the African Charter on Human and Peoples' Rights (African Charter) replicates them.[5] National constitutions are not left out; for instance, the Constitution of the Federal Republic of Nigeria 1999 (CFRN) contains human rights provisions.[6]

Human rights, being universal, are for everyone irrespective of sex or gender. Despite the UDHR's use of the words 'all human beings', 'everyone', 'all', 'men and women', the Vienna Declaration insists that the human rights of women and girls are inalienable, integral, and indivisible parts of universal human rights.[7] This is understandable, being that women constitute 49.5 percent of the global human population, a figure too significant to be ignored.[8] In prac-

1 United Nations. (December 10, 1948). Universal Declaration of Human Rights (General Assembly Resolution 217A [III]).

2 Office of the High Commissioner for Human Rights. (n.d.). Universal Declaration of Human Rights (English). United Nations. https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.

3 United Nations. (June 14-25, 1993). Vienna Declaration and Programme of Action (A/CONF.157/23, Para. 5). World Conference on Human Rights, Vienna.

4 Nnamuchi, O. (2008). Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria. Journal of African Law, 52(1), 10.

5 Organization of African Unity. (1981). African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 588 [1982], entered into force October 21, 1986).

6 Federal Republic of Nigeria. (1999). Constitution of the Federal Republic of Nigeria (Promulgation) Act (as amended). Cap C23, Vol. 3, Laws of the Federation of Nigeria (2004).

7 United Nations. (1993). Vienna Declaration and Programme of Action (VDPA), Para. 18.

8 Countrymeters. (January 1, 2025). World population.

tice, women seem not to enjoy equal rights with men, thus the adoption of specific treaties like the International Convention on the Elimination of all forms of Discrimination against Women (CEDAW)[9] and its African regional counterpart – the Protocol to the African Charter on Rights of Women in Africa (Maputo Protocol).[10] Some countries have women-specific laws on women's rights, while others have specific sections on women's rights in their Constitutions.[11] Nigeria has neither but rather a general law that guarantees everyone's rights.

Despite the interrelatedness of rights, none of the generations of rights seems to be most favorable to women. For instance, on civil and political rights, the right to life is guaranteed for everyone and not to be intentionally taken except in the execution of a court's sentence. This clearly does not take into consideration maternal mortality (MM), which is rife as Nigeria ranks second highest globally.[12] An example of socioeconomic right is the right to health, in cases of reduced access to reproductive healthcare goods and services; women suffer grievous health consequences, including MM. A sample of third-generation or solidarity rights is the right to a healthy environment, the violation of which will affect the lives of men and women. Though this third group is plagued by challenges of clarity of content, duty bearers, and right holders, it can also result in MM in cases of sudden extreme climate change.[13] This makes MM a form of violence against women (VAW) because it affects only women, and the death does not result from court sentences. It also neglects the fact that these women die while performing a social function of giving life.

The environment plays an important role in the survival of human beings, as it can affect the quality of life of humans. This makes its protection beneficial to humans. Humans also need to be protected from elements of the environment that impact on dignified life. Climate is an important aspect of the environment that changes due to either natural or manmade means, causing humans untold hardship. When this happens, in Nigeria as well as most countries, women suffer more than men, in the form of health impacts, injury, and death.[14] This is due to their peculiarity of being in the care economy, thereby constituting VAW.[15]

While policy and development scholarship have begun to explore the gendered impacts of climate change, legal responses, especially those concerning violence against women, remain under-examined. Although the body of literature on climate change and gender inequality has expanded, there is still a limited systematic analysis linking climate injustice to the legal frameworks governing violence against women. Research has shown that majority of academic literature pertaining to this issue fail to integrate a true gender perspective in regards climate change,[16] often treating gender merely as an additional explanatory variable rather than recognizing it as a social or cultural construct that generates inequalities putting women at

https://countrymeters.info/en/World.

9 United Nations General Assembly. (December 18, 1979). Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), GA Res 34/180; entered into force September 3, 1981).

10 African Union. (2003). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), (CAB/LEG/66.6 [2003]; entered into force November 25, 2005).

11 Federal Democratic Republic of Ethiopia. (1995). Constitution of the Federal Democratic Republic of Ethiopia, Art. 35.

12 Okeke, U. P., Agbo, I. L., Igwe, S. O. (2024). Questioning the Nigerianness of Nigerian women. African Journal of Law and Human Rights, 8(2), 116.

13 LawTeacher. (January 7, 2021). Third generation human rights and good governance. https://www.lawteacher.net/free-law-essays/international-law/third-generation-human-rights-and-good-governance-international-law-essay.php.

14 Boyle, P. (June 6, 2024). Climate change hurts women more. AAMC. https://www.aamc.org/news/climate-change-hurts-women-more.

15 Desai, B. H., Mandal, M. (2021). Role of climate change in exacerbating sexual and gender-based violence against women: A new challenge for international law. Environmental Policy and Law, 51, 138.

16 Alonso-Epelde, E., García-Muros, X., Gonzalez-Eguino, M. (2024). Climate action from a gender perspective: A systematic review of the impact of climate policies on inequality. Energy Research & Social Science, 112, 103511. https://doi.org/10.1016/j.erss.2024.103511.

a much greater risk; this lack of a gender perspective could lead to misinterpretation and misguided recommendations for improving climate policies.[17] This paper addresses this critical gap by establishing a doctrinal foundation for recognizing gender-differentiated climate harms as a form of VAW and by outlining the role of courts in advancing this emerging field. It argues that if courts fail or neglect to connect the dots between climate injustice and VAW, they risk becoming complicit in perpetuating such violence. Consequently, this study is both timely and necessary, providing a legal and theoretical basis for understanding how environmental degradation and climate change intersect with women's human rights and the state's obligations to protect them.

This work is divided into five parts. Following this introduction is a section positing climate change justice and linking climate injustice to VAW. The third part traces the legal framework for recognizing climate injustice as VAW and how the courts can connect the dots. The fourth part looks at the factors affecting the recognition of climate injustice as VAW, thus impeding the enjoyment of such rights by Nigerian women, while the final part makes useful recommendations on tackling the identified challenges. This work concludes that where the courts fail or neglect to connect the dots between climate injustice and VAW, it becomes an agent in the perpetration of such violence.

METHODOLOGY

This study employs a doctrinal legal research methodology, integrating analytical, normative, and purposive interpretive approaches. This methodology is particularly appropriate given that the disproportionate impact of climate change on women, and its possible classification as a form of violence against women, represents a relatively novel and under-explored area of scholarship, with limited empirical data available. Doctrinal legal research provides a systematic framework for clarifying conceptual and normative issues, constructing an interpretive model for judicial engagement, and critically evaluating existing legal instruments. The primary objective of this study is to examine how gender-differentiated climate harms may be recognized as VAW within existing legal frameworks, and to assess the potential role of courts in reinforcing this conceptual and normative linkage.

The research draws on multiple sources of law and scholarship. Primary legal instruments include the 1999 Constitution of the Federal Republic of Nigeria, the Climate Change Act 2021, the Violence Against Persons (Prohibition) Act 2015, the African Charter, and other relevant national and regional legal norms. International instruments and soft-law sources include the CEDAW, the Maputo Protocol, the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, CEDAW General Recommendation No. 37, and the Beijing Platform for Action. Judicial authorities such as SERAC v. Nigeria, Gbemre v. Shell, and Centre for Oil Pollution Watch v. NNPC are analyzed to illustrate State obligations in relation to environmental protection and the protection of human rights. Secondary materials comprise peer-reviewed academic literature, monographs, and research reports by recognized international institutions.

The study applies a gender-sensitive and intersectional analytical lens to reveal the mechanisms through which climate impacts intensify women's vulnerability to violence and exacerbate socio-economic inequalities. Judicial decisions are examined using a precedent-based analytical model, while statutory and normative interpretation is guided by purposive, principle-based reasoning that foregrounds the indivisibility, interdependence, and universality of human rights. This research does not involve primary empirical data collection; rather, it systematically analyses legal, institutional, and secondary empirical materials to elucidate the relationship between climate impacts and VAW. By combining doctrinal analysis with critical

17 Ibid.

normative reasoning, the study develops an interpretive framework that advances gender-responsive climate justice and strengthens the judicial recognition of gendered climate harms.

1. THEORIZING CLIMATE CHANGE, CLIMATE JUSTICE, AND CLIMATE INJUSTICE

Human existence within an environment presupposes an interdependent relationship. Human beings can, through their actions, contribute to the growth and development or the destruction of the environment. Climate, a part of the environment, is the long-term pattern of weather in a particular area, tracked for at least 30 years.[18] It changes slowly over hundreds or thousands of years by natural factors, human activities, and/or both. Natural causes include volcanic eruptions, ocean currents, the earth's orbital changes, solar variations, and internal variability.[19] Human-related factors include: transportation, electricity generation, industrialization, mechanized agriculture, development of oil and gas, building, deforestation, and lifestyle choice, among others.[20] In view of human factors, industrialized nations would contribute more to climate change, but with globalization, other countries that neither contributed to the causative factor nor benefited from the industry will partake in the effect, which amounts to climate injustice, entitling them to reparation.[21]

Nigeria's climate is mainly tropical.[22] Signs of climate change include extreme flooding,[23] unpredictable rainy seasons, and air and water pollution.[24] The effects are enormous; for instance, flooding has destroyed schools, making it impossible for children to go to school, displaced people, destroyed farms, leading to food insecurity and unemployment for farmers, making them soft targets for recruitment by insurgents.[25] It affects health, fuels domestic violence, and is worse on the vulnerable, including children, the elderly, and pregnant women.[26] Like most countries, Nigeria experiences natural and human factors related causes. Of the human-related causes, the chief ones include gas flaring[27] and deforestation,[28] and both are eradicable. All these can be largely categorized as environmental violence, defined by the Committee on the Elimination of Discrimination Against Women (CEDAW) as any "form of environmental harm, degradation, pollution, or State failures to prevent foreseeable harm connected to cli-

18 National Geographic. (n.d.). All about climate. https://education.nationalgeographic.org/resource/all-about-climate/.

19 Turrentine, J. (n.d.). What are the causes of climate change? Natural Resources Defense Council (NRDC). https://www.nrdc.org/stories/what-are-causes-climate-change.

20 Ibid.

21 Chapman, A. R., Ahmed, A. K. (2021). Climate justice, human rights, and the case for reparations. Health and Human Rights, 23(2), 83.

22 United States Agency for International Development (USAID). (January, 2013). Nigeria climate vulnerability profile. https://www.climatelinks.org/sites/default/files/asset/document/nigeria_climate_vulnerability_profile_jan2013.pdf.

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24 Babalola, E. (April 24, 2018). The effects of climate change in Nigeria. ASEC. https://asec-sldi.org/news/current/climate-change-nigeria/.

25 Stromsta, R. (May 30, 2024). Climate change, disasters, insecurity and displacement: The impact of flooding on youth marginalisation and human mobility in Nigeria. International Organization for Migration (IOM). https://environmentalmigration.iom.int/blogs/climate-change-disasters-insecurity-and-displacement-impact-flooding-youth-marginalization-and-human-mobility-nigeria.

26 Ugwu, U. G., Ukamaka, T., Chinonye, C. P. (2023). Impact of climate change on the environment and human health in Nigeria: Implication for sustainable development. International Journal of Studies in Education, 19(1), 387.

27 World Rainforest Movement (WRM). (November 25, 2008). Nigeria: Gas flaring – major contributor to climate change and human rights abuses. https://www.wrm.org.uy/bulletin-articles/nigeria-gas-flaring-major-contributor-to-climate-change-and-human-rights-abuses.

28 Proshare. (December 12, 2022). Deforestation and climate change crisis in Nigeria. https://www.proshare.co/articles/deforestation-and-climate-change-crisis-in-nigeria.

mate change".[29] The catalysts for this violence often arise from the failure of states to address climate change impacts or state and corporate actions that cause environmental degradation, revealing shortcomings in international and domestic law to hold perpetrators accountable.[30] Government-authorized degradation of the environment through contracts with corporations is one major form of environmental violence that results in gendered harm; this harm triggers mass migration due to the destruction of land and forced removals, leading to increases in violence against women.[31]

Climate justice recognizes the impact of climate change on those who are the least responsible for it by tackling the root causes. Nigeria is among the top seven countries flaring gas, even though the gas could be put to better use.[32] She has shifted the date for its stoppage several times, suggesting that the government might not be interested in stopping it. This stance is fortified by the fact that the Nigerian state owns a 50 percent shareholding of the oil venture, which makes the government both a polluter and a beneficiary. Such contradictions reflect structural climate injustice: the state profits while citizens, especially women, bear the costs.

Globally, evidence reinforces that gender equality strengthens climate resilience. A 2022 cross-country study covering 146 nations found that every 1% rise in gender equality correlates with a 0.6% improvement in climate adaptation capacity, primarily due to greater readiness and lower vulnerability.[33] Conversely, each 1% increase in gender inequality leads to a 0.5% decline in adaptation.[34] Education equality, in particular, was identified as the strongest driver of climate readiness.[35] These findings highlight that empowering women through education, participation, and equitable access to resources is not only a matter of justice but a practical necessity for effective climate action. In Nigeria, where women disproportionately experience the social and economic fallout of environmental degradation, closing gender gaps is therefore essential to achieving true climate justice and resilience.

1.1. Linking climate injustice to violence against women (VAW)

The consequences of climate change are not distributed equally; a significant body of research indicates that women are subject to its most severe effects.[36] This disparity is deeply rooted in societal structures; cultural norms often assign women primary responsibility for tasks such as securing water, fuel, and food, or performing home care; these rely heavily on natural resources, making them exceptionally vulnerable to environmental instability.[37] This vulnerability is intensified by economic and infrastructural factors. Women generally spend

29 Asgari, S. (November 27, 2023). A potential avenue for justice: The possibility of international criminal responsibility for gender-based violence caused by climate change. Oxford Human Rights Hub. https://ohrh.law.ox.ac.uk/a-potential-avenue-for-justice-the-possibility-of-international-criminal-responsibility-for-gender-based-violence-caused-by-climate-change/.

30 Ibid.

31 Asgari, S. (November 27, 2023). A potential avenue for justice: The possibility of international criminal responsibility for gender-based violence caused by climate change. Oxford Human Rights Hub. https://ohrh.law.ox.ac.uk/a-potential-avenue-for-justice-the-possibility-of-international-criminal-responsibility-for-gender-based-violence-caused-by-climate-change/.

32 Adelana, O. (March 11, 2022). Will Nigeria's climate change law put the brakes on gas flaring? Climate Home News. https://www.climatechangenews.com/2022/03/11/will-nigerias-climate-change-law-put-the-brakes-on-gas-flaring/.

33 Pinho-Gomes, A.-C., Woodward, M. (2024). The association between gender equality and climate adaptation across the globe. BMC Public Health, 24, Art. 1394. https://doi.org/10.1186/s12889-024-18880-5.

34 Ibid.

35 Ibid.

36 Alonso-Epelde, E., García-Muros, X., Gonzalez-Eguino, M. (2024). Climate action from a gender perspective: A systematic review of the impact of climate policies on inequality. Energy Research & Social Science, 112, 103511. https://doi.org/10.1016/j.erss.2024.103511.

37 Ibid.

more time in the home managing care duties, heightening their dependence on domestic energy. Concurrently, lower rates of private vehicle ownership mean they rely more heavily on public transport systems.[38] Furthermore, a persistent income gap translates into a higher incidence of energy poverty among women; this financial barrier makes it significantly more difficult for them to adopt sustainable alternatives, such as investing in renewable energy or energy-efficient upgrades.[39] This situation is particularly unjust given that women's consumption habits have historically accounted for a smaller portion of the greenhouse gas emissions driving the climate crisis; compounding the issue, the very groups most exposed to climate impacts, including women, are also the most likely to be negatively affected by flawed or badly designed climate policies; in short, women's disproportionate risk is a product of their greater exposure during severe climatic events, their frequent reliance on low-technology agriculture, and a systemic lack of resources and power.[40]

Another instance of the adverse effect of climate change on women is when climate change changes the rainfall pattern, and women and girls, who are mostly responsible for collecting and managing household water, undergo enormous difficulty in getting water. In confirmation, the UN reported that women in sub-Saharan Africa annually spend 40 billion hours fetching water, equivalent to the annual labor worth of the entire workforce in France.[41] Further, where people are compelled into camps due to climate change, women suffer indignity in the form of being victims of 'sex for food'.[42] These demonstrate that climate change is not gender neutral but disproportionately affects women. It could invariably be said to mete out injustice on women. Researchers, policy makers, and climate change scientists have been trying to link climate change to gender and social inequity.[43] However, the link is yet to be concretized by the UN, but the UN Women have lent their voices in calling for that recognition.[44]

Seeing that climate change results in injustice to women by increasing their burden, though they did not cause it, is it a form of VAW? The United Nations Declaration on the Elimination of Violence against Women, (UNDEVAW), the first international instrument to unequivocally address VAW, defines it as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. Climate change extremely affects women simply because of their sex and or gender. It inflicts physical harm when a woman dies, for instance, in cases of MM due to the effects of weather changes on pregnant women. It becomes sexual harm when a woman endures rape due to climate change, for instance, when climate change forces people to move into camps, and women are subjected to 'sex for food'. It becomes psychological when a woman is dehumanized as a result of climate change. This can happen in the privacy of homes or in the community. It follows that government or state actors can be held responsible. Relying on the foregoing, this work argues that climate injustice constitutes VAW.

38 Ibid.
39 Ibid.
40 Ibid.
41 Stephanie, D., Suleiman, H. (2024). The climate crisis in Nigeria: Climate justice and women's rights. Education as a Vaccine. https://www.evanigeria.org/the-climate-crisis-in-nigeria-climate-justice-and-womens-rights/.
42 Ibid.
43 UN Women. (February 28, 2022). Explainer: How gender inequality and climate change are interconnected. https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected.
44 UN Women. (2020). 2019–2020 Women, Peace and Security in Action. https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/Women-peace-and-security-annual-report-2019-2020-en.pdf.

1.2 Specific forms of VAW exacerbated by climate change

Climate change, often acting as a threat multiplier, exacerbates pre-existing gender inequalities and social stressors, leading to a spike in various forms of violence against women during and after climate-related disasters, crises, and displacement. Specific forms of violence exacerbated by climate change include:

a. Intimate partner violence (IPV) and domestic abuse

Intimate Partner Violence and domestic abuse, overwhelmingly borne by women, tend to increase climate-induced disasters and are characterized by the UNDEVAW adopted on 20 December 1993 by General Assembly resolution 48/104, this violence is characterized as a continuum of harmful behaviors ranging from control and psychological abuse to physical and sexual violence that occur within the family or domestic setting and are commonly perpetrated by a current or former intimate partner.[45] This violence manifests in multiple forms: physical abuse and violence have been documented during both slow-onset crises, such as droughts in Australia and sub-Saharan Africa, and sudden-onset events such as hurricanes, cyclones, and bushfires[46] psychological and emotional abuse rises as disaster exposure and declining resources generate stress, leading to increased emotional harm[47] intimate partner femicide, or the murder of women by partners or family members, has shown heightened risk following heat waves[48] spousal battery often escalates due to disaster-related tensions and economic insecurity caused by climate change;[49] and general domestic violence frequently increases during post-disaster reconstruction phases, as observed after Hurricane Mitch in Nicaragua and Honduras,[50] where stress from climate extremes aggravated household conflict and VAW risks.

b. Sexual violence and exploitation

Sexual violence and exploitation of women, which are highly documented in emergency and displacement settings during climate-related disasters, are exacerbated by resource scarcity and lack of security, exposing women and girls to multiple overlapping risks. Rape and sexual assault rose significantly among women displaced after Hurricane Katrina, including cases of intimate partner rape, while women and girls forced to walk longer distances in search of food, water, or firewood became especially vulnerable, as seen in reports of rape following the 2007 Gizo tsunami in the Solomon Islands.[51] Sexual harassment is also widespread, particularly in disaster contexts where women and girls are targeted in cyclone shelters while accessing sanitation facilities or during floods,[52] where unemployed men loiter and harass adolescent girls. Sexual trafficking and exploitation often intensify under conditions of displacement and scarcity caused by climate change, with children – especially girls – left unprotected and at risk of rape, trafficking, or forced prostitution in exchange for food, water, or other valuables, while women and girls face heightened coercion into sexual exploitation during climate-induced crises.[53] Finally, sexual violence against women climate change defenders highlights

45 Le, M. V. (2022). Disasters, Climate Change, and Violence Against Women and Girls. Oxford Research Encyclopedias: Natural Hazard Science.

46 Ibid.

47 Ibid.

48 Ibid.

49 Olusegun, O., Oyelade, O. (2022). Access to justice for Nigerian women: A veritable tool to achieving sustainable development. International Journal of Discrimination and the Law, 22(1), 4.

50 Fapohunda, T., Stiegler, N., Bouchard, J. P. (2024). Climate change and violence against women. Elsevier Masson SAS, 112.

51 Ibid.

52 Alston, M., Fuller, S., Kwarney, N. (2025). Women and climate change in Vanuatu, Pacific Islands region. Gender, Place & Culture, 32(1), 83.

53 Fapohunda, T., Stiegler, N., Bouchard, J. P. (2024). Climate change and violence against women. Elsevier Masson SAS, 112; Fruttero, A., Halim, D., Broccolini, C., Coelho, B., Gninafon, H., Muller, N. (2024). Gendered impacts of climate change: Evidence from weather shocks. Environmental Research Climate.

another layer of risk, with threats of rape and intimidation disproportionately weaponized to silence and control women who resist or protest against climate change.[54]

c. Economic and property violence

Economic and property violence, which intensifies during climate-related shocks and resource scarcity, undermines women's financial stability and autonomy while increasing their susceptibility to abuse. Financial deprivation occurs when men refuse to meet economic responsibilities, such as alimony, or deliberately restrict women's access to financial resources, leaving them vulnerable during crises. Denial of livelihood and income opportunities, often through husbands preventing women from working, can become life-threatening in contexts of food insecurity and disaster-related stress, stripping women of the ability to sustain themselves or their families. Property rights shifting further compounds recovery challenges, as post-disaster processes often reinforce patriarchal norms that transfer land, housing, or other assets disproportionately to men, thereby marginalizing women's ability to rebuild their lives.[55] Finally, economic abuse, while recognized and criminalized under Nigerian law, becomes more pronounced during crises, manifesting in the loss of women's employment, livestock, or agricultural output and leaving them with reduced bargaining power and heightened dependence, which in turn deepens their exposure to gender-based violence.[56]

d. Violence related to forced migration and displacement

Climate change causes the rapid degradation of land, forcing communities to abandon their homes and migrate in search of habitable land.[57] This forced migration disproportionately affects women, leading to an increase in incidents of violence against women; this violence arises from structural shortcomings and cultural perpetuations of gendered discrimination.[58] Violence related to climate-induced migration and displacement is a critical concern in the context of climate events, as the insecurity created by displacement exacerbates women's and girls' exposure to multiple forms of abuse. Violence in temporary shelters and camps is widespread, with women and girls reporting high levels of sexual violence during routine activities such as sleeping, washing, bathing, or dressing, particularly in tents or shelters that lack privacy, adequate lighting, and proper security measures.[59] Forced prostitution emerges as another grave risk, as displaced women and girls are frequently coerced or exploited under conditions of vulnerability and scarcity, leaving them with few alternatives for survival.[60] In addition, xenophobic attacks pose heightened threats to women and girls in migration contexts, as climate-induced displacement often fuels social tensions in host communities, making female migrants disproportionately vulnerable to gendered violence, harassment, and exclusion.[61] Further, a field study on climate change in some parts of Africa found that in the event of severe drought conditions, men migrate to other rural

54 Ibid., 9.

55 Alston, M., Fuller, S., Kwarney, N. (2025). Women and climate change in Vanuatu, Pacific Islands region. Gender, Place & Culture, 32(1), 83.

56 Fapohunda, T., Stiegler, N., Bouchard, J. P. (2024). Climate change and violence against women. Elsevier Masson SAS, 112.

57 Asgari, S. (November 27, 2023). A potential avenue for justice: The possibility of international criminal responsibility for gender-based violence caused by climate change. Oxford Human Rights Hub. https://ohrh.law.ox.ac.uk/a-potential-avenue-for-justice-the-possibility-of-international-criminal-responsibility-for-gender-based-violence-caused-by-climate-change/.

58 Ibid.

59 Desai, B. H., Mandal, P. (2021). Role of climate change in exacerbating sexual and gender-based violence against women: A new challenge for international law. Environmental Policy and Law, 51, 185.

60 Le, M. V. (2022). Disasters, Climate Change, and Violence Against Women and Girls. Oxford Research Encyclopedias: Natural Hazard Science, 5.

61 Fapohunda, T., Stiegler, N., Bouchard, J. P. (2024). Climate change and violence against women. Elsevier Masson SAS, 11.

or urban areas in search of water or grazing land, or work.[62] The women who are left behind face increased risks of expulsion from their families and communities, as well as sexual violence; the gendered impacts of these male migrations are manifested in terms of their negative effect on the girls' education.[63] In the absence of fathers and brothers, girls are expected to support their mothers in household and farming activities; as a result of the extra workloads the girls assume, they are forced to miss out on schooling.[64]

e. Harmful Traditional Practices

Harmful Traditional Practices (HTPs) can intensify under the economic and social pressures of climate change, as families resort to these practices as coping mechanisms or strategies to reduce dependency. Child marriage and forced marriage often rise following disasters, with families marrying off daughters at younger ages during droughts to reduce household size and secure dowries as a form of cash income.[65] After the 2004 South Asian tsunami, cases were documented of young women being forced to marry older "tsunami widowers", while displaced girls were compelled into marriages against their will, and widows were coerced into marrying relatives of their late husbands.[66] Female genital mutilation, already a severe violation of women's rights, is recognized as a form of sexual violence that can be exacerbated in climate disaster contexts where social control over women's bodies intensifies.[67] In addition, forced abortion has been reported in climate disaster situations, where women may be compelled to terminate pregnancies due to displacement, resource scarcity, or coercion, further reflecting the way harmful traditional practices become intertwined with crises driven by climate change.

f. Mental health

Climate change increasingly affects psychological well-being, manifesting in emotions such as fear, helplessness, and persistent distress that can escalate into clinical anxiety, depression, or trauma-related disorders.[68] Women are particularly vulnerable to these effects, often exhibiting higher rates of psychological strain following extreme weather events; this heightened risk is closely tied to pre-existing social and economic inequalities, as well as gendered responsibilities that place additional emotional burdens on women during and after crises.[69] In the aftermath of floods or droughts, women frequently experience intense worry over their families' safety and livelihoods; a growing phenomenon, sometimes referred to as eco-anxiety, captures the deep, ongoing fear of environmental collapse, one that has even influenced reproductive choices, with some women reconsidering childbirth in light of future climate risks.[70] Pregnant women exposed to disasters such as cyclones are also found to have elevated and prolonged risks of post-traumatic stress, often persisting long after the event itself.[71]

62 Abebe, M. A. (2014). Climate change, gender inequality and migration in East Africa. Washington Journal of Environmental Law & Policy, 4(1), 104-140. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1034&context=wjelp.

63 Ibid.

64 Ibid.

65 Le, M. V. (2022). Disasters, Climate Change, and Violence Against Women and Girls. Oxford Research Encyclopedias: Natural Hazard Science, 5.

66 Ibid.

67 Desai, B. H., Mandal, P. (2021). Role of climate change in exacerbating sexual and gender-based violence against women: A new challenge for international law. Environmental Policy and Law, 51, 185.

68 Zavala, M. D., Cejas, C., Rubinstein, A., Lopez, A. (2024). Gender inequities in the impact of climate change on health: A scoping review. International Journal of Environmental Research and Public Health, 21(8), 1093. https://doi.org/10.3390/ijerph21081093.

69 Ibid.

70 Ibid.

71 Ibid.

2. LEGAL FRAMEWORK FOR RECKONING CLIMATE INJUSTICE ON WOMEN AS VAW

At the international level, few legal instruments directly address how climate change affects women and girls. Consequently, many women experience heightened vulnerability to violence and exploitation as climate impacts intensify.[72] Historically, international environmental and climate frameworks have largely overlooked gender considerations, treating them as peripheral rather than integral to policy design.[73] This neglect has created a persistent gap in legal protection for women, particularly concerning gender-based violence linked to climate-related stressors. Existing international environmental and climate laws remain largely silent on these gender-specific dimensions, leaving women without adequate safeguards in global climate governance.[74]

The commencement point is the UDHR, of which Article 25 guarantees standards of living adequate for wellbeing. This will invariably include a safe, clean, healthy environment. Specific ones on climate change include the 1992 UN Framework Convention on Climate Change (UNFCCC), establishing a structure for confronting challenges of climate change,[75] and the Paris agreement, recognizing that climate change is a shared problem, thus all countries need to set emission targets. It covers climate change mitigation, adaptation, and finance.[76] These and other climate change treaties barely recognize gender, let alone finding a linkage with VAW.

The CEDAW, acknowledged as the women's bill of rights, condemns all forms of abuse of women, without the use of the word 'violence'. Though it has nothing on climate change, the purposive reading of its Article 1 on discrimination against women will include climate change-related VAW because women's disproportionate suffering has the effect of nullifying their exercise of human rights on an equal basis as men. As if affirming this, its General Recommendation(GR) no 37 – which is related to gender and disaster risk reduction in climate change, but failed toexhaustively cover VAW in climate change – correctly observed that women are more affected by climate change and experience difficulty in adapting to the changes that come with it, requiring targeted laws, policies and budget to redress it.[77] The Beijing Declaration and Platform for Action highlighted 12 crucial areas where action is needed for greater equality of men and women, and they include 'violence against women' and 'women and the environment'.[78] It noted that women are more stable in the community as men constantly seek greener pastures; consequently, sustainable development can only be achieved if women's contribution to environmental management is acknowledged and supported.[79]

At the regional level, the African Charter guarantees the right to a generally satisfactory environment favorable for development,[80] while the Maputo Protocol guarantees African women the right to a healthy and sustainable environment.[81] None of the treaties defined this right, but the Maputo Protocol has a more holistic provision, calling for the greater participation

72 Mandal, M. (2023). Climate change exacerbated sexual and gender-based violence: Role of the feminist foreign policy. Environmental Policy and Law, 53(5-6), 401-413. https://doi.org/10.3233/EPL-239018.

73 Ibid.

74 Ibid.

75 UN Framework Convention on Climate Change (UNFCCC). (May 9, 1992). S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

76 Paris Agreement to the UN Framework Convention on Climate Change. (November 4, 2016). T.I.A.S No.16 – 1104.

77 The UN Committee on the Elimination of Discrimination against Women. (2018). General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change (CEDAW/C/GC/37), Paras. 3, 8.

78 United Nations. (1995). Beijing Declaration and Platform for Action: Fourth World Conference on Women (A/CONF.177/20 and A/CONF.177/20/Add.1), goals 4, 11.

79 Ibid., para. 251.

80 African Charter on Human and Peoples' Rights (n 4), Art. 24.

81 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), (n 9), Art. 18.

of women in the planning, management, and preservation of the environment. In relation to the extractive industry, the African Commission explained this right to mean an environment that is clean enough for a safe and secure life and development of individuals and people.[82] This work adopts this definition, which it argues is sufficient to cover concerns outside of the extractive industry. However, it lacks a gender perspective. Specifically on climate change, the African Union observed that there is a lack of awareness of the gender dimension of climate change and thus the need to mainstream gender into climate change policy formulation, planning, monitoring, and evaluation.[83]

The Maputo Protocol adopts the definition of violence as stated in the UNDEVAW, but goes a step further to prohibit violence in times of peace and armed conflict or war.[84] Article 4 on VAW calls on States Parties to identify its causes and consequences. In line with this provision, this work lends its voice in demonstrating that climate change causes VAW. Further, Article 10 on women in armed conflict specifically includes protection of internally displaced persons from violence. It follows that when women are internally displaced as a result of climate change, they must be protected from sexual and economic violence. Again, Article 24 on women in distress calls for the protection of poor women. This study has shown that climate change makes women poorer and deserving of protection. This work submits that the combined reading of the provisions of the Maputo Protocol suggests that climate change can be said to be VAW.

At the domestic level, there are few laws on it. Laws on any issue signify the government's willingness to address it. Nigeria has laws on climate change and VAW. This aspect examines these laws for any linkage of the two, beginning with the 1999 Constitution of the Federal Republic of Nigeria as amended (CFRN), the foundational document upon which all laws in Nigeria derive their validity. The CFRN makes provisions for environmental concerns, which invariably cover climate change. Section 20 of the CFRN stipulates environmental objectives of protection, improvement of the environment, and safeguarding of the water, air, land, forest, and wildlife, the duty of the state. Of course, this duty is for the benefit of Nigerians. Section 42 prohibits discrimination in law or performance of executive or administrative function, on many grounds, including sex. It follows that when the government is carrying on the environmental objectives, it must endeavor to do so in a non-discriminatory manner.

The Climate Change Act of 2021 (CCA)[85] provides a framework for achieving a low greenhouse gas emission (GHG), environmentally sustainable, and climate-resilient society. It sets up the National Council on Climate Change (NCCC) to coordinate the attainment of reduced GHG and other anthropogenic causes of climate change. It obligates public entities as well as private ones with a minimum of 50 employees to establish measures for achieving carbon emission reduction.[86] It provides for the reduction of emissions from deforestation and forest degradation,[87] but it surprisingly has nothing on gas flaring, which contributes 65 percent of the global gas flares and is a major cause of climate change, especially in Nigeria.[88] The NCCC administers a climate change fund, set up for, among other things, conducting assessments of climate change impact on the vulnerable com-

82 African Commission on Human and Peoples' Rights. (May 22, 2017). State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment. Niamey, Republic of Niger, Para. 27.

83 African Union. (2022). African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032). 120.

84 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). (n 9), Art. 1.

85 Federal Republic of Nigeria. (2021). Climate Change Act. Official Gazette of the Federal Republic of Nigeria.

86 Ibid., s. 24.

87 Ibid., s. 28.

88 University of Exeter. (December 23, 2022). Penalties, Corruption and Legislation Are Failing to Deter Harmful Gas Flaring in Nigeria, Study Shows. University of Exeter.https://phys.org/news/2022-12-penalties-corruption-legislation-deter-gas.html.

munity and population.[89] This fund is, however, not for assisting victims of climate injustice. Seeing that women suffer more in cases of climate change, the absence of such an enabling provision is gender discriminatory. It provides for the punishment of acts that affect the mitigation efforts under the Act, but the penalty is to be determined by the Council.[90] This violates the attribute of offence that must be defined and a penalty prescribed in a written law.[91] Where the penalty is to be determined by the council, it leaves room for differential punishment and all other acts of corruption-fueled considerations. An example is the non-punishment of gas flaring.

The Violence against Persons Prohibition Act (VAPPA) of 2015 prohibits and punishes all forms of violence against anyone.[92] It defines violence as any act or attempt that causes or may cause any person, physical, sexual, psychological, verbal, emotional, or economic harm occurring in private or public life, in peacetime and in conflict situations.[93] Climate change has been linked to conflict.[94] It drives conflict in which women suffer all forms of violence. The combined reading of these laws will make room for the punishment of climate injustice as VAW.

Connecting the dots by the courts

In democratic societies, all eyes are on the courts to do justice. Justifying this is a common saying that the judiciary is the last hope of the common man. In doing justice, the courts interpret the law because the law becomes what the courts say it is. It follows that in reaching the end of recognizing climate injustice as VAW in Nigeria, the courts are of utmost importance. Nigeria has enacted the VAPP as well as the CCA. Unfortunately, none of these laws directly links climate injustice to VAW. The pertinent question is whether asking the court to come to this conclusion is demanding an impossibility. Seeing that the law remains a skeleton till it is interpreted by the courts, should the courts apply the law according to justice, or should justice be done in accordance with the law?[95] In a place like Nigeria, where there is no specific law on women's rights and the CFRN has no specific section dedicated to women's rights, doing justice according to law will always leave women at a disadvantage. To do justice to women, the courts must apply the law according to justice by interpreting existing laws as living documents.

In interpreting the laws to do justice, Nigerian courts must embrace the doctrine of 'implicitly guaranteed rights' enunciated by the African Commission in the case of *SERAC v Nigeria*.[96] Here, the Nigerian government's recklessness in oil development affected the health and environment of the Ogoni people, threatening their food sources by destroying their water and land. Ogoni people demonstrated their grievance by carrying on non-violent campaigns. The government responded by using the army to kill them and destroy their houses. On a complaint to the African Commission, it held that the Nigerian government violated the following Articles of the African Charter – 2(nondiscrimination), 4 (life), 14(protection of property), 16 (health), 18(1) (family protection), 21 (free disposal of natural resources), and 24 (satisfactory environment). It further held that Nigeria violated rights to housing and food, which, though not guaranteed in the Charter, are 'implicitly guaranteed'. To reach this conclusion, they read articles 14 (protection of property), 16 (health), 18(1) (family protection), together. These, they held, protect rights to housing or shelter as destruction of housing negatively affects health,

89 Climate Change Act. (n 46), s. 15(2).
90 Ibid., s. 34(1).
91 CFRN. (n 5), s. 36(8) and (12).
92 Federal Republic of Nigeria. (2015). Violence Against Persons (Prohibition) Act (VAPPA 2015). Official Gazette of the Federal Republic of Nigeria.
93 Ibid., s. 46.
94 Women for Women International. (December 1, 2023). Climate, Conflict and Gender Inequality. https://www.womenforwomen.org/blogs/climate-conflict-and-gender-inequality.
95 Ikimi, I. L. (2022). Law According to Justice or Justice According to Law: Examining the Judiciary as the Last Hope of the Common Man in a Democratic State, Journal of Legal Studies and Research, 8(5), 196.
96 SERAC v. Nigeria. (2001). (60) African Human Rights Law Reports.

property, and family. They also read articles 4(life), 16 (health), and 22 (economic, social, and cultural development), together to implicitly guarantee the right to food. They reasoned that the right to food is essential for the enjoyment of expressly guaranteed rights like health, education, among others.

This decision strongly suggests that pronouncing climate injustice an act of VAW is possible in Nigeria because it has domesticated the African Charter and incorporated it as part of local laws.[97] Consequently, the combined reading of Articles 16 (health), 18(3) (elimination of discrimination against women, protecting their rights in accordance with international standards), 24 (satisfactory environment), and 46 of VAPP (prohibiting all forms of violence against persons in public or private in peace and conflict situations) would give room for the interpretation of climate change that disproportionately affects women's health, dignity and livelihood as VAW, from which they need protection. Further, relying on Article 60 of the domesticated African Charter, the courts can draw inspiration from international and regional human rights treaties as interpretative guides. The justification is that climate change increases women's burden and exacerbates VAW. The non-prevention of exacerbating manmade factors will mean non-protection of women. This conclusion is strengthened by the Commission's observation that all charter rights are operative and that international law and human rights must be responsive to African circumstances.

Nigerian courts seem to have embraced this doctrine. In the case of *Gbemre v Shell Petroleum Development Company of Nigeria Ltd. & Ors,*[98] the applicant representing his community sued the Nigerian government and Shell for failing to stop gas flaring and engaging in gas flaring, respectively, which violated constitutionally guaranteed rights to life and dignity, affected means of livelihood, survival, and worsened the effects of climate change. The Court held that the acts complained about violated rights to a clean and healthy environment.

In another case, *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation,*[99] the Supreme Court overruled the decision of two lower courts in holding that an NGO has a locus to bring an action for a community whose waterways were contaminated by oil spillage from the respondent's oil pipe. Relying on sections 20(Environmental objectives), 33(right to life) of CFRN and Article 24 (satisfactory environment) of the domesticated African Charter, it held that the right to the environment is implicitly guaranteed. To address the present concerns, this study posits that all the courts need to do is extend the embracing of this doctrine to women, particularly as it relates to climate justice and VAW, when such an opportunity presents itself.

3. FACTORS HINDERING THE LINKAGE OF CLIMATE JUSTICE AND VAW IN COURTS

Many factors pose a challenge to Nigerian courts in recognizing climate injustice against Nigerian women and linking it to VAW.

3.1. Linkages related challenge

Over time, women have successfully challenged the violation of their rights in different aspects like land, sexual and reproductive health, and employment, among others. Unfortunately, researchers, policy makers, and women themselves are still struggling to link climate change and VAW.[100] This study evidences the

97 Federal Republic of Nigeria. (1990). African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap. 10, Laws of the Federation of Nigeria). Official Gazette of the Federal Republic of Nigeria.

98 Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others. (2005). (6) African Human Rights Law Reports 152.

99 Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation. (2019). (5) NWLR (Pt. 1666) 518.

100 UN Women. (2019-2020). Women, Peace and Security

differential effect of climate change on men and women, as well as the fact that it drives conflict with ripple effects, directly increasing all manner of VAW, and concludes that women suffer climate injustice. However, linking climate change as a causative factor of VAW in a tangible document at the international and regional levels is yet to be concretized, though the journey has begun.[101] For effective linkage, further research linking climate change and injustice to VAW is inevitable.

3.2. Law-related challenge

Laws cannot be exhaustive, meaning that there is always room for more laws on any issue. Flowing from the challenge of climate change and VAW linkage, there is no hard or soft law at the international and regional levels on this. Realizing that domestic laws take inspiration from such international and regional agreements, it is understandable that Nigeria lacks such laws. While waiting for such agreements that will influence domestic laws, reliance could be placed on the VAPPA /VAPPL, which is holistic on VAW and can be stretched to issues of climate change.

Even with the laws, implementation is another concern. For instance, Nigeria enacted the CCA, but it took the president eight months to appoint the Director General of NCCC.[102] The delay was attributed to bureaucracy, and one wonders if a simple thing, such as an appointment, takes eight months, what would the position be for more serious and pertinent climate change matters. Again, one of the sources of the fund for climate change actions is from fines for failing to meet climate change mitigation obligations. Nigeria introduced a penalty of $2 per thousand cubic feet of gas wasted to discourage multinational corporations from flaring gas, and in 2021 had $521 million in fines, which remain mostly unpaid, despite the violations.[103]

3.3. Court-related challenge

It is trite that in the absence of courts, justice will remain a mirage; Nigerian women can only get justice when they have access to them. The CFRN guarantees the right to a fair hearing and access to an independent and impartial court of law.[104] Access to courts requires legal representation as well as payment for the filing of processes. These necessitate payment of professional fees to lawyers and filing fees for processes. On filing costs, the courts are gradually becoming economically inaccessible because many states have relegated the courts to revenue-making ventures. Consequently, they have increased courts' filing fees, leaving Nigerians unable to initiate the judicial process because the courts are unaffordable.[105] This affects mainly the vulnerable and marginalized groups, like women, who, due to this development, will rather leave judgment to God. In agreement, research confirms that 69 percent of Nigerian women are poor.[106]

On the difficulty of affording professional fees for lawyers, the Legal Aid Act of 2011 provides a leeway.[107] The Act establishes a Legal Aid Council (LAC) that aids indigent Nigerians in accessing courts at no cost, whether in terms of lawyers' professional fees or filing fees. This commendable act is stalled by the fact that the Act has three areas of focus – criminal defense, civil litigation, and community legal services.[108] The absence of a women-related focus will in-

in Action. (n 34).

101 Ibid.

102 Adebote, S. (August 31, 2022). Is this Nigeria's 'loudest' statement yet on climate change? https://www.bond.org.uk/news/2022/08/is-this-nigerias-loudest-statement-yet-on-climate-change/.

103 Adelana. (n 26).

104 CFRN. (n 5), s. 17(2)(e) and s. 33.

105 Usman, D. J., Yaacob, N., Rahman, A. A. (2016). An Inquiry on the Affordability of Legal Services and the Appropriateness of the Regular Courts for Consumer Redress in Nigeria. Beijing Law Review, 7(2), 89.

106 Jerumeh, T. R. (2024). Incidence, Intensity and Drivers of Multidimensional Poverty among Rural Women in Nigeria. (2024). Heliyon, 10, 6.

107 Federal Republic of Nigeria. (2011). Legal Aid Act. Official Gazette of the Federal Republic of Nigeria.

108 Ibid., s. 6.

hibit its use by women because the staff may not be trained on women-specific issues. This will mean that when women come to the office, there will be no staff with the expertise to handle their issues. This lack of skills applies to the lawyers being used by the LAC, since there is no provision for their training, and the LAC only uses lawyers who indicate an interest.

Further, a person can only receive legal aid on satisfying the Director General that there is reasonable ground for taking, defending, or being a party to such a suit.[109] This provision fails to recognize the fact that many Nigerians are not very much at home with women-specific issues; thus, the officer may see such proposed litigation as unreasonable and unworthy of court intervention. Where this happens, and the woman is indigent, legal aid will be denied her. For instance, in the recent past, domestic violence was seen as a family matter and not a violation of human rights. Another issue with the use of LAC is the fact that their offices are mainly located in urban areas.[110] The reason may not be far from the usual Nigerian challenge of most workers rejecting rural postings due to a lack of basic amenities. Despite this tenable reason, the fact remains that many Nigerians dwell in rural areas, and such violations are more prevalent there, implying that situating them in rural areas will be beneficial. Consequently, this veritable tool that would have been of immense help to Nigerian women is ineffective because it is gender blind.

CONCLUSION

While it is suggested that Nigeria is waiting to be inspired by an international and regional-level framework on this issue, it is submitted that standard setting is good, but the implementation is better. This means that she can rely on a combination of extant hard and soft laws. To this, this study recommends the following:

a) The enactment of gender sensitive climate laws without waiting for an international and regional level framework to protect Nigerian women from VAW in climate change;
b) Much as laws are necessary, people need to know about available laws. Lawmakers must consider this because enacted laws that remain on shelves help nobody and defeat the purpose of their enactment. So they must find a way of disseminating enacted laws or drawing attention to them. They could do this by partnering with the National Human Rights Commission (NHRC), which has offices scattered throughout the federation and has the duty of investigating human rights violations and instituting civil actions;[111]
c) Equipping LAC with gender lenses to make it gender sensitive. This is necessary because it is instrumental to the courts' connecting climate justice to VAW. Presently, Nigerian courts are gender blind, drawing attention to the fact that it is not about positive discrimination in favor of women but realizing that women's needs differ from those of men. In taking this into consideration, the Act should be revised to specifically include women's issues as an area of focus; otherwise, the implementers of the law may neglect to purposively interpret it to relate to such issues. When this is done, it becomes a duty for LAC to ensure that, being a special area of expertise, they either engage lawyers who are knowledgeable in women's issues or devise a means of conducting intermittent training for their lawyers to ensure adequate representation. The same will also apply to the staff of LAC;
d) In making the Act women-specific, LAC will devise a better strategy to fulfill its mandate. This will mean introducing a sensitization campaign that legal aid

109 Ibid., s. 8(6).
110 Adeyemi, A. (2017). The Legal Aid Council in Nigeria: Challenges and Possible Solutions. SSRN. https://ssrn.com/abstract=3547025.
111 National Human Rights Commission (NHRC). (n.d.). State Offices. https://www.nhrc.gov.ng/index.php/regional-offices.

covers related services so that indigent women can take advantage of it. Again, it will mean taking their services to the venue where they are needed, in this case, the rural areas, where 47 percent of Nigerians live.[112] With LAC in the rural areas, it becomes easier for victims to lodge complaints. While VAW happens everywhere, it is prevalent in rural areas. The reasons include the fact that many rural dwellers may not be aware of acts that constitute VAW and the laws prohibiting them. Consequently, the women requiring legal aid may not know when they are victims of a law violation. Logically, people would call for help for acts they know the law prohibits;

e) The courts must also be seen to be courageous in protecting the vulnerable. For instance, in Gbemre's case,[113] the court found that the applicant's right to a clean and healthy environment was violated, yet awarded no costs, damages, or compensation. Knowing that the respondents are not too poor to compensate the applicants, such acts send the wrong signal that courts aren't strong enough to protect and deter others from seeking judicial redress;

f) Funders should consider funding nongovernmental organizations (NGOs) carrying on women-related programs, especially those on climate change. Ordinarily, NGOs conduct enlightenment programs for the populace. This they do through simplifying the laws in a manner that anyone, irrespective of educational status, will understand, and or translating them into the local languages of the area concerned. This is necessary because many NGOs are constrained by funds.[114] Beyond funding NGOs, it is also necessary that women-specific climate change research is deliberately funded and carried on.

The court is key to gender climate justice and linking it to VAW. Most courts have imbued the duty of impartiality as a professional ethic. However, they need to be gender sensitive too. This connotes the ability to look at issues from different perspectives, thereby recognizing and deciphering the biases fueled by gender stereotypes. This will boost the confidence of women in the courts in the ever-changing world, in line with the pronouncement of Pat Acholonu in the case of *Magit v University of Agriculture, Makurdi*. It is said that the function of the court is to interpret laws made by the legislature and not to make laws. In theory, that is so. But it must equally be admitted that judges are not robots (or zombies) who have no mind of their own except to follow precedents. They are intrepid by their great learning and training and can distinguish to render justice to whom it is due. As the society is eternally dynamic and with a fast-changing nature of things in the ever-changing world and their attendant complexities, the court should empirically speaking situate its decisions on realistic premises with regard to the society's construct and understanding of issues that affect the development of jurisprudence.[115]

Judges should never be influenced by the weather of the day but by the climate of the era in applying their great learning to protect Nigerian women from VAW driven by climate change.[116] Climate change being an existential issue, its litigation must come before courts. In hearing such matters, the courts can rely on specific laws or borrow from general laws, but they must be climate change and VAW-conscious for Nigerian women to enjoy climate justice.

112 Statista. Nigeria: Urbanization from 2012 to 2022. https://www.statista.com/statistics/455904/urbanization-in-nigeria/.

113 Gbemre. (n 58).

114 Abanyam, N. L., Mnorom, K. (2020). Non-Governmental Organizations and Sustainable Development in Developing Countries. Zamfara Journal of Politics and Development, 1(1), 1-17.

115 Magit v. University of Agriculture, Makurdi (2005). 19 NWLR (Pt. 959) 211, 259 D-E.

116 Coyle, M. (June 29, 2020). The Supreme Court and the 'Climate of the Era'. National Constitution Center. https://constitutioncenter.org/blog/the-supreme-court-and-the-climate-of-the-era.

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Criminalization of Electronic Begging in Algerian Legislation

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ABSTRACT

This study addresses a very important topic represented in electronic begging as a dangerous and emerging global phenomenon based on deception and fraud, which has developed instantaneously using internet technologies and various modern methods, as a result of the misuse of technology, where the electronic beggar takes the digital space as a tool to achieve illegal goals, and to appeal to users through social media platforms, and due to the seriousness witnessed by this crime, it has become necessary to search for mechanisms to deter the electronic beggar from different age groups, including children, women, and the elderly, who is begging to reduce this criminal phenomenon of a social nature, the Algerian legislator has criminalized any criminal behavior that would exploit others to obtain material benefits similar to comparative legislation, and to impose deprivation of liberty penalties under the provisions of the Algerian Penal Code with its amendments.

INTRODUCTION

Due to the digital transformation and the subsequent huge changes in the social lifestyle, the individual has been looking for ways to earn money regardless of its legitimacy, as cybercriminal phenomena known as 'electronic begging' have spread, using modern fraudulent methods in a virtual space that witnesses a remarkable presence of electronic beggars.

In fact, this new method of begging became a global phenomenon in 2009 as an independent sector on the internet, where it is easy for anyone to own a certain domain for advertising and electronic begging[1] and to be treated as a virtual job that is completely contrary to social values and threatens the stability of security and public order within societies, especially the youth of their nationality by impersonating users of various social media platforms with anonymous identities, according to recent statistics.

What is the purpose behind attracting this group, which uses false justifications, except to earn money through illegal means and to finance organized groups as the most dangerous forms of crime, as a large percentage of people suffer from the exploitation of these organized criminal groups, especially children, as the beggar child is vulnerable to delinquency and exploitation under the weight of difficult economic conditions,[2] and the Algerian legislator has given special legal protection to this vulnerable group under the provisions of Law No. 15-12 of July 15, 2015 on Child Protection.[3]

This has become a necessity for the intervention of the Algerian legislator, as in other comparative legislations, and its regulation of the provisions criminalizing electronic begging in the Algerian Penal Code, without sufficing with articles 195 and 196 of the Penal Code, He neglected to mention the deterrent aspect of the crime of electronic begging, which has been developing with the development of social media platforms in recent times.

Purpose and Objectives

The purpose of this study, which includes a recent research topic in identifying the current phenomenon of cyber begging, is to address whether the provisions of the Algerian Penal Code are sufficient to criminalize the dangerous social phenomenon 'cyber begging', which has been and continues to be on the rise as a result of the development of social media technologies and its comparison with the legislative frameworks of other Arab countries (Saudi Arabia, the United Arab Emirates, and Jordan). The study aims to analyze the current legal framework, assess its effectiveness in addressing cyber begging, and identify potential areas for legislative reform in Algeria, in order to develop a legal framework for the crime of cyber begging as a distinct cybercrime in the Algerian criminal code.

Research Problem

Through this study, we seek to identify the legal texts regulating the crime of electronic begging under Algerian law by evaluating the basic aspects contained in the Algerian Penal Code, which prompts us to pose the problem of the study as follows: Are the legal texts contained in the Algerian Penal Code sufficient to criminalize the phenomenon of electronic begging? Shouldn't the Algerian legislature develop a strategy to curb this particular cybercriminal phenomenon?

To address this problem, we have decided to divide the subject of the study, which is very

1 Al-Hashlamon, R. M. A. (2021). Electronic Begging and its Social and Economic Impact on Jordanian Society from the Perspective of a Sample of Facebook Users. Journal of Humanities and Social Sciences, 5(4), Arab Foundation for Science and Research Publishing, Palestine, 64-66.

2 Salah Rizk, A. G. Y. (2015). Crimes of Economic Exploitation of Children: A Comparative Study. Mansoura: Dar Al-Fikr wa Qanun, 1st ed., 238-247.

3 Algeria. (2015). Law No. 15–12 of 15 July 2015 on Child Protection (begging and child endangerment provisions). Official Journal,. No. 39, promulgated on July 19, 2015.

important in our real life, into two main axes, as follows:

- The Conceptual Framework of Electronic Begging;
- Elements of the Crime of Electronic Begging and the Punishment Prescribed for it.

METHODOLOGY

The study applies a qualitative legal research methodology based on the analysis of the content of the provisions of the Algerian Penal Code as amended in 2009 and 2014, especially the legislative texts relevant to the subject of the research, and here we will limit this study between 2014 and 2025 in line with the amendments that occurred to the Algerian Penal Code under the aforementioned Decree No. 66-156, and describe the phenomenon of electronic begging in Algerian society, without neglecting to study the repercussions of this criminal phenomenon on children who are at risk, the Algerian legislator has taken an interest in ensuring legal protection by enacting Law No. 15-12 on child protection in particular, and this approach is complemented by comparing the components of Algerian legal texts only with some of the legislations of Arab countries (Saudi Arabia, the United Arab Emirates, and Jordan) that have the precedence in criminalizing electronic begging under special legal provisions, especially the Saudi Anti-Begging Law, Jordanian Law, and the UAE Anti-Begging Law, which dealt with the phenomenon of electronic begging and came with deterrent sanctions, unlike the Algerian legislator, who we noted the extent of his inadequacy in regulating the provisions of electronic begging.

Thus, based on these common research approaches, we can reach comparative theoretical, descriptive and analytical insights, by highlighting the absence of explicit legislative provisions in Algeria compared to other Arab countries, which embodies one of the shortcomings while identifying the legal gaps contained in the Algerian Penal Code, and considering the extent to which its amendments respond to modern technology that has contributed to the development of traditional crime. No. 66-156 containing the Algerian Penal Code, related cybercrime laws, and secondary literature covering the period under analysis of developments 2014-2025.

1. THE CONCEPTUAL FRAMEWORK OF ELECTRONIC BEGGING

Electronic begging is one of the modern social problems that is similar to the traditional known begging, but it is committed in a modern technical way, which makes it of an electronic nature, so let's divide this topic into two demands, in the first demand, we deal with the concept of electronic begging, and the second demand we have dedicated to talking about the causes of the phenomenon of electronic begging and its forms:

1.1. The concept of electronic begging

Through this requirement, we will talk about the concept of electronic begging, where in the first section we will discuss the definition of electronic begging, while the second section will be devoted to talking about the characteristics of electronic begging:

1.1.1 Definition of electronic begging

Begging is a dangerous global social phenomenon,[4] which spreads across all societies, where the electronic beggar uses the digital space to achieve illegal goals, and to identify

4 It is worth mentioning that begging means the language of begging in the sense of sharpening, asking and etracting in the sense of asking for gifts and charity, which has its origin in questioning and it is taken from the one who asked and asked what a person asks, as the Almighty said: "I have asked you, O Moses" Surah Taha, verse 36.

this emerging phenomenon, we must define it in terms of terms and law based on various comparative legislations:

Terminological and jurisprudential recognition

Begging is defined in terms of begging and asking for charity from others without financial compensation or for a symbolic financial compensation,[5] as defined by a part of jurisprudence as "the illegal criminal behavior carried out by the offender, which is represented in begging and asking for charity from others without compensation or for a trivial fee that was not requested by that third party, which entails a penalty or precautionary measures by law".[6]

As for electronic begging, it is a form of modern begging, which is an electronic version similar to traditional begging, asking for money behind screens using electronic methods through social media platforms such as electronic text messages and fake personal photos to bring the affection of its users in a short period of time to collect money, where the electronic beggar pretends to be financially helpless,[7] asks for help and explains his economic conditions, taking advantage of his presence in the virtual space.[8] with an anonymous identity without revealing his personal data, as his details cannot be identified.[9]

It is noted that the electronic beggar does not exert any personal effort to endure hardship to obtain legitimate money, which constitutes a burden on society and negatively affects individual income, as a result of not looking for a job opportunity, and crime rates increase.

Legal definition

The definition of begging has received considerable attention in the light of comparative legislation, as Article 1/5 of the Saudi Anti-Begging Law of September 16, 2021 defines it as "a person who begs for the money of another without consideration or for an unintended consideration in cash or in kind, directly or indirectly, in public places, shops, or in modern means of technology and communication, or by any means whatsoever".[10]

Referring to the UAE Anti-Begging Law No. (31) of 2021 promulgating the Crimes and Penal Code[11] under the provisions of Article 475 in its first paragraph, begging is defined as "begging for the purpose of obtaining a material or in-kind benefit in any form or means".

It is clear to us through these definitions that the comparative legislation has come to criminalize this phenomenon of begging in general and electronic begging in particular, as evidenced by its reference to the occurrence of this crime in a traditional or technical, or modern way through the use of modern electronic means.[12]

As for the Algerian legislator, the provisions of the crime of traditional begging were regulated in the Penal Code No. 14-01 of February 4, 2014,[13] but it omitted the definition of begging; this necessitates the regulation of the provisions of traditional begging and begging in its modern form with a special legal system within

5 Salah Rizk, A. G. Y. (2015). op. cit., 247.

6 Al-Sheikh, M. (2022). The Legal Framework of Criminal Responsibility for the Crime of Begging in Palestine. Modern Journal of Legal Studies, 2(2), Modern University College, Ramallah, Palestine, 122.

7 Al-Awni, H. B. M. (2024). Electronic Begging and its Impact on Social Security in Saudi Society. Journal of the Future of Social Sciences, Arab Society for Human and Environmental Development 18(2), Egypt, 10.

8 Habtoor, F. H. (2023). The Crime of Begging in the Saudi System: A Comparative Study. Journal of Jurisprudence and Legal Research, Al-Azhar University, (40), Egypt, 1482.

9 Nazzal Marji, A. S. (2022). The Position of Islamic Sharia and Emirati Legislation on the Phenomenon of Electronic Begging: A Comparative Study and Approach. Journal of Jurisprudential and Legal Research, (3), Al-Azhar University, Egypt, 1780.

10 Saudi Arabia. (2021). Anti-Begging Law. Decree No. M/20 dated February 9, 1443 AH (September 16, 2021), published on September 24, 2021.

11 United Arab Emirates. (2021). Federal Decree-Law No. 31 of 2021 promulgating the Crimes and Penal Code, issued on December 20, 2021, No. 712, issued on September 26, 2021.

12 Al-Sheikh, M. (2022). op. cit., 122.

13 Algeria. (2014). Law No. 14-01 of February 4, 2014 amending and supplementing the Penal Code, Official Journal. No.7, promulgated on February 16, 2014.

the provisions of the Algerian Penal Code, the latter of which ignores the regulation of the crime of electronic begging, unlike the comparative legislation, and in accordance with article 195 of Law No. 82-04 of February 13, 1982 it considered a person who used to practice begging anywhere despite the availability of the means of subsistence, or who can obtain it by work or any other lawful means.

In view of the fact that the crime of begging is committed by any person, whether fully or incompetent, and the latter refers to a child who has been exploited by others to earn money illegally, the Algerian legislature stipulates in Law No. 15-12 on the protection of the child that begging or exposing the child to begging is one of the cases that endanger the child in accordance with the provisions of article 2/2 of the same law.[14]

1.1.2. Characteristics of electronic begging

Electronic begging is distinguished from other traditional criminal phenomena by the following:

- The phenomenon of electronic begging is based on 'electronic fraud' and exploitation of others to achieve financial interests, where the electronic beggar selects influential phrases, designs videos and photos, and publishes them widely, to attract the affection of users to obtain financial donations;[15]
- Electronic begging committed on Facebook and Twitter platforms with private tweets is considered one of the crimes that cross borders are difficult to prove and do not stop at a specific country,[16] as the information society does not recognize geographical borders, as borders have become intangible due to the use of the information network,[17] similar to cybercrimes that are committed without the control of the security services;
- Electronic begging is considered one of the safe digital criminal phenomena for the anonymous beggar, whose real identity cannot be revealed and tracked, due to the concealment of his identity by using pseudonyms and fake photos,[18] unlike some countries, including Mexico, which require the electronic beggar to reveal their real identity so that he is not a victim of deception and electronic fraud;[19]
- The cyber beggar uses the internet to penetrate accounts and personal data,[20] and conduct electronic espionage on them by impersonating false identities through several electronic applications in pages and groups to interfere in the privacy of users, getting closer to them, and identifying their financial and social status to obtain personal information such as address, credit cards, or bank balance, etc;[21]
- The reliance of fraudulent beggars on the public publication of personal facts of privacy,[22] including the fabrication of disabilities, the disclosure of a serious illness and the request for treatment from it by uploading prescriptions, medical reports, fake official papers for fake accidents, electricity or gas bills, or collecting donations for the construction of a mosque, etc.[23] or to disclose the case

14 Kreidan, S. A. B. M. (2022). Criminal Policy in the Face of the Phenomenon of Juvenile Exploitation in Begging. Journal of Media and Arts, School of Media and Arts, 11(1), Libya, 310.

15 Al-Awni, H. B. M. (2024). op. cit., 24.

16 Jabbar-Mansour, I. (2025). Means of Management in Addressing the Phenomenon of Electronic Begging (A Comparative Study). International Journal of Humanities and Social Sciences, (64), Lebanon, 386.

17 Hamada-Khair, M. (2022). The crime of electronic begging and ways to confront it. International Journal of Advanced Research on Law and Governance, 4(2), Egypt, 73.

18 Al-Awni, H. B. M. (2024). op. cit., 24.

19 Ibid., 26.

20 Nazzal Marji, A. S. (2022). op. cit., 1784.

21 Al-Hashlamon, R. M. A. (2021). op. cit., 63.

22 Mufleh Al-Hisban, I, Al-Damour, A. M. (2024). Novel Crimes (Informatics, Cyber, and Electronic). Dar Al-Khaleej for Publishing and Distribution, 146.

23 Habtoor, F. H. (2023). op. cit., 474.

of his inability to pay debts.[24]

- The transformation of electronic begging from an individual act to a collective act carried out by organized criminal groups that violate human rights, in exchange for funds called the 'begging mafia',[25] which represent electronic gangs that work to attract professionals of electronic begging,[26] whether or people suffering from diseases or illegal immigrants and events that insult their dignity by beating,[27] mistreating and maiming them to collect funds through the internet.[28] This puts them at risk of deviation, exploitation, or other risks, and they use communication through web services to bring in large capital and carry out charitable projects.[29]

From this point of view, we adapt the crime of electronic begging to organized crime, which negatively affects society, making the foreign investor not open investment projects in countries where electronic begging is prevalent.

1.2. The causes and forms of electronic begging

Through this requirement, we will address the motives and forms of electronic begging, which we divide into two sections, so that we can identify, through the first section, the causes of electronic begging, and the second section we have dedicated to talking about the forms of electronic begging:

1.2.1. Causes of electronic begging

The causes of electronic begging are numerous among social, economic, and political reasons, which push individuals of different age groups to commit this new crime, so we summarize these reasons as follows:

- The misuse of electronic technical means and virtual platforms by the electronic beggar who does not communicate with the outside world, which results in the adaptation of electronic begging to cybercrime, as a result of the increase in the frequency of electronic criminal behaviors by its perpetrators;[30]
- The desire of the electronic beggar to search for any means to bring a livelihood, even at the expense of his humanitarian and religious principles, makes him vulnerable to exploitation, and to simulate the developments of communication through cyberspace to earn money;
- The spread of social ills and the deviation of the individual's behavior that make the beggar practice begging in the virtual space out of need,[31] especially the phenomenon of youth using drugs, is considered a direct cause of the practice of begging, as some members of society practice electronic begging to get money to buy it;[32]
- Lack of family support systems (family and friends)[33] as a result of family disintegration, which leads to the deviation of the individual's behavior and the exploitation of his social or health conditions to achieve financial interests,[34] or to receive treatment, open a small business, or obtain housing;
- Some members of the community have succumbed to these beggars out of their favor and made it a habit in compliance with the words of Allah Almighty, "But the

24 Mufleh Al-Hisban, I, Al-Damour, A. M. (2024). op. cit., 146.
25 Agarwal, R. (2021). Child Begging – An Organized Crime?, International Journal of Trend in Scientific Research and Development (IJTSRD), 6(1), India, 374-376.
26 Al-Hashlamon, R. M. A. (2021). op. cit., 61.
27 Sahar, F. M. (2019). Novel Crimes (An In-Depth and Comparative Study of Several Crimes). Arab Center, 2.
28 Agarwal, R. (2021). op. cit., 375.
29 Al-Awni, H. B. M. (2024). op. cit., 25.
30 Nazzal Marji, A. S. (2022). op. cit., 1786.
31 Al-Awni, H. B. M. (2024). op. cit., 23.
32 Al-Sheikh, M. (2022). op. cit., 124.
33 Lanane, M. (2019). Begging and Harassment: Case Study: Wilaya of Bejaia. Journal of Social Orbits, (3), Algeria, 233.
34 Mostafa Mohamed Al-Mahrouqi, M. (2023). Milestones of Criminal Policy in the Face of Begging Crimes: An Analytical Study in Comparative Criminal Systems. Journal of Legal and Economic Research, (83), Mansoura University, Egypt, 619.

beggar does not flow" (Surah Al-Duha, verse 10), which results in a loss of trust in the real needy and a lack of social solidarity,[35] or rather a lack thereof, by distributing financial donations to the needy class, In fact, electronic begging distorts the image of charitable institutions and reduces their credibility, as individuals are reluctant to donate for fear of electronic fraud.[36]

1.2.2. Forms of electronic begging

As a result of the technological wealth in various fields, people have exploited this development in negative ways due to the deterioration of economic conditions, where the electronic beggar takes multiple innovative methods to beg through the internet, through social media, by asking for money by email, WhatsApp, and Facebook,[37] where the forms of electronic begging vary as follows:

- **Begging through internet rooms:** The e-beggar uses the chat box to participate in the collection of money and financial aid by poker players through the internet, who pay huge profits to the beggars;
- **Begging through chat rooms:** Young people use chat rooms and transfer money via fake accounts in exchange for fake relationships;[38]
- **Begging through live broadcasting:** The electronic beggar resorts to live broadcasting through voice or video communication through electronic platforms,[39] in exchange for concessions and behaviors made by the broadcaster or the supporter of the live broadcast, we give the example of the followers through the TikTok application who are famous for electronic begging due to the advantages and financial gains with quick profit that this application provides;[40]
- **Begging via email:** This type of electronic begging is the most common form, as the electronic beggar targets certain groups and sends annoying emails that deceive the sender that he needs money to face special social conditions;
- **Commenting through electronic publications:** The electronic beggar takes the opportunity of a lot of comments about a certain electronic post through virtual platforms,[41] where the beggar takes advantage of some activists on social media sites in order to call for fundraising and achieve personal profit.[42]

2. ELEMENTS OF THE CRIME OF ELECTRONIC BEGGING AND THE PUNISHMENT PRESCRIBED FOR IT

States are developing a strategy aimed at enacting legislation at the national level to combat the crime of electronic begging, as it is a major challenge for them, despite the Algerian legislator's neglect to talk about the phenomenon of electronic begging over the internet using modern methods as one of the cybercrimes punishable by law, unlike traditional begging, Let us divide this topic into two demands, and we try to adapt through the first requirement the crime of electronic begging and its elements, while in the second demand, we talk about the punishment prescribed for the crime of electronic begging.

35 Al-Hashlamon, R. M. A. (2021). op. cit., 74.

36 Sayed Al-Sayeh-Hamdan, E. (2024). The Phenomenon of Electronic Begging through Live Broadcasting via TikTok from the Perspective of Social Media Users in Egyptian Society: An Ethnographic Study. Egyptian Journal of Media Research, (89), 424.

37 Al-Sheikh, M. (2022). op. cit., 128.

38 Al-Awni, H. B. M. (2024). op. cit., 25.

39 Adas, N., Mahmoud, M. (2025). Confronting the Phenomenon of Electronic Begging in Palestine between Law and Society. An-Najah University Journal for Research in Humanities, An-Najah National University, Palestine, 2.

40 Sayed Al-Sayeh – Hamdan, E. (2024). op. cit., 414 – 415.

41 Al-Awni, H. B. M. (2024). op. cit., 25.

42 Adas, N., Mahmoud, M. (2025). op. cit., 3.

2.1 Adapting the crime of electronic begging and its elements

Through this requirement, we focus on adapting the description of the crime of electronic begging between a traditional crime and a cybercrime, and identifying the pillars on which this crime is based, through two branches:

2.1.1 Adaptation of the crime of electronic begging

The Criminal Code neglects to regulate the criminalization of electronic begging provisions, which makes it impossible to issue sentences against the perpetrators, where the electronic beggar who violates the privacy of individuals escapes punishment,[43] and is classified as electronic or virtual fraud, whose purpose is to seize the money of others by deception, where the cybercriminal commits acts by using computerization aimed at obtaining a financial privilege.[44]

It should be noted that the adaptation of the description of the crime of electronic begging as electronic fraud falls within the framework of cybercrime as an integral part of it, which is committed as a result of the illegal use of the digital communication network (internet), with the intervention of a cybercriminal to carry out the criminal act, which results in causing damage to the victims of begging as a result of the robbery of their money in fraudulent ways[45] Consequently, electronic begging is described as a misdemeanor that includes the set of legally sanctioned acts and activities that link the criminal act to technology.[46]

2.1.2 Elements of the crime of electronic begging

The crime of electronic begging is subject to the existence of three pillars, namely the "legal element", which is the basis of criminalization and punishment, the "material element", which is represented by the act, the result and the causal relationship, and the "moral element", which is represented by the will that is associated with the act, which consists of the elements of science and will, as these elements will be dealt with as follows:

The legal element of the crime of begging

The rule of "no crime and no punishment except by text" is one of the basic principles stipulated in most national constitutions and legislations, where the legal or legal element of the crime requires the existence of a legal text that indicates the act constituting the crime as an illegal act that is criminalized by law without giving it any reason for permissibility and specifies the punishment for the perpetrator of such criminal act or behavior, and this is called the principle of legality.[47]

The material element of the crime of begging

The material element of the traditional crime is positive material behavior that leads to the perpetrator committing a criminal activity, using methods of publishing content about the material needs of individuals or donation institutions to provide a helping hand and exploiting their affection, by begging or requesting a material donation remotely, even if by pretending to achieve financial demands, regardless of whether the offender achieves a material or in-kind benefit.

To achieve this, it is assumed that modern technological means, including a computer connected to the internet, are used in a virtual

43 Al-Hashlamon, R. M. A. (2021). op. cit., 63.

44 Salman Abdel Jubouri, S. (2014). The Crime of Electronic Fraud (A Comparative Study). Master's Thesis, Faculty of Law, Al-Nahrain University, 17-47.

45 El Kadi, N. (2023). Electronic Begging in Algeria between Attracting Social Solidarity and Indicators of Virtual Fraud – An Analytical Study of the Opinions of a Sample of Pioneers, Social Media Sites in the Governorate of Tizi Ouzou. Journal of Humanities and Social Sciences, 9(2), University of Constantine 2 Abdelhamid Mehri, 242.

46 Hamada – Khair. M. (2022). op. cit., 65.

47 Al-Khawaldah, M. H., Al-Khseilat, A. A. (2021). The Crime of Begging. A Comparative Study of the Jordanian, French, Belgian and German Laws. Turkish Online Journal of Qualitative Inquiry (TOJQI), 12(3), Turkiye, 2149.

space, which causes harm to the offender himself and his dignity, and inflicts material and moral damage on the victim, once he asks for charity and exploits him financially, He practices this criminal behavior taking advantage of his own circumstances.[48]

Based on this, the cybercrime of begging does not differ from the traditional crime of begging except in terms of the means of committing it, where the crime of electronic begging is committed by intelligent people through the use of virtual mechanisms,[49] which emphasize the direction of the preconceived intention of the perpetrator towards committing the act of virtual fraud,[50] unlike the traditional crime of begging, which is committed by people in public places.

Therefore, it is sufficient for the perpetrator to commit purely criminal behavior in the crime of electronic begging, On the basis that it is a formal crime whose commission does not require the achievement of the result or the achievement of the purpose of the criminal conduct, and because it is considered a dangerous crime that is committed as soon as the dangerous behavior is available without the requirement that a specific result be achieved, the behavior represented in begging is not productive of any criminal effect (consequence), and there is no causal link between the behavior and the criminal result that may begin and end in a short time, which may begin and end in a short time or remain continuous and related to the criminal activity.

This entails that criminal liability arises as soon as assistance is sought; without the requirement of achieving a specific result, and it follows that the importance of achieving the criminal result or not in the crime of electronic begging is that there is no need to search for the causal relationship between the result and the criminal behavior,[51] which requires proving this relationship and that the money in his possession resulted from the act of virtual begging, otherwise The perpetrator could not be held criminally accountable for the crime of begging.

The moral element of the crime of begging

The moral element plays an important role in determining the legal adaptation of the criminal incident, when the offender's intention to commit the crime of electronic begging is available, which results in intentional crimes, in which the moral element is verified by the existence of the general criminal intention of the knowledge and will in the offender's psyche,[52] we can summarize the elements of knowledge and will as follows:

Science: Knowledge is a psychological state of mind that requires the offender to be aware of all the legal elements of the crime, so that the incident is given its legal description, as the offender is assumed to be aware of the material nature of the criminal act,[53] knowledge of the elements of the crime, its seriousness, and the tendency of his will to commit it contrary to the legal text, intending by his criminal behavior to obtain the victims' money by illegal means,[54] (However, if it is proven that the offender intended to use the property of others and return it without showing the intention to seize it, the criminal intent is eliminated because the beggar does not have the criminal intention;[55]

The will: The will is an engine towards carrying out criminal behavior and achieving the criminal result, the intention and will of the offender towards collecting money,[56] which calls for the integrity of the will of the electronic beggar and its absence from defects of the will to realize the truth of his actions, and the direction of the will of the perpetrator towards committing the criminal act and achieving the result, and his intention towards exploiting the

48 Habtoor, F. H. (2023). op. cit., 1480-1482.
49 Hamada-Khair, M. (2022). op. cit., 66.
50 El Kadi, N. (2023). op. cit., 242.
51 Habtoor, F. H. (2023). op. cit., 1479-1482.
52 Al-Sheikh, M. (2022). op. cit., 132-133.
53 Wiza Belasali, W. (2020). The Criminalization of Begging by Exploiting Children in Algerian Law. Journal of Humanities, University of Mentor Constantine, 31(4), 304.
54 Adas, N., Mahmoud, A., op. cit., 3, 4.
55 Habtoor, F. H. (2023). op. cit., 1484.
56 Al-Sheikh, M. (2022). op. cit., 134.

victims, by putting pressure on their psyche,[57] using software and information technology or the internet through various means of communication,[58] but the moral element of the crime of electronic begging is not achieved Unless the offender's will is proven, but he is forced to commit the criminal conduct under the influence of physical or moral coercion.[59]

2.2 The penalty prescribed for the crime of electronic begging

In this demand, which is also divided into two sections, we will deal with the position of the Algerian legislator regarding the penalty prescribed for the crime of electronic begging through the first section, and the position of the comparative legislation in the second section:

2.2.1 The position of the Algerian legislator

The Algerian legislature addressed the phenomenon of begging by stipulating the criminalization and punishment of begging in the Algerian Penal Code,[60] where it addressed the provisions of the crime of traditional begging in its fourth section entitled "Begging and the child" under the title of Chapter One, Felonies and Misdemeanors against Public Objects, under Chapter VI, Felonies and Misdemeanors against Public Security, Article 195 of Law No. 82-04 of 13 February 1982[61] that "anyone who is accustomed to practicing begging anywhere shall be punished by imprisonment from (1) months to (6) six months, even though he has the means of subsistence or can obtain them by work or in any other lawful way".

It is clear from the text of this article that the criminalization of the phenomenon of begging in the Penal Code is sufficient to give the act a criminal character, as begging is considered a crime punishable by a specific legal provision, but it stipulates the following:

- Linking the character of criminalization to habituation and the repetition of practicing criminal behavior, so that he is a profession regardless of the place, whether private or public, or whether or not he initiates trial proceedings. In the sense of violation, if a person is arrested or caught begging for the first time and legal proceedings have been taken against him, his social, health, psychological, and economic status must be studied to reveal the reasons that led him to commit this criminal behavior.[62]
- The existence of the means of coexistence in the person who commits this act, or can obtain them through work or through another project.
- The beggar receives money free of charge, meaning that the person's receipt of money as a result of the display of commercial materials denies the crime of begging.[63]

Based on the text of article 196 bis of the same law, which states that the offences stipulated in the aforementioned article do not affect the category of juveniles who have not yet reached the age of eighteen (18), except with regard to measures of protection and refinement, it is clear that the Algerian legislator has explicitly or implicitly referred to the penalties imposed on the crime of traditional begging, which explains his neglect to pay attention to the seriousness of the crime of begging in its modern form.

However, the Algerian legislature criminalized this conduct in the Penal Code, as amended and supplemented by Law No. 14-01 of February 4, 2014 containing the amended Penal Code, when the crime was committed by using or exposing a minor to begging, as article 195 bis stipulates that anyone who begs for a minor under the age of 18 or exposes him to begging

57 El kadi, N. (2023). op. cit., 242.
58 Hamada-Khair, M. (2022). op. cit., 66-67.
59 Habtoor, F. H. (2023). op. cit., 1484.
60 Algeria. (1966). Penal Code, Ordinance No. 66–156 of June 8, 1966, Official Journal. No. 49, promulgated on June 11, 1966.
61 Algeria. (1982). Law No. 82-04 of February 13, 1982, amending Ordinance No. 66-156 containing the Penal Code. Official Journal, No. 7, 336.
62 Habtoor, F. H. (2023). op. cit., 1477.
63 Al-Sheikh, M. (2022). op. cit., 125.

shall be punished by imprisonment from six (6) months to two (2) years, and the penalty will be doubled when the perpetrator is an asset of the minor or any person who has authority over him.

This is the same meaning referred to in article 303 bis 04 in its second paragraph of Law No. 09-01 of February 25, 2009,[64] which includes the Algerian Penal Code, which focuses on the crime of exploiting others in begging, and increases the penalty in the case of begging with a child, where begging with children is considered an inevitable consequence of human trafficking crimes, where children trafficked are exploited by criminal gangs With the aim of committing other crimes, including electronic begging with the aim of earning money for organized groups.

Accordingly, we conclude that the Algerian legislature is relatively interested in the phenomenon of begging in its new dress through virtual platforms by asking for help from others to obtain financial benefit, which calls for tightening penalties to curb this criminal phenomenon, which is still increasing.

2.2.2 The position of comparative legislation

In this section, we will discuss the presentation of the various provisions of the comparative legislation regarding the determination of the penalty imposed on the perpetrators of the crime of electronic begging:

Electronic begging in the Kingdom of Saudi Arabia

The Saudi legislator considered cases of asking for aid through social media to be classified as a crime, as Article 02 of of the Saudi Anti-Begging Law stipulates that "begging in all its forms and forms, regardless of its justifications, is prohibited", it is working to challenge this criminal phenomenon by allocating platforms for donations and establishing charitable associations, and has also assigned tasks to the Ministry of Human Resources and Social Development in accordance with Decree No. 203 of April 22, 2017, and adopting organizational measures to combat the phenomenon by studying the social, economic and psychological status of the electronic beggar, directing him to government charitable institutions or appointing him to work to obtain financial compensation, in response to the pretexts that push him towards begging.[65]

Electronic begging in Jordan

The Jordanian legislature has worked to protect communities from the repercussions of electronic begging, as it granted the Jordanian Ministry of Social Development, in a decision issued in 2019[66] with all the powers that enable it to pursue all unlicensed donations through social media, in cooperation with the Ministry of Finance and Endowments, and other concerned authorities.[67]

Electronic begging in the Emirate of Abu Dhabi

Article 51 of Federal Decree-Law No. (34) of 2021 on Combating Rumors and Cybercrimes stipulates that anyone who commits the crime of begging using information technology means shall be punished by imprisonment for a period not exceeding three (3) months, and a fine of not less than 10,000 dirhams, and the second paragraph of the same article stipulates that anyone who uses information technology means to seek help from federal or local government entities, or one of their officials, in a bad way, or contrary to the truth, shall be punished with the same penalty.[68]

64 Algeria. (2009). Law No. 09–01 of February 25, 2009 on the Algerian Penal Code. Official Journal, No. 15, promulgated on March 8, 2009.

65 Saudi Arabia. (2017). Ministerial Resolution No. 203 of April 22, 2017, Ministry of Human Resources and Social Development, Referenced at: El Kadi, N., op. cit., (2023), 243.

66 Jordan. (2019). Ministry of Social Development Decisions on the control of unlicensed online donations and electronic begging.

67 El Kadi, N. (2023). op. cit., 242-243.

68 United Arab Emirates. (2021). Federal Decree-Law No. 34 of 2021 on Combating Rumors and Cybercrimes, issued on December 20, 2021, No. 712, promulgated on September 26, 2021.

CONCLUSION

At the conclusion of this study, we say that electronic begging is a new face of traditional begging based on deception, which has spread very quickly in most countries of the world, and is distinguished from it in that it is committed in a modern technical manner, and among our findings are the following:

- The lack of an explicit legal provision criminalizing the phenomenon of electronic begging, similar to traditional begging, is a legal loophole in Algerian legislation;
- We adapt the crime of electronic begging to be an electronic crime based on electronic fraud, given the means by which the crime is committed through the internet;
- The multiplicity of ethical, social, economic, and political reasons that drive the commission of the crime of electronic begging.
- The expansion of the personal scope of the perpetrators of the crime of electronic begging from a single natural person to organized criminal groups (undercover gangs) that use begging money to achieve illegal ends and collect profits at the expense of others.
- Among the recommendations we suggest:
- The Algerian legislature has enacted special legal provisions to combat the crime of electronic begging by making a legislative amendment that criminalizes acts of begging committed using social media platforms;
- The Algerian legislature explicitly stipulates the penalties that criminalize electronic begging and the severity of the punishment for deprivation of liberty that is commensurate with the gravity of the crime committed;
- We call for the use of various technical and technological means to raise smart awareness among communities about the seriousness of the crime of electronic begging and to report it, using smart applications similar to some Arab countries, including the United Arab Emirates, through a smart application 'Combat Begging';
- Raising awareness about the misuse of the internet in committing the crime of electronic begging through awareness programs;
- Encouraging humanitarian work and activating the role of charitable institutions and voluntary bodies, to care for needy social groups with limited income and facilitate the procedures of benefiting from these charitable institutions;
- Influenced by Arab International Experiences and cooperation in unifying programs to combat electronic begging locally, regionally, and internationally;
- Spreading the culture of reporting on entities that invest in needy families and defaming them through published videos and photos;
- Using artificial intelligence technologies to prevent illegal campaigns calling for the commission of cybercriminal behaviors;
- Intensifying joint efforts on the intervention of the justice agencies to monitor and follow up on electronic beggars;
- We call for periodic research on the issue of cyber begging, which is of a transnational nature and has become one of the threats facing societies across the world, due to the nature of cybercrime, which is witnessing continuous development.

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Legal Protection Mechanisms for Electronic Consumers from Misleading Advertising

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ABSTRACT

This study addresses the legal protection of electronic consumers from misleading advertisements. Fair electronic advertising is a fundamental requirement of e-commerce and a means for advertisers to promote their products. However, violations of advertising integrity rules occur in attempts to mislead consumers. Considering that the electronic consumer is a weak party in electronic commercial transactions, the Algerian legislator has established legal protection through several laws enshrining the principles of transparency and establishing penalties for violations by electronic suppliers.

Legal systems vary between countries in the level of protection provided, with developed countries advancing comprehensive legislation and effective mechanisms compared to developing countries still striving to keep pace with technological developments. Addressing these challenges requires developing national legislation, enhancing international cooperation, investing in advanced monitoring technology, and intensifying consumer awareness programs on digital rights. This contributes to building a safe and reliable e-commerce environment that effectively protects consumer rights from misleading and fraudulent business practices.

INTRODUCTION

Electronic commerce has transformed commercial transactions globally, enabling consumers to purchase goods and services across borders with unprecedented ease. However, this development has exposed consumers to new risks, particularly misleading electronic advertising. The rise of influencer marketing has blurred the line between genuine opinion and paid endorsement, creating new vectors for consumer deception that traditional legal frameworks struggle to address.[1]

The Algerian legislator has drawn on comparative models, including the European Union's Digital Services Act[2] and Directive 2005/29/EC,[3] the American FTC[4] framework, and British consumer protection regulations.[5] At the soft-law level, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023)[6] call on enterprises to ensure that marketing and advertising are fair and not misleading, and that consumers receive accurate information about products and services. Recent comparative research demonstrates that challenges arising from data-intensive business models and cross-border e-commerce weaken the overall effectiveness of legal protection for electronic consumers, calling for more harmonised rules and enhanced cross-border cooperation.[7]

The European regulatory architecture for electronic commerce rests on two complementary instruments. Directive 2000/31/EC of 8 June 2000 on electronic commerce[8] established the foundational legal framework for information society services in the internal market, including specific requirements for commercial communications under Articles 6 and 7. Article 6 mandates that commercial communications be clearly identifiable as such, that the natural or legal person on whose behalf they are made be clearly identifiable, and that promotional offers and conditions be easily accessible and presented clearly and unambiguously. This transparency-based approach sought to prevent consumer deception by ensuring that electronic advertising could be distinguished from other content. Twenty-two years later, Regulation (EU) 2022/2065 (Digital Services Act) amended this directive to address new challenges posed by online platforms, including the dissemination of misleading information and manipulative interface designs, while preserving the foundational liability framework established by Articles 12-14 of Directive 2000/31/EC.[9]

1 Mukherjee, S. (2025). Social media and e-commerce: A study of the legal issues in influencer marketing and online advertising with special reference to India. International Journal for Multidisciplinary Research, 7(3), 1-12. https://doi.org/10.36948/ijfmr.2025.v07i03.45519.

2 European Union. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). Official Journal of the European Union, L 277. http://data.europa.eu/eli/reg/2022/2065/oj.

3 European Union. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive). Official Journal of the European Union, L 149, 22-39. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005L0029.

4 Federal Trade Commission. (1983). Policy Statement on Deception. https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

5 United Kingdom. (2008). Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277. https://assets.publishing.service.gov.uk/media/5a74d389e5274a3cb28677f4/oft1008.pdf.

6 Organisation for Economic Co-operation and Development. (2023). OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. OECD Publishing. https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf.

7 Babayev, J. (2023). Safeguarding consumer rights in the digital age: Challenges and strategies. Uzbek Journal of Law and Digital Policy, 1(1), 1-11. https://doi.org/10.59022/ujldp.70.

8 European Union. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). Official Journal of the European Union, L 277. http://data.europa.eu/eli/reg/2022/2065/oj

9 European Union. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). Official Journal of the European Union, L 277. http://

The Algerian legislator issued E-Commerce Law 18-05 dated May 10, 2018,[10] and Law No. 09-03 of February 25, 2009, relating to consumer protection and suppression of fraud.[11] Recent Algerian scholarship has examined Law 18-05 as a comprehensive framework for protecting online consumers, with particular focus on pre-contractual information duties and safeguards against misleading electronic advertising, though important gaps remain, including the lack of an explicit definition of misleading electronic advertising.[12]

This study aims to clarify the most important aspects of legal protection for the electronic consumer from misleading advertising, evaluate the adequacy of national legal texts in comparison with international standards, and urge electronic advertisers to adhere to legal rules to avoid unfair practices.

This topic raises an important problem: *To what extent do current legal mechanisms for protecting the electronic consumer fit with the challenges posed by misleading electronic advertising in the contemporary digital environment?*

Several hypotheses branch out from this main problem:

First, how can traditional legal frameworks keep pace with the rapid development of advanced digital advertising technologies?

Second, current legal mechanisms for protecting electronic consumers suffer from legislative and enforcement gaps that limit their effectiveness in confronting advanced methods of misleading advertising, which calls for the development of innovative legal approaches that combine technical flexibility with effective protection;

Third, protecting consumers from misleading advertising requires incorporating technical standards into legal texts;

Fourth, effective regulation requires unified international cooperation mechanisms between regulatory authorities.

METHODOLOGY

This study employs analytical, descriptive, and comparative approaches to examine the legal texts governing electronic consumer protection from misleading advertising. The analytical approach deconstructs the research problem and extracts protective provisions from relevant legal texts. The descriptive approach provides a deep understanding of fundamental concepts such as electronic consumer, electronic advertising, and misleading advertising. The comparative approach encompasses three dimensions: horizontal comparison between different legal traditions (Anglo-Saxon, civil law, mixed systems), vertical comparison between regulatory levels (international soft law, regional instruments, national legislation), and temporal comparison tracking the evolution of consumer protection legislation from Directive 2000/31/EC to the Digital Services Act. The study is divided into two chapters: the conceptual framework for misleading advertising and the legal basis for electronic consumer protection (Chapter One), and legal mechanisms to protect the electronic consumer from misleading electronic advertising (Chapter Two).

1. The Conceptual Framework for Misleading Advertising and the Legal Basis for Electronic Consumer Protection

Commercial advertising plays a major role in influencing consumer behavior. However, consumers may be exposed to deception through

data.europa.eu/eli/reg/2022/2065/oj

10 Algeria. (2018). Law No. 18-05 of May 10, 2018, relating to electronic commerce. Official Gazette of the People's Democratic Republic of Algeria (JORA), No. 28. https://www.joradp.dz/FTP/jo-francais/2018/F2018028.pdf.

11 Algeria. (2009). Law No. 09-03 of February 25, 2009, relating to consumer protection and the repression of fraud. Official Gazette of the People's Democratic Republic of Algeria (JORA), No. 15. https://www.joradp.dz/FTP/jo-francais/2009/F2009015.pdf.

12 Kettab, Z. (2025). Legal mechanisms for consumer protection under Algerian e-commerce law. Journal of Law and Sustainable Development, 13(1), 1-18. https://doi.org/10.55908/sdgs.v13i1.4261.

advertising, and therefore, adequate legal protection must be provided. Modern legislation has tended towards criminalizing false claims and misleading advertising.

1.1. Definition of misleading advertising

The dishonest practice of false statements and impressions made by advertisers to persuade consumers to make a purchase is known as deceptive advertising.[13] The Internet in e-commerce is a double-edged sword: facilitating commercial exchanges while also enabling crimes. Legislative intervention is necessary to control the consumer process in this virtual environment.

1.1.1 Definition of misleading advertising in Algerian law

The crime of misleading electronic advertising is considered a form of information crimes in which the victim is the electronic consumer,[14] whom the Algerian legislator defined in the Electronic Commerce Law 18-05, Article 06, as "any natural or legal person who acquires, for compensation or free of charge, a good or service through electronic communications from the electronic resource for the purpose of end use".[15] Misleading electronic advertising is defined as an advertisement in which the advertiser uses false words or phrases about the essential characteristics of the product or service advertised electronically, leading to consumer deception.[16]

The Algerian legislator did not provide an explicit definition, but defined electronic advertising requirements under Law No. 18-05.[17] Law 09-03 considers advertising that deceives consumers through writings or publications as an aggravating circumstance for the misdemeanor of deception.[18] Article 28 of Law 04-02 relating to commercial practices states that all misleading advertising is illegal and prohibited, especially if it includes misleading information about product definition, quantity, availability, or features, or could lead to confusion with another seller's products.[19]

1.1.2 Definition of misleading advertising in comparative legislation

Comparative legal systems converge on three constitutive elements of misleading advertising: (1) the presence of false, inaccurate, or incomplete information; (2) the capacity to influence the economic decision of the average consumer; and (3) the deliberate omission of material information.

At the European Union level, Directive 2005/29/EC establishes a harmonised prohibition of unfair commercial practices, including misleading actions and omissions that materially distort the economic behaviour of the average consumer.[20] Recent scholarship defines evolving deceptive techniques as "dark patterns", interface designs deliberately crafted to manipulate user autonomy and steer consumer choices.[21] This development is reflect-

13 Ahmed, A. M. A., Othman, A. K. (2024). The effect of false advertising on consumer online purchase behavior with mediating effect of e-WOM: Consumer in Malaysia. Information Management and Business Review, 16(2(I)S), 115-128. https://doi.org/10.22610/imbr.v16i2(I)S.3774.

14 Lasami, R. B. D., Kahoul, W. (2022). Misleading electronic advertising: A new side of cybercrime (in Arabic). Journal of Law and Political Science, 9(1), 714-728. https://asjp.cerist.dz/en/article/186120.

15 Law No. 18-05, Art. 6.

16 Abu-Kaif, A. M. (2023). Consumer protection from misleading electronic advertising: A comparative study (in Arabic). Journal of Legal and Economic Research, 13(86), 1-41, 4. https://doi.org/10.21608/mjle.2023.340162.

17 Law No. 18-05, Art. 30.

18 Law No. 09-03, Art. 69.

19 Algeria. (2004). Law No. 04-02 of June 23, 2004, defining the rules applicable to commercial practices (as amended). Official Gazette of the People's Democratic Republic of Algeria (JORA), No. 41. https://www.joradp.dz/FTP/jo-francais/2004/F2004041.pdf.

20 European Union. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Official Journal of the European Union, L 149, 22-39. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005L0029.

21 Yi, W., Li, Z. (2025). Mapping the scholarship of the

ed in the Digital Services Act, whose Article 25 prohibits designing interfaces that deceive or manipulate service recipients.[22] Annex I complements this framework with a blacklist of practices that are in all circumstances unfair, several of which directly target misleading advertising techniques such as bait advertising, bait-and-switch strategies, false endorsements, and advertorials.[23]

The interaction between the E-Commerce Directive and unfair commercial practices legislation creates a layered regulatory framework. While Directive 2000/31/EC establishes formal transparency requirements for commercial communications—mandating clear identification of advertising content and the advertiser's identity—Directive 2005/29/EC addresses the substantive truthfulness of such communications by prohibiting misleading actions and omissions. This complementary structure means that electronic advertising may violate European consumer protection law either by failing to meet formal identification requirements (Article 6 of Directive 2000/31/EC) or by containing materially misleading content (Articles 6-7 of Directive 2005/29/EC). The Digital Services Act reinforces this framework by imposing additional due diligence obligations on online platforms, including the prohibition of deceptive interface designs under Article 25. This evolution reflects the recognition that effective protection against misleading electronic advertising requires addressing both the formal presentation and the substantive content of commercial messages, as well as the structural conditions that facilitate their dissemination.

The French Consumer Code (Article L121-1) qualifies as misleading any commercial practice containing false information or likely to mislead, even if formally correct.[24] Under the US Federal Trade Commission Act,[25] an advertisement is misleading where it involves misrepresentation or omission, is likely to mislead consumers acting reasonably, and concerns material information affecting purchasing decisions.[26] British law, through the Consumer Protection from Unfair Trading Regulations 2008, criminalises practices that deceive the average consumer through false information, undue influence, or concealment of essential facts.[27]

From this definition, the basic elements of misleading advertising can be identified as follows:

First, the presence of an advertising message directed to the public to promote a good or service;

Second, providing false or misleading information, whether this information relates to the nature of the product, its characteristics, its price, or the guarantees provided with it;

Third, the possibility of advertising influencing the consumer's decision, meaning that advertising would push the consumer to make a purchase decision that he would not have made without that information.

Article L121-2 of the Consumer Code further stipulates that the deliberate concealment of essential information can constitute a misleading practice, even in the absence of explicit false information.[28]

regulation of dark patterns: A systematic review of concepts, regulatory paradigms, and solutions from law and HCI perspectives. Computer Law & Security Review, 59, 106225. <https://doi.org/10.1016/j.clsr.2025.106225>.

22 European Union. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). Official Journal of the European Union, L 277. http://data.europa.eu/eli/reg/2022/2065/oj.

23 European Union. Regulation (EU) 2022/2065 (Digital Services Act), Annex I.

24 France. (n.d.). Code de la Consommation (Légifrance). Retrieved on December 16, 2025. https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069565.

25 Federal Trade Commission. (1983). Policy Statement on Deception. https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

26 United States. (1983). Federal Trade Commission.

27 United Kingdom. (2008). The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277). Reg. 5(2)(a)(b). https://www.legislation.gov.uk/uksi/2008/1277.

28 France. Code de la Consommation (Légifrance).

According to the US Federal Trade Commission (FTC),[29] an advertisement is considered misleading if three main elements are present:

First, incorrect representation or omission of information, such as providing incorrect data or withholding essential information;

Second, the capacity to mislead, meaning that advertising would mislead the average consumer who relies on this information;

Third, the materiality of the information in the purchasing decision, meaning that the misinformation must be related to a factor influencing the consumer's decision to purchase the product or service.

Therefore, misleading advertising in the US law is a clear violation of the consumer's right to correct information, constitutes illegal commercial behavior, and is combated at the federal and state levels through special legislation and effective regulatory bodies.

1.2. Elements of the crime of misleading electronic advertising

Every crime requires three pillars: the legal pillar, the material pillar, and the moral pillar. The crime of misleading advertising is a formal crime that occurs as soon as the conduct criminalized by law is committed.

1.2.1. Material element

The material element presupposes the existence of a commercial advertisement disseminated through electronic means,[30] containing misleading information likely to confuse consumers regarding the nature, quantity, or characteristics of the product or service.[31] Neither Algerian nor French law requires a specific professional status for the perpetrator; liability attaches to any natural or legal person who publishes a misleading advertisement.[32]

The forms of misleading advertising are represented in the elements stipulated by the legislator in Article 28 of Law 04-02. Jurisprudence divides these into two categories: misleading related to the good or service itself (availability, components, origin, method and date of manufacture, quantity, price),[33] and misleading related to elements independent of it (terms and motives of sale, advertiser's obligations and identity).

1.2.2. Moral element

Most French court rulings have tended to assume bad faith in misleading advertisements. The French Court of Cassation, in its decision of 5/1/1994, considered that the misdemeanor of misleading advertising occurs even without bad faith; the advertiser is obligated to verify the advertisement before publishing it.[34] Judges are not obligated to search for bad faith; negligent error suffices for liability.[35]

Failure to require intentionality or bad faith of the advertiser: Most French court rulings have tended to assume bad faith in misleading advertisements, including a notable ruling convicting a real estate agent who had made a false advertisement for an advertised property, relying on the trust confirmed by the property owner. The court did not consider bad faith a condition for liability for false advertising, stating that "a lie is necessarily voluntary, i.e., intentional". Thus, the court ruled that a false commercial message triggers liability regard-

29 Federal Trade Commission. (1983).

30 Shaoua, H. (2015). Consumer protection from the crime of misleading or false commercial advertising (in Arabic). Journal of Legal Studies, 23, 147-158. https://asjp.cerist.dz/en/article/64272.

31 Alaoua, H., Azzaouz, S. (2017). Criminal protection of the consumer from unfair practices (in Arabic). Journal of Rights and Freedoms, 5(1), 221-246. <https://asjp.cerist.dz/en/article/32913>.

32 Petty, R. D. (1996). The law of misleading advertising: An examination of the difference between common and civil law countries. International Journal of Advertising, 15(1), 33-47. https://doi.org/10.1080/02650487.1996.11104632.

33 Bouguendoura, A. H. (2018). Controls for criminalizing false advertising in the commercial advertising market (in Arabic). Hawliyat Jamieat Qalama lil-Ulum al-Ijtimaiyahwa al-Insaniyah, 12(1), 165-182. https://asjp.cerist.dz/en/article/56298.

34 Shaoua (2015), 150.

35 Ibid., 152.

less of the advertiser's bad faith.[36]

The French Court of Cassation definitively settled this matter in its decision of 5 January 1994, which held that the misdemeanor of misleading advertising occurs even without the advertiser having bad faith.[37] Negligence or lack of precaution cannot serve as an excuse to escape responsibility, as the advertiser is obligated to verify the advertisement and its authenticity and to be aware of everything it contains before publishing it.

In the face of this decisive ruling, judges are not obligated to search for the advertiser's bad faith; it is sufficient that the latter committed a negligent or careless error to be considered guilty. As for the Algerian legislator, based on Article 28 of Law 04-02,[38] it is clear that he did not refer to the requirement of bad faith or its exclusion, meaning that the advertiser's will is directed towards the material actions that represent lying and misleading.

In Brazilian legislation, Article 67 of the Consumer Defense Code establishes criminal liability for misleading advertising where the person "knows or should know" the advertisement is misleading, covering both intent (dolo) and negligence (culpa).[39] European Union laws focus on "the possibility of misleading the average consumer" regardless of the advertiser's intention.[40]

1.2.3. Consumer misinformation assessment criteria

Consumer assessment is subject to two criteria. The *subjective criterion* considers the recipient's personal characteristics—intelligence, perception, experience. However, this criterion is criticized for requiring research into hidden personal attributes.[41] The *objective criterion* uses the standard of the ordinary person of average intelligence representing the general public, according to which misleading advertising occurs only if likely to mislead the average consumer.

2. WAYS TO LEGALLY PROTECT THE ELECTRONIC CONSUMER FROM MISLEADING ADVERTISEMENTS

Commercial advertising pushes consumers to contract, necessitating protection from advertisers displaying misleading electronic advertisements. False and misleading advertisements can be categorized into violations of the consumer's right to information and choice, and violations of the consumer's right to safety.[42]

This protective framework is grounded in the United Nations Guidelines for Consumer Protection (UNGCP, 2015). Guideline 11(b) requires businesses to avoid "illegal, unethical, discriminatory or deceptive practices", while Guideline 63 urges Member States to ensure consumer protection in e-commerce is not less than in other forms of commerce.[43] The 2016 OECD Recommendation on Consumer Protection in E-commerce sets standards for fair business practices, clear online disclosures, and effective dispute resolution, requiring that consumer protection in e-commerce be not less effective than in offline commerce.[44]

36 Ibid., 154.

37 Ibid., 156.

38 Law No. 04-02, Art. 28.

39 Santiago, M. R., Alves, D. S. (2019). A legal analysis of surrogate advertising and its accountability in Brazil in the consumer society paradigm. Revista Jurídica, 2(55), 106-132.

40 Golecki, M. J., Tereszkiewicz, P. (2019). Taking the prohibition of unfair commercial practices seriously. In Mathis, K., Tor, A. (Eds.). New developments in competition law and economics (pp. 91–106). Springer. https://doi.org/10.1007/978-3-030-11611-8_5.

41 Bliman, Y. (2009). False or misleading advertising (in Arabic). Journal of Humanities, 20(4), 289-313, 294. https://asjp.cerist.dz/en/article/3553.

42 Meenakumary, S. (2021). Legal regulation of false and misleading advertisements with special reference to Consumer Protection Act, 2019. Commerce & Business Researcher, 14(2), 53-61, 56. https://doi.org/10.59640/cbr.v14i2.53-61.

43 United Nations Conference on Trade and Development. (December 22, 2015). United Nations Guidelines for Consumer Protection. United Nations. https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf.

44 Organisation for Economic Co-operation and De-

2.1. Preventive protection for the electronic consumer from misleading advertisements

Preventive protection means legal and regulatory measures aimed at preventing the publication of advertisements containing incorrect or misleading data before reaching the consuming public. These measures include prior censorship, binding standards for advertising content, and special obligations on advertisers.

In Algeria, Law No. 18-05 and Law No. 09-03 prohibit the publication of advertisements containing false data or likely to mislead consumers.[45] The legislator obliges advertisers to accurately state essential data and grants competent authority to stop or withdraw violating advertisements.[46] Recent Algerian scholarship emphasises that these mechanisms seek to rebalance the contractual relationship in electronic commerce by deterring misleading advertising and providing enforceable rights and remedies, though legal measures must be complemented by sustained awareness-raising efforts.[47]

Developed jurisdictions have established robust preventive mechanisms. In France, the DGCCRF may prevent misleading advertisements before publication.[48] The US Federal Trade Commission possesses the authority to issue cease and desist orders and impose fines.[49] Egypt's Consumer Protection Law No. 181 of 2018 gives the Consumer Protection Agency authority to stop advertisements containing misleading information,[50] with the possibility of referring violators to the Public Prosecution.[51] Japan's Fair Trade Commission reviews advertisements and issues corrective orders under the Act against Unjustifiable Premiums and Misleading Representations.[52]

At the European Union level, the Digital Services Act establishes a harmonised preventive framework based on due diligence obligations for intermediary service providers, requiring online platforms to actively assess and mitigate systemic risks, including the dissemination of misleading information.[53] The OECD Guidelines (2023) reinforce preventive standards by calling on enterprises to refrain from deceptive commercial practices and conduct risk-based due diligence.[54] The Council of Europe's 1989 European Convention on Transfrontier Television prohibits subliminal and surreptitious advertising and imposes safeguards for advertising addressed to children.[55]

The preventive framework established by Directive 2000/31/EC operates through transparency mechanisms rather than prior authorisation. Article 6 requires that commercial communications transmitted by electronic means satisfy four cumulative conditions: they must be clearly identifiable as commercial communications; the natural or legal person on whose behalf the communication is made must be clearly identifiable; promotional offers must be clearly identifiable as such, with conditions easily accessible and presented clearly; and promotional competitions or games must likewise be clearly identifiable, with participation

velopment. (March 24, 2016). Recommendation of the Council on Consumer Protection in E-commerce (OECD/LEGAL/0422). OECD Publishing. https://doi.org/10.1787/9789264255258-en.

45 Law No. 09-03, Art. 17.

46 Law No. 18-05, Art. 30.

47 Medjahed, H. (2025). Consumer protection mechanisms from misleading electronic advertising in light of Algerian legislation. The International Tax Journal, 52(6), 3208-3215. https://internationaltaxjournal.online/index.php/itj/article/view/315.

48 France. Code de la Consommation, Art. L121-1.

49 United States. Federal Trade Commission Act, 15 U.S.C. § 45.

50 Egypt. (2018). Consumer Protection Law No. 181 of 2018 (in Arabic). WIPO Lex. <https://www.wipo.int/wipolex/ar/legislation/details/19866>.

51 Egypt. (2018). Consumer Protection Law No. 181 of 2018, Art. 15.

52 Japan. (1962). Act against Unjustifiable Premiums and Misleading Representations No. 134 of May 15, 1962 (as amended). https://www.japaneselawtranslation.go.jp/en/laws/view/2303/en.

53 European Union. Regulation (EU) 2022/2065 (Digital Services Act), Art. 25.

54 Organisation for Economic Co-operation and Development. (2023). Chap. VIII.

55 Council of Europe. (1998). Protocol amending the European Convention on Transfrontier Television (ETS No. 171). Strasbourg, October 1, 1998. https://rm.coe.int/168007f2cd.

conditions easily accessible. Article 7 complements these requirements by regulating unsolicited commercial communications, requiring Member States to ensure that service providers undertaking such communications consult and respect opt-out registers.

These provisions establish a preventive logic based on consumer empowerment through information rather than administrative censorship. However, the effectiveness of this approach has been questioned in the context of contemporary digital markets, where the proliferation of native advertising, influencer marketing, and algorithmic content curation has blurred the boundaries between commercial and non-commercial content. The Digital Services Act responds to these challenges by requiring online platforms to ensure that advertisements are clearly distinguishable from other content and that recipients can identify the advertiser and the parameters used for targeting. Article 26 specifically mandates that online platforms label advertisements and provide meaningful information about their commercial nature, thereby updating the transparency requirements of Directive 2000/31/EC for the platform economy.

Recent scholarship on advertising self-regulation emphasises that preventive consumer protection in digital markets also depends on how power and responsibility are distributed among advertisers, media, self-regulatory organisations, digital platforms, and consumers.[56] Influencer marketing and social media advertising create specific risks of misleading endorsements; emerging regulatory frameworks now require clear disclosure of paid partnerships.[57] Recent Indian scholarship confirms that technology-responsive legal frameworks are decisive factors in building consumer trust in digital markets,[58] while Chinese scholarship on live streaming commerce illustrates governance gaps related to the allocation of responsibility among platforms, streamers, and merchants.[59] Similar regulatory fragmentation has been documented in South Africa.[60]

Applying the Power-Responsibility Equilibrium framework, recent scholarship shows that the rise of global platforms and cross-border digital campaigns has disrupted traditional national self-regulatory systems, as those actors with the greatest structural power do not yet bear commensurate regulatory responsibilities.[61] It therefore calls for embedding responsibility within corporate and platform cultures, aligning standards and funding models across jurisdictions, and strengthening proactive monitoring and cross-country cooperation to restore the balance of power and ensure effective protection against misleading online advertising.

2.2. Therapeutic protection for the electronic consumer from misleading advertisements

Remedial protection relates to legal mechanisms allowing consumers or competent authorities to address damage resulting from misleading advertising after it occurs. It encompasses legal, administrative, and judicial means aimed at addressing negative effects, restoring disturbed balance, and ensuring violations are not repeated.[62,63]

56 Dickinson-Delaporte, S., Mortimer, K., Kerr, G., Waller, D. S., Kendrick, A. (2020). Power and responsibility: Advertising self-regulation and consumer protection in a digital world. Journal of Consumer Affairs, 54(2), 675-700. https://doi.org/10.1111/joca.12295.

57 Mukherjee. (2025).

58 Chawla, N., Kumar, B. (2022). E-commerce and consumer protection in India: The emerging trend. Journal of Business Ethics, 180, 581-604. https://doi.org/10.1007/s10551-021-04884-3.

59 Liu, H. (2025). Consumer rights protection law in the governance of false advertising: A case study of live streaming commerce. Scientific Journal of Humanities and Social Sciences, 7(8), 117-122. https://doi.org/10.54691/g623mg68.

60 Mupangavanhu, Y., Kerchhoff, D. (2023). Online deceptive advertising and consumer protection in South Africa: The law and its shortcomings? De Jure Law Journal, 56, 86-106. https://doi.org/10.17159/2225-7160/2023/v56a7.

61 Dickinson-Delaporte et al. (2020).

62 Abdullah, A. G. B. (2015). Commercial law and consumer protection (in Arabic). Dar Al Nahda Al Arabiya, 233.

63 Al-Sanhuri, A. (2011). The intermediary in explaining

2.2.1. Civil liability

Civil liability is based on compensating damage caused to consumers as a result of misleading advertising, including material and moral damages.[64] The French Consumer Code allows affected consumers to file lawsuits before civil courts to claim compensation.[65] The FTC has the authority to issue orders to stop advertising, impose fines, and oblige companies to compensate those affected; class actions can also be filed.[66] Egyptian consumer protection agencies can stop violating advertisements and refer those responsible to the Public Prosecution.[67] In Britain, the Advertising Standards Authority can impose withdrawal of advertisements and refer violators to courts.[68]

Comparable challenges have been documented in developing e-commerce markets. In Bangladesh, fragmented oversight has resulted in weak enforcement against misleading advertisements; proposed reforms include a unified E-Commerce Consumer Protection Act.[69] In Indonesia, general consumer protection laws have proved insufficient to address online false advertising, confirming that effective redress depends on institutional capacity, consumer awareness, and smart regulatory mixes.[70]

Article 30(6) of the Algerian Electronic Commerce Law explicitly prohibits misleading and ambiguous electronic advertising formulated in terms that deceive consumers and cause confusion, stating: "...Ensure that all conditions that must be met to benefit from the commercial offer are neither misleading nor ambiguous". Similarly, Article 28 of Law No. 04-02 on commercial practices prohibits misleading advertising, particularly when it includes statements, data, or presentations that could mislead consumers regarding the definition, quantity, availability, or characteristics of a product. Although the latter provision does not specifically address electronic advertising, its principles can be applied by analogy to digital commercial communications. This regulatory gap underscores the need for the Algerian legislator to address the matter more comprehensively, as traditional legal texts have become inadequate to counter sophisticated electronic advertising deception methods.[71]

The liability framework for misleading electronic advertising must be understood in light of the safe harbour provisions established by Directive 2000/31/EC. Articles 12-14 provide conditional exemptions from liability for intermediary service providers acting as mere conduits, caching services, or hosting providers, provided they meet specific conditions regarding knowledge and expeditious removal of illegal content. These provisions, preserved by the Digital Services Act, create a distinction between the liability of advertisers who create misleading content and the liability of platforms that host or transmit such content. The practical consequence is that effective remedial protection requires identifying the appropriate defendant:

the new civil law: Sources of obligation, Vol. 1 (in Arabic). Dar Nahdat Misr, 89. ISBN 9786144010037.

64 Abdullah. (2015), 235.

65 France. Code de la Consommation (Légifrance).

66 United States. Federal Trade Commission Act, 15 U.S.C. § 45.

67 Egypt. (2018). Consumer Protection Law No. 181 of 2018, Art. 9.

68 Advertising Standards Authority. (2021). The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code). https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html.

69 Chowdhury, J. (2025). Strengthening e-commerce consumer protection in Bangladesh: Legal challenges, regulatory gaps, and reform strategies. International Journal of Research and Innovation in Social Science, 9(1), 2548-2567. https://doi.org/10.47772/IJRISS.2025.9010206.

70 Zulham, Z. (2023). A critical review of Indonesian online consumer protection: Online shopping, false advertising, and legal protection for Indonesian e-commerce customers. Journal of Law and Sustainable Development, 11(5), 1-15. https://doi.org/10.55908/sdgs.v11i5.740.

71 Algeria. (1990). Executive Decree No. 90-367 of November 10, 1990 (in Arabic), Art. 13. Official Gazette of the People's Democratic Republic of Algeria (JORA), No. 50. https://www.joradp.dz/FTP/jo-arabe/1990/A1990050.PDF; Algeria. (2013). Executive Decree No. 13-378 of November 9, 2013 (in Arabic), Art. 56. Official Gazette of the People's Democratic Republic of Algeria (JORA), No. 58. https://www.joradp.dz/FTP/jo-arabe/2013/A2013058.pdf.

while advertisers bear direct liability for misleading commercial communications, platform liability depends on proof of actual knowledge and failure to act expeditiously. This distinction is particularly relevant in the Algerian context, where Law 18-05 does not explicitly address the allocation of liability between content creators and intermediary service providers.

2.2.2. Criminal liability

Criminal liability punishes advertisers who intentionally publish false or misleading advertisements through fines, imprisonment, or both. The French Penal Code stipulates criminal penalties of up to two years in prison and fines if intentional deception is proven.[72] Under Algerian law, Article 40 of the Electronic Commerce Law provides: "Without prejudice to the rights of victims to compensation, anyone who violates the provisions of Articles 30, 31, 32, and 34 of this law shall be punished with a fine of 50,000 to 500,000 DZD".[73] The fine is doubled for repetition within twelve months.[74] Both the advertiser and service provider publishing the misleading advertisement are held responsible for criminal and civil liability.

The basis for imposing financial penalties without deprivation of liberty lies in the economic nature of these crimes committed for illegal profit. However, the fine value remains small compared to potential profits, and does not achieve the required deterrence, especially since this crime affects consumer health and safety.

2.2.3. Removal of misleading advertising

Removal involves obligating the advertiser to withdraw the advertisement from publishing media and issue a corrective statement. Under Japanese law, the Consumer Protection Authority may issue immediate orders to stop misleading advertising and oblige advertisers to correct false information.[75]

CONCLUSION

This study demonstrates that while e-commerce offers significant advantages, it poses new challenges for consumer protection against misleading advertising. Comparative analysis reveals a disparity between developed countries, which have established comprehensive legal frameworks with effective enforcement mechanisms, and developing countries still adapting their legislation to technological developments.

Key findings include: consumers' lack of digital awareness makes them more vulnerable to misleading practices; the cross-border nature of e-commerce makes enforcing local laws complex; and the rapid development of artificial intelligence and targeted advertising creates new forms of misleading advertising difficult to detect with traditional means. Recent legal scholarship on "dark patterns" shows that deceptive online choice architectures have become a central regulatory challenge, calling for a shift from ex post, harm-based enforcement towards proactive, design-embedded regulatory approaches.

Four recommendations emerge: first, developing national legislation with clear definitions of digital misleading advertising and proportionate sanctions; second, strengthening international cooperation through unified standards and information exchange mechanisms; third, deploying advanced monitoring technologies, including AI-assisted content analysis; fourth, intensifying consumer awareness programmes on digital rights and recognition of misleading advertising.

72 France. Code de la Consommation, Art. L132-2 (Légifrance).

73 Lakhal, I. E., Islam, S. (2023). Consumer protection from misleading electronic advertising under Law 18-05 (in Arabic). Al-Hikma Journal for Media and Communication Studies, 11(3), 54-74, 68. https://asjp.cerist.dz/en/article/231633.

74 Algeria. Law No. 18-05, Art. 48.

75 Japan. (1962). Act against Unjustifiable Premiums and Misleading Representations No. 134.

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