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Przemyslaw Kieronczyk*

Historical Reflections in the Current Constitution of Lithuania (in the Context of Polish Constitutional Solutions)

The article is focused on the issue of the extent to which the currentconstitutions of Poland and Lithuania from the 1990s arebased on historicalsolutions. However, the article does not reach the distant period of the Polish-Lithuanian Commonwealth, but deals with the period of relatively modern statehood and constitutionalism (i.e. after 1918). The author makes a certain choice, looking for the most interestingsolutions from the history of Polish and Lithuanianconstitutionalism from that period, whichinfluenced the texts of the currentconstitutions.

Of course, for understandable reasons, the least such influence can be found today among the constitutional solutions from the period of Soviet domination in Poland or the occupation of Lithuania by the USSR. Hence, the main research concerned the constitutionalism of both countries in the period 1918-1939/1940. The author therefore chose particularly interesting – in his opinion – examples, concerning both the fundamental principles of the system and individual constitutional solutions, and proving, to a greater or lesser extent, the historical roots of current constitutions.

After presenting specific examples, the author comes to the conclusion that both constitutions are typical representatives of the latest era of European constitutionalism and it is difficult to talk about the wide use of historical solutions in their case. However, there are undoubtedly some historical antecedents in their content. Ultimately, the author comes to the conclusion that the creators of the Lithuanian constitution used solutions with a historical origin (especially from the interwar period of Lithuanian constitutionalism) to a slightly wider extent than their Polish counterparts.

Keywords: *constitution; history; system; state; Poland; Lithuania.*

1. Introduction

Constitutional development is inherently shaped by the interaction between historical continuity and political transformation. Although modern constitutions are primarily designed to regulate contemporary systems of government, they rarely emerge in complete isolation from previous constitutional traditions. Historical constitutional experience may survive through institutional continuity, constitutional principles, legal terminology, or broader constitutional values, even where profound political ruptures have occurred. Consequently, the relationship between constitutional innovation and constitutional memory constitutes an important field of inquiry within comparative constitutional law, particularly in states that have experienced radical changes of political regime during the twentieth century.

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Poland and Lithuania provide a particularly valuable comparative perspective in this respect. Both states restored their independence after the First World War, developed their own constitutional traditions during the interwar period, experienced authoritarian transformations in the late 1920s and 1930s, lost their sovereignty during the Second World War and the subsequent period of Soviet domination, and eventually adopted new democratic constitutions in the final decade of the twentieth century. Despite these broadly comparable historical trajectories, the constitutional evolution of the two countries followed different legal and political paths, creating an appropriate basis for examining the extent to which historical constitutional solutions influenced the drafting of their present constitutional orders.

The purpose of this article is not to provide a comprehensive comparison of the Constitutions of the Republic of Lithuania (1992) and the Republic of Poland (1997). Rather, it seeks to identify selected constitutional institutions, principles, and structural solutions whose origins can be traced to earlier stages of Polish and Lithuanian constitutional development, with particular emphasis on the period between the restoration of independence after 1918 and the loss of sovereignty in 1939–1940. The analysis deliberately concentrates on constitutional antecedents that demonstrate either continuity or conscious departure from previous constitutional models, while avoiding an exhaustive historical reconstruction of the constitutional history of both states.

The research adopts a comparative historical-legal approach. It analyses constitutional texts against their historical and political context, allowing individual constitutional institutions to be assessed not only from a formal legal perspective but also in light of their constitutional evolution. Particular attention is devoted to the principles of state sovereignty, separation of powers, systems of government, direct democracy, constitutional rigidity, constitutional nomenclature, and selected institutional mechanisms whose contemporary form reflects, to varying degrees, earlier constitutional experience.

The article proceeds from the assumption that the constitutions of Lithuania and Poland belong primarily to the modern generation of European democratic constitutions and therefore derive their general structure and constitutional philosophy from contemporary constitutional standards rather than from historical constitutional models. Nevertheless, constitutional continuity remains visible in a number of specific solutions. By examining these elements, the article contributes to a better understanding of how historical constitutional traditions continue to influence present-day constitutional design, while demonstrating that constitutional development is better understood as a process combining innovation with selective institutional continuity rather than as a complete rupture with the past.

2. Constitutional Continuity and Historical Influence

Cicero'swords on history are widely known, at least in the paraphrased version: *Historia magistra vitae (est)*[1]. At the same time, the history of the world has repeatedly convinced us that – as humanity – we are definitely not always able to draw conclusions from the past[2].

1 The relevantquote from Cicero's "De Oratore" isexactly: Historia verotestistemporum, luxveritatis, vitamemoriae, magistra vitae, nuntiavetustatis, qua vocealia, nisioratoris, immortalitaticommendatur? From:

The truth, as usual, probably lies somewhere in between. Also when it comes to the experience of global constitutionalism. On the one hand, after many bitter experiences from the past (full of the tragedies of authoritarian and totalitarian governments), we were certainly able to draw conclusions. The latest generation of constitutions in force in democratic countries act as guarantees of democracy consciously introduced by the legislators (having, for example, an extensive catalog of guiding principles, human rights, and modern systems of guaranteeing the constitutionality of law). On the other hand, the phenomenon of "democratic backsliding" (or "democratic erosion")[3], known in many countries, clearly emphasizes that constitutions, even the most perfect ones, will not be a fully effective barrier against politicians' ambitions if they are not protected by an appropriate political culture and the determined will of society[4].

The situation is similar when it comes to specific, "local" historical justifications for constitutional solutions. Sometimes the history of constitutionalism (or, more broadly, the history of the political system) in a given country leaves a trace only in the preamble to the constitution, but sometimes it directly affects a number of its provisions. And sometimes this history appears in full force in the form of the binding force[5] or restoration of the constitution from many years ago[6]. There is no uniform principle here in the context of global constitutionalism.

This article attempts to present selected (according to the author, the most interesting) solutions in the contemporary constitutions of Lithuania and Poland, in the context of their genesis or historical context (justification). It is clear that both of these constitutions belong to the generation of "new"

CICERO, De Oratore | Loeb Classical Library (loebclassics.com) [01.07.2026]. Ibid., English translation: "And as History, which bears witness to the passing of the ages, sheds light upon reality, gives life to recollection and guidance to human existence, and brings tidings of ancient days, whose voice, but the orator's, can entrust her to immortality?".

2 We can, of course, mention a well-known saying here (known in various versions and attributed to various authors, e.g. Georg Hegel, in Poland prof. Aleksander Krawczuk, or even to popular cabarets) goes something like: "History only teaches one thing: it has never taught anyone anything." See e.g.: <https://lubimyczytac.pl/cytat/24503>;<https://lubimyczytac.pl/cytat/140049>; <https://historia.kul.pl/zlote-mysli-o-historii/> [01.07.2026].

3 See (among others): *Przeworski A.*, Crises of Democracy, Cambridge 2019, passim; <https://www.democratic-erosion.com>; <https://en.wikipedia.org/wiki/Democratic_backsliding> [01.07.2026].

4 On the other hand, it is worth noting an interesting opinion: "It is by now well established that all constitutional orders retain emergency powers, either formalny or informally. Justice Jackson's firm admonition that the Constitution is not >>a suicde pact<< well sums up the sense that even a tolerant democratic socjety must be able to police its fragile borders". *Issacharoff S.*, Fragile democracies, Constitutional Law Review (Constitutional Court of Georgia in partnership with Ilia State University), March 2010, No 2, 99 (there source of the quote: Terminello v. Chicago U.S. 1, 37/19 1949, Jackson. J, dissenting).

5 For example: the constitutions of the USA (1787), Norway (1814), Belgium (1831) have been in force for many years and constitute a strong element of national identity in these countries (although, especially the last two, have been amended many times). See (among others): <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm>; <https://lovdata.no/dokument/NLE/lov/1814-05-17>; <https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf> [01.07.2026].

6 An example here is the Constitution of Latvia (1922), which was restored in the 1990s. See the footnote 102 in this article. See also: <https://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/> [01.07.2026].

legal acts of this type (although, of course, it is difficult to call them completely "new", as they have already been in force for about thirty years). However, the question arises whether and how "newness" is situated in the historical context. And – are they similar constitutions in this aspect?

The author would like to warn the potential reader that this article does not attempt to comprehensively compare both constitutions, as this would be a matter worthy of a book, but rather looks for their most interesting "antecedents" (and – possible – elements common in this aspect). The article is therefore the result of a rather selective (although the choice was made completely consciously by the author) comparison of the most interesting constitutional antecedents of two constitutions.

Both of these constitutions share a basic common feature (like most constitutions of European post-authoritarian or post-totalitarian states)[7]. Both constitutions belong to the same "generation" ("fourth generation")[8] of fundamental laws and were adopted in the 1990s. The Constitution of the Republic of Lithuania is slightly earlier – it was adopted in a national referendum on October 25, 1992[9]. The Constitution of the Republic of Poland is five years later[10].

The fate of Polish and Lithuanian statehood is relatively long-lasting (and, to a quite significant extent, common). It is obvious that there is no place here for a comprehensive presentation of the

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7 The author does not go into detail here about definitional issues related to the concepts of authoritarianism and totalitarianism, especially in the context of "real socialist" countries, commonly called "communist". Pro domo sua can only point out that in the context of assessing the so-called People's Poland (1944-1989) in principle agrees with the opinion of prof. Marek Chmaj (who caused great emotions in Poland, especially on the right side of the political scene), that "it was an authoritarian, undemocratic system, based on violence, but it could hardly be considered typical totalitarianism". See <https://wiadomosci.onet.pl/tylke-w-onecie/ustroj-prl-nie-byl-totalitarny-prof-marek-chmaj-tlumaczy/8dk03sy> [01.07.2026]. Alternatively, one can consider whether at the height of Stalinism in Poland in the 1950s, when the authorities largely managed to subordinate (for a short period) the Catholic Church, the system temporarily acquired totalitarian features. In any case, the assessment is not easy, at least due to the fact that the social reality in this region of Europe was, after all, diverse. The situation was different, for example, in Albania, Romania, Yugoslavia or Poland. It also changed over time.

8 It is conventionally assumed that this generation was initiated by the constitutions of Greece (1975), Portugal (1976) and Spain (1978), i.e. countries emerging from the period of dictatorial rule, and it continues to this day. Constitutions of this generation very often share common axiological values, appropriate for modern, democratic states of law, and even specific elements of content. Although, of course, the texts of these constitutions are not always and not everywhere accompanied by proper practice. See: *Garlicki L.*, Polskie prawo konstytucyjne. Zarys wykładu, Warszawa 2016 (similarly also in later editions of this book), 43-44. See also: *Kierończyk P.*, Konstytucje państw Unii Europejskiej. Przykłady najciekawszych rozwiązań prawnoustrojowych [in:] red. *Borkowski M.*, *Friedberg A.*, X lat Polski w Unii Europejskiej – doświadczenia i perspektywy, Gdańsk 2014.

9 See: <https://lt.wikipedia.org/wiki/Lietuvos_Respublikos_Konstitucija> [01.07.2026]. The issue of the entry into force of the Lithuanian Constitution is described in detail by *Górecki D.*: Uchwalenie, wejście w życie i szczególny tryb zmiany konstytucji Republiki Litewskiej [in:] red. *Witkowski Z.*, Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej, Toruń 1998.

10 Basic information regarding the adoption and entry into force of the Constitution of the Republic of Poland see in: *Garlicki L.*, Polskie prawo konstytucyjne. Zarys wykładu, 35-36; *Kierończyk P.*, Konstytucja RP z 1997 r. – tryb przygotowania i charakterystyka aktu [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016, 118-122.

history of the nation, the political system, or just the constitutionalism of Poland[11] and Lithuania[12]. As well as the entirety of long-term and often complex mutual relationships[13].

However, it is worth noting an interesting fact that in a particularly interesting period after 1918, which meant gaining independence[14] for both Poland and Lithuania[15], the constitutional history of both countries ran in a parallel manner. This is particularly interesting considering the fact that the mutual relations between Lithuania and Poland were far from perfect almost throughout the interwar period[16].

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11 The author's views on the history of Polish constitutionalism, e.g: *Kierończyk P.*, Wprowadzenie do nauki prawa konstytucyjnego dla studentów administracji, Gdańsk 2008 (chapters VIII-X).

12 In this regard, the author takes the liberty of referring the interested reader to a number of his publications concerning Lithuanian constitutionalism and its history. Especially: *Kierończyk P.*, System konstytucyjny państwa litewskiego (1922-1940), Gdańsk, 2008; idem, Building the new State.First Lithuanian (provisional) constitutions, Zeszyty Naukowe Gdańskiej Szkoły Wyższej 2014, nr 14; idem, Aneksja Litwy przez ZSRR w roku jako element współczesnej dyskusji politycznej i prawnej, Studia Iuridica Toruniensia 2014, t. 14; idem, Ustawy zasadnicze Litewskiej Socjalistycznej Republiki Radzieckiej, Zeszyty Naukowe Gdańskiej Szkoły Wyższej 2013, nr 13; idem, W dwudziestą rocznicę litewskiej deklaracji niepodległości, Gdańskie Studia Prawnicze 2010, t. XXIV.

13 The article essentially ignores the heritage of the Polish-Lithuanian Commonwealth, which (although fascinating) did not include "typical modern constitutionalism". While appreciating the great historical significance of the Constitution of May 3, 1791 (recognized quite widely, although debatably as the second in the history of the world), for many reasons it is difficult to consider it as belonging to "modern" constitutionalism. See L. Stomma's critical comments: Polskie złudzenia narodowe, Poznań 2006, 130-136.

14 In the Polish case, we can talk about regaining state independence. After many years of partitions – see: <https://www.britannica.com/event/Partitions-of-Poland> [01.07.2026]. The answer to the question whether (and to what extent) Lithuania, established in 1918, can be considered the "heir" of the Grand Duchy of Lithuania – is extremely complex. See an attempt at such an answer in: *Kierończyk P.*, System konstytucyjny państwa litewskiego (1922-1940), 12-18.

15 As a side note, it can be mentioned that in Poland, National Independence Day is traditionally celebrated on November 11 (but it is rather a symbolic date – see: <https://en.wikipedia.org/wiki/National_Independence_Day_(Poland)> [01.07.2026]). In the case of Lithuania, it is February 16. The "Act of Independence of Lithuania" (Lietuvos nepriklausomybės aktas) adopted by Lietuvos Taryba on February 16, 1918 (it was a declaration of independence, de facto the second, the first – from December 11, 1917 – provided for Lithuania's union with Germany), was, at the time of adoption, rather a demonstration of will than real independence, because until the fall of 1918, real and full control of the Lithuanian lands was exercised by the German occupiers. The text of the declaration of February 16, 1918, e.g. in *Ochmański J.*, Historia Litwy, Wrocław-Warszawa-Kraków 1990, 170 (photo); *Zubiński T.*, Ciche kraje, Rzeszów 2006, 7 (photo); <https://en.wikipedia.org/wiki/Act_of_Independence_of_Lithuania> [01.07.2026]. Details related to the adoption of the first and second Lithuanian declarations of independence in: *Wisner H.*, Litwa. Dzieje państwa i narodu, Warszawa 1999, 161-163; *Łossowski P.*, Litwa, Warszawa 2001, 62-65. See also: <https://lt.wikipedia.org/wiki/Lietuvos_Nepriklausomybės_Aktas> and <https://lt.wikipedia.org/wiki/Lietuvos_Taryba> [01.07.2026]; *Kierończyk P.*, System konstytucyjny państwa litewskiego (1922-1940), 25-37; idem, Nadrzędność parlamentu – mit czy realna alternatywa ustrojowa? Analiza wybranych przykładów, Gdańsk 2010, 181-188.

16 Again, there is no space here to present the Polish-Lithuanian conflict from the interwar period in all its complexity. Those initially interested in the subject can be referred to, for example, a general presentation of the issue at: <https://en.wikipedia.org/wiki/Lithuania–Poland_relations> [01.07.2026]. A more in-depth presentation of the problem can be found in: *Wisner H.*, Wojna nie wojna. Szkice z przeszłości polsko-litewskiej, Warszawa 1978; *Łossowski P.*, Konflikt polsko-litewski 1918-1920, Warszawa 1996; idem, Litwa a sprawy polskie 1939-1940, Warszawa 1982; idem, Po tej i tamtej stronie Niemna. Stosunki polsko-litewskie 1883-1939, Warszawa 1985; idem, Stosunki polsko-litewskie 1921-1939, Warszawa 1997; idem,

Shortly after regaining independence, both countries adopted „small constitutions" (in Poland – one[17], in Lithuania – three[18]). Then came a short-lived period of the flourishing of democratic constitutionalism (based on the March constitution of 1921 in Poland[19], in Lithuania on the constitution of 1922[20]), ending in the same year (1926) with coups d'état[21]. After them, there was a rapid evolution towards autocracy[22] (at the first stage "sealed" by the August 1926 amendment in Poland[23] and the Lithuanian constitution of 1928[24] adopted by President Antanas Smetona[25]). In the final years of the interwar period, both countries attempted to legally petrify dictatorial governments and create *sui generis* presidential systems – in the constitutions of 1935 (Poland)[26] and 1938 (Lithuania)[27].

Polska-Litwa. Ostatnie sto lat, Warszawa 1991; *Kierończyk P.*, Bez dobrego wyjścia – Kilka uwag o relacjach litewsko-polskich w czasach Józefa Piłsudskiego, Imponderabilia. Biuletyn Piłsudczykowski 2010, nr 1.

17 *Kierończyk P.*, Małe konstytucje w Polsce [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016; <https://pl.wikipedia.org/wiki/Mała_konstytucja> [01.07.2026].

18 *Zakrzewski A.*, Wstęp [in:] Konstytucja Litwy, Warszawa 2006, 9-10; *Kierończyk P.*, Building the new State. First Lithuanian (provisional) constitutions.

19 See: *Burda A.*, Konstytucja marcowa – dokumenty naszej tradycji, Lublin 1983; *Machnikowska A.*, Konstytucja marcowa z 1921 r. [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016; <https://en.wikipedia.org/wiki/March_Constitution_(Poland)> [01.07.2026].

20 This constitution was published in: "Vyriausybės Žinios" nr 100/1922. Polish translation in:: *Makowski J.*, Nowe konstytucje przełożone pod kierunkiem dra Juljana Makowskiego, Warszawa 1925, 117-177. Text (in Lithuanian) avaiable on the website: <https://lt.wikisource.org/wiki/Lietuvos_Valstybės_Konstitucija_(1922_m._rugpjūčio_1_d.)> [01.07.2026]. See also: *Kierończyk P.*, System konstytucyjny państwa litewskiego (1922-1940), 38-67; idem, O specyfice pierwszych konstytucji państw bałtyckich, Studia Iuridica Toruniensia 2013, t. 13; idem, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Antecedencje i przebieg zamachu, Studia Iuridica Toruniensia 2017, t. 20.

21 See: <https://en.wikipedia.org/wiki/May_Coup_(Poland)>; <https://en.wikipedia.org/wiki/1926_Lithuanian_coup_d%27état> [01.07.2026]; *Garlicki A.*, Przewrót majowy, Warszawa 1987; *Kierończyk P.*, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Antecedencje i przebieg zamachu.

22 One of the most valuable studies on this period in Lithuanian history is: *Łossowski P.*, Kraje bałtyckie na drodze od demokracji parlamentarnej do dyktatury (1918-1934), Wrocław-Warszawa-Kraków-Gdańsk 1972.

23 See: <https://pl.wikipedia.org/wiki/Nowela_sierpniowa> [01.07.2026].

24 See: *Kierończyk P.*, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Oktrojowana ustawa zasadnicza, Studia Iuridica Toruniensia 2017, t. 21.

25 About A. Smetona see in: <https://lt.wikipedia.org/wiki/Antanas_Smetona> [01.07.2026]; *Zubiński T.*, Ciche kraje, 5-27; *Eidintas A.*, Antanas Smetona and his Lithuania. From the national liberation movement to an authoritarian regime (1893-1940), Leiden-Boston 2015; *Kierończyk P.*, Antanas Smetona i jego czasy, Disputatio. Reżimy 2009, t. VIII, 103-120.

26 See.: <https://en.wikipedia.org/wiki/April_Constitution_of_Poland> [01.07.2026]; *Gdulewicz E.*, *Gwiżdż A.*, *Witkowski Z.*, Konstytucja Rzeczypospolitej Polskiej z 1935 r. [in:] red. *Kallas M.*, Konstytucje Polski. Studia monograficzne z dziejów polskiego konstytucjonalizmu, Warszawa 1990, 146–156; *Machnikowska A.*, Konstytucja kwietniowa z 1935 r. [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016; *Mażewski L.*, Prezydencjalna odmiana systemu parlamentarnego w konstytucji kwietniowej, Studia Prawnicze 1984, nr 3-4; *Kierończyk P.*, W 80. rocznicę uchwalenia „konstytucji styczniowej". Uwagi polemiczne, Gdańskie Studia Prawnicze, t. XXI, Gdańsk 2014.

27 See: *Kierończyk P.*, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Petryfikacja systemu – konstytucja z 1938 r., Studia Iuridica Toruniensia 2018, t. 23.

Even in the period commonly called communism, appropriate analogies can be drawn. Exactly – between the “Stalinist” constitutions – the Lithuanian one from 1940[28] and the Polish one from 1952[29], as well as the Lithuanian “Brezhnev” constitution from 1978[30] and the amendment to the Polish constitution from 1976[31]. However, these comparisons will be highly illusory, as it should be remembered that the situation in Lithuania at that time (annexed by the USSR), was very different and certainly much more difficult than the Polish People's Republic[32]. We can finally talk about a certain “parallelism” of Lithuanian and Polish constitutional experiences, taking into account the political provisionalities of the period of regaining full sovereignty. However, the Lithuanian period of constitutional provisionality was much shorter and covered only the years 1990-1992 (in Poland, the period 1989-1997).

The contemporary Lithuanian constitution[33] was adopted in the referendum on October 25, 1992. It is worth noting that this is quite a characteristic reference to the institution of direct democracy (very extensive in the democratic constitution of Lithuania from 1922).

It is characteristic that in all the constitutions of the “Baltic States"[34] (Lithuania, Latvia and Estonia) adopted in the 1920s, the principle of the sovereignty of the nation were extremely important (and its quite direct consequence – direct democracy). It can be said that in this particular case these constitutions definitely ahead of their era. In each of them, was a number of situations in which the

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28 See: <https://lt.wikisource.org/wiki/1940_m._Lietuvos_Tarybų_Socialistinės_Respublikos_Konstitucija> [01.07.2026]. See also: *Kierończyk P.*, Ustawy zasadnicze Litewskiej Socjalistycznej Republiki Radzieckiej, 70-76.

29 See: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19520330232> [01.07.2026]. See also: *Kierończyk P.*, Konstytucja lipcowa z 1952 r. [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016.

30 See: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/00ca15b024e611e58a4198 cd62929b7a?jfwid=5v2xfdk63&fbclid=IwAR3noKnskTiSO51LgfRuMIFZxXceFGv70kWH9mTwzxASW-kSaY0_QT2ReWE> [01.07.2026]. See also: *Kierończyk P.*, Ustawy zasadnicze Litewskiej Socjalistycznej Republiki Radzieckiej, 77-78.

31 See: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19760050029> QT2ReWE [01.07.2026].

32 "People's Poland” was quite widely awarded the title of “The most cheerful barrack” of the Eastern Bloc (often interchangeably with Hungary).

33 See: <https://www.lrs.lt/home/Konstitucija/Konstitucija20220522.htm> [01.07.2026]. English text: <https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192> [01.07.2026]. The Polish text, translated by H. Wisner, was published by the Sejm Publishing House (Wydawnictwo Sejmowe) – Konstytucja Republiki Litewskiej, Warszawa 1994 (introduced by A. B. Zakrzewski). As for this translation of the text of the constitution, you can have some small reservations, raised, among others by *Górecki D.*, Republika Litewska, [in:] *Brodziński W.*, *Górecki D.*, *Skotnicki K.*, *Szymczak T.*, Wzajemne stosunki miedzy władzą ustawodawczą a wykonawczą (Białoruś, Czechy, Litwa, Rumunia, Słowacja, Węgry), Łódź 1996, 86, note 20. For the first time in Polish, the Constitution was published as a project in the “Kurier Wileński” of October 17, 1992 (unfortunately – with many errors in translation). We currently have another release of the text of the Constitution in a series of the Sejm Publishing House (from 2006) – also with the introduction of A. B. Zakrzewski.

34 The concept of “Baltic States” is quite common and consistently (although not very correctly from the geographical or ethnic point of view) used to Estonia, Lithuania and Latvia. See critical comments: *Kierończyk P.*, Recenzja: *Zieliński J.*, Systemy konstytucyjne Łotwy, Estonii i Litwy, Warszawa 2000, Przegląd Sejmowy 2000, nr 4, 123-127. See also: *Zieliński J.*, Instytucjonalizacja przemian ustrojowych na Litwie, Łotwie i w Estonii, Warszawa 2004, 11-12.

nation could exercise power directly expressing its will[35]. The effect of comparing these constitutional regulations with the Polish March constitution (1921) will be interesting. It will turn out that in the March constitution, direct democracy institutions are practically not occurring[36].

In the case of the Baltic states, it can be clearly stated that the idea of the special, most important role of the nation and the supreme power exercised by it, both through representatives in parliament[37] and directly (using the institution of direct democracy), was present in all three "Baltic constitutions" from 20. Without going into excessive detail, this can be explained by the specific "youth" of those nations (that in the second half of the 19th century experienced a period of national revival and the crystallization of modern national consciousness)[38].

In the above context, the solutions of direct democracy, strongly emphasized today in the Polish constitution of 1997[39], seem to be less rooted in Polish interwar constitutionalism than in Lithuanian one. In order to remain objective, it is worth noting that the solutions in the Lithuanian Constitution of 1922 regarding direct democracy were not accompanied by much political practice and were rather

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35 In the Lithuanian (1922 Constitution), they were: a popular legislative initiative (§ 20 of the Basic Law), popular constitutional initiative (§ 102), popular initiative of the constitutional referendum (§ 103) and the law of petition to parliament (§ 19). Estonian Constitution (published in "Riigi Teataja" No. 113/114 from 1920, Polish translation from the interwar period in: *Makowski J.*, Nowe konstytucje przełożone pod kierunkiem dra Juljana Makowskiego, 115-133, contemporary Polish translation in: Konstytucja Estonii, Warszawa 1997 – with an introduction by L. Garlicki and P. Łossowski), introduced: popular initiative (§ 29-34), constitutional initiative (§ 87) and the law of complaints (§ 15). The provisions of the Latvian Constitution (published in "Valdibas Vēstnesis" No. 141 from 1922, Polish translation from the interwar period in: *Makowski J.*, Nowe konstytucje przełożone pod kierunkiem dra Juljana Makowskiego, 137-154, newer translation in: Konstytucja Łotwy, Warsaw 2001 – with the introduction of P. Kierończyk) also introduced many direct democracy institutions. First of all, the referendum regarding: amendments to the Constitution (Articles 77-80), Parliament's dissolution (Articles 48 and 50), postponement of the promulgation of the Act by the head of state (Article 72), other issues related to legislation (Articles 73-75). In addition, this basic act knew a popular legislative initiative (Articles 65 and 78) and popular constitutional initiative (Article 78).

36 In the case of interwar Poland, however, institutions of direct democracy appeared on the occasion of the plebiscites in Upper Silesia, Warmia and Masuria (conducted as a consequence of the Versailles Treaty). One can also mention the "plebiscite" to decide on the cast of the Presidential Office in accordance with the April Constitution (1935). In case two candidates aspire, not only a candidate sent by the Electors' Assembly. Although this "plebiscite" was actually common elections (never realized in practice, because their date was provided for 1940). See The term "plebiscite" in: *Komarnicki W.*, Ustrój państwowy Polski współczesnej. Geneza i system, Kraków 2006 (reprint from 1937 book), 202.

37 More on the role of the parliaments of the Baltic states in the discussed historical period in: *Kierończyk P.*, Wizja silnego parlamentu w pierwszych konstytucjach państw bałtyckich, Zeszyty Naukowe Gdańskiej Wyższej Szkoły Administracji 2005, nr 1; idem, Nadrzędność parlamentu – mit czy realna alternatywa ustrojowa? Analiza wybranych przykładów, 189-204 i 218-240.

38 See (among others): <https://en.wikipedia.org/wiki/Estonian_national_awakening>; <https://en.wikipedia.org/wiki/Lithuanian_National_Revival>; <https://en.wikipedia.org/wiki/Latvian_national_awakening> [01.07.2026].

39 See (among others): *Kuciński J.*, Demokracja przedstawicielska i bezpośrednia w Trzeciej Rzeczypospolitej, Warszawa 2007; *Uziębło P.*, Demokracja partycypacyjna. Wprowadzenie, Gdańsk 2009; *Waniek D.*, *Staszewski M. T.*, Referendum w Polsce współczesnej, Warszawa 1995.

theoretical solutions. Even during the period of relatively democratic political practice (which lasted until the coup d'état in December 1926, which began the period of authoritarian rule in Lithuania).

The modern Lithuanian constitution is characterized by a rather average volume of content and its layout typical of the "fourth generation constitution"[40]. The content consists of a short preamble (mainly axiological, historical and programmatic nature)[41] and fourteen subsequent chapters. The contents of the Lithuanian and Polish constitutions are, in general terms, quite similar and they refer more to the taxonomies of typical constitutions of the latest generation than to the earlier constitutions of our countries.

However, in terms of general structure, there is quite a significant difference between the constitutions discussed. The Lithuanian Constitution is, of course, a "written" constitution, uniform, but in the "composite version". Its art. 150 specified (in the original version from 1992) that two earlier political acts were integral parts of the constitution: the constitutional act of February 11, 1991 "On the State of Lithuania"[42] and the constitutional act of June 8, 1992 "On non-accession of the Republic of Lithuania to post-Soviet Eastern Unions"[43]. In 2004, the Lithuanian "constitutional bloc", which constitutes the Lithuanian written constitution, but of a complex nature, was joined by a constitutional act regarding Lithuania's accession to the European Union[44]. It is also worth mentioning a separate legal act concerning the entry into force of the Constitution of 1992, which was also included by Art. 150 of the constitution into the "constitutional bloc" (forming part of the Lithuanian constitution)[45]. Therefore, the Lithuanian constitution today consists of the actual constitution and several additional acts. From today's perspective (in the case of two acts – February 11, 1991 and June

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40 See analysis of the systematics of several contemporary European constitutional acts made by *Sarnecki P.*, Systematyka konstytucji [in:] red. *Trzciński J.*, Charakter i struktura norm konstytucji, Warszawa 1997, 27-33.

41 The introduction to the Lithuanian Constitution is primarily a historical argument (see *Sarnecki P.*, Systematyka konstytucji, 28), a specific justification by which the importance of national and state continuity is emphasized. They are accompanied by an outline of the most important national goals. It should be assumed that the Lithuanian constitution-maker uses the concept of the Lithuanian nation in two meanings – the Lithuanian ethnic community (preamble) and all citizens of the Lithuanian state (e.g. Articles 1 and 2). See for example, some statements regarding the normative nature of introductions (preambles) to the constitution: *Burda A.*, Polskie prawo państwowe, Warszawa 1978, 162-163; *Rozmaryn S.*, Konstytucja jako ustawa zasadnicza PRL, Warszawa 1967, 85; *Sarnecki P.*, Mała konstytucja. Wstęp [in:] red. *Garlicki L.*, Komentarz do Konstytucji RP, Warszawa 1995, 1-2; *Trzciński J.*, Charakter i struktura norm konstytucyjnych, [in:] red. *Działocha K.*, *Pułło A.*, Projekt Konstytucji Rzeczypospolitej Polskiej w świetle badań nauki prawa konstytucyjnego, Gdańsk 1998, 31.

42 See: <https://lt.wikipedia.org/wiki/Sausio_įvykiai_(1991_m.)> [01.07.2026]. Due to historical importance it has become an element of the "constitutional bloc", even though provisions completely analogous to it are contained in Art. 1 and 148 of the Constitution of Lithuania of 1992. See also: *Zieliński J.*, Referendum na Litwie, Łotwie i w Estonii [in:] *Staszewski M. T.*, *Waniek D.*, Referendum w Polsce i Europie Wschodniej, Warszawa; Konstytucja Litwy, 78.

43 See: ibid., 79; *Zieliński J.*, Referendum na Litwie, Łotwie i w Estonii, 183-185.

44 See: Konstytucja Litwy, 80-81.

45 See: ibid., 76-77. The fact that it is formally called an Act (law) is somewhat controversial (įstatymas „Dėl Lietuvos Respublikos Konstitucijos įsigaliojimo tvarkos"), unlike the other acts listed in Art. 150 of the Constitution of Lithuania, which are either a constitutional law or constitutional acts (konstitucinis įstatymas and konstitucinis aktas).

8, 1992), this can be considered the result of a kind of respect for the legal acts that accompanied Lithuania's regaining independence in the early 1990s.

The Polish constitution is a typical uniform constitution (today, there are no other legal acts in Poland with a force equal to the constitution that would be part of the so-called "constitutional bloc"). Even transitional provisions (Chapter XIII) are an integral part of the actual content of the Polish constitution.

It should be noted that neither the Lithuanian nor the Polish constitutions make any specific reference to their predecessors in terms of the general structure of the text or the nature of the preamble. However, there is a visible (especially in the preamble to the Lithuanian Constitution) very strong emphasis on national and state traditions as an important element constituting one of the axiological bases of the discussed constitution.

Constitutions of Lithuania of 1992 and Poland of 1997 are certainly a symbolic culmination of the rather rich, although sometimes controversial, Lithuanian and Polish constitutional tradition of the 20th century, but also constitute a completely new quality in the history of our constitutionalism. In this case, there is no question of any simple continuation of previous solutions.

Let's start with the Lithuanian constitution. Is it worth looking for the role of historical antecedents in shaping the content of the contemporary Lithuanian constitution? Yes, but *cum grano salis*, without forcing any historical connections. In such a search, we will discover individual traces rather than general inspiration. It is not even a legal act significantly inspired by its predecessor – the interim constitution of 1990[46]. However, it played (similarly to the Polish small constitution of 1992)[47], the invaluable role of a *sui generis* legal laboratory of the political system, allowing for testing various new solutions in political and legal practice. Of course – with varying results.

The lack of connection between the current Lithuanian constitution and Soviet political regulations is evident. Lithuania got rid of the external signs of state belonging to the USSR radically and extremely quickly. Although fundamentally common sense and pragmatism were maintained. All post-Soviet institutions were considered provisional and used out of necessity[48]. However, when necessary, they were used. It is therefore not surprising that the 1990 constitution, which was largely derived from the previous system (although, of course, amended accordingly), was, as its name suggests, only temporary. However, for several years it was the basis of the political system of the reborn Lithuania[49].

46 See: *Kierończyk P.*, Nadrzędność parlamentu – mit czy realna alternatywa ustrojowa? Analiza wybranych przykładów, 189-204.

47 See: <https://pl.wikipedia.org/wiki/Mała_Konstytucja_z_1992> [01.07.2026].

48 For example, the declaration "On the powers of deputies of the Supreme Council of the Lithuanian SSR" of March 11, 1990 clearly spoke about the unwanted origin of the authorities inherited from the Lithuanian Soviet Socialist Republic: "The use of foreign state structures imposed on Lithuania should not be interpreted as recognition of the sovereignty of this state with respect to the Lithuanian nation and its territory or as recognition of aggression committed by this state" (P. Kierończyk's translation). Ведомости Верховного Совета и Правительства Литовской Республики 1990 No. 9, item 220.

49 By restoring the independence of their country (on March 11, 1990), Lithuanians symbolically restored the binding force of the 1938 constitution, omitting a significant part of its provisions. However, this constitution was immediately repealed to be replaced by the Provisional Basic Law of the Republic of

The situation in Poland was similar, but only to a certain extent. There was also a political breakthrough in our country, but on the basis of the actually existing Polish statehood. The Third Polish Republic was preceded by the Polish People's Republic, a state that could not fully decide on its own fate for geopolitical reasons, but was formally equipped with all the attributes of a sovereign state, including full international legal subjectivity. And it actually benefits from these attributes to a much greater extent than the Soviet republic[50]. Therefore, Poles also broke with the past in constitutional regulations in a fundamental way, although probably more evolutionary than Lithuanians. Although the 1952 Constitution was not formally repealed at that time, a fundamental break with the existing political model occurred in Poland already in the December 1989 amendment. Even in 1992, the entire 1952 Constitution was not formally repealed. After 1997, however, references were sought in the Polish constitutional regulation. to regulations from the period of "real socialism" is a task doomed to failure (unless we take into account the number of deputies in the Polish Sejm that has remained the same since the 1960s, or the length of the chamber's term of office, which has remained unchanged since 1952).

Such aversion to the past was not demonstrated – in the case of Lithuanian constitutionalism – when it comes to constitutional acts before the Soviet annexation of Lithuania in 1940. While the essentially autocratic constitution of 1938 was treated rather in symbolic categories ("for a while", restored in 1990 its binding force), the democratic constitution of 1922 was much more willingly used. This time, antecedents "appear" more often and sometimes in highly exposed places. For example, the current Art. 1 of the Lithuanian Constitution actually quotes *in extenso* the first sentence of the Lithuanian Constitution of 1922[51]: "Lithuania is an independent democratic republic". This consequence, motivated by the past, resulted in the omission of the provision on the rule of law from Article 1 (and the entire first chapter) of the current Lithuanian Constitution. The idea (and principle) of the rule of law appears in the Lithuanian Constitution primarily in the preamble and as a result of the interpretation of specific provisions of the Constitution.

The republican form of government remains unchanged in both Poland and Lithuania[52]. Analogous to the Lithuanian constitution of 1922 (and 1928)[53], there is also a provision on the

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Lithuania, which was de facto an amended constitution of the LSSR, obviously devoid of provisions regarding Lithuania's membership in the USSR and some of the solutions typical of a "socialist" constitution. See: Ведомости Верховного Совета и Правительства Литовской Республики z 1990 r. No. 9, item 223 and Ведомости Верховного Совета и Правительства Литовской Республики 1990 No. 9, item 224. See also: *Kierończyk P.*, W dwudziestą rocznicę litewskiej deklaracji niepodległości, Gdańskie Studia Prawnicze 2010, t. XXIV.

50 Of course, de iure Soviet republics were states with very limited sovereignty that were part of a federation. De facto, their subjectivity was negligible. Its ironic symbol may be the fact that, for example, recipes for confectionery (cakes) for Tallinn (Estonia) were approved in Moscow. *Lewandowski J.*, Estonia, Warsaw 2001, 210.

51 Also the later one from 1928 (although it was autocratic and copied an important part of the provisions of the constitution of 1922). See: *Kierończyk P.*, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Oktrojowana ustawa zasadnicza 164-167.

52 In the 20th century political history of Lithuania, we have only one monarchist episode from the period – before Lithuania regained full independence in 1918 (during the German occupation of the country). It was related to the planned personal union of Lithuania with Germany, and then with the planned installation of

separation of powers (current Article 5, first sentence). Compared to the pre-war constitutions, the president also appeared among the organs of divided power mentioned *expressis verbis*.

The principle of separation of powers also has a long tradition in the Polish political tradition[54]. The principle of uniformity of state power, although also long-standing in Polish constitutionalism[55], was not so much the result of independent actions of the sovereign supreme legislator (the nation), but rather proof that the history of Poland (including constitutional history) was extremely difficult and complex.

In all Lithuanian constitutions we are dealing with the explicit adoption of the principle of nation/people's sovereignty[56]. Even in the authoritarian Lithuanian Constitution of 1938, which assumed a special political role for the president, this principle was maintained (and expressed directly in its article 1). The current constitution does not deviate from this rule either. It is similar in the case of Poland, although we should remember the interesting but also very controversial episode of the authoritarian April Constitution (1935), in which there was no mention of the sovereignty of the nation and, of course, of the "working people of cities and villages" from the period of the Constitution of the Polish People's Republic (1952 -1989)[57].

An interesting question is the historical context of the systems of government introduced in both countries. The current situation in Lithuania is probably more clear. The local system can be described as a rationalized version of the parliamentary-cabinet system[58]. That is, a parliamentary-presidential

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Wilhelm von Urach on the throne of Lithuania as King Mindaugas II. There was even a draft constitution for the Lithuanian monarchy. After the failure of these plans, monarchist never played any role in Lithuania. In Poland, apart from the period of the Regency Council controlled by the occupiers (the period of World War I), the ideas of introducing a monarchy had no chance of being implemented, although, of course, various monarchist organizations existed and still exist in Poland. See: *Grigaravičius A.*, Lietuvos konstitucijų projektai. 1916–1918 metais, Lietuvių atgimimo istorijos studijos 1991, t. 3; cited for: *Zakrzewski A.*, Wstęp [in:] Konstytucja Litwy, 9, note 8. See also: <https://en.wikipedia.org/wiki/Kingdom_of_Lithuania_(1918)>; <https://en.wikipedia.org/wiki/Regency_Council_(Poland)> [01.07.2026].

53 The organization of the state apparatus on this basis was mentioned in the constitutions of 1922 and 1928. The authoritarian constitution of 1938 broke with this principle (similarly to the Polish constitution of April 1935), stating in art. 4 that "state power is one and indivisible.".

54 We can mention here the constitution of May 3, 1791 (obviously belonging to the common Polish-Lithuanian political tradition), the March 1921 constitution and the small constitutions of 1947 and 1992. See (among others): *Kierończyk P.*, The constitutional position of the President of Poland in the context of the principle of separation of powers, Journal of Polish-Georgian Law, No. 3 (2023) SŁUPSK-TBILISI, <https://jpgl.upsl.edu.pl/jpgl.>.

55 In the small constitution of 1919, the April constitution of 1935 and the constitution of the Polish People's Republic of 1952.

56 Only in the times of Soviet Lithuania – the sovereignty of the "working people".

57 Without going into details, it can be said that the current Lithuanian constitution strongly emphasizes the importance of direct democracy as a way of implementing the nation's sovereignty (undoubtedly referring to the solutions of the 1922 constitution). The Polish constitution undoubtedly devotes more space to this issue than its pre-war predecessors.

58 However, the specific political responsibility of the head of state in Lithuania before the parliament may raise some concerns. See notes below.

system[59]. In the old Lithuanian constitutions, such a system can only be found in the constitution of May 15, 1928. Its exclusively formal and legal analysis would lead to the rather obvious conclusion that it introduced a rationalized parliamentary-cabinet system[60]. Without a doubt, the scale of formal and legal corrections in the system of government introduced by the constitution of 1928 can also be compared to the Polish March constitution, amended by the "August amendment" of 1926. And it did not formally break with democratic solutions, only rationalizing the parliamentary-cabinet system. However, both in Poland and Lithuania at that time, the political reality was different from the letter of the law, including the constitutional one. The installation of the authoritarian system was faster in Lithuania than in Poland, where the major breakthrough revealing the growing repressiveness was the Brest trial and the "Brest elections" (1930)[61]. A significant part of the provisions of the Lithuanian Constitution of 1928 remained dead from the very beginning, which resulted from the fact that in the years 1927-1936 there was no parliament in Lithuania[62].

Much more difficult is trying to clearly define the current Polish system of government. Typical parliamentary-cabinet model, or perhaps a "slight" rationalization of it? The text of the 1997 constitution itself may raise some interpretative doubts in this respect, and there is also the problem of political system practice. However, it can probably be assumed that despite a certain but obvious limitation of presidential competences in the 1997 constitution, the Polish model can still be classified as a rationalized parliamentary-cabinet system, with a very moderate nature of this rationalization[63]. We would therefore look for antecedents in all solutions from the small constitution of 1992 and – possibly (and only in a formal sense) – the March constitution amended by the August amendment.

Historical antecedents also played a role in introducing regulations regarding the defense of sovereignty into the current Lithuanian constitution. They were the dramatic experiences of 1940, when, under military pressure and under the conditions of the country's occupation by the Red Army, but maintaining appearances, fictitious legality and subsequent, gradual moves (surprising the society), Lithuania was incorporated into the Soviet Union. After manipulated elections in mid-July 1940, the

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59 The term semi-presidential even appears in the literature. See: *Malużinas M.*, Pozycja ustrojowa prezydenta w systemie parlamentarnym i semiprezydenckim w świetle konstytucji litewskich z 1922 r. i 1992 r., Przegląd prawa konstytucyjnego, Nr 1 (65)/2022, 177-178.

60 In very general outlines, it is similar to the solutions in the constitutions of that time: German (Weimar constitution) and Finland. See: *Stembrowicz J.*, Rząd w systemie parlamentarnym, Warszawa 1982, 93-104. The other two interwar Lithuanian constitutions introduced systems of government different from the one currently in force in Lithuania. It can be assumed that the constitution of 1922 introduced a very specific "pro-parliamentary" rationalization of the parliamentary and cabinet system, significantly strengthening the political position of the Seimas (in relation to other constitutional bodies). However, the constitution of 1938 established a sui generis presidential system, analogous to the one introduced by the Polish constitution of April (1935).

61 See: <https://en.wikipedia.org/wiki/1930_Polish_parliamentary_election> [01.07.2026].

62 See: *Kierończyk P.*, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Antecedencje i przebieg zamachu, 203.

63 See: *Kierończyk P.*, Regulacja instytucji Prezydenta w nowej Konstytucji RP, Gdańskie Studia Prawnicze 1998, t. III, 189-191; idem, System rządów [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016, 404.

then People's Parliament of Lithuania (*Liaudies Seimas*)[64]decided to establish the Lithuanian Soviet Socialist Republic and its accession to the USSR[65]. This happened despite the fact that during the election campaign to this *Liaudies Seimas* (although illusory, because it was limited to agitation for the only list allowed for election), the slogan of Lithuania joining the USSR did not officially appear at all[66].

Therefore, solutions have been introduced into the current Lithuanian constitution that are intended to prevent similar political manipulation from happening again in the future. This includes the recognition of the citizen's right to resist against anyone who threatens Lithuania's independence, the integrity of its territory or its constitutional system (Article 3). Moreover, the illegal nature of the seizure of state power by force is emphasized (Article 8). The constitutional act (mentioned above) on the non-accession of the Republic of Lithuania to the post-Soviet eastern unions also undoubtedly has a similar historical context.

Dramatic antecedents were also undoubtedly the cause of the characteristic differences in the provisions of the Lithuanian Constitution in terms of the difficulty of changing them. Its art. 1, defining Lithuania as an independent democratic republic, may only be changed by referendum if at least 3/4 of citizens with voting rights vote in favor of it. Two chapters of the constitution, defining the basic guiding principles of the political system and the procedure for amending the constitution, can only be changed by referendum (but not by such an extremely high majority). The remaining provisions of the constitution can be changed by the parliament itself, acting by a 2/3 majority of the total number of deputies (Article 148). The memory of the drama of 1940 is a very obvious premise for such regulation[67].

Similarly, a specific *idée fixe* of Lithuanian constitutionalism and a characteristic feature of most Lithuanian constitutions from the interwar period was the particular emphasis on the unitary character of the state as well as the guarantee of the inviolability of borders. In the interwar period, raising territorial claims also had some importance[68]. Only autonomous solutions were allowed on the territory of Lithuania, and in practice it was only related to the specific status of – part of – Little

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64 See:.<https://lt.wikipedia.org/wiki/Liaudies_Seimas> [01.07.2026].

65 See: <https://en.wikipedia.org/wiki/Occupation_of_the_Baltic_states> [01.07.2026].

66 A general outline of the events at that time, e.g. in: *Łossowski P.*, Tragedia państw bałtyckich, Warszawa 1990.

67 In Poland, distant reminiscences of dramatic events from history can only be found in the preamble, the institution of statutory regulations issued during martial law (Article 234) and a slightly different treatment of the three “most important” chapters in the procedure for amending the constitution (Article 235).

68 Without going into the details of the political and military conflict at that time, it can be noted that pre-war Lithuania consistently refused to accept the territorial changes made after the occupation of Vilnius by the troops of General Lucjan Żeligowski (and the subsequent annexation by Poland of the so-called Central Lithuania). Changes later accepted in principle by the international community. Lithuanians consistently recognized that the eastern border of Lithuania was determined by the Soviet-Lithuanian agreement of 1920. As a result, even in the constitution of 1938 (which had already come into force after the normalization of relations forced by Poland), the capital of the Lithuanian state was again defined as Vilnius, but allowed “temporary” transfer of the seat of government to another place (Article 6). See: *Łossowski P.*, Konflikt polsko-litewski 1918-1920; idem, Po tej i tamtej stronie Niemna. Stosunki polsko-litewskie 1883-1939, 276-288.

Lithuania[69] (Klaipeda District)[70]. Similarly, today's Lithuanian constitution emphasizes the unitary and indivisible nature of the state (Article 10)[71]. The lack of federal solutions and the consistently unitary character of the state also belong to the 20th century Polish political tradition. One can only mention the interwar autonomy of the Silesian Voivodeship and the unsuccessful attempt to grant special self-government status to three voivodeships of the then so called Eastern Małopolska (Eastern Lesser Poland, also known as Eastern Galicia, or as a part of Western Ukraine)[72].

The systems of government in the Lithuanian constitutions have changed, but the basic classification of state bodies (and their nomenclature), especially since 1922[73], did not change significantly[74]. Legislative power remained consistently in the hands of the unicameral parliament – the Sejm (*Seimas*), executive power was dualistic and consisted of the president and the government, and judicial power belonged to independent courts[75]. Traditionally, there was also a state control body in Lithuania.

The 1992 Constitution finally petrified the traditional nomenclature of Lithuanian state bodies, whose origins date back primarily to the Lithuanian Constitution of 1922[76]. The traditional name of the parliament, originating from the pre-partition period and the Polish-Lithuanian Commonwealth,

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69 See: <https://en.wikipedia.org/wiki/Lithuania_Minor> [01.07.2026].

70 More on the issue of the Klaipėda District (Country) (Klaipėdos kraštas) in: *Łossowski P.*, Kłajpeda kontra Memel. Problem Kłajpedy w latach 1918-1939-1945, Warszawa 2007.

71 An attempt by areas inhabited by the Polish minority to gain autonomy was suppressed already in 1991. See:. <https://pl.wikipedia.org/wiki/Polski_Kraj_Narodowo-Terytorialny> [01.07.2026].

72 See: *Kierończyk P.*, Zapomniane naruszenie prawa, czyli konstytucja kwietniowa a autonomia Śląska, Zeszyty Naukowe Gdańskiej Wyższej Szkoły Administracji, nr 5, Gdańsk 2007; *Komarnicki W.*, Polskie prawo polityczne (geneza i system), Warszawa 2008 ((reprint from 1922 book), 224-236; idem, Ustrój państwowy Polski współczesnej. Geneza i system, 38; *Mroczka L.*, Spór o Galicję Wschodnią 1914-1923, Kraków 1998; *Zagóra-Jonszta U.*, Autonomia Śląska w ramach państwa polskiego, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu, nr 509/2018.

73 Small constitutions from the period before the adoption of the Constitution of 1922, which were still in force during the period of the unstable state apparatus, were omitted here. And also the bodies provided for by the interim constitution of 1990, which, undoubtedly already being the constitution of Lithuania striving for sovereignty, still provided – temporarily – for the existence of state bodies rather specific to the state of real socialism. See: *Kierończyk P.*, Building the new State. First Lithuanian (provisional) constitutions; idem, Provisional Constitution of the Republic of Lithuania (1990), as an example of transitional regulation between a socialist and democratic state, Studia Iuridica Toruniensia 2018, t. 22.

74 Except, of course, for the Soviet period in the history of Lithuania.

75 The Constitutional Court (Lietuvos Respublikos Konstitucinis Teismas), however, is a relatively new body for Lithuanian constitutionalism, as it appeared only in the constitution of 1992. This is not surprising, however, if we take into account that the solution proposed by Hans Kelsen was not particularly popular in the interwar period, and Soviet constitutionalism he rejected this institution as contrary to the idea of domination of the organs of people's power (councils). See: <https://lrkt.lt/lt/apie-teisma/veiklos-sritys/105> [01.07.2026].

76 Of course, the nomenclature was already shaped in an earlier period. For example, the term "Sejm" (lit. Seimas) for the parliament, or more specifically the Legislative Seimas (another translation – Founding Seimas – lit. Steigiamasis Seimas), comes from the interim constitution of 1920. See: Laikinosios vyriausybės žinios 1920, no. 37. See also: <https://lt.wikipedia.org/wiki/Steigiamasis_Seimas> [01.07.2026].

was retained – Sejm (*Seimas*)[77]. The traditional names of the state authorities were also retained: president (*prezidentas*) and government (*vyriausybė*). An interesting fact is undoubtedly the traditional term still used to refer to the Lithuanian Prime Minister – *Ministros Pirmininkas* (Chairman of Ministers). The current constitution specifies in art. 91, that the second element (apart from the president) of the executive power is the government (*Lietuvos Respublikos Vyriausybė*), headed by the *Ministros Pirmininkas* (Article 91)[78].

It is also worth emphasizing that the nomenclature of the state control body has been maintained. Starting from the small constitution of 1920 (§ 14), it is invariably called the state controller (*valstybės kontrolierius*).

The situation in Poland is similar. Our constitution also maintains the nomenclature of state bodies, usually known at least since the March constitution (1921)[79]. One may, of course, wonder whether it would make sense, for example, to name the entire parliament as the Sejm and restore the name of the Chamber of Deputies to its "lower" house (as in Polish-Lithuanian Commonwealth)[80]. However, the bicameral nature of Polish legislature itself proves respect for historical antecedents[81].

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77 Maintaining the „typical Soviet" name Supreme Soviet or Supreme Council (lit. Aukščiausioji Taryba) for the Lithuanian parliament in 1990-1992 was temporary and towards the end of the Council's term of office, the practice of referring to it as the Seimas and its deputies as MPs developed. See *Sobczak J.*, Studia nad wyborami prezydenckimi i parlamentarnymi na Litwie i Białorusi, Poznań 1997, 15, note 1. There was (is) term in use: Supreme Council – Restoration Seimas (Aukščiausioji Taryba – Atkuriamasis Seimas). See: <https://lt.wikipedia.org/wiki/Aukščiausioji_Taryba_–_Atkuriamasis_Seimas> [01.07.2026].

78 This name was already used by the interim constitution adopted by Taryba on November 2, 1918 (art. 11, letter b), the small constitution of 1920 (e.g. § 8, letter a), as well as three "large" constitutions from 1922, 1928 and 1938. This name should therefore be considered an element of Lithuanian specificity, just like in France the constitutional designation of the prime minister as first minister (Le Premier ministre). See *Skrzydło W.*, Ustrój polityczny Francji, Warszawa 1992, 181; for example, Article 21 of the French Constitution of 1958 <https://www.elysee.fr/la-presidence/la-constitution-de-la-cinquieme-republique> [01.07.2026].

79 Different nomenclature appearing in the history of Polish constitutionalism (mainly in its early period or during the "People's State"), e.g.: Chief of State (Naczelnik Państwa), President of Ministers (Prezydent Ministrów), Assembly of Electors (Zgromadzenie Elektorów), State National Council (Krajowa Rada Narodowa), Council of State (Rada Państwa) – is rather archaic or controversial today, and rightly so – no connection was made in the 1990s. See (for example): <https://en.wikipedia.org/wiki/Chief_of_State_(Poland)>; <https://en.wikipedia.org/wiki/State_National_Council>; <https://en.wikipedia.org/wiki/State_Council_of_the_Polish_People%27s_Republic> [01.07.2026].

80 See: *Górecki D.*, Wpływ polskich tradycji ustrojowych na współczesne rozwiązania konstytucyjne, 24.

81 The problem that can be raised in this case is whether such respect for historical solutions (implying the existence of the Polish Senate) makes any sense in today's political and political situation. From the (rich) Polish scientific discussion about the sense of the Senate's existence, it is worth recalling, for example: *Ajnenkiel A.*, Spór o istnienie Senatu w procesie stanowienia konstytucji z 1921 r. [in:] Senat w II i III Rzeczypospolitej Polskiej. Materiały z konferencji zorganizowanej pod patronatem Marszałka Senatu RP prof. Longina Pastusiaka w 80. rocznicę pierwszego posiedzenia Senatu w II RP 27 listopada 2002 r.; *Banaszak B.*, Czy Polsce potrzebna jest druga izba, Przegląd Sejmowy 1994, nr 2; *Chruściak R.*, Spór o Senat w pracach nad Konstytucją RP z 1997 r. [in:] Senat w II i III Rzeczypospolitej Polskiej. Materiały z konferencji zorganizowanej pod patronatem Marszałka Senatu RP prof. Longina Pastusiaka w 80. rocznicę pierwszego posiedzenia Senatu w II RP 27 listopada 2002 r., Warszawa 2003; idem, Sejm i Senat w Konstytucji RP z 2 IV 1997. Powstawanie przepisów, Warszawa 2002; *Wąsiewski G. J.*, Czy Polsce

Constitutional antecedents did not have a major impact on the term of office of Lithuanian state bodies. For example, the constitution of 1922 introduced a three-year term of office for the *Seimas* and the president, which was typical of all Baltic states at that time. After 1928, the terms of office were significantly extended (the *Seimas* – 5 years, the president – 7). This solution was retained in the constitution of 1938. The Constitution of Soviet Lithuania of 1940 introduced a 4-year term of office for the Supreme Council (Supreme Soviet), and in 1978 a 5-year term of office. The 1992 constitution provides for a 4-year term of office for the *Seimas* and a 5-year term for the president, thus not making much reference to the solutions known from the previous constitution.

Similarly, in Poland there are no special traditions in this regard. The 4-year term of office of the parliament was simply maintained – provided for in the July constitution (1952), and in the case of the president – finally, in 1990, the term of office was set at 5 years. In the interwar period (and in the small constitution of 1947) it was – 5 and 7 years, respectively .

It is also worth emphasizing that subsequent Lithuanian legislators did not see any particular advantage in the permanent working mode of the parliament, consistently maintaining the principle of sessionality. The 1992 Constitution also provides (in Article 64) that the Parliament meets for two ordinary sessions a year – spring and autumn. In this respect, Poland has broken with a long-standing tradition, maintaining the principle of permanent operation of the parliament since the political transformation (currently stipulated in Article 109(1) of the Polish Constitution).

The number of Lithuanian deputies (141) results from maintaining the size of the chamber equal to the composition of the Supreme Council elected in 1990. This is somewhat reminiscent of the Polish solution, which has maintained a constant number of deputies (460) since the amendment of the constitution in 1960, regardless of changes in the political system[82]. In the pre-war Lithuanian parliaments, the number of members was approximately half of what it is today. On the other hand, in the final period of Lithuania's accession to the USSR, the number of deputies to the Supreme Council of the LSSR was more than twice the current number of deputies to the *Seimas*[83].

A certain curiosity is the similar definition of the basic political function of the head of state in the constitution of 1938 and in the current Lithuanian constitution, despite fundamentally different political and systemic realities. The current Lithuanian constitution uses the term *valstybėsvadovas* to

potrzebny jest Senat?, Studia Iuridica Toruniensia 2006, t. 3. In the case of Lithuania, the debate on the meaning of bicameralism was probably resolved long ago and definitively. Similarly to other Baltic states, all Lithuanian constitutions provided for the existence of a unicameral parliament, and bicameralism was known only from the period of the Polish-Lithuanian Commonwealth.

82 The Polish constitution of 1992 consistently maintained the number of deputies introduced in 1960 and the number of senators adopted in 1989. However, it can be noted that, for example, in the 1990s, some drafts of the new constitution assumed a return to the number of deputies from the period of the March constitution (444). See: *Górecki D.*, Wpływ polskich tradycji ustrojowych na współczesne rozwiązania konstytucyjne, 24.

83 With the exception of the Seimas elected in 1936, which consisted of only 49 deputies. See: <https://lt.wikipedia.org/wiki/Ketvirtasis_Seimas> [01.07.2026]. Regarding the number of members of parlament in other Lithuanian parliaments until 1940, see: <https://lt.wikipedia.org/wiki/Pirmasis_Seimas>; <https://lt.wikipedia.org/wiki/Antrasis_Seimas>; <https://lt.wikipedia.org/wiki/Trečiasis_Seimas>; <https://lt.wikipedia.org/wiki/Liaudies_Seimas> [01.07.2026].

refer to the president, which can be translated in various ways, but also as "leader", "commander" or "guide" of the state (Article 77). Article 3 of the 1938 constitution, stating that the president "leads (directs) the state" (*vadovauja Valstybei*), sounded somewhat similar. In the then authoritarian conditions, of course, this meant that President Smetona was actually leading the country. Also formally, according to the Constitution of 1938, the term *vadovauja Valstybei* was to be understood as actual authority over other state bodies in the system of unitary and indivisible state power (Article 4 of the Lithuanian Constitution of 1938). The general political context of this term is, of course, completely different today. The current Lithuanian president is one of the elements in the system of democratic, mutually balancing authorities. Of course, it can be assumed that in today's conditions the term *valstybėsvadovas* has definitively acquired the meaning of "head of state" and is used without any additional context[84].

The Polish president, according to the 1997 constitution, is of course also an element of the executive power[85]. Operating in a system of three separated and balanced powers: legislative, executive and judicial. And its political position and functions are determined primarily by Art. 10 and art. 126 of the constitution. It is difficult to look for simple historical analogies in this case, but undoubtedly such a general structure of the presidential institution certainly does not refer to previous, authoritarian Polish solutions, but rather to the democratic small constitution of 1992 and the March constitution of 1921.

The current Lithuanian constitution undoubtedly took over a specific solution from the pre-war political tradition, which boils down to the right of the newly elected *Seimas* (after the president dissolved his predecessor) to order early elections of the head of state. This institution was known in the constitution of 1922. However, it was removed from the Constitution of 1928. § 52 of the Lithuanian Constitution of 1922 provided for the president's right to dissolve the *Seimas*, interestingly, without the need to meet (or exist) any conditions. New elections to the chamber should be held within 60 days of the dissolution of the *Seimas*. After the new parliament was constituted, presidential elections were also mandatory (the head of state was elected by the *Seimas* in accordance with this constitution)[86].

This institution was used in practice only once. After the second president of independent Lithuania (Aleksandras Stulginskis) dissolved the Seimas in 1923, the new parliament re-elected

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84 See: <https://lt.wikipedia.org/wiki/Valstybės_vadovas> [01.07.2026].

85 We are not going into the discussion here – whether it is right to include the president in the executive power, or whether we should (unlike what Article 10 of the Polish Constitution requires) recognize him, for example, as a representative of another power (e.g. political arbitration). We also do not deal with the problem of Polish political practice. See (and the literature mentioned there): *Grzybowski M.*, System rządów w Rzeczypospolitej Polskiej – model konstytucyjny a praktyka ustrojowa (Prezydent RP – Rada Ministrów) [in:] Podstawowe problemy stosowania Konstytucji Rzeczypospolitej Polskiej. Raport wstępny, Warszawa 2004.

86 Michał Pius Römer (lit. Mykolas Romeris) referred to the possibility of dissolving the parliament in the context of the requirement to elect a new head of state as the "harakiri" of the President. *Zakrzewski A.*, Wstęp [in:] Konstytucja Litwy, 15. About Michał Pius Römer see: <https://www.mruni.eu/en/mykolas-romeris-2/> [01.07.2026].

him[87]. Without going into details, it should be noted that Stuginskis acted in a situation in which his re-election was highly probable.

An analogous solution, although in a slightly changed shape, appears in the current constitution. The first difference is the fact that currently the president can dissolve[88] the parliament only in strictly defined cases[89], and not, as in the constitution of 1922, only "at his own request". Moreover, in the constitution of 1922, the new parliament could directly elect the head of state. Currently, the *Seimas* only orders early presidential elections. This is due to the fact that, according to the constitution of 1922, the president was elected by the Parliament by an absolute majority of votes (§ 41), while currently presidential elections are general in Lithuania. It is now also more difficult to apply this "sanction" to the head of state, because in order to order new presidential elections, it is necessary to obtain a 3/5 majority of the votes of the total number of deputies in the Sejm (see Article 87 of the current Lithuanian Constitution).

Some differences in detail, however, do not change the fact that the above-described solution proves an obvious, substantive connection between the Lithuanian Constitution of 1922 and its successor, seventy years later. This solution can be described as *sui generis* political responsibility of the president before the *Seimas*. Responsibility that can only be enforced in a very specific situation and under various conditions, and is a direct consequence of the specific behavior of the head of state towards the legislature. Nevertheless, it is a responsibility of a political nature, not a constitutional one. This is undoubtedly a quite controversial institution, causing some difficulties in determining the type of government system in Lithuania. It is quite obvious that a characteristic feature of the parliamentary-cabinet system is the political irresponsibility of the head of state before the parliament[90]. Without going into a more detailed description of the current Lithuanian government

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87 Eidintas, *President of Lithuania. Prisoner of the Gulag. A.* A. Stulginskis biography was written by: A. Biography of Aleksandras Stulginskis, Vilnius 2001. See also: *Zubiński T.*, Ciche kraje, 29-32; <https://lt.wikipedia.org/wiki/Aleksandras_Stulginskis> [01.07.2026].

88 The current Lithuanian constitution does not use the term "dissolution of the Seimas" but "ordering early elections to the Seimas". See art. 58 and 87 of the constitution of 1992. It is worth noting that the Polish constitution of 1997 also abandoned the traditional "dissolution" in favor of "shortening the term of office".

89 This possibility is obtained in accordance with Art. 58 of the Constitution, only when: the Seimas does not adopt a resolution on this matter within 30 days from the presentation of the program by the new government, the Seimas has not approved it twice in a row within 60 days from the first presentation of the program by the government, the government has submitted a motion to order premature parliamentary elections after the Seimas passed a vote of no confidence in him. The President of the Republic may not order early elections to the Seimas if there are not less than 6 months left to the end of the president's term of office, and if not 6 months have passed since the early elections to the Seimas. If the President orders early elections to the Seimas, the newly elected Seimas may, within 30 days from the date of the first meeting, by a majority of 3/5 of the total number of members of the Seimas, order early elections of the head of state.

90 See for example, a short characterization of the parliamentary-cabinet system, made by: *Gebethner S.*, System rządów parlamentarno-gabinetowych, system rządów prezydenckich oraz rozwiązania pośrednie [in:] red. *Domagała M.*, Konstytucyjne systemy rządów, 80. Of course, the political irresponsibility of the head of state is also an inherent feature of the presidential system and the so-called "mixed systems". Ibid., 80-81. See also (about the features of different systems of government): *Kierończyk P.*, Wprowadzenie do nauki prawa konstytucyjnego dla studentów administracji (chapter II).

system here, it should be clearly emphasized that it is a system derived from parliamentary and cabinet solutions, but of course not in its classical form. As already mentioned, we can best describe it as a rationalized parliamentary-cabinet system. In the version most often known as the presidential-parliamentary (or parliamentary-presidential) system[91].

The correctness of such a definition of the system of government is, of course, potentially threatened by the above-described institution of political accountability of the Lithuanian head of state before the *Seimas*. However, this responsibility does not fundamentally question the correctness of the above-mentioned conclusions. The political responsibility of the president before the *Seimas*, which is of an exceptional nature and is subject to particular difficulties in the form of the need for an appropriate condition (dissolution of the parliament) and depends on gathering a qualified majority in the parliament, does not necessarily contradict the classification of the Lithuanian system of government established above. Nevertheless, one should be aware of the controversial nature of this institution in connection with the list of features characteristic of the parliamentary-cabinet system and its derivatives, which is already quite widely accepted in science.

One thing is certain, however. This solution is an obvious proof of respect for constitutional antecedents[92], a testimony of the will to continue certain political solutions, even assuming a different philosophy underlying the system of government[93]. When discussing the institution of the Lithuanian president, it is also worth mentioning the Lithuanian specificity and "anchored" quite strongly in the political tradition of deciding on the constitutional responsibility of the head of state by way of a fairly typical impeachment (i.e. a procedure in which the role of the court is played by the parliament) and on the article 78 of the Constitution of 1992, regarding the presidential elections (referring to the constitution of 1928)[94]. It is worth emphasizing that while in Poland the institution of constitutional responsibility is largely (and traditionally) dead[95], i.e. in our constitutional history, only one

91 See (among others): *Górecki D.*, Republika Litewska, 101; *Sobczak J.*, Studia nad wyborami prezydenckimi i parlamentarnymi na Litwie i Białorusi, 55; *Zakrzewski A.*, Wstęp [in:] Konstytucja Litwy, 27.

92 The political responsibility of the head of state before the parliament was a characteristic feature of the first interwar constitutions of the Baltic states, strongly emphasizing the importance (or rather – dominance) of the parliament in the political system. Most strongly – in Estonia, slightly less – in Lithuania and Latvia. See: *Kierończyk P.*, Wizja silnego parlamentu w pierwszych konstytucjach państw bałtyckich.

93 The Constitution of 1922 and the current Lithuanian Constitution remain – generally speaking – within the scope of parliamentary and cabinet solutions. However, the basic assumptions shaping the state system are quite different in these acts. The Constitution of 1922 was created with maximum emphasis on the role of the Seimas, clearly at the expense of the political position and competences of the executive power, including the head of state. This resulted in a greater limitation of the president's role than even in the "pure" parliamentary-cabinet model, which did not assume the existence of a strong head of state. The Lithuanian Constitution of 1992 is rather an example of seeking to rationalize the parliamentary-cabinet system by strengthening the position of the president (in relation to the parliamentary-cabinet "archetype").

94 See: *Zakrzewski A.*, Wstęp [in:] Konstytucja Litwy, 29.

95 See: *Pietrzak M.*, Odpowiedzialność konstytucyjna w Polsce, Warszawa 1992; *Zaleśny J.*, Odpowiedzialność konstytucyjna. Praktyka III RP, Warszawa 2004; idem, Odpowiedzialność konstytucyjna w Drugiej Rzeczypospolitej, Warszawa 2003; *Zubik M.*, Trybunały po dziesięciu latach obowiązywania Konstytucji RP, Przegląd Sejmowy 2007, nr 4; *Kierończyk P.*, Odpowiedzialność konstytucyjna (Trybunał Stanu) [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016.

proceeding ended with a final judgment of the State Tribunal (*Trybunał Stanu*)[96], in Lithuania in 2004 the president (Rolandas Paksas) was spectacularly removed from office as a result of the impeachment procedure[97].

A very characteristic Lithuanian solution, undoubtedly taken over from previous constitutional regulations, is the institution of a specific vote of no confidence in the government. In this case, it is a negative consequence of an unsatisfactory response to an interpellation (see Article 61 of the current Constitution)[98]. A group of at least 1/5 of "members of the Sejm" (*Seimo narių*) has the right to address an interpellation to the minister or prime minister during the session. After hearing the response to the interpellation, the *Seimas* has the right to consider it unsatisfactory and, consequently, to express a vote of no confidence. Depending on the type of interpellation – either for the Prime Minister and the entire government (on the basis of joint and several liability) or for a specific minister. For the vote to be effective, a majority of the total number of MPs must support it. The above solution comes primarily from the constitution of 1938. The then parliament, strongly limited by its provisions, retained some formal control powers over the government, but the control procedure itself was made more difficult[99]. The political responsibility of the government before the parliament was then linked with the current control exercised by the *Seimas*. This solution was mentioned in the relevant chapter of that constitution (XV). To submit an interpellation to the Prime Minister or Minister, the support of 1/4 of the total number of MPs was necessary. If, after hearing the answer, the *Seimas* resolved (again at the request of 1/4 of all the deputies), by a qualified majority of 3/5 of the total number of deputies, that the answer of the prime minister or minister was unsatisfactory, the prime minister and the government (or only a specific minister[100]) were dismissed or the *Seimas* was dissolved. In the event of the dissolution of the *Seima*s, if the newly elected parliament, at its first session, at the request of 1/4 of all deputies, decides to reconsider the matter and, by an absolute majority of votes, finds the answer to the interpellation unsatisfactory – the president should dismiss the prime minister[101].

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96 In a rather secondary case (the so-called "alcohol scandal") that could have been the subject of interest of the common court. See: *Garlicki L.*, Polskie prawo konstytucyjne. Zarys wykładu, 432; <https://pl.wikipedia.org/wiki/Afera_alkoholowa> [01.07.2026].

97 See: *Górecki D.*, *Matonis R.*, Odpowiedzialność konstytucyjna Prezydenta Republiki Litewskiej Rolandasa Paksasa, Przegląd Sejmowy 2004, nr 4 i <https://lt.wikipedia.org/wiki/Rolando_Pakso_apkalta> [01.07.2026].

98 See: *Zakrzewski A.*, Wstęp [in:] Konstytucja Litwy, 29.

99 See – rather optymistic opinion – *Ochmański J.*, Historia Litwy, 295.

100 If (before the matter was considered by the Seimas) the Prime Minister expressed solidarity with the minister, it was automatically considered that the interpellation was addressed to the Prime Minister.

101 A slightly similar solution (in general outlines) was also known during the period in which the Lithuanian interim constitution of 1990 was in force. At that time, the right to submit interpellations was held by a group of deputies (consisting of at least 1/15 of their total number), a parliamentary faction or a committee. The institution itself consisted in demanding that the Prime Minister or other members of the government explain the reasons for a specific decision and further proceedings. The right to interpellation could only be exercised during the session. The person asked was obliged to respond to the interpellation within two weeks. No later than five days after the answer was given, the interpellation was considered at a plenary session of the Supreme Council. An appropriate debate was held, after which a resolution was adopted

At the end of detailed considerations, it is worth mentioning constitutional rights and freedoms. The catalog of rights and freedoms adopted by the new Lithuanian constitution is undoubtedly much more perfect and extensive today than in previous regulations. It should be emphasized, however, that the constitution of 1922 already defined the most basic (and quite extensive, for those times) catalog of rights and freedoms, which was adopted – in principle – also by the latest Lithuanian constitution. These include: freedom of conscience and religion, of printing and coalition (association), secrecy of correspondence, inviolability of the citizen and his home, right to compensation for damage caused by state officials, right of petition, guarantee of free primary school education, the rights of national minorities to independently manage their education and social assistance and freedom of economic activity. It seems that there is a connection, at least of an axiological or ideological nature, between the constitution of 1922, which introduced a relatively broad catalog of civil rights, and the current Lithuanian Constitution. However, at the same time, this should not be exaggerated, bearing in mind the fact that the modern Lithuanian constitution is characterized by much more extensive regulations in this respect than the previous one (though at the same time – more modest than its Polish counterpart). And the quite progressive nature of the old Lithuanian constitution in this respect (for 1922) was effectively (and negatively) verified by the fact that a number of civil rights guaranteed by the constitution of 1922, even during the period of democratic rule in Lithuania until 1926, remained a dead letter, for example due to the permanent state of emergency in force at that time (related mainly to the conflict with Poland over Vilnius and Vilnius region).

Also in the contemporary Polish new constitution, we find the regulation of the status of an individual in the state in a much more perfect (and extensive) way than in its predecessors. Which, of course, also results from the implementation into Polish law of a number of solutions resulting from relevant international agreements that set modern standards of human rights protection. It is difficult to find any particular similarities in this respect with historical constitutions. If anything, it will be primarily with the March 1921 constitution, but it will only be a similarity of a very general nature, because our current constitution is, in this respect, an act of a completely different quality and from a different era of human rights protection.

Undoubtedly, the creators of the current Polish and Lithuanian constitutions did not act in a vacuum. Also – in a historical vacuum. The constitutional antecedents were quite interesting in both cases, although in the Lithuanian case they were undoubtedly limited by the 50-year of forced integration within the USSR period (with a break for the occupation of Lithuania by Nazi Germany). However, it is debatable to what extent this constitutional historical experience has been used in our countries. Certainly, in the case of Lithuania, we were not dealing with a simple pattern based on one of the previous Lithuanian constitutions.

Is it possible to fully restore the legal force of any old Lithuanian constitutional regulation? In practice, a potential role model for Lithuanians could be the three pre-war constitutions: those of 1922, 1928 and 1938. The simplest solution (and a kind of historical justice) would be to restore the binding force of the constitution that was in force at the time of the Soviet aggression in 1940 r. It would

approving or rejecting the response of the prime minister or member of the government. A negative resolution was tantamount to passing a corresponding vote of no confidence.

therefore be the constitution of 1938, which, however, was not entirely suitable as the political basis of a democratic state. As a result, the reborn Lithuania did not follow the Latvian path, which consisted in actually adopting the continued validity of the interwar constitution[102]. The restoration of the Lithuanian Constitution of 1938, made at the memorable meeting of the Supreme Council on March 11, 1990, was only of symbolic nature and thus excluded a simple continuation in this respect in Lithuania.

The general conclusion will therefore be clear: the Lithuanian Constitution of 1992 is a constitutional act of the latest generation, written according to principles typical of its era. This does not mean, however, that constitutional antecedents were completely unimportant when drafting the text of the 1992 Constitution. Assessing the degree of their use is undoubtedly a complex task. However, it seems that we can talk about a quite direct takeover of at least some of the institutions known in previous constitutional regulations. One can point out here, first of all, the interpellation being linked to a vote of no confidence, and the *sui generis* political responsibility of the president (as a consequence of his dissolution of parliament). Also very characteristic is the extensive inclusion of forms of direct democracy, undoubtedly firmly rooted in the Lithuanian constitutional tradition. Also in the case of other, specific solutions, there is sometimes a greater or lesser connection between antecedents and Lithuanian constitutional contemporary times. It undoubtedly seems that the greatest substantive connections can be demonstrated between the current constitution and its predecessor from 1922[103]. The Basic Law of 1992 undoubtedly has slightly fewer points of contact with the autocratic constitution of 1938. However, it must not be forgotten that the latter constitution particularly contributed to the independence of Lithuania, contributing to the restoration of statehood on March 11, 1990. Some common elements can also be found between the current constitution and the interim constitution of 1990. Although deeply rooted in the previous political system, which was consistently rejected, it served as a political laboratory for testing the institutions and political principles typical of a democratic state.

Using historical solutions when defining the Polish system in the 1990s was, paradoxically, even less important than in the Lithuanian case. If historical reflection was reflected in the text of the Polish constitution of 1997, it was a very direct one – referring primarily to the period of the small constitution (1992-1997). The influence of the assessment of the then presidency (L. Wałesa 1990-1995) on legislative activities is particularly visible. There are rather few more distant historical references, and if they do appear, they are usually either obvious (e.g. continuation of the names of

[102] In the 1990s, Latvians actually restored their 1922 constitution to be in force. Of course, they later made various changes to it. It should be remembered that this constitution was undoubtedly of democratic origin and character. See (among others): *Kierończyk P.*, Wstęp [in:] Konstytucja Republiki Łotewskiej, Warszawa 2001, 24 -25; idem, Kilka uwag o genezie i specyfice konstytucji łotewskiej, Gdańskie Studia Prawnicze 2005, t. XIV; *Zieliński J.*, Systemy konstytucyjne Łotwy, Estonii i Litwy, Warszawa 2000, 16-17.

[103] And also with the constitution of 1928 – repeating in extenso most of the provisions of the Constitution of 1922. However, in its case it should be remembered that it played, to a significant extent, the role of a façade legal act (in the conditions of an authoritarian state). See: *Kierończyk P.*, Zamach stanu na Litwie w 1926 r. i jego konstytucyjnoprawne następstwa. Oktrojowana ustawa zasadnicza, Studia Iuridica Toruniensia 2017, t. 21.

Polish state bodies – e.g. Sejm and Senate) or extremely general, when we can talk about the continuation of the broadly understood European democratic heritage rather than Polish political traditions. There was certainly no will in Poland, and probably no need, to use acts from the interwar period in the transitional period, and the ideas of restitution of a fully independent Republic of Poland after the period of the Polish People's Republic based on the April constitution (1935) were treated as unrealistic (and unnecessary) declarations assessed in terms of wishfulthinking[104].

3. Conclusion

The comparative analysis confirms that the contemporary constitutions of Lithuania and Poland are fundamentally products of the democratic constitutionalism that emerged in Europe after the collapse of authoritarian and totalitarian political systems during the final decade of the twentieth century. Their institutional architecture, catalogue of constitutional principles, protection of fundamental rights, and mechanisms safeguarding constitutional democracy clearly reflect the standards characteristic of modern constitutional law rather than a direct continuation of earlier constitutional models. Consequently, neither constitution can be regarded as a simple reconstruction or revival of any previous constitutional order.

At the same time, the research demonstrates that historical constitutional experience has not been entirely abandoned. Instead, both constitutional texts incorporate selected institutional and normative solutions whose origins can be identified in earlier stages of national constitutional development. Such continuity is, however, selective rather than comprehensive and reflects deliberate constitutional choices made during the democratic transitions of the 1990s.

The analysis further indicates that the influence of historical constitutional antecedents is more pronounced in the Lithuanian constitutional order than in the Polish one. The Constitution of the Republic of Lithuania preserves a greater number of institutional links with interwar constitutionalism, particularly with the democratic Constitution of 1922. These include, among other examples, the strong constitutional position of direct democracy, the preservation of traditional constitutional terminology, certain mechanisms governing the relationship between the President and the Seimas, specific parliamentary instruments of political accountability, and constitutional safeguards protecting state independence and territorial integrity. Although these institutions have been substantially adapted to contemporary democratic standards, their historical origins remain clearly identifiable.

By contrast, the Polish Constitution of 1997 demonstrates a considerably weaker reliance on earlier constitutional solutions. While certain historical elements, such as the traditional nomenclature of constitutional organs and selected institutional concepts, remain visible, the Polish constitutional legislator primarily relied on contemporary democratic constitutional standards and the constitutional experience accumulated during the transitional period preceding the adoption of the Constitution, especially under the Small Constitution of 1992. More distant constitutional traditions generally served as historical references rather than as direct legislative models.

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[104] See: *Kierończyk P.*, W 80. rocznicę uchwalenia „konstytucji styczniowej". Uwagi polemiczne, 829-836.

The comparison therefore illustrates that constitutional development should not be understood solely through the dichotomy of continuity and discontinuity. Instead, constitutional change represents a complex process in which historical constitutional traditions may survive in modified institutional forms while simultaneously adapting to the requirements of contemporary constitutional democracy. The experience of Lithuania and Poland demonstrates that modern constitutions are capable of reconciling constitutional innovation with carefully selected elements of constitutional heritage, thereby strengthening both democratic legitimacy and constitutional identity without compromising the demands of modern democratic governance.

Ultimately, the study confirms that historical constitutional antecedents continue to possess interpretative and normative significance, even within constitutional systems consciously designed as modern democratic frameworks. Their influence, however, is neither mechanical nor comprehensive; rather, it is expressed through carefully selected constitutional institutions whose preservation reflects both historical memory and contemporary constitutional rationality. In this respect, the Lithuanian Constitution reveals a somewhat stronger attachment to its historical constitutional legacy than its Polish counterpart, while both constitutions remain unmistakably representative of the newest generation of European constitutionalism.

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The Cabinet Council in the Contemporary Polish Constitution (the meaning of the institution)

In this article, in the first part, the author presents the history of the institution of the Cabinet Council (pol. Rada Gabinetowa) in Poland, as well as current legal solutions and practice. Solutions similar to the Cabinet Council have been known in Polish constitutional law for a long time, although it was only the constitution of 1997 and the appropriate practice during its validity that gave this institution a new meaning.

This presentation is primarily intended to draw the attention of the Georgian reader to the Polish experience in this area. Of course, the article does not discuss all aspects of the issue. Anyone interested in Polish experience in the field of legal solutions and the operation of the "composition of the government chaired by the president" can use the valuable literature items listed in the bibliography.

The rest of the article is devoted primarily to an attempt to answer the question whether the Cabinet Council in Poland (which does not have the powers of the Council of Ministers) is an institution needed in the Polish constitutional system? Recognizing that the institution may be perceived (at least at the beginning) as controversial, the author nevertheless comes to the conclusion that it is necessary and works well in Polish political practice. However, its importance cannot be overestimated.

Keywords: *Council; Cabinet; constitution; law; Poland.*

1. Introduction

The constitutional organization of executive power remains one of the central issues of contemporary constitutional law, particularly in parliamentary and semi-parliamentary systems where the distribution of powers between the head of state and the government requires carefully balanced legal mechanisms. Among the institutions designed to facilitate cooperation within the executive branch, the Cabinet Council occupies a distinctive position in the Polish constitutional system. Although it does not exercise the constitutional competences of the Council of Ministers, it provides a formal framework through which the President of the Republic may convene and chair discussions with the government on matters considered to be of particular importance for the state.

The contemporary regulation of the Cabinet Council, established by Article 141 of the Constitution of the Republic of Poland of 2 April 1997, reflects both historical constitutional traditions and the constitutional choices made during Poland's democratic transformation. While analogous forms of cooperation between the President and the government have existed throughout different periods of Polish constitutional development, the current constitutional model assigns the Cabinet Council a consultative rather than decision-making character. Consequently, the institution has

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generated considerable scholarly debate regarding its constitutional significance, practical utility, and role within the framework of Poland's dual executive.

This article examines the historical evolution of the Cabinet Council, analyses its constitutional foundations and practical operation, and considers its place within the contemporary Polish system of government. Particular attention is devoted to assessing whether the institution continues to serve a meaningful constitutional function despite the absence of independent governmental powers. Drawing upon constitutional provisions, legal doctrine, and political practice, the article argues that the Cabinet Council constitutes an important instrument for communication and coordination between the President and the Council of Ministers, while remaining fully consistent with the constitutional principle that governmental decision-making authority belongs exclusively to the Council of Ministers.

2. Constitutional Development, Legal Framework and Functional Significance

Article 141 of the current Constitution of the Republic of Poland of 1997 reads as follows[1]:

1. The President of the Republic may, regarding particular matters, convene the Cabinet Council[2]. The Cabinet Council shall be composed of the Council of Ministers whose debates shall be presided over by the President of the Republic.
2. The Cabinet Council shall not possess the competence of the Council of Ministers.

In the Polish political tradition, the Cabinet Council is a meeting of the government (or rather – the personal composition of the government) chaired by the president[3]. This institution has been

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[1] The text below is based on the translation available on the website of the Polish Constitutional Tribunal: <https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland> [01.07.2026]. Current Polish text (tekst ujednolicony – unified text) available, among others, at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970780483> [01.07.2026]. Those interested in basic Polish-language literature dealing generally with the constitution can refer to numerous textbooks of constitutional law and commentaries [for example: red. *Garlicki L.*, *Zubik M.*, Konstytucja Rzeczypospolitej Polskiej. Komentarz, t. I and II, Warszawa 2016; red. *Safjan M.*, *Bosek L.*, Konstytucja RP. Komentarz, t. I (art. 1-86), t. II (art. 87-243), Warszawa 2016; red. *Tuleja P.*, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2023]. Some of them are also referenced in the bibliography for this article.

[2] This translation of the Polish term Rada Gabinetowa is most often used (e.g. in the text indicated in the previous footnote). However, you can find other translations. See (for example): *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym, Przegląd Prawa Konstytucyjnego, nr 1/2011, 125 (the translation "Cabinet Advice" was used there).

[3] From the Polish scientific literature, one can note, among others, the following titles devoted to the Cabinet Council (and further bibliography indicated therein): *Górecki D.*, Rada Gabinetowa w Polsce [in:] *Górecki D.*, Wokół rządu w polskim i litewskim prawie konstytucyjnym, Łódź 2019; *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym; *Skrzydło W.*, Instytucja Rady Gabinetowej w Polsce [in:] red. *Łopatka A.*, *Wróbel A.*, *Kiewlicz S.*, Państwo prawa, administracja, sądownictwo: prace dedykowane prof. dr hab. Januszowi Łętowskiemu w 60. rocznicę urodzin, Warszawa 1999 The author of this article dealt with the subject of the Cabinet Council, among others: *Kierończyk P.*, Rada Gabinetowa [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016, s. 296-299; idem, Czy Rada Gabinetowa jest potrzebną instytucją?, Zeszyty Naukowe Gdańskiej Wyższej Szkoły Administracji, nr 7/2008.

known for a long time, but it was only under the constitution of April 2, 1997 that it began to be used quite often. This article is an attempt to answer, very preliminary, the question – whether the Cabinet Council in the form specified in Art. 141 of the current constitution is necessary? What were the constitutional antecedents of this institution in the 20th century?

It must be admitted that the Polish interwar constitutional regulations, i.e. both the March constitution of 1921[4] and the April constitution of 1935[5], did not introduce *expressis verbis* the institution of the Cabinet Council[6]. However, this did not mean that this solution was not known. As B. Opaliński rightly notes: "Nevertheless, already in the interwar period – despite the lack of constitutional or even statutory regulation of this matter – there were joint meetings of both entities of the executive power. In a sense, the prototype of the institution of the Cabinet Council was the one established during the validity of the March Constitution, the Political Committee of the Council of Ministers, established by the resolution of the Council of Ministers of October 6, 1921, could indeed participate in the meetings of this body (like in the meetings of the Council of Ministers), but without the right to chair the meetings and without the right to vote. During the period of validity of the March Constitution, it was the only institution ensuring the maintenance of permanent contacts between the bodies of the executive Power"[7].

The government meeting with the president's participation, which was called the Cabinet Council, took place, for example, in the dramatic circumstances surrounding the May coup in 1926[8].

While the April 1935 constitution was in force, the president rarely attended meetings of the Council of Ministers, but held weekly meetings with the prime minister (often with the participation of the deputy prime minister and sometimes the minister of foreign affairs). The president also held meetings with individual members of the cabinet. Occasional meetings were also held with the

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4 See: *Burda A.*, Konstytucja marcowa – dokumenty naszej tradycji, Lublin 1983; *Machnikowska A.*, Konstytucja marcowa z 1921 r. [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016; <https://en.wikipedia.org/wiki/March_Constitution_(Poland)> [01.07.2026].

5 See.: <https://en.wikipedia.org/wiki/April_Constitution_of_Poland> [01.07.2026]; *Gdulewicz E.*, *Gwiżdż A.*, *Witkowski Z.*, Konstytucja Rzeczypospolitej Polskiej z 1935 r. [in:] red. *Kallas M.*, Konstytucje Polski. Studia monograficzne z dziejów polskiego konstytucjonalizmu, Warszawa 1990, 146–156; *Machnikowska A.*, Konstytucja kwietniowa z 1935 r. [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016; *Mażewski L.*, Prezydencjalna odmiana systemu parlamentarnego w konstytucji kwietniowej, Studia Prawnicze nr 3-4/1984; *Kierończyk P.*, W 80. rocznicę uchwalenia "konstytucji styczniowej". Uwagi polemiczne, Gdańskie Studia Prawnicze, t. XXI, Gdańsk 2014.

6 At this point, attention should be paid to a certain inconsistency of the March constitution. Its art. 2 referred to the executive power as "the President of the Republic of Poland together with the responsible ministers", which could suggest that the head of state is also the head of government. However, this was not the case, the council of ministers was chaired – just like today – by the prime minister. This was confirmed in other provisions of this constitution. For example, in its article 55 it was clearly mentioned that the Council of Ministers is chaired by its president.

7 *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym, 110-111 (P. Kierończyk's translation). See also: ibid., p. 111-112 on practice during the April Constitution of 1935.

8 See: <https://en.wikipedia.org/wiki/May_Coup_(Poland)> [01.07.2026]; *Garlicki A.*, Przewrót majowy, Warszawa 1987. "At 5.30 m. (on May 14, 1926 – P. Kierończyk's note), the meeting of the Cabinet Council began, during which the government and the president decided to resign". Quoted for: *Garlicki A.*, Józef Piłsudski 1867-1935, Warszawa 1988, 356 (P. Kierończyk's translation).

participation of all members of the government. The president's contacts with members of the government continued under the conditions of the Polish authorities in exile in France and the United Kingdom (after Poland's defeat in 1939)[9].

The constitutionalization of the Cabinet Council was carried out only by Art. 18 of the Constitutional Act of February 19, 1947 on the structure and scope of operation of the highest bodies of the Republic of Poland (generally recognized as the second Polish “small” constitution)[10]. Pursuant to this provision, at the request of the President of the Republic of Poland, the Prime Minister convened the Cabinet Council to consider matters of exceptional importance. It was constituted by the Council of Ministers chaired by the President. In fact, in the years 1947-1952 the Cabinet Council was not convened. It was, as it were, “replaced” by meetings of the Government Presidium[11] chaired by the president – acting on the basis of a specific constitutional custom. These bodies were composed of: the president, the Prime Minister, deputy prime ministers and the undersecretary of state to the prime minister[12].

The July Constitution of 1952[13] abolished the institution of the president. Thus, the Cabinet Council disappeared from the Polish constitutional system for decades. It was only reactivated in the April 1989 amendment[14]. Interestingly, the term “Cabinet Council” was not used in it. Pursuant to Art. 32 section 1 point 8 (amended by the April 1952 constitution), the president could convene and chair meetings of the Council of Ministers on matters of particular importance[15].

In the third Polish small constitution, i.e. the Constitutional Act of October 17, 1992[16] on mutual relations between the legislative and executive powers of the Republic of Poland and on local government, the regulation was analogous to that provided for in the April amendment (from 1989). Article 38 section 2 introduced the principle that in matters of particular importance to the state, the President may convene and chair meetings of the Council of Ministers. It is worth noting that in this case the constitution did not explicitly use the name “Cabinet Council”, although this term was widely used in practice.

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9 *Górecki D.*, Rada Gabinetowa w Polsce, 66. See also the study mentioned in footnote 18 on this page: *Górecki D.*, Polskie naczelne władze państwowe na uchodźstwie w latach 1939–1990, Warszawa 2002.

10 See: *Czarny P.*, Mała konstytucja z 1947 r. a polska tradycja konstytucyjna, Przegląd Sejmowy nr 5/2007; *Kierończyk P.*, Ile było polskich małych konstytucji?, Zeszyty Naukowe Gdańskiej Wyższej Szkoły Administracji nr 6/2008, 63-76; idem, Małe konstytucje w Polsce [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016, 167-172.

11 About the Government Presidium in the times of the Polish People's Republic, see: *Trzciński J.*, Prezydium Rządu w PRL [in:] Studia nad rządem PRL w latach 1952– 1980, red. M. Rybicki, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985.

12 See: *Burda A.*, Polskie prawo państwowe, Warszawa 1969, 129; *Jarosz Z.*, *Zawadzki S.*, Prawo konstytucyjne, Warszawa 1987, 56, 58.

13 See: <https://en.wikipedia.org/wiki/Constitution_of_the_Polish_People%27s_Republic> [01.07.2026]; *Kierończyk P.*, Konstytucja lipcowa z 1952 r. [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016.

14 See: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19890190101> [01.07.2026].

15 See: *Mojak R.*, Instytucja Prezydenta RP w okresie przekształceń ustrojowych 1989-1992, Warszawa 1994, 235-236. See also: *Sokolewicz W.*, Konstytucja wobec ewolucyjnej zmiany ustroju: od dyktatury proletariatu do demokracji parlamentarnej [in:] Studia konstytucyjne, t. VIII, Warszawa 1990, 57.

16 See: *Kierończyk P.*, Małe konstytucje w Polsce.

It was decided to maintain the institution of the Cabinet Council in the 1997 constitution[17]. Pursuant to the current Polish Constitution, the president may convene the Cabinet Council in matters of particular importance (Article 141). The Cabinet Council is formed by the Council of Ministers chaired by the head of state. However, in accordance with Art. 141 section 2 does not have the powers of the Council of Ministers. As you can see, the new regulation finally clearly introducing the name of the institution (*Rada Gabinetowa*), but did not grant it government competences. Under the constitution of April 1997, all current presidents used the institution of Cabinet Councils. However, considerations on the sense of its introduction into the constitution undoubtedly intensified when President A. Kwaśniewski[18] exercised his right for the first time (January 27, 1998)[19].

This happened in a rather specific situation, in the conditions of cohabitation[20] between the president and the government representing a different political option than the head of state. Prime Minister J. Buzek's office opposed the participation of the president's representative at its meetings without a special invitation. In such a situation, the president somehow decided to force information about the government's work by convening the Cabinet Council[21].

A. Kwaśniewski continued the practice of convening Cabinet Councils in the future. Their deliberations were devoted to, among others, the financial situation of the country, the government's socio-economic program, the assessment of Poland's preparation for NATO membership, the status of negotiations on Poland's admission to the European Union and the preparation of society for a referendum on this matter, and even activities resulting from arrangements adopted during V. Putin's visit to Poland[22]. As can be seen, the nature of the issues discussed during the Council meetings was relatively diverse[23].

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17 Basic information regarding the adoption and entry into force of the current Constitution of the Republic of Poland see in: *Garlicki L.*, Polskie prawo konstytucyjne. Zarys wykładu, Warszawa 2016 (and later editions), 35-36; *Kierończyk P.*, Konstytucja RP z 1997 r. – tryb przygotowania i charakterystyka aktu [in:] red. *Szmyt A.*, Leksykon prawa konstytucyjnego. 100 podstawowych pojęć, Warszawa 2016, 118-122.

18 Biography see: <https://en.wikipedia.org/wiki/Aleksander_Kwaśniewski> [01.07.2026].

19 For the first time after 1989 (A. Kwaśniewski expressed the opinion that he was the first to use this institution in the history of Poland). See (among otthers): <https://www.prezydent.pl/archiwalne-aktualnosci/aktualnosci-rok-2000-i-starsze/komunikat-po-posiedzeniu-rady-gabinetowej,32450,archive> [01.07.2026].

20 A situation in which the president is from a different political camp than the government (and the majority in parliament). In Polish – koabitacja, see (among others): Ł Jakubiak Ł., Koabitacja w systemie politycznym V Republiki Francuskiej, Kraków 2010. In Poland's recent history, periods of coabitation took place in the following years (president's name in brackets): 1989-1990 (W. Jaruzelski), 1993-1995 (L. Wałęsa), 1997-2001 and 2005 (A. Kwaśniewski), 2007-2010 (L. Kaczyński), 2015 and 2023-present (A. Duda), see: <https://en.wikipedia.org/wiki/Cohabitation_(government)> [01.07.2026].

21 See: *Frankiewicz A.*, Kontrasygnata aktów urzędowych Prezydenta RP, Kraków 2004, 169.

22 See: *Skrzydło W.*, Ustrój polityczny RP w świetle konstytucji z 1997 roku, Kraków 2004, 195.

23 For a shortened list of Cabinet Councils convened during the presidency of A. Kwaśniewski (date and synthetic presentation of the topics discussed), see: <https://pl.wikipedia.org/wiki/Aleksander_ Kwaśniewski#Rada_Gabinetowa> [01.07.2026]. Full list available at: *Górecki D.*, Rada Gabinetowa w Polsce, 77.

The Cabinet Councils were consistently convened by subsequent Polish presidents[24]: L. Kaczyński[25], B. Komorowski[26], A. Duda[27] and K. Nawrocki. For example, the first meeting of the Council was convened by L. Kaczyński in conditions when power was held by a government created by political forces favorable to the head of state (this concerned the cabinet of K. Marcinkiewicz at the beginning of 2006). Later, in the conditions of cohabitation, the first meeting of the Cabinet Council when the coalition of the Civic Platform and the Polish People's Party was already in power was held on January 14, 2008 and was mainly devoted to the situation in the health service. It is widely acknowledged that it ended in a fiasco, and during the deliberations there was strong tension and animosity between members of the government and the president. The next meeting of the Cabinet Council – October 28, 2008 – took place in a much better atmosphere[28]. It is worth noting that – for example – the Cabinet Council, convened by President A. Duda on February 13, 2024, during his cohabitation with the government of D. Tusk, also caused a lot of emotions. And the first meeting of the cabinet council during the term of office of President K. Nawrocki (August 27, 2025, Prime Minister also D. Tusk) took place in an atmosphere of mutual sarcasm and some have described it as a "sad spectacle"[29].

It is also worth noting that the Cabinet Council was convened by the Speaker (pol. *Marszałek* – Marshall) of the Sejm (replacing the president in accordance with Article 131 of the Polish Constitution). On June 10, 2010, the then temporarily acting President of the Republic of Poland (the tragically deceased L. Kaczyński), Marshal of the Sejm, B. Komorowski, convened meeting of the

[24] Basic biographies of Polish presidents see: <https://en.wikipedia.org/wiki/Lech_Kaczyński>; <https://en.wikipedia.org/wiki/Bronisław_Komorowski>; <https://en.wikipedia.org/wiki/Andrzej_Duda> [01.07.2026].

[25] List of Cabinet Councils meeting during the presidency of L. Kaczyński (date and synthetic presentation of the topics discussed), see: <https://pl.wikipedia.org/wiki/Lech_Kaczyński#Rada_Gabinetowa> [01.07.2026]. See also: *Górecki D.*, Rada Gabinetowa w Polsce, 77-78.

[26] List of Cabinet Councils meeting during the presidency of B. Komorowski (date and synthetic presentation of the topics discussed), see: *Górecki D.*, Rada Gabinetowa w Polsce, 77-78. Note: one of these meetings was convened when B. Komorowski (as Speaker of the Sejm) was replacing the president.

[27] List of Cabinet Councils meeting during the presidency of A. Duda (date and synthetic presentation of the topics discussed), see: <https://pl.wikipedia.org/wiki/Andrzej_Duda#Rada_Gabinetowa> [01.07.2026].

[28] Members of the government were even surprised by the good atmosphere and the conciliatory attitude of the president. Prime Minister D. Tusk highly appreciated this meeting, and L. Kaczyński also believed that the atmosphere in the meeting room was very good. However, some controversy has arisen. Just before the meeting, the Prime Minister was surprised that the President of the National Bank of Poland and two advisors to the president were to participate in the Council meeting. See: <https://www.gazetaprawna.pl/wiadomosci/artykuly/92426,prof-winczorek-sklad-rady-gabinetowej-okresla-wprost-konstytucja.html>; <https://pl.wikinews.org/wiki/2008-10-29:_Dobra_atmosfera_na_Radzie_Gabinetowej_z_28_października> [01.07.2026].

[29] See (among others): <https://wiadomosci.onet.pl/kraj/fala-komentarzy-po-radzie-gabinetowej-chcial-prawdziwej-rady-to-ja-ma/r1w88gn>; <https://www.bankier.pl/wiadomosc/Rada-gabinetowa-w-szczegolach-Tusk-przyniosl-plik-dokumentow-o-Pegasusie-Duda-wciaz-mowi-o-CPK-8694484.html>; <https://tvn24.pl/polska/rada-gabinetowa-pod-przewodnictwem-karola-nawrockiego-relacja-st8617463>; <https://www.tokfm.pl/polityka/rada-gabinetowa-smutny-spektakl-prezydent-w-roli-wychowawcy-klasy-dyscyplinujacego-uczniow> [01.07.2026].

Cabinet Council, devoting it entirely to the issues of state security in the face of flood threats[30]. This step can be considered completely consistent with the constitution, because in accordance with Art. 131 section 4 of the Polish Constitution of 1997 a person performing the duties of the President of the Republic of Poland may not "decide to shorten the term of office of the Sejm" (i.e. – *a contrario* – it may exercise all other powers of the president apart from these)[31].

However, one cannot deny the sense of B. Opaliński's argument in this case: "Therefore, he (person replacing the president in accordance with Art. 131 constitution – P. Kierończyk's note) should show appropriate restraint, taking only those actions that are necessary for the proper functioning of public authorities. Referring these comments to the adopted classification, it should be stated that the Speaker of the Sejm as a rule, he should exercise only those powers of the president bear the hallmarks of strictly or relatively defined duties. This catalog does not include convening the Cabinet Council, because in accordance with previous comments, it constitutes the president's right. However in some situations, it may be permissible to convene the Cabinet Council by the Speaker of the Sejm, who is temporarily acting as president. These are situations when the important matters that constitute the basis for convening this body constitute one of the fundamental values that the president is obliged to protect pursuant to Art. 126 of the Constitution. (…) Considering though on the freedom to classify matters of particular importance that may be subject of meetings of the Cabinet Council, each time this body is convened by the Speaker of the Sejm acting as the head of state, be adequately justified on the basis of the fundamental values set out in Article 126 of the Constitution"[32].

How should the current regulation of issues related to the Cabinet Council be perceived? The Constitution of 1997 constitutionalized this institution (once again) – mainly in the above-mentioned Art. 141. Moreover, a traditional, well-established name was clearly used for it, but it was not used *expressis verbis* in previous regulations[33]. However, this does not mean that the importance of this institution is strengthened. It is true that the legislator distinguished the Council in the constitution, but did not grant it exactly any constitutional tasks and competences (within the meaning of a separate catalog specific to it). A simple conclusion follows from this – because at the same time the Constitution denied the Cabinet Council the right to exercise the competences of the Council of Ministers – therefore it is not currently entitled to any competences. We are therefore dealing with an

[30] See: *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym, 124. D Górecki expresses the opinion that substantive considerations were not the deciding factor in convening its meeting. In his opinion, since the meeting of the Cabinet Council took place 10 days before the first round of the presidential elections, it can be assumed that it was an element of the election campaign of the Speaker of the Sejm running for the office of president. See: *Górecki D.*, Rada Gabinetowa w Polsce, 72. See also: *Budzanowska A. T.*, Rada Gabinetowa – konstytucyjna instytucja współpracy władzy wykonawczej w Polsce w ramach Konstytucji z 1997 roku, Horyzonty Polityki, 2018, Vol. 9, No 28, 117-118.

[31] See: *Górecki D.*, Rada Gabinetowa w Polsce, 72.

[32] Quoted for: *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym, 123-124 (P. Kierończyk's translation)..

[33] As already mentioned, e.g. in the small constitution of 1992, the term "Cabinet Council" did not appear anywhere in this act.

interesting case of creating an institution and giving it a name – while completely omitting it in the division of competences[34].

Can any decisions be made at the Cabinet Council meeting? Going further with these considerations – is it worth making them at all if the Council cannot transform them into appropriate decisions? The answer to these questions will undoubtedly be affirmative, but it should be remembered that if any arrangements or arrangements are made at the meeting of the Cabinet Council, they must later be transformed (by a „proper" Council of Ministers) into binding acts and decisions. Here, the competent authority is the Council of Ministers and the Prime Minister, not the head of state (this is the opinion of, for example, Z. Witkowski)[35]. P. Winczorek thinks similarly, although the author emphasizes that the decisions of the Cabinet Council can also be implemented by the head of state (which, of course, should be agreed with, taking into account the basic role of the government in the dualistic executive power): "(Cabinet Council – P. Kierończyk's note) cannot therefore make any decisions of authority. If the proceedings of the Cabinet Council result in any conclusions regarding the need to make such decisions, they shall be made by the Council of Ministers, the Prime Minister, ministers and (or) the President of the Republic of Poland within the framework of their own tasks and competences"[36].

Convening the Council, in accordance with Art. 144 section 3 point 15 of the Constitution of April 2, 1997, is one of the presidential prerogatives[37]. It follows that the relevant official act of the head of state regarding the convening of the Council does not require the signature[38] of the Prime Minister for its validity. Treating the right to convene the Council as a discretionary power of the head of state is absolutely logical. It allows the president to try to get the government to cooperate in any situation. Even when the government represents a political option that is hostile to the person holding the position of head of state[39]. Also when there is a deep personal conflict between the president and the prime minister. It is clear that introducing the countersignature requirement could lead to the institution of the Cabinet Council being effectively dead (especially in the conditions of cohabitation). However, one should not draw excessive conclusions from the fact that convening the Cabinet Council is not subject to the countersignature requirement. The fact that this right belongs to the category of presidential prerogatives means only that the president can at any time enforce the willingness to meet with the government if he deems it necessary – and nothing more[40].

Therefore, in its current form, the Cabinet Council has the form of a consultative and advisory institution (it seems justified to also use the term "state body", but with certain reservations related to the advisory nature of the Council). Perhaps it would be justified – although somewhat controversial –

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34 See: red. *Boć J.*, Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku, Wrocław 1998, 227.

35 *Garlicki L.*, Polskie prawo konstytucyjne. Zarys wykładu, Warszawa 2007, 263.

36 See: *Winczorek P.*, Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku, Warszawa 2008, 295 (P. Kierończyk's translation).

37 See (among others): *Dąbrowski M.*, The Evolution of the Institution of President's Prerogative Powers in the Polish Legal System, Przegląd Prawa Konstytucyjnego, nr 6 2018.

38 Exactly – countersignature (pol. kontrasygnata).

39 See: *Frankiewicz A.*, Kontrasygnata aktów urzędowych Prezydenta RP, 169.

40 See (among others): red. *Witkowski Z.*, Prawo konstytucyjne, Toruń 1998, 250.

to treat the Council as a *sui generis* auxiliary body of both the president and the government. Its activity may, but does not have to, influence the mutual harmonization and coordination of the actions of the elements of the dual executive – the president and the government. Undoubtedly, the initiating factor in this case is the head of state[41]. It is solely up to her to assess whether a given matter is of "particular importance" (which is the condition for convening the Cabinet Council), and the decision to convene it is typically of a personal and discretionary nature. However, as B. Banaszak rightly noted, the president, by convening meetings of the Cabinet, by calling them, chairing them, speaking and giving the floor to participants, can only draw the attention of members of the Council of Ministers to certain issues and stimulate them to take action in the normal manner. He can submit his proposals, conclusions and comments to the government regarding the cabinet's policy in specific areas, with the only guarantee – that he will be listened to. It does not have any legal instruments that could force the Council of Ministers to implement the arrangements[42].

It is also worth noting an interesting opinions: "The fact that the Cabinet Council does not have the competences of the Council of Ministers does not exclude the possibility of it taking certain actions as a result of the discussions held at the meeting of the Cabinet Council. In this way – as Zbigniew Witkowski notes – the president becomes an advisory body to the Council of Ministers, rather than a body superior to the government. However, this view should be supplemented – it cannot be ruled out that, drawing conclusions from such a discussion, the president may also take certain actions, and this would mean that in such a situation the Cabinet Council would become a sui generis advisor to the head of state. Unfortunately, current practice does not confirm the above observations. Cabinet Councils resulted in no real consequences"[43].

Therefore, the Cabinet Council is only a kind of discussion forum where the president can be heard and possibly – but only if there is good will on the part of the government – he can obtain knowledge about the issues that interest him. The extent to which the government is willing to provide information to the head of state – and take into account his opinions – depends only on the nature of mutual relations and the political culture of politicians. Therefore, the Cabinet Council should not be perceived – in any way – as a body superior to the government, or it can – as already mentioned above – be treated as a kind of auxiliary (opinion-giving and advisory) body. The President thus obtained the constitutional possibility of establishing cooperation with the Council of Ministers, but his role was reduced to that of an "advisor" rather than a decision-maker, or even only a co-decision-making factor. It is worth agreeing with R. Mojak that the regulation of Art. 141 section 2 of the constitution leaves

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41 However, attention can be drawn to an interesting situation when (although the Cabinet Council was formally convened by President A. Kwaśniewski), the initiative in this respect actually belonged to Prime Minister L. Miller (June 2002). See: *Górecki D.*, Rada Gabinetowa w Polsce, 71; Łódź 2019; *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym, 117. See also the source indicated by both authors above in the footnotes: *Leszczyńska K.*, Rządy Rzeczypospolitej Polskiej (1989–2005). Skład, organizacja i tryb funkcjonowania, Toruń 2008, 412.

42 See: *Banaszak B.*, Prawo konstytucyjne, Warszawa 1999, 514.

43 Quotef for: *Górecki D.*, Rada Gabinetowa w Polsce, 70-71. See also the source of Z. Witkowski's opinion indicated there (in footnote 37): *Witkowski Z.*, Prezydent Rzeczypospolitej Polskiej [in:] red.. *Witkowski Z.*, Prawo konstytucyjne, Toruń 2011, 382.

no doubt that the president has been deprived of the opportunity to participate in shaping the current government policy[44].

It is therefore worth asking the question – were there any rational grounds for introducing the institution of the Cabinet Council in its current constitutional form? Probably yes. Firstly, they were related to the desire to provide a formal framework for contacts and relations between the two parts of the executive power. Secondly, there was a visible intention to create a platform for potential resolution of conflicts between them (which was expected especially in situations when the president represented a different political option than the government – i.e. in conditions of cohabitation). There were probably rational reasons behind depriving the Cabinet Council of government powers. The intention was to prevent the head of state from actually becoming the head of the government. Moreover, the intention was probably to emphasize the government's political responsibility for the decisions it makes. It is worth noting again that the Council serves as a specific (and potentially useful) forum for information exchange. After all, the provision present in the small constitution of 1992 did not appear in our constitution – Art. 38 section 1 – which specified that "the Prime Minister informs the President about the basic problems that are the subject of the work of the Council of Ministers". Therefore, there are currently no regulations that would directly require the Prime Minister to inform the President about the government's activities. Let's ignore how the provision of Art. 38 section 1 of the small constitution was implemented in practice (because it was very different)[45], but its disappearance from the constitutional regulation undoubtedly created a situation in which often only convening the Cabinet Council can – in a specific political situation – give the president access to information about the government's intentions.

However, one must be clearly aware that the degree to which the government will share its knowledge with the head of state depends on the will of the Prime Minister and his ministers. The President has no opportunity to force government members to behave in a specific manner in terms of the perceived "information policy" during the meetings of the Cabinet, or even after they have ended. We can find a quite similar opinion even on the website of the President of Poland: "The positions presented during the Cabinet Council and the arrangements made are therefore not legally binding, but have an important political value. In this way, the President can draw the attention of the Council of Ministers to important problems and demand information as to the Government's intentions or actions in these areas. It may also establish a joint strategy with the Council of Ministers on specific issues"[46].

Concluding the above remarks, it is worth noting that there are political and political systems in the world in which contact and cooperation between the government and the president are very close[47].

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44 *Mojak R.*, Model prezydentury w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (regulacja konstytucyjna roli ustrojowej Prezydenta RP a praktyka politycznoustrojowa realizacji modelu ustrojowego prezydentury) [in:] red, *Grzybowski M.*, System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa, Warszawa 2006, 48.

45 Without going into details, it should be recalled that the practice in this area varied, depending on the relationship between the President and the Prime Minister. No less relevant provision existed in the small constitution (1992-1997).

46 <Https://www.prezydent.pl/prezydent/kompetencje/rada-gabinetowa> [01.07.2026]. Tranlation – P. Kierończyk.

47 A broader, comparative presentation of the president-government relationship in the context we are interested in was made, for example, by B. Opaliński (using Polish literature): "Like in Poland, also in other

The role of the head of state in relation to the cabinet is strongly marked, and sometimes it can even be considered dominant. Suffice it to mention the constitution of the Fifth French Republic of 1958, which introduced the principle that government meetings were chaired by the president[48]. However, the Third Polish Republic is undoubtedly not one of the countries with such relations between the elements of the executive power. In this respect, we are much closer to the typical parliamentary-cabinet model. According to its assumptions, the head of state's possibilities to influence the government's activities are extremely limited. Therefore, the possibility of convening the Cabinet Council is rightly considered to be the most important means at the president's disposal to influence the work of the government without conflict and inspire it in the sphere of policy direction. Therefore, the existence of the Council, even in its present form, has a deep political meaning.

3. Conclusion

The constitutional development of the Cabinet Council demonstrates that the institution represents the continuation of a long-standing tradition of cooperation between the President and the government within the Polish constitutional order. Although its legal status has evolved across successive constitutional frameworks, the Constitution of 1997 provided the institution with a clear constitutional basis while deliberately excluding it from exercising the competences of the Council of Ministers. This constitutional solution preserves the balance of powers within the executive by maintaining the government's exclusive responsibility for adopting legally binding decisions.

The analysis confirms that the Cabinet Council should primarily be understood as a consultative and coordinating forum rather than as an autonomous decision-making body. Its constitutional significance derives not from the authority to adopt binding resolutions but from its capacity to facilitate dialogue, exchange information, and create opportunities for cooperation between the two components of the dual executive. The effectiveness of this institution therefore depends less on legal mechanisms than on the political culture, mutual relations, and willingness of the President and the government to engage in constructive constitutional cooperation.

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countries adopting the dualistic executive model, there are institutions integrating both bodies of the executive power One way of this integration is joint meetings of the president and the government. However, individual regulations differ. In some countries, joint meetings are convened on the initiative of the head of state (e.g. France, Latvia, Slovakia), in others the president can only participate in ordinary ones. government meetings (e.g. Russia, Romania, Czech Republic). The president's participation may involve chairing the meetings (e.g. Russia, France, Latvia, Slovakia), or only participating in them (e.g. the Czech Republic). the government has the obligation to inform the head of state about its work and to provide appropriate explanations and information ex officio (e.g. Germany), or upon prior request of the president (e.g. Slovakia). All these regulations are an expression of the desire not to separate the president from the current policy pursued by the government". Quoted for: *Opaliński B.*, Rada Gabinetowa w polskim systemie ustrojowym, 110 (P. Kierończyk's translation). Similar comprehensive, comparative presentation in: *Górecki D.*, Rada Gabinetowa w Polsce, 65-66.

[48] See: *Skrzydło W.*, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2007, 143; *Pułło A.*, Ustroje państw współczesnych, Warszawa 2007, 184-185. See also (primarily) Articles 9 and 21 of the French Constitution of 1958. English translation of this constitution available on the website: <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf> [01.07.2026].

At the same time, the experience of constitutional practice demonstrates that the Cabinet Council retains practical relevance, particularly in periods of political cohabitation, when the President and the parliamentary majority represent different political orientations. Even though the institution cannot compel governmental action, it enables the President to initiate discussion on matters of particular importance and to obtain information concerning government policy within the constitutional framework.

Accordingly, the Cabinet Council should not be regarded as a mechanism for extending presidential authority over the executive, but rather as an institutional instrument supporting communication and constitutional cooperation without undermining the principles of parliamentary government. In this respect, the institution continues to perform a meaningful role within the contemporary Polish constitutional system, while its significance should be assessed realistically and without attributing to it powers that the Constitution intentionally withholds.

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The Patient as a Party to Mediation – the Rights, Needs and Barriers to Access

This article analyzes the position of the patient as a party to mediation within the Polish legal system, focusing on the patient's rights, actual needs, and the barriers that restrict access to this form of resolving medical disputes. Although Polish law permits mediation in disputes between patients and healthcare providers, in practice the use of this measure is rare. The author identifies a fundamental paradox seen in the Polish legal reality. The prevailing public perception is that medical disputes should be resolved through litigation, whereas patients' actual needs extend far beyond strictly financial considerations. Patients primarily expect to have information and an explanation regarding the medical incident, but equally important to them is to be heard, receive an apology, and be assured that similar situations will not happen to other patients. Paradoxically, patients continue to choose judicial proceedings, which focus mainly on the financial aspect, even though their actual needs are much broader.

Mediation, due to its procedural characteristics, responds better to these needs than formal court proceedings, allowing for a comprehensive resolution of the conflict in both the substantive and relational dimensions. Nevertheless, patients rarely use this tool due to cumulative awareness barriers (low recognition of mediation, ignorance of rights as a party to proceedings) and systemic barriers (no early information obligation, problems with the professional liability model in which the mediator is a physician, insufficient organizational support, costs and emotional barriers).

The article proposes introducing a clear obligation to inform patients about the possibility of mediation, revising the model of mediation in proceedings concerning the professional responsibility of physicians and the development of a more specialized model of medical mediation. Only a comprehensive approach, covering both legal and practical aspects, can make mediation a real alternative to judicial proceedings in medical disputes.

Keywords: *medical mediation; patient's rights; medical disputes; alternative dispute resolution; professional responsibility of physicians.*

1. Introduction

In Poland, in the context of the relationship between the patient and the healthcare provider or medical staff, the phenomenon of a growing number of disputes is becoming increasingly apparent.[1] It

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1 In publicly available nationwide data, there is no single register of all patient-physician disputes; the closest formal indicator is the data of the medical self-government, according to which the number of new

should not be treated as a sum of individual cases, but rather as a manifestation of a more profound socio-legal transformation, in which a dispute concerning the treatment process becomes a permanent element of the functioning of the healthcare system. Importantly, it is rare that a medical dispute boils down solely to the financial dimension. It usually also comprises a sense of injustice, loss of trust towards the medical institution, and the need to obtain clear confirmation that there was a breach of standards of due diligence. For this reason, it should be recognized that medical disputes are of a special nature, as they concern not only claims but also relationships that had been based on trust and then disrupted.

In this context, it is particularly important that litigation is still dominant in the social consciousness of Poles. It is perceived not so much as one of the possible ways of pursuing medical claims, but as the basic measure, and sometimes even the only one. This situation leads to a kind of narrowing of the legal perspective of the parties, because the medical conflict is almost automatically identified with the need to activate jurisdictional mechanisms, which by their very nature are formalized, confrontational and long-term. As a result, the parties to medical disputes make little use of solutions based on dialog, explaining the causes of the dispute and seeking agreement, including on those issues whose nature would justify choosing a faster and less escalating way to resolve them. Therefore, a paradox arises that the use of mediation is in practice marginal while the currently applicable rules allow for it.[2] This leads to the conclusion that the mere normative provision of a specific mechanism does not yet determine the mechanism being established in social practice. The limited importance of mediation is determined not only by the low level of its social recognition, but also by the fact that existing legal solutions are dispersed and insufficiently adapted to the nature of medical disputes. Thus, instead of being de-escalated as soon as possible, the medical dispute is subject to transformation into a legal dispute with an increased degree of formalization, which at the same time reveals a discrepancy between the availability of a legal instrument and the readiness of social life participants to actually use it.

This article is intended to examine medical mediation from the perspective of the patient as a party to the mediation process. Medical mediation is understood to mean any mediation procedure in which one party is a patient and the other party is a healthcare provider, medical professional, or another participant in the process of providing healthcare services. The decisive criterion is therefore not the name or specific mode of mediation, but the medical nature of the dispute and the status of the participant in the proceedings. The subject of this discussion covers both the patient’s rights and actual needs as revealed in the medical dispute, especially the need to be informed, to be heard, to have the circumstances of the case clarified, and a resolution that is not merely of a formal nature. The paper also identifies actual legal, institutional, and awareness-related barriers which restrict the use of mediation, as well as an assessment of whether the current solutions constitute a model truly adapted to the specific nature of medical disputes.

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notifications to District Professional Liability Advocate increased from 3,304 in 2022 to 4,524 in 2025, <https://nil.org.pl/uploaded_files/1770879960_sprawozdanie-nroz-za-2025-r-tekst.pdf> [10.03.2026].

[2] See the data of the Statistics and Analyses Division of the Department of Analyses and Strategy of the Ministry of Justice, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,77.html> [28.04.2026].

The primary research method used in the study is the formal-dogmatic method, which involves an analysis of the applicable legal regulations governing patients' rights and the admissibility of mediation. As an auxiliary method, a review of the literature on the subject and an analysis of available statistical data regarding the use of mediation in medical cases in Poland has also been carried out.

2. Legal Situation of the Patient in Polish Law

The most deeply rooted provision regarding the patient's position under Polish law is Article 68 of the Constitution of the Republic of Poland, which establishes the right of everyone to health protection.[3] This provision cannot be approached solely in terms of an axiological declaration. The relevant scholarly opinion and case-law have established the position that, according to Article 68 (1) of the Constitution, expresses a public vested right of the individual, and thus constitutes the normative basis for formulating specific expectations towards the State in the sphere of health protection. It is emphasized that the nature of this provision is not merely declarative, but acts as a constitutional foundation of the whole system of protection of patients' rights and sets the direction for their further concretization in the legislation.[4] This means that the patient's situation does not start only at the stage of pursuing claims resulting from the violation of rights, but it has its source already in the Constitution, which imposes on the authorities the obligation to provide genuine, not only formal, protection in this sphere.

The constitutional guarantee of health protection is further developed in the Act of 6 November 2008 on Patient's Rights and the Patient Ombudsman (hereinafter referred to as APR), which lists the catalog of patients' rights and provides for the mechanisms of their protection, as well as the Act on the Professions of Physician and Dentist (hereinafter referred to as APPD), which imposes on the physician the obligation to practice their profession in accordance with the indications of current medical knowledge, the methods and means available to them in order to prevent, diagnose[56] and treat diseases, in accordance with the principles of professional ethics and due diligence. These principles of professional ethics are contained in the Code of Medical Ethics.[7]

The following rights are of particular importance in the practice of medical disputes: the right to information, the right to health services corresponding to the requirements of current medical

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3 Constitution of the Republic of Poland of 2 April 1997, Article 68, Journal of Laws 1997, No. 78, item 483.

4 *Zdyb M.,* The Essence of the Right to Health Protection in the Light of Article 68 of the Constitution of the Republic of Poland, with Particular Emphasis on Article 68(1): Dilemmas and Controversies, Annales UMCS sectio G (Ius), 2024, 182, 187-189 (in Polish); *Ryś K.,* Constitutional Right to Health Protection and the Right to Special Health Care, Zeszyty Naukowe Prawa Konstytucyjnego, No. 10, 2017, 116-118 (in Polish); *Dana A.,* Jurgilewicz M., Skelnik K., Legal Determinants of Mediation in the Light of the Act on Chambers of Physicians, Prawo i Więź, No. 3(56), 2025, 292 (in Polish).

5 Act of 6 November 2008 on Patients' Rights and the Patient Ombudsman, especially Articles 1-2, Journal of Laws of 2026, item 26 (consolidated text).

6 Act of 5 December 1996 on the Professions of Physician and Dentist, Journal of Laws of 2026, item 37 (consolidated text), as amended by item 203.

7 Code of Medical Ethics of 2 January 2004, Annex to Resolution No. 5 of the Extraordinary 16th National Congress of Physicians of May 18, 2024 (in Polish).

knowledge and provided with due diligence, and the right of access to medical records.[8] It is in these areas that the conflict between the patient and the healthcare provider occurs most frequently, and the violation of these rights does not always have to be associated with a medical error in the classic sense.[9] It can also comprise failure to inform, defective organization of the treatment process, or hindering access to the records, which is not only of cognitive but also evidentiary significance for the patient.

Table 1. Source: Author's own elaboration based on the annual reports of the Patient Ombudsman concerning compliance with patients 'rights in the territory of the Republic of Poland for 2013-2017, <https://www.gov.pl/web/rpp/sprawozdania-dotyczace-przestrzegania-praw-pacjenta> [18.04.2026] (in Polish). [18.04.2026].

Subject and scale of patient rights violations, 2022–2024

Patient right category	2022	2023	2024
Right to healthcare services	53 631	47 233	45 144
Right to information	8 947	13 879	10 415
Right to medical records	5 220	6 062	5 488
Right to mental health protection	4 647	5 292	5 794
Right to respect for intimacy and dignity	2 949	1 720	1 933
Right to respect for private and family life	1 651	949	746
Right to give consent	777	776	603
Right to submit an objection	576	876	178
Right to confidentiality of information	227	273	247
Right to store valuables in a deposit	195	163	163
Right to report adverse drug reactions	291	101	64
Right to pastoral care	48	62	45
TOTAL	**79 157**	**77 668**	**70 820**

It is important in this respect that the legislature linked the violation of patient rights with the possibility of seeking compensation. Pursuant to Article 4 (1) APR, where a culpable violation of patient rights arises, the court may award an appropriate sum as compensation based on Article 448 of the Civil Code (hereinafter referred to as CC).[10] The relevant scholarly opinion and case law emphasize the independent nature of this claim, and regarding the right to information, it is pointed out

[8] Act of 6 November 2008 on Patients' Rights and the Patient Ombudsman, Articles 6, 8-9, 23-24, Journal of Laws of 2026, item 26 (consolidated text); Act of 5 December 1996 on the Professions of Physician and Dentist, Article 4, Journal of Laws of 2026, item 37 (consolidated text), as amended by item 203; Wrze*śniewska-Wal I.,* Pursuing Claims in Medical Error Cases: Remarks de lege lata and de lege ferenda, Studia Prawnoustrojowe, No. 48, 2020, 249 (in Polish).

[9] *Kowalska A.,* Compensation for Non-Pecuniary Damage for the Violation of Patients' Rights, Studia Prawnoustrojowe, No. 48, 2020, 94-95 (in Polish); *Nesterowicz M.,* The Patient's Right to Medical Information (in the Light of Case Law), Gdańskie Studia Prawnicze, No. 1(49), 2021, 24-25 (in Polish).

[10] Act of 23 April 1964 – Civil Code, Journal of Laws of 2025, item 1071 (consolidated text); Act of 6 November 2008 on Patients' Rights and the Patient Ombudsman, Article 4, Journal of Laws of 2026, item 26 (consolidated text); *Grzesiowski K.,* Compensation for Non-Pecuniary Damage for the Violation of Patients' Rights and Compensation for Damage to the Person in the Light of the Latest Case Law of the Supreme Court, Europejski Przegląd Prawa i Stosunków Międzynarodowych, No. 4, 2024, 59 (in Polish).

that the right may also be exercised even if the patient has not suffered any bodily harm or health disorder.[11] However, it should be added that the legislature excluded from this specific basis the right of access to medical records, to store valuable items in the deposit, to be informed about the type and scope of services rendered by the healthcare provider, and to report adverse drug reactions, which does not mean a lack of protection, but only the necessity to resort in such a case to the general instruments of civil law.[12] As a result, a violation of patient's rights may constitute an independent event initiating a medical dispute, and sometimes it also opens the way to mediation as a method of resolution.

3. Available Paths of Seeking Claims by the Patient

Polish law provides for several parallel paths for protecting the interests of the patient. The primary one is civil procedure, under which the patient can seek compensation for personal injury, reimbursement of treatment costs, a disability benefit, and redress for harm based on Articles 444 and 445 of the Civil Code, and regardless of the above, compensation for the culpable violation of patient rights under Article 4 APR in conjunction with Article 448 CC. Moreover, in civil cases concerning the violation of patient rights, the Patient Ombudsman may request the initiation of proceedings or participate in ongoing proceedings with the rights of a prosecutor, which strengthens the patient's procedural position.

Beside the civil procedure path, there is a criminal procedure regulated in the Code of Criminal Procedure, namely Article 304 § 1 (hereinafter referred to as the CCP), initiated with reporting a suspected criminal offense, if the behavior of a medical professional may fulfill the criteria of a criminal offense. The third path is the professional liability of physicians.[13] Pursuant to the Act on Chambers of Physicians and Dentists, members of the self-government of medical professionals are subject to professional liability for violation of medical ethics and regulations related to the practice of the profession, and the injured patient is also a party to such proceedings. As compared to the above-mentioned ways, mediation does not appear to be a separate basis for the liability, but an alternative way of resolving the conflict. In civil proceedings, its voluntariness results directly from Article 183^1 § 1 of the Code of Civil Procedure, the possibility of referring a case for mediation in criminal proceedings is provided for in Article[14] 23a of the Code of Criminal Procedure, while in proceedings concerning professional liability of physicians, mediation is regulated in Article 113 of the Act on Chambers of Physicians and Dentists.

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11 *Nesterowicz M.,* The Patient's Right to Medical Information (in the Light of Case Law), Gdańskie Studia Prawnicze, No. 1(49), 2021, 24-25 (in Polish).

12 *Kowalska A.,* Compensation for Non-Pecuniary Damage for the Violation of Patients' Rights, Studia Prawnoustrojowe, No. 48, 2020, 94 (in Polish); *Wrześniewska-Wal I.,* Pursuing Claims in Medical Error Cases: Remarks de lege lata and de lege ferenda, Studia Prawnoustrojowe, No. 48, 2020, 252 (in Polish).

13 Act of 6 June 1997 – Code of Criminal Procedure, Article 304(1), Journal of Laws of 2026, item 490 (consolidated text); Wrze*śniewska-Wal I.,* Pursuing Claims in Medical Error Cases: Remarks de lege lata and de lege ferenda, Studia Prawnoustrojowe, No. 48, 2020, 259 (in Polish).

14 Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws of 2026, item 468 (consolidated text)..

It should be mentioned that, from the historical perspective, proceedings before provincial committees for adjudicating on medical incidents played an important role, but this model has been phased out. Since 1 July 2024, these committees have been closed and the pending cases have been taken over by the Patient Ombudsman.[15] The current non-judicial compensation model has been based on the Patient Ombudsman and the Medical Incidents Compensation Fund, referring to medical incidents which occurred during the provision or as a result of the provision or failure to provide healthcare services financed from public funds in hospitals.[16] This means that the legal status of the patient in Polish law is multilayered: constitutional, statutory, civil-law, criminal-law, disciplinary and extrajudicial. The essence of this is not only the possibility of seeking compensation, but also the right to information, to correct treatment and to procedurally effective protection.

4. Rights of the Patient as a Party to Mediation

Since mediation has been adopted in Polish law as one of the permissible means of resolving medical disputes, it is necessary to further specify the status of the patient not only as a party whose rights have been violated, but also as a party to the very mediation proceedings. This status is defined primarily by the principle of voluntariness. In civil proceedings, the legislature explicitly states in Article 183^1 § 1 of the Code of Civil Procedure that mediation is voluntary. In criminal proceedings, referring a case to mediation pursuant to Article 23a §1 and §4 of the Code of Criminal Procedure requires the initiative or consent of the injured and the defendant, provided that the injured should be informed of the objectives and principles of mediation and of the option of withdrawing the consent until the conclusion of the mediation proceedings. Pursuant to the reference contained in the Act on Chambers of Physicians and Dentists (hereinafter ACPD) in Article[17] 113 (1) and (6), this solution is also applicable to mediation carried out with regard to physicians' professional liability.

The literature rightly emphasizes that a party enters into mediation only when the party considers this path potentially useful, and may withdraw from the very mediation procedure at any stage thereof.[18] However, this thesis currently requires certain clarification. While the principle of voluntariness itself remains intact, in terms of civil procedure it can no longer be argued without reservation that a refusal to mediate is procedurally completely irrelevant. Under the current wording of Article 103 § 3, 4 of the Code of Civil Procedure, the court may impose financial consequences on

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15 Patient Ombudsman, The Patient Ombudsman Takes Over the Cases of Provincial Commissions for the Adjudication of Medical Events, 22 July 2024, <https://www.gov.pl/web/rpp/rzecznik-praw-pacjenta-przejmuje-sprawy-wojewodzkich-komisji-ds-orzekania-o-zdarzeniach-medycznych> [23.03.2006] (in Polish).

16 *Gałęska-Śliwka A., Śliwka M.,* Out-of-Court Procedure for Pursuing Medical Claims in the Light of the Amendment to the Act on Patients' Rights and the Patient Ombudsman, Medycyna Ogólna i Nauki o Zdrowiu, Vol. 30, No. 1, 2024, 27, 32 (in Polish).

17 Act of 2 December 2009 on Chambers of Physicians, Journal of Laws of 2021, item 1342 (consolidated text).

18 See, e.g., *Bronowicka B.,* The Role of the Mediator in Resolving Medical Disputes, in: Medical Disputes, Wnukiewicz-Kozł*owska A. (ed.), Wroc*ław, 2021, 118 (in Polish); *Morek R.,* Voluntariness of Mediation and Its Limitations (Law and Practice), Studia Iuridica, Vol. XLIX, 2008, 141 (in Polish).

a party if that party refuses to participate in mediation without a valid reason or, after having previously consented, fails to appear at a mediation session without a valid excuse. However, this does not invalidate the fundamental rule that a patient cannot be compelled to participate in mediation, much less to accept the specific terms of a settlement.

This voluntary nature is linked to the patient's right to obtain accurate information about the nature, course, and consequences of mediation before deciding whether to participate. In criminal proceedings, this obligation stems directly from Article 23a § 1 of the Code of Criminal Procedure. In civil proceedings, the mediator informs the parties of the costs of the mediation process before commencing mediation, while mediation standards and the Code of Ethics for Polish Mediators require that the parties know and understand the nature of the mediation process, the mediator's role, the possible outcomes of the proceedings, and the terms of the agreement that may be reached. In practice, this means that the patient should be informed not only of the very possibility of entering into settlement talks, but also of the legal consequences of a mediated settlement, including the fact that, once approved by the court, it has the force of a settlement made before the court, and once an enforcement clause is appended, it may constitute an enforceable title. From the perspective of control of the scope of information to be disclosed, it is also significant that in court mediation, pursuant to Article 183^{9} § 2 of the Code of Civil Procedure, the mediator may review the case files only where a party does not object to this within the statutory time limit.

The position of the patient as a party to mediation does not imply that the patient must remain without support in this proceeding. In court mediation, the regulations take into account the participation of the parties' legal representatives, since the presiding judge, in accordance with Article 183^{9} § 3, provides the mediator with the contact details of the parties and their legal representatives, if these are included in the case files. Moreover, mediation standards provide that the mediator shall inform the parties about the possible presence of other individuals during the mediation process (Standard 5) and shall obtain their consent for this, and indicates the possibility for the parties to use the knowledge and advice of specialists (Standard 7). This undoubtedly becomes of particular significance in medical disputes, in which the patient often enters mediation in a state of significant emotional strain, while at the same time having to address legal and medical issues.

Finally, special emphasis is needed on the confidentiality of mediation. Pursuant to Article 183^{4} § 1-3 of the Code of Civil Procedure, the mediation proceedings are not open to the public, and the mediator, the parties and other persons participating in the mediation are obliged to keep secret the facts learned in the process. In addition, it is not possible in further proceedings to effectively rely on settlement proposals and other statements made during the mediation. In criminal proceedings, in accordance with Article 23a § 7, mediation must be conducted in an impartial and confidential manner, and the mediation standards extend this requirement to the documentation of the mediation and to third parties present during sessions (Standard 4). In medical disputes, this guarantee is of particular importance, because the conversation usually covers information the health status, course of treatment and circumstances of violation of patients' rights. For this reason, the rights of the patient as a party to mediation should be understood not only as formal procedural rights, but also as instruments ensuring the patient's real autonomy, information security and control over the manner in which the settlement conversation is carried out.

5. Actual Needs of the Patient in Medical Disputes

Modern medical law and ethics promote a partnership between the doctor and the patient, in which the patient has the right to decide on their own treatment, even if the patient's choices are not in accordance with the doctor's recommendations. The healthcare system is built around the patient as a central entity, who simultaneously operates as a recipient of health services, consumer, client and beneficiary of the public healthcare system. More and more emphasis is put on informed consent, the patient's right to obtain complete information and the possibility to actively participate in decisions regarding their own health. As public awareness grows, so do patients' expectations of medical professionals, particularly those regarding the quality, safety and effectiveness of treatment. However, even extensive legal regulations and quality standards do not eliminate the risk of adverse incidents that may lead to legal disputes.

The patient's position has been described above through the lens of the patient's rights and the available ways for seeking legal protection, and at this point one should move on to an issue of fundamental practical importance, namely the needs that the patient brings to the medical dispute. Such a dispute cannot be comprehensively characterized by reference only to its legal basis or to the nature of the claim being pursued. In formal terms, the patient most often submits a claim for the payment of damages, compensation or disability benefit, so he/she seeks to obtain benefits compensating for the material and non-material damage. It is a basic need, especially where the effects of a medical incident entail long-term treatment, rehabilitation, increased existential needs or permanent deterioration of the victim's existential situation.[19]

Nonetheless, this analysis cannot stop at this point. The literature on medical disputes indicates that apart from financial demands, there are strong personal aspects related to the need to check the basis of liability, obtain an explanation and recognition of the harm suffered. The literature on medical mediation emphasizes that the patient or their relatives are in dispute not only for a financial claim, but also with the expectation of obtaining comprehensive information about the course of treatment and the need to show them respect. It is therefore reasonable to distinguish between formal needs and actual needs. The former are reflected in the *petitum* of the statement of claim or in the structure of the claim. The latter concern the items expected by the patient in factual and existential terms, and these include explanations, hearing, apologies, restoration of elementary dignity, and sometimes also the assurance that a similar incident will not affect other people.[20]

This distinction is significant for more than just systematization purposes. It allows us to grasp the fundamental paradox in medical disputes. The patient very often initiates a dispute in a legally formalized manner, even though it is rooted in needs that are not exclusively of a legal nature. In other words, a legal claim is often merely a legal expression of a much broader experience: a sense of injustice, ignorance, disappointment with a healthcare institution, or a loss of trust in medical professionals. Only against this backdrop does it become clear why mediation can be viewed not only

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[19] *Janiszewska B.,* The Specificity of Medical Disputes in Civil Proceedings, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 46-47 (in Polish).

[20] Ibid.; *Dana A., Jurgilewicz M., Skelnik K.,* Legal Determinants of Mediation in the Light of the Act on Chambers of Physicians, Prawo i Więź, No. 3(56), 2025, 300 (in Polish).

as an alternative dispute resolution procedure, but also as an instrument that may be better suited to the actual subject of the dispute.

The first of the patient's actual needs is the need to be informed. The patient or their closest persons generally want to know not only whether the grounds for legal liability exist, but above all what actually happened, why specific diagnostic or therapeutic decisions were made, and at what stage the event deemed harmful occurred. The need for information about the incident has been identified in the literature on medical disputes as one of the primary reasons why patients choose litigation. At the same time, recent studies point out that patients or their closest persons feel the need to be comprehensively informed about the course of treatment, and that a lack of effective communication can lead to an escalation of conflict and deepening of the divide between the family and the medical personnel.[21]

However, this need must be approached with appropriate caution. It cannot be said that the judicial proceedings are completely irrelevant to this need. On the contrary, as is rightly pointed out in the literature, it is usually judicial trial that is the only certain and effective way of checking whether the conditions for liability have been met, as well as a way of conducting a thorough evidence-taking and obtaining a binding legal assessment of the incident. However, the problem is that the court's role is primarily to establish liability and decide on the claim, not to provide a forum for the communicative explanation of the incident from the perspective of the participants in the therapeutic relationship. The court therefore answers the question of liability, but does not always satisfy the need for a conversation in which the patient receives an explanation that is understandable, direct and relates to the patient's individual experience.[22]

Equally important is the patient's need for an apology. In the realities of medical disputes, an apology is not just a courtesy. It is not a mere polite formula or gesture, but a recognition that there has been real suffering on the part of the patient and that the medical staff or healthcare provider is willing to take this suffering seriously. Thus, in addition to the need for information, the need to show respect for the patient, including in the form of an apology, is also pointed to in studies on medical mediation.[23]

Against this backdrop, the limitations of the traditional litigation method become particularly apparent. The literature indicates that non-pecuniary claims for the protection of personal rights,

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21 *Bronowicka B.*, The Role of the Mediator in Resolving Medical Disputes, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 117-118 (in Polish); *Dana A., Jurgilewicz M., Skelnik K.,* Legal Determinants of Mediation in the Light of the Act on Chambers of Physicians, Prawo i Więź, No. 3(56), 2025, 301 (in Polish); *Kmieciak B.,* Clinical Mediation as an Element of Effective Conflict Resolution in Medical Institutions, in: Medical Disputes, *Wnukiewicz-Kozłowska A. (ed.), Wroc*ław, 2021, 139-140 (in Polish).

22 *Janiszewska B.,* The Specificity of Medical Disputes in Civil Proceedings, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 46-47 (in Polish).

23 See *Relis T.,* Perceptions in Litigation and Mediation, Lawyers, Defendants, Plaintiffs and Gendered Parties, New York, 2009, 37-43; *Davenport A.,* Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases, Pepperdine Dispute Resolution Law Journal, Vol. 6, No. 1, 2006, 83, <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1129&context=drlj> [01.04.2026].

including demands for an apology to the patient, are rarely pursued in medical cases. This stems both from the litigation practices of the patients themselves and from the fact that, given the nature of personal injury, an apology often proves to be an inadequate remedy under civil law. This means that while the law does not entirely preclude such a demand, an apology does not constitute a central mechanism of the medical trial.[24] The situation is different in mediation, where the emphasis is put on creating conditions for calm conversation, active listening, avoiding conflict escalation, and restoring mutual respect. Only in this formula can an apology acquire a truly communicative meaning, rather than merely a formal one.

The third need that recurs in analyses of medical disputes is the need to prevent similar incidents in the future.[25] This need is unique because it goes beyond the individual interest of the patient and takes on a broader dimension. The injured person or their family sometimes expect not only compensation and an explanation, but also that the experience they have gone through will lead to genuine reflection on the part of the provider or personnel and will not happen again to others. In this sense, a medical dispute often contains a preventive element that cannot be reduced to a mere monetary claim.

It is exactly the point where the structural advantage of mediation over the strictly judicial model is most evident. In a mediated settlement, the parties can address more issues than those that could be decided by a court. This opens up an opportunity not only for financial settlements, but also for agreements on communication practices, how to proceed, and sometimes even the direction of corrective actions. This is of fundamental importance from the patient's perspective. The need for "it not to happen again" is not strictly compensatory, but it is a need for correction, prevention, and to give meaning to one's own experience of harm.

One cannot also ignore the patient's need to be heard and to regain their instrumental role in the dispute. In a medical conflict, the patient very often experiences not only damage or harm, but also the impression that after the incident that gave rise to the dispute, he or she loses control of the way their own story is described. Undoubtedly, it is important for the injured patient to be allowed to talk about the incident, their own feelings and expectations, as well as for the parties to listen to each other.[26] The patient should have the opportunity to speak out, but also to hear what dilemmas the doctor is experiencing. It is therefore not only about the transmission of information, but also about restoring the patient's position as a participant in the conversation, and not only as an object of assessment by experts and institutions.[27]

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[24] *Janiszewska B.,* The Specificity of Medical Disputes in Civil Proceedings, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 48 (in Polish); *Bronowicka B.,* The Role of the Mediator in Resolving Medical Disputes, in: Medical Disputes, *Wnukiewicz-Kozłowska A. (ed.), Wroc*ław, 2021, 117-118 (in Polish); *Kmieciak B.,* Clinical Mediation as an Element of Effective Conflict Resolution in Medical Institutions, in: Medical Disputes, Wnukiewicz-Koz*łowska A. (ed.), Wroc*ław, 2021, 142-143 (in Polish).

[25] *Gmurzyńska E., Morek R.,* On Problems Concerning the Resolution of Medical Malpractice Disputes and the Role of the Mediator, Kwartalnik ADR, No. 3(15), 2011, 67 (in Polish).

[26] *Rajca M., Nowosielska E.,* Mediation Proceedings within the Framework of a Physician's Professional Liability, Medyczna Wokanda, No. 3, 2011, 149 (in Polish).

[27] *Kmieciak B.*, Clinical Mediation as an Element of Effective Conflict Resolution in Medical Institutions, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 141 (in Polish).

6. Mediation as a Response to Actual Needs of the Patient

The above remarks should not lead to the depreciation of judicial proceedings as a form of protecting patients' rights. On the contrary, proceedings before a general court essentially remain the most comprehensive and reliable form of finding whether, in a given case, the conditions for liability due to medical damage have occurred. As a rule, the patient is deprived of the possibility of independently verifying whether a culpable error in medical practice has occurred, and a judicial trial enables both the conduct of extensive evidentiary proceedings with the participation of court experts and the obtaining of an enforceable title, allowing for the compulsory enforcement of awarded benefits.

However, the problem is that the strengths of the judicial process from a dogmatic-legal perspective do not fully coincide with the list of real needs of the patient as an injured person. The structure of civil proceedings is aimed at establishing liability, assessing evidence and deciding on the claims being pursued – it therefore meets the need for legal conclusion of the dispute, not its resolution in a broader, psychosocial dimension.[28] As stated above, the actual needs of the patient in a medical dispute go far beyond the financial dimension and also include the informational, relational and symbolic spheres. It is pointed out in the literature on the subject that it is precisely the disrupted or insufficient communication between medical staff and the patient that is one of the main causes of escalation of conflict and referral of the case to court. In this sense, a judicial trial can lead to a legal end to the dispute, but it does not meet these needs.[29]

In view of the discussion presented above, mediation appears not as a simple substitute for a trial, but as a mechanism better suited to those needs of the patient that go beyond the purely financial dimension of the dispute. It allows for conversations to be conducted without timing and procedural pressure, in a calm atmosphere conducive to openness. Its purpose lies not so much in imposing a ready-made solution, but in assisting mutual communication between the parties, recognizing their actual expectations, and uncovering interests hidden beneath the layer of formal claims. In this sense, mediation can respond to the informational, symbolic, and relational needs of participants in a medical dispute more effectively.

From the patient's perspective, it is also of particular importance that mediation can partially compensate for the asymmetry inherent in the medical dispute — the asymmetry of expertise, position and resources. The impartial role of the mediator and the formula of a conversation based on equal treatment of the parties allow the patient to express their own position and hear the arguments and dilemmas of the other party. As it is the parties, not the court, who work out the final solution, mediation offers a greater opportunity to take into account non-financial needs and a more individualized conclusion of the conflict. This does not, of course, rule out the importance of judicial trial where the liability must be authoritatively determined or enforcement of the performance is

[28] *Janiszewska B.,* The Specificity of Medical Disputes in Civil Proceedings, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 47-48 (in Polish).

[29] *Bronowicka B.,* The Role of the Mediator in Resolving Medical Disputes, in: Medical Disputes, Wnukiewicz-Kozłowska A. (ed.), Wrocław, 2021, 117-118 (in Polish); *Przylepa-Lewak A.,* Contemporary Challenges of Medical Mediation, Krytyka Prawa, Vol. 15, No. 3, 2023, 244, 249 (in Polish).

necessary. However, this means that in cases where the patient is seeking not only compensation, but also understanding, being heard and the sense that the incident in question has indeed been clarified, mediation turns out to be a more accurate tool and more adequate to the real nature of the conflict.

Therefore, the most important observation from the perspective of further discussion herein, is that the patient's needs in a medical dispute only partially overlap with what is offered by a classic court trial. Since mediation better responds to a significant part of these needs, the fundamental problem is no longer the question of its admissibility, but the question of why, despite this functional usefulness, patients resort to it so rarely. This leads directly to the issue of barriers to access to medical mediation.

7. Barriers to Patients' Access to Medical Mediation

At this point, it seems necessary to ask a further, thus more practical, question: why do patients so rarely make use of it? This problem cannot be explained by pointing to a single cause. In fact, the barriers restricting access to medical mediation are multilayered. For the sake of clarity in further discussion, the barriers limiting a patient's access to mediation can be divided into two main categories: awareness barriers, and legal and systemic barriers. The former stem from a lack of knowledge about mediation itself and about the patient’s rights as a party to the proceedings, while the latter result from the adopted regulatory framework and the manner of its operation in practice.[30]

The first of the awareness-related barriers is the low level of public recognition of mediation as a viable means of resolving medical disputes. In the Polish public consciousness, a dispute with a doctor is primarily associated with a judicial procedure, often lengthy and complex. This means that even before a patient begins to consider their rights, the court-based framework is already activated in their mind at the level of the public perception of the conflict. Mediation does not appear here as an equivalent way for seeking protection, but at best as a secondary solution, poorly established in legal practice. This assessment is supported by data on mediation in Poland, which show that public awareness of the possibility of resolving disputes through this method remains low, and that mediation itself is used very rarely. In medical disputes, this weakness seems to be even more vivid, given that the number of cases referred to mediation, even in cases involving medical malpractice, has remained minimal for years.

As a result, a patient who enters into a conflict with a physician or a healthcare provider very often does not make a real choice between several ways of proceeding, but acts within one, socially established pattern. It is therefore not only the ignorance of certain regulations, but a deeper problem of legal culture. If the prevailing way of thinking about the dispute remains its judicial resolution, then mediation loses already at the stage of imagining what “seeking justice” is. From this point of view, the low number of mediation cases does not have to prove this institution useless, but rather shows that the patient does not see it as a first-choice path.

[30] *Przylepa-Lewak A.,* Contemporary Challenges of Medical Mediation, Krytyka Prawa, Vol. 15, No. 3, 2023, 240-241 (in Polish); *Najman M.T., Stelmaszczyk A.,* On the (In)Effectiveness of Mediation in Poland, Przegląd Prawno-Ekonomiczny, No. 3, 2025, 72-73 (in Polish).

The second awareness barrier is the low degree of knowledge about mediation and about the rights that the patient already has as a party to mediation.[31] It has been stated above that these mainly include voluntary participation, the possibility of withdrawing consent, the right to information about the course and consequences of mediation, the right to use the support of an attorney or other accompanying person, as well as the guarantee of confidentiality. However, it is hard to expect that the average patient will know these rights sufficiently, as these result from several normative acts, mediation standards and institutionally scattered solutions. The lack of clear and accessible information means that the parties may not be aware of the possibility of out-of-court resolution of the dispute, especially when they do not act with the help of a professional attorney. In this sense, the formal guarantees for the patient do not have a real effect unless they are accompanied by communication that allows the patient to understand that mediation is neither coercion nor an informal "agreement at the expense of their rights", but a fully-fledged procedure based on the autonomy of the parties.

Moving on to the systemic level, the lack of an effective mechanism for informing patients in advance of the possibility of using mediation is of particular importance. The current rules do not legally oblige the procedural authorities to instruct the parties of this possibility, which in practice means that the patient may never know about the existence of this measure. If the mediation impulse does not appear at an early stage of the conflict, but only after it has been formalized, the willingness of the parties to dialog naturally decreases. The absence of the information obligation is therefore not a technical flaw but an actual barrier to undertaking mediation.[32]

The systemic nature of this barrier becomes even more apparent in mediation conducted with regard to medical malpractice. The personal model of the mediator raises the most objections. The relevant Polish literature indicates that the arrangement whereby the mediator is a physician selected by the medical council contradicts the fundamental principles of mediation and is the source of the dysfunction of the regulatory framework as a whole. This is not about questioning the integrity of a particular individual, but rather about the objective perception of the model itself, because from the patient's perspective, a mediator belonging to the same professional association as the accused physician may appear to be closer to the other party in the dispute. Furthermore, the law does not require the mediator to have specialized mediation training, which further undermines patients' trust in this procedure. As a result, the patient is supposed to participate in a process based on trust, while the organizational model itself undermines that trust.[33]

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31 See Pluci*ńska-Nowak M.,* The Status and Faces of Mediation in Polish Society, Poznań, 2021, 173-174 (in Polish).

32 *Trapszyc J.,* Methods of Out-of-Court Resolution of Medical Disputes: The Specificity of Mediation, in: Alternative Methods of Dispute Resolution in Medical Matters, Bączyk-Rozwadowska K., Chludziński B. (eds.), Toruń, 2021, 101 (in Polish).

33 *Kmieciak B.,* Conflict between the Physician and the Patient: An Attempt at Diagnosis, Proposals for "Treatment", Archiwum Filozofii Prawa i Filozofii Społecznej, No. 1, 2016, 40 (in Polish); Gmurzy*ńska E., Morek R.,* On Problems Concerning the Resolution of Medical Malpractice Disputes and the Role of the Mediator, Kwartalnik ADR, No. 3(15), 2011, 70 (in Polish). *See also Nordhelle G.,* Mediation: The Art of Resolving Conflicts, Gdańsk, 2010, 142-157 (in Polish).

Another problem that had been noticed for a long time was the caution of public healthcare providers in entering into settlements. There was a significant reserve on the part of public finance sector entities to settle disputes amicably, due to fears of a negative assessment of such type of resolution by their supervisory authorities and the entrenched belief that even an unfavorable court ruling is "safer" than a settlement. A normative change was brought about by the introduction of Article 54a of the Public Finance Act, which, effective from 1 June 2017, requires that the effects of concluded settlements in disputes over civil law claims be assessed.[34] It cannot therefore be claimed that this barrier has the same gravity today as it did before 2017. However, it must be equally clearly emphasized that it has been removed primarily at the normative level, and not automatically at the practical level. Since the need to overcome the "mental" reserve towards settlements used to be noted even after the amendment, the patient may still encounter institutional caution on the part of a public healthcare provider in resorting to amicable solutions.

As far as practical barriers are concerned, the lack of organizational support for the patient in the mediation preparation phase should first be mentioned. A medical dispute almost always involves complex clinical, documentation and legal issues, and the patient enters into a dialog with an entity with greater organizational experience and professional background. The existing institutional arrangements provide access to free-of-charge general legal assistance and mediation, but do not create a clearly separate path for preparing a patient for medical mediation as a specific category of cases. As a result, the patient can formally enter into mediation, while still being practically unprepared for it. This problem should be understood not as a total lack of any assistance but as a lack of sufficiently specialized and easily accessible assistance.

Costs are also part of the list of practical barriers. Mediation is generally a cheaper option than court proceedings, the mediator's remuneration in property-related cases is one percent of the value of the disputed item.[35] However, this does not mean that the financial barrier disappears completely. The patient after a medical incident often struggles with a deterioration of their health, limited ability to work or the cost of further treatment, and in such conditions even a relatively lower cost of mediation is perceived as another burden. The existing system of free-of-charge mediation, while in fact available, covers a limited circle of eligible persons and does not solve the problem of costs in every medical case. It is therefore more accurate to say that mediation weakens, but does not eliminate, the financial barrier.

Emotional barriers, which are of particular importance in medical disputes, cannot be ignored, either. Conflicts related to medical events are often associated with dramatic damage, a strong sense of

[34] Article 54a of the Act of 27 August 2009 on Public Finance, Journal of Laws of 2024, item 1530 (consolidated text), provides that an entity of the public finance sector may conclude a settlement concerning a disputed civil-law receivable if its effects are more advantageous to that entity than the probable outcome of court or arbitral proceedings. This provision entered into force on 1 June 2017 pursuant to the Act of 10 February 2017 amending the Act on Public Finance, Journal of Laws of 2017, item 659.

[35] Regulation of the Minister of Justice of 20 June 2016 on the Amount of the Mediator's Remuneration and Reimbursable Expenses in Civil Proceedings, Journal of Laws of 2016, item 921; see also Article 79(1)(2)(a) of the Act of 28 July 2005 on Court Costs in Civil Matters, Journal of Laws of 2025, item 1228 (consolidated text), as regards the reimbursement of the court fee.

harm and a profound disturbance of trust. The decision to enter into mediation is made by the patient not as a cold calculation, but very often due to a resentment, anger or a sense of helplessness. In such a condition, the proposal for mediation itself may be perceived not as an opportunity to clarify the matter, but as an attempt to weaken the claims or to conclude the conflict prematurely. Mediation, despite its advantages, requires minimal willingness to talk, and the patient may simply be temporarily unable to have it.

The emotional barrier to accessing mediation is of a dual nature: it stems from the medical incident itself, and at the same time reinforces other barriers, primarily a lack of trust and a tendency to view the court as the only place where "justice is administered." Access to mediation is therefore not solely a matter of regulations and institutions; it is also a matter of the participant's psychological readiness to engage in a communication-based process.

For the reasons outlined above, it must be acknowledged that the patient's limited access to medical mediation does not result from a single obstacle, but from the cumulation of multiple factors such as low public awareness, insufficiently timely information, structural flaws in certain legal provisions, a fragmented organizational infrastructure, costs, and a heavy emotional burden. Consequently, the patient's rights as a party to mediation, although formally in place, largely fail to achieve full practical effectiveness. This, in turn, leads directly to the final question regarding the conclusions that should be drawn from this state of affairs, and the resulting recommendations.

8. Conclusion

The analysis confirms the paradox mentioned in the Introduction: although mediation in medical matters is permissible under Polish law, it has not become an institution truly rooted in the practice of resolving medical disputes. However, it is impossible to explain this situation solely by pointing to low social awareness or just the attachment of parties to the judicial path. A more accurate statement is that the marginal significance of mediation is determined both by the barriers related to awareness and culture, and the dispersion and insufficient adaptation of existing legal solutions to the specificity of patient–doctor disputes.[36]

The second conclusion of fundamental importance is that the primarily compensatory nature of medical disputes is only ostensible. In fact, much broader needs behind it are revealed: the need for clarification, to be heard, to have one's dignity respected, sometimes also for an apology and to influence the way of resolving the conflict. It is precisely the sphere in which mediation proves to be a procedure potentially better adapted to the real nature of the dispute than the classical judicial

36 *Przylepa-Lewak A.,* Contemporary Challenges of Medical Mediation, Krytyka Prawa, Vol. 15, No. 3, 2023, 241, 246-247, 250 (in Polish); *Ziemiak M.P.*, Mediation in Medical Matters in Common Law Systems on the Example of Great Britain, Ireland, and the USA: A Model for the Polish Legislator?, in: Alternative Methods of Dispute Resolution in Medical Matters, *Bączyk-Rozwadowska K., Chludziński B. (eds.), Toruń*, 2021, 162 (in Polish); *Trapszyc J.,* Methods of Out-of-Court Resolution of Medical Disputes: The Specificity of Mediation, in: Alternative Methods of Dispute Resolution in Medical Matters, *Bączyk-Rozwadowska K., Chludziński B. (eds.), Toruń*, 2021, 101, 103-104, 112 (in Polish).

procedure, because it allows not only the financial element to be covered by the settlement, but also those issues that have a relational and communicative dimension for the patient.

This does not mean, however, that the catalog of rights of the patient as a party to mediation is sufficient to consider the current model satisfactory. These rights exist, but they have not been based within an institutional structure that corresponds to the delicate nature of medical disputes. This is most clearly seen in the proceedings on the professional liability of physicians, where both the model of the mediator-doctor and the insufficiently defined influence of the settlement on the further course of the proceedings are questionable. From this perspective, the weakness of medical mediation is not only practical but also systemic.

In view of the above, it should first be proposed that patients be clearly and as early as possible informed of the possibility of using mediation. This information should not boil down to the mere indication that mediation exists, but should also include its voluntary nature, its basic legal effects, the rules of confidentiality and the nature of the settlement. Since it is argued in the literature that the ignorance of the parties and the lack of trust in an unfamiliar procedure are among the important causes of the marginalization of mediation, the duty to provide information should be deemed a condition for real access by patients to this form of dispute resolution.

Secondly, it seems that the model of mediation in proceedings concerning the professional liability of physicians needs to be revised. It is difficult to consider a structure where the patient faces a situation in which both the defendant physician and the mediator come from the same professional group, as a solution that fully complies with the axiology of mediation. This is not about alleging that the doctor-mediator is biased, but about objective conditions for building trust in the procedure. Therefore, it would be reasonable to move away from the current model to a mediator independent of associations of medical professionals, and at the same time prepared to conduct medical disputes. At the same time, the consequences of the settlement for the further course of the proceedings should be made clearer, so that the conclusion of the agreement does not remain a legally weak and institutionally vague event.

Thirdly, it is worth considering a more specialized model of medical mediation, whether by the institution of a medical mediator or by a separately defined out-of-court procedure designed for patients' disputes with doctors and healthcare providers. The legal comparative literature indicates that the genuine attractiveness of mediation is built only by such features as promptness, de-formalization, confidentiality, equality of parties and a high level of specialization of the mediator. It is not a matter of mechanical transplantation of foreign solutions, but of taking over their functional core.[37]

[37] *Sporczyk-Popielarczyk A.,* Medical Mediator as a Chance to Save the Patient-Physician Relationship? Reflections Against the Background of Belgian Legal Regulations, in: Alternative Methods of Dispute Resolution in Medical Matters, *Bączyk-Rozwadowska K., Chludziński B. (eds.), Toru*ń, 2021, 124, 127-128 (in Polish); *Ziemiak M.P.,* Mediation in Medical Matters in Common Law Systems on the Example of Great Britain, Ireland, and the USA: A Model for the Polish Legislator?, in: Alternative Methods of Dispute Resolution in Medical Matters, *Bączyk-Rozwadowska K., Chludziński B. (eds.), Toru*ń, 2021, 176 (in Polish).

The Polish normative and scholarly material shows that the mere statutory adoption of mediation does not yet determine its effectiveness. This is because what is also needed is legible information, a neutral and specialized mediator, clearly defined effects of the settlement and an institutional structure that will improve the trust of the party involved in the dispute against the professional and the healthcare institution.

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Limitation of Freedom of Speech of Judges in Polish Law and the Procedural Guarantee of the Principle of Objective Impartiality – Considerations Against the Background of Civil Procedure

This article addresses the issue of the limits of judges' freedom of speech within the Polish legal order, analyzing it through the prism of the procedural guarantee of the objective impartiality of the court. In the face of the growing activity of judges in public debate and social media, the author raises the question of the admissibility and justification of their exercise of the constitutional freedom of speech.

The study points out that judges, although enjoying special systemic privileges (including independence, high remuneration, immunity), are subject to rigorous restrictions and ethical obligations. According to legal provisions and the Code of Ethics, a judge must avoid behaviors that could bring disrepute to the dignity of the office or weaken trust in their impartiality. The citizen's right to a fair trial before an objective clashes with the judge's right to freely express their views, especially in the political and public spheres.

Speaking publicly, revealing the private or political convictions of a judge, may give rise to justified concerns on the part of the parties to the proceedings regarding their objectivity, thereby undermining the foundations of the administration of justice. Although the right to expression is not entirely taken away from judges (e.g., in scientific discourse or when defending the independence of courts, which is confirmed by the case law of the ECtHR), such situations require a case-by-case balancing of values based on the principle of proportionality.

Concluding, the article states that for the protection of objective impartiality, the overriding principle should be far-reaching restraint, or even striving for the silence of judges outside the courtroom. The restriction of freedom of speech constitutes in this case a necessary and systemically justified burden, which is adequately compensated by the state in the form of professional privileges.

***Keywords:** freedom of speech; principle of objective impartiality; civil procedure; judges.*

1. Introduction

Recently, in the Polish reality – especially the extra-legal one – it has become increasingly common to encounter public activities of judges who voice their opinions in ongoing politically significant discussions, but also who record shorts and reels for social media. This trend is growing

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stronger. On the other hand, one can observe events such as the recent statement by Dr. hab. Marcin Dziurda, a professor at the University of Warsaw (a specialist in the field of civil procedure), who, after his election as a judge of the Constitutional Tribunal, announced the limitation of his activity on the LinkedIn portal, indicating that "I believe that a judge should speak through their judgments, and not on social media."[1]

Given the aforementioned divergence of views regarding the judge's role in public discussion, the question arises whether a judge in the Polish legal system enjoys freedom of speech, and if so – whether they should actually exercise it, or whether, due to special reasons, they should not exercise freedom of speech to the fullest extent. The procedural guarantee of the court's objective impartiality may stand in opposition to this freedom of speech.

It should be noted here that this article does not constitute a study in the field of legal theory and philosophy on whether courts and judges should be more open to society. Currently, considerations are being conducted in the literature as to whether the courts stepping out of the "glass tower" causes the courts to regain their legitimacy to adjudicate and pass judgments in the eyes of society. The aim of the article is to examine this issue exclusively from a procedural perspective and the perspective of binding procedural guarantees.

2. The Position of Judges in the Legal Order of Poland

The considerations should begin with an explanation of a certain semantic difference that exists within Polish law. For a clear distinction is made between the concept of "court" and "judge." A court is an organ that resolves cases referred to it (within the framework of civil procedure, the court's role is to resolve civil cases and constitutional cases). Meanwhile, a judge is a person holding the office of a judge. In Polish procedure (as far as common courts are concerned), a court may adjudicate in a panel of one judge, three judges, or one judge and two lay judges. The attributes of a judge can directly influence the characteristics of the court in a given case – if the judge is not impartial, then the court will be all the less impartial.

The Polish legal system is based on the principle of the separation of powers – in accordance with Article 10 of the Constitution,[2] the system of the Republic of Poland is based on the division and balance of the legislative, executive, and judicial powers. Judicial power is exercised by courts and tribunals. Within the framework of Articles 178, 179, 180, and 181 of the Constitution, the constitution-maker provided for certain systemic guarantees aimed at securing the balance of the judicial power. These include: judicial independence, constitutional protection of working conditions and pay at a level corresponding to the dignity of the judicial office and the duties performed, appointment of judges for an indefinite period linked to the principle of judicial irremovability, and judicial immunity. Only in exceptional cases is it possible to dismiss a judge from office, suspend

1 LinkedIn post dated March 13, 2026 <https://www.linkedin.com/posts/marcin-dziurda-94115626b_szanowni-pa%C5%84stwo-droga-sieci-ze-wzgl%C4%99du-activity-7438207288492064768-YN6E?utm_source=share&utm_medium=member_desktop&rcm=ACoAACHCCWwBjNF0cOklXW_swCTvgtXNJQpXXvo> [01.07.2026].

2 Constitution of the Republic of Poland of April 2, 1997 (Dz. U. No. 78, item 483, as amended).

them from duty, or transfer them to another seat or another position against their will. At the same time, the Constitution provides that upon reaching the legally prescribed age, judges retire.

Attention should also be drawn to judicial privileges in the form of receiving a dignified salary – it is calculated as a multiplier of the average salary in the second quarter of the previous year, as announced in the Official Gazette of the Republic of Poland "Monitor Polski" by the President of Statistics Poland (GUS). For a district court judge, this multiplier is 2.05 in the first pay grade; in the case of an appellate court judge, the multiplier is 3.23 in the tenth pay grade. As of the writing of this article, the average salary is PLN 9,197.79 gross, which means that a beginning judge can expect a base salary of PLN 18,855.47 gross, and a judge at the end of their career within the common judiciary can expect a base salary of PLN 29,708.86 gross. Additionally, judges are entitled to a seniority allowance (from 5% to 20% of the base salary), a functional allowance, and no social security contributions are deducted from judges' salaries. A judge is also entitled to other benefits – however, I believe they can be omitted from the perspective of this article. It should be noted that the median salary in the national economy in Poland in 2025 was PLN 7,414.00 gross.[3]

However, it is impossible to ignore the regulation of Article 98 §1 of the Law on the System of Common Courts (p.u.s.p.), which in my opinion remains an unconstitutional provision, as it cannot be reconciled with the requirement of the separation of powers and leading one's life in a way that does not weaken trust in their impartiality. According to this provision: "A judge applying for the mandate of a deputy, senator, or councillor shall be granted unpaid leave for the duration of the election campaign."

The position of the judge described above leads, in my opinion, to a fairly clear conclusion – judges in Poland constitute a legally privileged group. They achieve salaries about which there may be doubt as to whether they constitute an adequate amount of remuneration – it should be noted that according to legal provisions, professors employed at a public university receive a salary of no less than PLN 9,370.00 gross.[4] A judge's salary is, however, quite consistent with the amount of a deputy's salary (PLN 13,872.00 gross), if increased by an allowance (dieta) of PLN 4,335.00 gross.[5] Although this remuneration seems inadequate from the perspective of earnings in the state's budgetary sphere, if limited to entities directly exercising legislative or executive power, it does not seem to deviate from them. It should be noted, however, that neither persons involved in the exercise of executive or legislative power have a guarantee of almost lifelong employment, which is additionally free from practically all external interference.

For their privileges, however, judges pay a relatively high price – as evidenced by §1 of the Code of Professional Ethics for Judges and Judicial Associates (hereinafter: the "Code"),[6] according to

[3] <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-zatrudnieni-wynagrodzenia-koszty-pracy/rozklad-wynagrodzen-w-gospodarce-narodowej-w-pazdzierniku-2025-r-,32,22.html > [01.07.2026].

[4] Regulation of the Minister of Science and Higher Education of September 25, 2018, on the amount of the minimum basic monthly salary for a professor at a public university (consolidated text: Dz. U. of 2024, item 1407).

[5] <https://www.sejm.gov.pl/sejm10.nsf/komunikat.xsp?documentId=345209DCB7AD8FC0C1258A6200 4E1707&symbol=FAQ_KOMUNIKAT> [01.07.2026].

[6] Resolution No. 25/2017 of the National Council of the Judiciary of January 13, 2017, on the announcement of the consolidated text of the Collection of Principles of Professional Ethics for Judges and Assessors.

which: “The holding of the office of a judge is associated with special duties and personal restrictions.” According to Article 82 §2 of the p.u.s.p.[7], a judge should, both in and out of service, guard the dignity of the judicial office and avoid everything that could bring disrepute to the judge's dignity or weaken trust in their impartiality. Generally, a judge also may not undertake additional employment, with the exception of teaching and research. Nor may they undertake an occupation or a method of earning that would interfere with the performance of a judge's duties, could weaken trust in their impartiality, or bring disrepute to the dignity of the judicial office. Furthermore, according to Article 178(3) of the Constitution, a judge may not belong to a political party or a trade union, nor conduct public activity incompatible with the principles of the independence of courts and the independence of judges. Further restrictions result from the principles specified in the Code of Professional Ethics for Judges and Judicial Associates. According to §2 of the Code, a judge must always be guided by the principles of honesty, dignity, honor, a sense of duty, and must observe good manners. In turn, according to §3 of the Code, a judge may not use their status and the prestige of the office to support their own interests or those of other persons. It seems, however, that for the analysis of the research problem, §3a and §4 of the Code are of the greatest importance. According to the legal norms contained in these provisions, a judge is obliged to care for the good of the court, the administration of justice, and to care for the systemic position of the judicial power. According to §3a of the Code, a judge is obliged to avoid taking actions in the private, professional, and public spheres that could create a conflict of interest and thereby negatively affect the perception of the judge as an impartial person and undermine trust in the judicial office. This corresponds with the content of §5 of the Code, which states that: “A judge should avoid behaviors that could bring disrepute to the judge's dignity or weaken trust in their impartiality, even if they were not included in the Code.” A similar principle is found in §10 of the Code. According to further provisions of the Code, a judge should not express opinions regarding pending proceedings or those that may arise in the future; furthermore, they should use social media with restraint.

The outlined problem regarding the systemic position of the judge in Polish law is related to the concept of the judge's role in society – an epistemic and an egalitarian variant can be distinguished.[8] As P. Kaczmarek points out – the former “presents the judge as a special category of citizen due to professional obligations,” while the latter assumes that the judge is a citizen like any other person.[9]

3. The Principle of Objective Impartiality as a Systemic Principle and a Principle of Civil Procedure

According to Article 45 §1 of the Constitution, everyone is guaranteed the right to have their case heard by an impartial court. Impartiality manifests itself in two aspects – subjective impartiality, which expresses the judge's attitude toward the case and the party, and objective impartiality, which

[7] Act of July 27, 2001, Law on the Organization of Common Courts (consolidated text: Dz. U. of 2024, item 334, as amended).

[8] *Kaczmarek P.*, Wolność wypowiedzi sędziego w perspektywie pełnionych obowiązków, Krytyka Prawa, No 4, 2022, 92.

[9] Ibid.

comes down to answering the question of whether for any external participant (an objective observer) the court will remain impartial.[10]

The very principle of judicial impartiality is considered one of the most essential principles of a democratic state ruled by law. It is even pointed out that it constitutes "the essence of justice and the most valuable attribute of judicial power."[11] For its premise is equality before the law, and this cannot be achieved if some individuals, for whatever reason, were to have extra-legally granted protection on legal grounds.[12]

As T. Pietrzykowski aptly points out: "The rank of impartiality as one of the fundamental legal values results from its close connection with the very idea of law as an abstract and general norm that equally determines the rights and obligations of everyone who finds themselves in a similar situation. It is therefore the opposite of the dependence of legal decisions on the arbitrary whims or preferences of a specific decision-making person."[13] According to Pietrzykowski, impartiality is a duty not only towards the parties to the proceedings themselves, but also towards society.[14] T. Pietrzykowski points out, however, that impartiality by no means argues for withdrawing from publicly presenting views, but only requires exercising restraint.[15]

It should be explained that the constitutionally guaranteed right to a court is based on the concept of a fair trial, i.e., a reliable judicial process that guarantees each party to the proceedings a balance in procedural rights.[16] Impartiality, in turn, is considered one of the guarantees of a fair trial.[17]

4. Freedom of Speech as a Constitutionally Protected Legal Value

According to Article 54 of the Constitution, "Everyone is guaranteed the freedom to express their views as well as to acquire and disseminate information." In the doctrine of constitutional law, it is pointed out that this principle applies in two scopes – in the sphere of private life and in the sphere

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10 Judgment of the Constitutional Tribunal (TK) of January 27, 1999, K 1/98, OTK 1999, No. 1, item 3; Judgment of the TK of July 20, 2004, SK 19/02, OTK-A 2004, No. 7, item 67; *Pietrzykowski T.*, Bezstronność sędziowska. Lekcje z kryzysu, Przegląd Sądowy 2022, No. 1, 7, footnote 7.

11 *Waśkowski E.*, System procesu cywilnego, t. 1, Wstęp teoretyczny. Zasady racjonalnego ustroju sądów i procesu cywilnego, Wilno 1932, 4 (in Polish); *Tobor Z., Pietrzykowski T.*, Bezstronność jako pojęcie prawne [in:] Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego, (eds.) *Tobor Z.*, *Bogucka* I., Kraków, 2003, 272 and n. (in Polish); *Tobor Z.*, Bezstronność sędziego, „Przegląd Sądowy" 2005, 6, 3 and n. (in Polish); *Łazarska A.*, Rzetelny proces cywilny, Warszawa, 2012, 214 and n. (in Polish); *Gudowski J.*, Wyłączenie sądu jako organu wymiaru sprawiedliwości – nowa instytucja w prawie procesowym cywilnym i karnym, „Przegląd Sądowy" 2021,6, 5 and n. (in Polish); *Gudowski J.*, Iudex impurus. Wyłączenie z mocy samej ustawy sędziego objętego zarzutem wadliwego powołania lub przejścia na wyższe stanowisko sędziowskie, „Przegląd Sądowy" 2022, 5, 5.

12 *Pietrzykowski T.,* Bezstronność sędziowska. Lekcje z kryzysu, Przegląd Sądowy 2022, 1, 6.

13 Ibid.

14 Ibid, 6-7.

15 Ibid. 16.

16 *Walasik M.,* Interakcje wykładni prawa cywilnego materialnego i procesowego, Państwo i Prawo 2023, 6, 137.

17 *Łazarska A., Szanciło T.* [in:] *Szanciło T.* (eds.), Kodeks postępowania cywilnego. Komentarz. Art. 1–458[16]. Tom I, 2023, art. 48, Nb 1.

of public and political life.[18] It seems that any statements made publicly will belong precisely to the latter sphere. It is also pointed out in the literature that freedom of speech constitutes a freedom of a political nature. There is no doubt that freedom of speech does not have an absolute character, which means that it is subject to limitations.[19]

5. Does a Judge Have the Right to Freedom of Speech?

It seems that a judge, within the framework of their private life, will generally enjoy a certain degree of freedom of speech – which, however, may in special situations be subject to limitations, so that the judge does not violate the requirements concerning the dignity of the office. However, since, as I have indicated, it is assumed that freedom of speech in the public sphere constitutes a freedom of a political nature, it does not seem that this freedom should belong to a judge, who should not be connected in any way with the legislature or the executive power.

Taking into account the wording of Article 54 of the Constitution, which categorically grants everyone the freedom of speech, one may have doubts as to whether the regulations concerning the limitation of judges' ability to make such statements are actually justified. It should be noted that the restriction of judicial freedom of speech can be justified by three arguments. Firstly – Article 54 of the Constitution remains in conflict with Article 178(3) of the Constitution (often in connection with Article 10 of the Constitution).[20] Secondly, they may arise from Article 45 §1 of the Constitution, which establishes the right to a court.[21] In the event of a conflict between constitutional norms, a weighing of conflicting values must be performed. Finally, these limitations may be introduced on the basis of Article 31(3) of the Constitution, according to which: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."[22]

In the Polish doctrine, it has even been pointed out that: "the attitude of an impartial judge must also manifest itself outside of pending cases in such a way that it shapes the image of an impartial court in the public consciousness."[23] M. Wróblewski emphasizes that this statement also applies to a judge's public statements, and the doctrine sees examples of threats to impartiality and independence in expressing political views, voting in association meetings, signing protest letters, making statements of a religious nature, or even participating in charitable campaigns (the latter, however, raises serious

18 *Sadomski J.* [in:] *Safjan M., Bosek L.* (eds.), Konstytucja RP. Tom I. Komentarz do art. 1–86, wyd. 1, 2016, art. 54, Nb 7.

19 *Florczak-Wątor M.* [in:] Tuleja P. (eds.) Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2023, art. 54.

20 *Wróblewski M.*, Granice ekspresji i wypowiedzi sędziego – zarys problemu, Krajowa Rada Sądownicza 2017,1, 29, 32.

21 Por. *Maniewska E.*, Apolityczność jako wyznacznik granic wolności wypowiedzi sędziego dotyczących ustawowych reform sądownictwa (ich krytyki), Państwo i Prawo 2019,7, 23.

22 Ibid, 21.

23 *Oniszczuk J.*, Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI wieku, Warszawa 2004, 371.

doubts in the opinion of both M. Wróblewski and a part of the doctrine).[24] It should be noted, however, that M. Wróblewski advocates allowing judges freedom of speech within social media.[25]

M. Laskowski admits that "Generally, there is a conviction that a judge is a citizen and, like everyone else, may enjoy freedom of speech, except that due to the office held, they are subject to restrictions in publicly expressing their own views," but he further argues that the participation of judges in public discussions should be assessed positively.[26] M. Laskowski also points out that the limitation of a judge's speech aims to ensure, inter alia, impartiality.[27]

Generally, within the disciplinary case law of the Supreme Court, it is assumed that a judge actually enjoys less freedom of speech than other citizens.[28] However, the possibility of restrictions is pointed out mainly due to the dignity of the profession rather than impartiality in the course of proceedings.[29] In the doctrine, however, it is indicated that the ethical requirements that judges must meet largely depend precisely on the requirement for the court to maintain impartiality.[30] One should cite a ruling of the Supreme Court, in which the Court stated that: "A judge should, both in and out of service, avoid everything that could weaken trust in their impartiality. The interest of the administration of justice as an overriding value requires from the judge far-reaching restraint in conduct in all spheres, not excluding the participation in public debate permitted by the Constitution and the right to speak on any topic, including political ones (Article 54(1) and Article 178(3) of the Constitution of the Republic of Poland); however, this activity may not undermine the principles of the independence of courts and the independence of judges."[31]

On the other hand, however, in the case law of the ECtHR, it is accepted that judges may participate in discussions concerning reforms of judicial proceedings.[32] It should be borne in mind, however, that in accordance with Article 10(2) of the ECHR,[33] the exercise of the freedom of

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24 *Banaszak B.*, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2012, 892–895(in Polish); *Wróblewski M.*, Granice ekspresji i wypowiedzi sędziego – zarys problemu, Krajowa Rada Sądownicza 2017,1, 29-30.

25 *Wróblewski M.*, Granice ekspresji i wypowiedzi sędziego – zarys problemu, Krajowa Rada Sądownicza 2017,1, 33-34.

26 *Laskowski M.*, Granice wolności wypowiedzi sędziego w warunkach kryzysu praworządności, Przegląd Sądowy 2023, 3, 7.

27 Ibid.

28 *Wróblewski M.*, Granice ekspresji i wypowiedzi sędziego – zarys problemu, Krajowa Rada Sądownicza 2017,1, 30 (in Polish); Judgment of the Supreme Court (SN) of June 22, 2015, SNO 34/15, LEX No. 1747852.

29 Judgment of the Supreme Court (SN) of June 22, 2015, SNO 34/15, LEX No. 1747852.

30 *Wróblewski M.*, Granice ekspresji i wypowiedzi sędziego – zarys problemu, Krajowa Rada Sądownicza 2017, 1, 31; *Dąbrowski S., Łazarska A.,* Nieskazitelny charakter jako przesłanka powołania na sędziego. Komentarz do art. 61 ustawy – Prawo o ustroju sądów powszechnych, LEX/el. 2013.

31 Judgment of the Supreme Court (SN) of December 15, 2017, SNO 51/17, LEX No. 2429623.

32 Judgment of the ECtHR of June 23, 2016, application No. 20261/12, *Baka v. Hungary*; Judgment of the ECtHR of October 28, 1999, in the case of *Wille v. Liechtenstein*, application No. 28396/95; Judgment of the ECtHR of November 13, 2008, in the case of *Kudeshkina v. Russia*, application No. 29492/05..

33 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS done in Rome on November 4, 1950, subsequently amended by Protocols Nos. 3, 5, and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

expression may be subject to restrictions that are necessary to guarantee the authority and impartiality of the judiciary.

The problem concerning the concurrence of the freedom to conduct scientific research (and the presentation of its results) with the freedom of speech should be pointed out. The Polish legislator, in fact, permits judges to conduct scientific work. As E. Maniewska indicates – this means that in the case of scientific symposia, conferences, and articles, the scope of a judge's freedom of speech should be broader.[34]

Merely by way of example, to illustrate what the considered problem entails – if a judge publicly violates another person's good name, e.g., by using words commonly considered insulting towards them – it seems that they will not meet the requirement of objective impartiality in any cases concerning the infringement of personal rights in this particular way. A plaintiff appearing before the court may harbor a concern whether, since the judge themselves applies such practices in private life, they might not look more leniently upon a defendant similar to themselves. Similarly, if a judge expresses an opinion on whether they recognize a given judgment (e.g., of the CJEU, the Constitutional Tribunal) or a given person as holding an office of a body (in a situation where this is disputed), or even if they speak about the constitutionality of a statutory act outside the courtroom – a litigant for whom this issue affects their legal situation will remain in deep doubt as to whether the judgment has not already been passed at the stage of the random allocation of the case.

However, E. Maniewska rightly points out that the limitation of speech resulting from Article 45(1) of the Constitution loses its significance the moment a judge retires.[35]

Thus, the assumption of whether a judge has freedom of speech remains problematic. It seems that in the private sphere – when this expression is presented with moderation and among the judge's closest friends – nothing should limit this sphere of expression. It is different, however, in the case of the public sphere – it seems that a judge should not appear in the media, nor should they run channels on social media. For the role of a judge is not to educate society, but to resolve disputes in a manner that gives citizens a sense of security. Finally, it should be noted that a judge who begins to live a public life enters a situation that threatens their impartiality – if they begin to develop a social media channel, which becomes their main source of recognition and a springboard to higher earnings or a political career, such a judge begins to fear issuing a ruling that is lawful but unpopular. The same will happen with all those situations where such a judge can count on the favor of television, radio, or the press (translated from the likely typo *pracy* to *prasy* for contextual coherence). The legislator introduced regulations concerning dignified remuneration precisely so that a judge would not be interested in seeking other ways to earn additional money – for this will always lead to the weakening of their impartiality.

Where and in what way, then, should the limit on judicial freedom of speech be drawn when looking at this issue from the perspective of objective impartiality? It seems that the basic mechanism deciding whether a judge's freedom of speech is subject to limitations will be the method of weighing

[34] Maniewska E., *Apolityczność jako wyznacznik granic wolności wypowiedzi sędziego dotyczących ustawowych reform sądownictwa (ich krytyki)*, Państwo i Prawo 2019, 7, 25-26.

[35] Ibid, 43.

within the framework of the principle of proportionality, which has an optimizing character.[36] As A. Olaś points out, “For liberal (deliberative) democracy and the open society appropriate for it are inherently associated with pluralism, i.e., the coexistence of various, often contradictory values and rights, which requires resolving the conflicts arising between them by seeking a 'golden mean,' and thus a dynamic balance – varying depending on the specificity of the adjudicated facts of the case and the entirety of relevant circumstances.”[37]

6. Conclusion

Summing up – abstracting from other reasons, in particular from the field of legal theory and philosophy, as well as social persuasion by judges, and limiting oneself only to the principle of judges' objective impartiality, it must be stated that a judge should not express their views outside the courtroom. This principle, however, does not have an absolute character – although it arises from Article 45 §1 of the Constitution and Article 178(3) of the Constitution, it does not have a strong enough character to invariably exclude the civic freedom of speech granted by Article 54(1) of the Constitution. Each time it is necessary to weigh these values and consider which constitutionally protected good is of greater importance. Nevertheless, it seems that the rule should be at least to exercise moderation, although striving for silence by judges would be preferred. Judges do not constitute a social group somehow particularly affected by these restrictions – admittedly, it is a somewhat painful burden, but the state adequately compensates for bearing it.

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[36] *Tuleja P.* [in:] *Tuleja P.* (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2023, 120.
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Opportunities for Introducing an Alternative Dispute Resolution Mechanism in Polish Tax Proceedings

This article is devoted to the topic of mediation in Polish tax law. It examines the possibility of regulating mediation as a method of dispute resolution in Polish tax law in the near future. Mediation in Polish tax law should be regulated by the provisions of the Polish Tax Ordinance. The study pays particular attention to the current position of the Ministry of Finance regarding the possibility of implementing mediation in tax proceedings. Published statistics on the resolution of administrative cases through mediation were also analyzed in the context of mediation's potential to accelerate the resolution of tax cases. Attention was also drawn to specific categories of proceedings in which cases should be resolved through mediation due to their unique nature. Contrary to the claims of the Ministry of Finance, the article confirmed the need to include mediation as a method of dispute resolution in Polish tax law, while also indicating a practical way in which mediation could be introduced into Polish tax law.

Keywords: *tax law; mediation; tax proceedings; public law.*

1. Introduction

Since the change of government in 2024, the Polish Council of Ministers has undertaken a series of legislative initiatives aimed at amending the provisions of the Tax Ordinance Act. Conducted work has been carried out on issues such as the statute of limitations, the expansion of the *in dubio pro tributario* principle, the restriction of mandatory disclosure rules regarding tax schemes, and the introduction of a six-month vacatio legis for tax legislation. Not all the proposed amendments entered into force. Nevertheless, the scale of the undertaken legislative efforts demonstrates the legislator's interest in reforming the provisions, including provisions of tax procedure. However, from this reform agenda there is almost no progress toward introducing the institution of mediation into the Polish tax system – even though a draft amendment to that effect had already been prepared.

In the current legal and political environment in Poland, the introduction of mediation into tax proceedings appears to remain only a theoretical concept. This happens despite the considerable support within legal scholarship and the existence of draft legislative proposals and probably it is unlikely to be put in the provisions of the Polish Tax Ordinance soon. The governing authorities appear to underestimate the benefits that mediation in tax matters could bring, referring in this context to the limited uptake of mediation in proceedings conducted under the Polish Code of Administrative Procedure. This reflects a broader underestimation of this dispute resolution method and a tendency to direct the activities of tax authorities toward resolving matters through the exercise of public authority, without due regard for the interests of the taxpayer – interests that could be served, among other

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things, by the fast resolution of disputes. The Ministry also appears to overlook mediation's potential as a vehicle for advancing the principle of building trust between tax authorities and taxpayers.

2. The Polish Ministry of Finance's Current Position on Mediation in Polish Tax Law

Any assessment of the current position of the Ministry of Finance regarding mediation in Polish tax law should be preceded by an overview of the strategic directions adopted by the National Revenue Administration for the years 2025–2028. These objectives are set out in the annex to the Ordinance of the Minister of Finance of 22 December 2024[1]. The objectives specified in that annex are organized into distinct strategic directions. It should be noted that the hierarchy in which those directions and, consequently, their corresponding objectives have been arranged appears to reflect the assumption that the most significant objectives are listed first in the document.

The first identified aim is the increase in the effectiveness and efficiency of the collection of tax and non-tax receivables, as well as the maintenance of a secure and effective system for border protection and the movement of goods. Among the actions intended to contribute to the achievement of this objective, the following are listed: effective management of tax arrears, ensuring border security and the proper flow of goods, effective collection of taxes, customs duties and other tax and non-tax receivables, efficient customs and fiscal control, closing loopholes in the tax system, and reducing the shadow economy. The way these primary objectives and corresponding actions have been defined indicates a high degree of fiscal orientation in the activities of the tax administration, which are fundamentally aimed at increasing tax revenue collection. Similarly, the 2025 Activity Plan of the Tax Administration Chamber in Bydgoszcz[2] identifies, as its first aim, the increase the effectiveness and efficiency of the collection of tax and non-tax receivables, as well as the maintenance of a secure and effective system for border protection and the movement of goods. It is only as the third and fourth aims that the plan identifies the provision of high-quality, professional and efficient client service across all tax offices, and the timely handling of appeals.

Considering the framework adopted by the Polish fiscal authorities, serious doubt must be raised against the prospects of effectively introducing and applying mediation in tax proceedings. While taxpayers might indeed be willing to resolve their disputes through such a mechanism, tax authorities could prove reluctant to engage in proceedings based on a mediation procedure. Mediation would not, by its very nature, serve the objective of maximizing tax revenues; rather, it would tend to lead to the adjustment of disputed tax liabilities to more realistic levels, or to the deferral of the moment at which such liabilities become due and payable.

This position appears to be supported by the response of the Polish Deputy Minister of Finance to a parliamentary question of 19 August 2025. While the response acknowledged that "*the possibility of introducing provisions on tax agreements – and, consequently, tax mediation – into the Polish legal*

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1 Order of the Minister of Finance of 22 December 2024 on the Guidelines for the Activities and Development of the National Tax Administration for 2025–2028, Official Journal of the Minister of Finance, Item 123, 23/12/2024 (in Polish).

2 Appendix to Order No. 119/2024 of the Director of the Tax Administration Chamber in Bydgoszcz, 31/12/2024 (in Polish).

system cannot be excluded," it simultaneously stipulated that "*the potential implementation of these institutions requires a prior in-depth analysis of the justification and advisability of such solutions*"[3]. At the same time, however, the Ministry chose to highlight and emphasize several circumstances that may indicate a lack of genuine willingness to introduce mediation into tax proceedings in the foreseeable future. Specifically, the Ministry pointed to the **potentially limited utility**[4] of the institution of mediation in tax matters as an obstacle to its introduction. Furthermore, the Ministry derived this assessment of limited utility from the restricted application of mediation in administrative proceedings conducted under the Code of Administrative Procedure, as well as in proceedings before administrative courts.

It must also be borne in mind that the comprehensive reform of the Tax Ordinance Act, prepared in previous years, ultimately never entered into force due to the principle of parliamentary discontinuity. In accordance with established Polish case law, "*the expiry of a term of the Sejm results in the discontinuity of actions undertaken both by the Sejm in pleno, by groups of deputies, and by its bodies. The expiry of a term is therefore understood by the Constitutional Tribunal as an interruption of the personal continuity of parliament and an interruption of the substantive continuity of its legislative work*"[5]. In the document, the Ministry indicates that it was precisely this parliamentary discontinuity that ultimately prevented the provisions on mediation in tax proceedings from entering into force. No mention is made, however, of the fact that there are no legal obstacles to incorporate the solutions developed by the Codification Commission including, in particular, those referring to mediation into a new government-sponsored legislative bill. It shows the lack of political willingness, which reflects the pursuit of other objectives of tax law from the perspective of both the executive and the legislature that take precedence over the introduction of mediation. In the author's view, the legislator should not close for the possibility of creating solutions that would enable mediation to be conducted within the framework of tax proceedings.

It should be assumed that the legislature should not rule out the creation of mechanisms that would allow for mediation within tax proceedings. In this regard, consideration should be given to gradually introducing mediation into specific categories of proceedings, to assess whether this institution is well-received and how it is perceived by both taxpayers and tax authorities.

Minister of Finance identified three areas that could be subject to mediation. It was noted that mediation and a tax agreement could apply:

- in cases of uncertainty regarding the facts of the matter, including when resolving such uncertainty in proceedings would entail excessive difficulties or costs disproportionate to the outcome;
- regarding the nature or value of a transaction, act, or event;
- regarding the application of tax relief, in particular the type of relief to be applied and the manner of its application[6].

[3] Response of the Minister of Finance and Economy to a Parliamentary Question, ref. no. DTS3.054.2.2025, 19/08/2025, 4–5 (in Polish).

[4] Ibid, 2.

[5] Judgment of the Provincial Administrative Court in Warsaw of 16 July 2020, Case No. VII SAB/Wa 92/20.

[6] Response of the Minister of Finance and Economy to a Parliamentary Question, ref. no. DTS3.054.2.2025, 19/08/2025, 4 (in Polish).

Among aforementioned areas, the greatest potential and public need lie in the introduction of mediation in cases involving the granting of relief from tax liabilities. This case will be analyzed in detail later in this text.

3. Polish Tax Proceedings – the Possibility of Introducing Mediation

In Poland, the most important forms of alternative dispute resolution include mediation and arbitration. Mediation is understood as a form of alternative dispute resolution in which a neutral and impartial third party, accepted by both parties to the dispute, assists in communication, identifies the scope of interests and issues for discussion, and seeks to reach a mutually acceptable agreement. Mediation is voluntary, informal, and confidential[7].

Arbitration, on the other hand, is a form of alternative dispute resolution conducted by an arbitrator without the involvement of a court. Disputes are typically resolved in accordance with the principles of civil or commercial law by impartial arbitrators (experts) appointed by the parties to the dispute. In Polish law, arbitration is known as an “arbitration tribunal.” Arbitration is used in civil and commercial matters.[8]

None of the forms of alternative dispute resolution have yet been provided for in Polish tax law. At the same time, the Polish Code of Administrative Procedure[9] provides comprehensive provisions regarding the conduct of mediation. Mediation may be conducted in cases decided through administrative discretion, such as those involving licenses or permits to conduct business, entries in the register of regulated activities, construction and architecture, or in matters of land-use planning.

It is true that, according to statistics cited by the Ministry of Finance, only one case was referred to mediation in administrative court proceedings in 2024[10]. However, according to statistics provided by the Ministry of Development and Technology, 7 cases were referred to mediation in 2017, 7 in 2018, 13 in 2019, and 11 in 2020. According to the findings in the mediation minutes, the following number of cases were resolved in each year: 2017 – 2, 2018 – 3, 2019 – 7, and in 2020 – 2[11]. It should be noted that these figures are based on surveys conducted by the Ministry of Development and Technology among public administration bodies. The survey was sent to 49 local government appeals boards (SKO), 16 provincial offices, 16 provincial building supervision inspectorates, 4 central offices, and all ministries[12].

At the same time, the same document identifies several factors that may explain why mediation is rarely used in administrative proceedings in Poland. These reasons include, among others, low

7 *Dumas A.*, Mediation in Tax Matters, Quarterly Journal of the National School of Judiciary and Public Prosecution, Issue 4(32), 2018, 30 (in Polish).

8 Ibid.

9 Act of 14 June 1960 – Code of Administrative Procedure, Journal of Laws of 2025, Item 1691 (in Polish).

10 Response of the Minister of Finance and Economy to a Parliamentary Question, ref. no. DTS3.054.2.2025, 19/08/2025, 3 (in Polish).

11 *Rochowicz P.,* Mediation Failure, but Simplifications Work – the Ministry of Development Evaluates Introduced Procedures, <https://www.prawo.pl/samorzad/uproszczenia-procedur-administracyjnych-nie-zawsze-dzialaja,516368.html\> [26.04.2026] (in Polish).

12 Ex Post Evaluation of the Functioning of Administrative Mediation, 4 (in Polish).

awareness of the possibility of using mediation and belief among parties that there is no genuine dispute between them and the first-instance authorities, which should be authoritatively resolved by a higher court. This belief results in a lack of interest among the parties in alternative dispute resolution methods[13]. At the same time, surveys show that authorities notified the parties of the possibility of mediation 1,294 times in 2018, 2,637 times in 2019 – 2,764 times, and in 2020, 1,669 times[14]. The real reason that may explain the lack of popularity of mediation in administrative cases is the parties' lack of awareness regarding the possibility of resolving the matter effectively and more quickly through this procedure. Therefore, it should be noted that providing the option to resolve some tax cases through mediation may not only positively impact the possibility of concluding tax proceedings more quickly and effectively for the parties but may also serve as an assumption for further promotion of mediation proceedings in Poland.

The statistics shown above indicate a lack of sufficient commitment on the part of public administration bodies in the process of promoting the amicable resolution of administrative disputes. However, this does not constitute sufficient evidence to conclude that the introduction of mediation into administrative proceedings in Poland was a mistake. Hence, the argument put forward by the Ministry of Finance regarding the potentially low interest in mediation in tax law appears merely as an excuse to avoid undertaking the necessary legislative work that would allow for the effective introduction of mediation into the Polish tax law system.

In this context, it would be worth to consider introducing mediation in phases in order to assess both the popularity of this procedure and how it is applied by Polish tax authorities. It would be possible to introduce legislative measures that would initially limit the use of mediation solely to cases involving the granting of relief from tax liabilities. Such proceedings are conducted pursuant to the provisions of Article 67a of the Polish Tax Ordinance[15].

The provision of Article 67a polish Tax Ordinance indicates that upon a taxpayer's application, in the events substantiated by important interest of the taxpayer or public interest, the tax authority may:

1) defer the time limit for tax payment or spread the tax payment into instalments;
2) defer or spread into instalments the payment of tax arrears including the default interest or interest on tax advance payments not paid timely;
3) annul tax arrears, default interest or prolongation fee in whole or in part.

Provisions mentioned before provide the possibility of deferring the tax payment deadline, spreading arrears into installments, or writing off tax arrears. The specific nature of this procedure is linked to the use of administrative discretion. Therefore, even if the conditions for granting relief are met, the tax authority is not obligated to grant it. The procedure for granting relief is a two-stage process. The first stage involves an evidentiary proceeding aimed at determining whether, in a specific case, there is an "important interest of the taxpayer" or a "public interest." These are disjunctive grounds – it is sufficient to satisfy one of them to proceed to the next phase of the proceeding. If

[13] Ibid.
[14] Ibid.
[15] Act of 29 August 1997 – Tax Ordinance, Journal of Laws of 2025, Item 111, as Amended (in Polish).

neither of these conditions are met, the authority is required to deny the relief. Only if at least one of them is found to exist does the authority decide based on administrative discretion, assessing the validity of granting the relief[16].

In practice, these cases are often highly emotionally challenging. When such cases are filed against the taxpayer, the taxpayer frequently fails to understand the outcome, often because they do not grasp the concept of administrative discretion, particularly when they have met one of the conditions specified in the regulation. At the same time, filing appeals against decisions and complaints regarding such decisions with the administrative court often leads to the revocation of these decisions from the legal system due to their defects. However, the nature of the system in place does not allow a court or an appellate body to dictate to the authority how to handle the case. This leads to a situation where the case is reviewed repeatedly, often failing to ultimately grant the taxpayer relief–but resulting in a significant prolongation of the time during which such a case is processed.

As indicated in the Polish literature, "*mediation in administrative proceedings may be used to: clarify and consider the facts of the case and the applicable legal norms, and to reach an agreement on a lawful resolution of the matter, for example, by issuing a decision or concluding a settlement with specific terms*"[17] . In the case at hand, mediation could be used both to reach findings on the facts of the case on neutral ground, including determining whether the conditions for granting a tax relief exist. It would also be possible for the party and the authority to negotiate the manner of resolving the matter, which would be as consistent as possible with both the party's interests and those of the tax authority.

Accordingly, negotiations could focus on selecting an appropriate payment plan, the possibility of a partial waiver of the arrears, the number of installments over which the arrears can be spread or setting an appropriate deadline for deferring the tax payment. After mediation, the authority's representatives would know how determined the taxpayer is to obtain relief, including what their actual motivations are for seeking relief. Meanwhile, the taxpayer could gain insight into the chances of a favorable resolution of the case. In the current reality, it is very difficult to obtain clear information regarding the outcome of the case while it is ongoing. Consequently, taxpayers are often surprised by a negative decision, which fosters a sense of injustice and misunderstanding, thereby eroding the taxpayer's trust in the tax authority. In the author's view, establishing both the factual circumstances and the possible directions of the resolution during mediation would lead to both a shortening of the duration of the proceedings and a reduction in the number of decisions subject to appellate review. This, in turn, would undoubtedly have a positive impact on reducing the costs of the proceedings.

Overall, in the author's view, the introduction of mediation could lead to more effective implementation of the fundamental principles of tax proceedings. Mediation could contribute to the implementation of the principle of conducting proceedings in a manner that inspires trust and to the

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16 Judgment of the Supreme Administrative Court of 12 June 2025, Case No. III FSK 322/24.

17 Ministry of Entrepreneurship and Technology, in Cooperation with the Center for Business Mediation at the National Chamber of Legal Advisers, Mediation in Administrative Proceedings: A Handbook for Public Administration Employees, 3 (in Polish).

optimization of the costs of such proceedings, thereby positively influencing the implementation of the principles of cost-effectiveness in tax proceedings.

Finally, it should be noted that the simplest way to introduce mediation into tax proceedings is not to create new regulations specific to tax proceedings. In this case, it is possible to formulate provisions referring to the provisions of the Code of Administrative Procedure regarding mediation. In principle, tax authorities could apply these provisions accordingly. Such a solution would allow for the rapid introduction of mediation into tax proceedings. Of course, in line with the earlier disclaimers, it is worth considering limiting the use of mediation (at the outset of its application in tax proceedings) to cases involving the granting of payment relief. In the next step, it would be possible to expand the use of mediation, for example, to cases involving the application of tax reliefs (R&D relief or IP BOX), in which it is often necessary to explain to the authority the methodology adopted for applying the relief – a task that cannot often be accomplished solely through an exchange of correspondence between the party and the authority.

4. Conclusion

Considering the arguments presented in this article, the thesis that the introduction of mediation into Polish tax law appears to remain, for the time being, merely a theoretical concept has been confirmed. This is evidenced primarily by the actions of the legislature and the executive branch. The results of the work conducted so far have not been utilized; in particular, the implementation of the prepared regulations on mediation in tax proceedings has been abandoned. Additionally, the Ministry of Finance appears to be seeking only arguments that, currently, confirm the lack of necessity to introduce mediation into tax proceedings. At the same time, the real benefits that could result from introducing mediation into tax proceedings – such as shortening the duration of tax proceedings, reducing the number of appealed decisions, and building trust in tax authorities–are not being recognized. On balance, taking these steps should also lead to a reduction in the costs associated with conducting tax proceedings, including the proceedings discussed in this article concerning the granting of relief in the repayment of tax liabilities.

De lege ferenda, the introduction of mediation into Polish tax law should be advocated. The simplest solution in this regard appears to be the formulation of provisions referring to the existing regulations on mediation in administrative proceedings. This would allow for the use of existing regulations, which, given their longer period of application, should have developed established practices for their use, which should positively impact the ease of implementing mediation in tax proceedings.

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Rethinking the Relationship Between State Justice and ADR – Towards a Normative Model of Complementarity and Limits

This article reconsiders the relationship between state justice and alternative dispute resolution from a normative rather than merely functional perspective. It argues that courts and ADR should not be understood as rival systems competing for institutional supremacy, but as differentiated mechanisms whose legitimacy depends on a structured model of complementarity. Such complementarity is justified where ADR improves accessibility, procedural economy, expertise, or consensual problem-solving in ways that judicial adjudication does not always achieve with the same adequacy. At the same time, the legitimacy of ADR remains conditional. It is limited by requirements of procedural fairness, the protection of weaker parties, the non-privatisable character of certain disputes, and the continuing responsibility of the state to secure effective legal protection. The article therefore contends that ADR is not legitimate by virtue of efficiency alone. Its legitimacy depends on its integration within a broader framework of public justice and judicial oversight.

Keywords: *Alternative Dispute Resolution, State Justice, Complementarity, Judicial Oversight, Access to Justice, Procedural Justice.*

1. Introduction

The relationship between state justice and alternative dispute resolution has long been framed through the language of contrast.[1] Courts are usually associated with legality, publicity, institutional authority, and the authoritative protection of rights, whereas ADR is commonly praised for flexibility, speed, lower costs, and the possibility of achieving solutions that are more responsive to the interests of the parties.[2] That familiar contrast, however, captures only part of the picture. It tends to assume that adjudication and ADR are rival models of dispute resolution, when in fact modern legal systems increasingly rely on both.[3] The more difficult question is therefore not whether one should displace the other, but how their coexistence should be normatively structured.[4]

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1 See *Garth B. G.*, *Cappelletti M.*, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, Buffalo Law Review, Vol. 27, 1978, 181-183; See *Fiss O. M.*, Against Settlement, Yale Law Journal, Vol. 93, 1984, 1073-1090; Comp. *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2663-2704.

2 *Genn H.*, Judging Civil Justice, Cambridge, Cambridge University Press, 2010, 1, 13-19.

3 See *Galanter M.*, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, Journal of Empirical Legal Studies, Vol. 1, Issue 3, 2004, 459-570; See also *Genn H.*, What Is Civil

The traditional opposition between courts and ADR is conceptually inadequate for at least two reasons. First, it exaggerates the internal unity of ADR. Mediation, arbitration, conciliation, ombuds schemes, and consumer redress bodies do not perform the same functions and do not raise the same legitimacy concerns.[5] Second, it reduces state justice to a purely formal image of adjudication, as though the public court were valuable only because it issues binding judgments.[6] In reality, adjudication also performs broader public functions: it produces precedent, articulates legal norms, constrains power through reason-giving, and places dispute resolution within a publicly accountable institutional framework.[7] For that reason, the rise of ADR cannot be assessed solely by reference to efficiency or caseload reduction.

At the same time, the critique of excessive faith in adjudication is also well established.[8] Scholars defending settlement and procedural pluralism have shown that formal adjudication is not always the most appropriate response to every dispute. Certain conflicts are relational rather than purely oppositional, others are highly technical, and many require solutions that are more adaptive than binary judgments. Moreover, there are contexts in which negotiated or facilitated outcomes better respect the parties' practical interests than a formally correct but socially unproductive judgment. This does not mean that ADR should be idealised. It means only that any adequate theory of dispute resolution must avoid the simplistic assumption that public adjudication is always normatively superior merely because it is public.

The problem addressed in this article is therefore a normative one. It is not enough to ask whether ADR is faster, cheaper, or more specialised than litigation. Those are important considerations, but they do not settle the question of legitimacy. The real issue is whether ADR may be integrated into a legal order committed to due process, equality, public accountability, and effective judicial protection without undermining those very values.[9] This article argues that such integration is

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Justice For? Reform, ADR, and Access to Justice, Yale Journal of Law and the Humanities, Vol. 24, n.º 1, 2012, 397-417.

4 See *Genn H.*, What Is Civil Justice For? Reform, ADR, and Access to Justice, Yale Journal of Law and the Humanities, Vol. 24, Issue 1, 2012, 397-398.

5 On the need to resist treating ADR as a unitary category, see *Härter K.*, *Hillemanns C.*, *Schlee G.*, Introduction, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, New York, Oxford, Berghahn Books, 2020, 1-12; See also *Cortés P.*, The Law of Consumer Redress in an Evolving Digital Market, Cambridge, Cambridge University Press, 2018, 67-98.

6 See *Härter K.*, *Hillemanns C.*, *Schlee G.*, Introduction. On Mediation: Historical, Legal, Anthropological and International Perspectives on Alternative Modes of Conflict Regulation, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, New York, Oxford, Berghahn Books, 2020, 1-12.

7 See *Resnik J.*, Managerial Judges, Harvard Law Review, Vol. 96, 1982, 374.

8 See *Galanter M.*, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, Journal of Empirical Legal Studies, Vol. 1, Issue 3, 2004, 459; See *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2663-2704; See also *Welsh N. A.*, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, Washington University Law Quarterly, Vol. 79, n.º 3, 2001, 787-861.

9 On a rights-based approach to ADR, see *McGregor L.*, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, European Journal of International Law, Vol. 26,

possible, but only through a model of complementarity rather than substitution.[10] Under that model, ADR may be justified where it enhances procedural adequacy in particular categories of disputes, yet remains bounded by limits that preserve the constitutive role of state justice.

Although this article is not conceived as a single-country study, the Portuguese legal order offers a particularly useful illustration of the broader argument advanced here. At constitutional level, Portuguese law combines a strong guarantee of access to law and effective judicial protection with the express admissibility of arbitration tribunals and justices of the peace. At legislative level, Portugal has developed a diversified ADR framework, including voluntary arbitration, a general mediation statute, justices of the peace, consumer ADR, and specialised forms of administrative and tax arbitration. This institutional landscape is especially significant because it reflects, in concrete terms, the central claim of this article: ADR is neither external to public justice nor normatively self-sufficient, but operates within a legally structured system of complementarity, supervision, and limits.[11]

2. From Rivalry to Complementarity

The first obstacle to a coherent theory of dispute resolution lies in the tendency to describe state justice and ADR as mutually exclusive institutional options. Within that framework, courts appear as the domain of law, while ADR appears as the domain of pragmatism.[12] The former is depicted as authoritative but slow; the latter as efficient but somehow less juridical.[13] That binary narrative is deeply misleading.[14] Courts are not simply machines for the production of judgments, and ADR is not simply a mechanism for escaping law. Both are embedded in legal orders, both depend on normative assumptions, and both may either strengthen or weaken the effective protection of rights depending on the circumstances in which they are used.[15]

A model of rivalry is also inadequate because it overlooks the extent to which ADR frequently depends on courts rather than displacing them. Arbitration is the most obvious example. Even where

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n.º 3, 2015, 607-634. See also *Deweer v. Belgium*, [1980] ECHR, and *Suovaniemi and Others v. Finland*, Decision on Admissibility, Application n.º 31737/96, 23/02/1999.

10 See *Sternlight J. R.*, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, Washington University Law Review, Vol. 74, Issue 3, 1996, 637-640.

11 See Constitution of the Portuguese Republic, Article 20, Article 209(2); Law n.º 63/2011 of 14 December approving the Voluntary Arbitration Law; Law n.º 29/2013 of 19 April establishing the general principles applicable to mediation carried out in Portugal, as well as the legal regimes of civil and commercial mediation, mediators and public mediation; Law n.º 78/2001 of 13 July regulating the jurisdiction, organisation and functioning of the Justices of the Peace and the procedure applicable to matters within their jurisdiction; Law n.º 144/2015 of 8 September on the out-of-court resolution of national and cross-border consumer disputes.

12 This dichotomy has been criticised both for over-romanticising adjudication and for over-instrumentalising settlement. See *Fiss O. M.*, Against Settlement, Yale Law Journal, Vol. 93, 1984, 1073-1090; Comp. *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2663-2704.

13 See *Genn H.*, Judging Civil Justice, Cambridge, Cambridge University Press, 2010, 13-19.

14 See *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2663.

15 See *Fiss O. M.*, Against Settlement, Yale Law Journal, Vol. 93, 1984, 1073.

parties agree to submit disputes to arbitral tribunals, the legal force of that choice depends on state recognition of arbitration agreements, judicial support for the arbitral process, and mechanisms for recognition and enforcement of awards. Mediation likewise often derives part of its practical effectiveness from the possibility of judicially enforceable settlements. In this sense, ADR does not stand outside the legal order.[16] It operates within a framework in which public institutions continue to define conditions of validity, enforceability, review, and public policy control.[17]

Once this interdependence is acknowledged, the proper conceptual shift becomes clearer.[18] The question is no longer whether ADR should replace adjudication or remain exceptional in relation to it. The more accurate inquiry is whether legal systems should distribute disputes among different procedures according to the values and risks associated with each. Some disputes require an authoritative public forum because they implicate precedent, public norms, or vulnerable parties.[19] Others may be more appropriately addressed through mechanisms that privilege expertise, dialogue, privacy, speed, or continuing relationships. The language of complementarity is therefore more precise than the language of rivalry because it recognises that institutional differentiation may be normatively justified without denying the special role of courts.

That conceptual shift matters because the defence of complementarity is neither an unconditional defence of ADR nor a disguised reaffirmation of judicial monopoly. It rejects both positions. It rejects the idea that all disputes should be redirected away from courts in the name of efficiency, but it also rejects the assumption that all legitimate justice must take the form of adjudication by a state judge. A differentiated legal order may legitimately accommodate plural procedures, provided that their relationship is structured by normative criteria. The task is therefore to identify the grounds upon which complementarity can be justified and the limits beyond which it ceases to be acceptable. That is the framework within which the remainder of the article proceeds.[20]

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16 See *Yeazell S. C.*, The Misunderstood Consequences of Modern Civil Process, Wisconsin Law Review, 1994, 631, 631-633. See also the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10/06/1958, Article II, Article III, Article V; UNCITRAL Model Law on International Commercial Arbitration, adopted 21/06/1985, as amended on 07/07/2006, Article 8, Article 18, Article 34, Article 35; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, OJ L 136, 24/05/2008, 3-8, Article 6

17 See *Genn H.*, What Is Civil Justice For? Reform, ADR, and Access to Justice, Yale Journal of Law and the Humanities, Vol. 24, Issue 1, 2012, 397.

18 See *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2665.

19 See *Garth B. G.*, *Cappelletti M.*, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, Buffalo Law Review, Vol. 27, 1978, 181. In EU law, mandatory recourse to ADR prior to judicial proceedings has been accepted only where effective judicial protection is preserved. See Joined Cases C-317/08 to C-320/08, *Alassini and Others*, Judgment of 18/03/2010; Case C-75/16, *Menini and Rampanelli*, Judgment of 14/06/2017. These judgments make clear that compulsory pre-trial ADR is compatible with EU law only if it does not result in a binding decision, does not cause substantial delay, does not suspend urgent judicial relief, and does not impose excessive cost on the parties.

20 See *Fiss O. M.*, Against Settlement, Yale Law Journal, Vol. 93, 1984, 1073.

3. The Normative Grounds of Complementarity

The claim that ADR may legitimately complement state justice cannot rest on efficiency alone. Speed, flexibility, and lower cost may explain why legislators, courts, and litigants are attracted to non-judicial procedures, but they do not by themselves justify the normative status of those procedures within a legal order. A defensible account of complementarity must therefore begin from a different premise. ADR is normatively acceptable only where it improves the adequacy of dispute resolution without dissolving the legal values that make justice worthy of public trust. In that sense, complementarity is not simply administrative convenience under another name. It is a structured justification for procedural differentiation.

That normative justification is strongest where ADR enhances procedural adequacy.[21] Procedural adequacy is not synonymous with procedural informality. Rather, it refers to the suitability of a process to the type of dispute, the interests at stake, the relationship between the parties, and the kind of outcome that can realistically resolve the conflict.[22] Some disputes require authoritative adjudication and the articulation of legal norms in public. Others benefit from dialogue, specialised expertise, confidentiality, or negotiated restructuring of relationships.[23] The normative case for complementarity therefore lies in the possibility that different procedures may better serve different categories of disputes without abandoning the broader commitments of the legal order.

A second normative ground of complementarity lies in procedural justice. ADR cannot be defended merely because it may produce settlement. Its deeper legitimacy depends on the extent to which it offers parties an experience of fair participation.[24] The literature on procedural justice demonstrates that parties evaluate legal procedures not only by outcome, but also by voice, respect, neutrality, and the opportunity to participate meaningfully in the shaping of the process.[25] This insight is highly important for mediation and for court-connected ADR. Where parties are heard, treated with dignity, and given genuine participatory space, ADR may reinforce rather than weaken perceptions of justice. Conversely, when party participation is marginalised, when professionals dominate the

[21] Procedural adequacy should be understood as fitness between the nature of the dispute and the design of the procedure, rather than as a synonym for informality. See *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2663-2704; See also *Genn H.*, Judging Civil Justice, Cambridge, Cambridge University Press, 2010.

[22] See *Menkel-Meadow C.*, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), Georgetown Law Journal, Vol. 83, 1995, 2663.

[23] See *Welsh N. A.*, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, Washington University Law Quarterly, Vol. 79, n.º 3, 2001, 787.

[24] See *Tyler T. R.*, What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, Law & Society Review, Vol. 22, n.º 1, 1988, 103-105. For the classic account, see *Tyler T. R.*, What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures, Law and Society Review, Vol. 22, n.º 1, 1988, 103-135; See also *Tyler T. R.*, Procedural Justice, Legitimacy, and the Effective Rule of Law, Crime and Justice, Vol. 30, 2003, 283-357

[25] See *Tyler T. R.*, Procedural Justice, Legitimacy, and the Effective Rule of Law, Crime and Justice, Vol. 30, 2003, 283. Applying procedural justice theory specifically to mediation, see *Welsh N. A.*, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, Washington University Law Quarterly, Vol. 79, n.º 3, 2001, 787-861.

process, or when pressure toward settlement becomes excessive, the normative case for complementarity begins to erode.

That concern leads to a third and more institutional justification. Complementarity becomes normatively defensible where ADR remains connected to the values of public justice rather than detached from them. Court-connected mediation is especially revealing in this regard. Its legitimacy does not derive from being less legal than adjudication, but from the possibility of combining consensual problem-solving with the public commitments of the judicial system. In that setting, ADR may be understood not as a privatisation of justice, but as a differentiated procedural form located within a broader institutional order that remains answerable to justice, accountability, and fairness.[26] Yet this argument only succeeds if ADR is not used to evade those values. The democratic concern is therefore internal to complementarity itself.

That same normative orientation can be observed in European and transnational instruments.[27] Mediation and ADR are not presented there as mechanisms whose legitimacy is self-evident, nor as simple devices for diverting disputes away from courts. They are instead framed as procedures capable of improving access to dispute resolution, provided that fairness, enforceability, and minimum guarantees are preserved. European Union law, in particular, encourages the use of mediation and consumer ADR because such mechanisms may offer simpler and more effective means of resolving disputes, while still preserving access to courts and ensuring standards of quality and fairness. Similarly, transnational arbitration law does not legitimate arbitral procedure merely by reference to party autonomy; it also insists on equality between the parties and a full opportunity to present one's case. This confirms that even where adjudication is displaced, legitimacy remains tied to procedural standards rather than to efficiency alone.

A fourth normative ground follows from the language of rights. Contemporary scholarship increasingly shows that the proper question is not whether ADR is useful in general, but whether its design is compatible with the requirements of access to justice and fair process. A rights-based approach does not prohibit ADR.[28] It does, however, require that ADR be justified by reference to standards that remain external to the preferences of the parties and to the convenience of institutions. Under such an approach, ADR may be legitimate because it broadens practical access, permits less adversarial forms of participation, and offers proportionate procedures for certain types of disputes. Yet precisely because legitimacy is rights-based, complementarity remains conditional. Once that point is accepted, the transition to the next part of the article becomes unavoidable: the same normative foundations that justify complementarity also generate its limits.

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26 See *Welsh N. A.*, The Place of Court-Connected Mediation in a Democratic Justice System, Cardozo Journal of Conflict Resolution, Vol. 5, n.º 2, 2004, 117, 130-132.

27 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, OJ L 136, 24/05/2008, 3-8, recital 6, recital 8, Article 1(1), Article 6; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18/06/2013, 63-79, recital 1, recital 4, Article 1, Article 5, Article 9.

28 See *McGregor L.*, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, European Journal of International Law, Vol. 26, n.º 3, 2015, 607-613.

4. Towards a Structured Model of Allocation and Judicial Control

The same considerations that justify complementarity also define its normative limits, especially where non-disposable rights, structural inequality, or public-interest adjudication are at stake. If ADR is to be integrated into a system of public justice without either being marginalised or overextended, legal orders require a structured method for allocating disputes between adjudicative and non-adjudicative procedures. Such allocation cannot be based solely on docket management, institutional convenience, or party preference in the abstract. It must take into account the nature of the rights at stake, the relative position of the parties, and the public significance of the controversy.[29] A dispute between sophisticated commercial actors concerning disposable patrimonial interests does not raise the same normative concerns as a dispute involving consumers, employees, family relationships, or claims with broader regulatory implications.[30] The legitimacy of complementarity therefore depends on principled differentiation rather than on the indiscriminate expansion of ADR. The Portuguese experience illustrates this especially well. While the constitutional framework preserves access to the courts and effective judicial protection, the legislative framework simultaneously accommodates voluntary arbitration, mediation, justices of the peace, consumer ADR, and specialised tax arbitration. The Portuguese model therefore supports the broader claim made in this article: complementarity is most defensible where procedural plurality remains institutionally framed by public law guarantees and judicial control rather than by a logic of privatised displacement. This is particularly visible in Portuguese tax arbitration before CAAD, where specialised arbitral adjudication has become a significant mechanism of dispute resolution within a publicly structured legal Framework.[31]

A first criterion of allocation is thus substantive and structural. The more disposable the right and the lower the degree of public interest embedded in the dispute, the stronger the case for allowing ADR to operate as a primary mechanism.[32] A second criterion concerns relational symmetry. Even where rights are formally disposable, serious disparities of bargaining power, information, or institutional leverage may undermine the legitimacy of privately structured dispute resolution.[33] A third criterion concerns the systemic significance of adjudication itself.[34] Some disputes require not merely resolution, but public articulation of legal standards, reason-giving, and the production of

[29] See *Genn H.*, What Is Civil Justice For? Reform, ADR, and Access to Justice, Yale Journal of Law and the Humanities, Vol. 24, n.º 1, 2012, 397-417.

[30] See *McGregor L.*, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, European Journal of International Law, Vol. 26, n.º 3, 2015, 607-634.

[31] See Decree-Law n.º 10/2011 of 20 January introducing tax arbitration into the Portuguese legal order; Ministerial Order n.º 112-A/2011 of 22 March binding the Tax Administration to the jurisdiction of arbitral tribunals operating within CAAD.

[32] See *Sternlight J. R.*, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, Washington University Law Quarterly, Vol. 74, n.º 3, 1996, 637-640.

[33] On the limits of consent in adhesive and asymmetric settings, see *Sternlight J. R.*, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, Washington University Law Quarterly, Vol. 74, n.º 3, 1996, 637-682; See also *Cortés P.*, The Law of Consumer Redress in an Evolving Digital Market, Cambridge, Cambridge University Press, 2018, especially ch.7.

[34] See *Welsh N. A.*, The Place of Court-Connected Mediation in a Democratic Justice System, Cardozo Journal of Conflict Resolution, Vol. 5, n.º 2, 2004, 117.

outcomes capable of guiding future conduct. In such cases, courts retain a role that cannot be replaced by private efficiency.

Judicial control is therefore not an external limitation imposed on ADR from outside, but an internal condition of its legitimacy.[35] Such control need not transform ADR into a duplicate of litigation. Its function is narrower and more principled: to preserve minimum fairness, to safeguard equality between the parties, to prevent the circumvention of public policy, and to ensure that the legal order retains ultimate authority over the enforceability of outcomes. Arbitration law illustrates this clearly.[36] Party autonomy and procedural flexibility are recognised, yet they remain bounded by equality, the opportunity to present one's case, and judicial review at the stage of setting aside or enforcement. The same logic extends, in different form, to mediated settlements and institutional ADR schemes.[37] Complementarity becomes normatively sustainable only where public justice remains capable of correction, supervision, and legal framing.

A structured model of complementarity does not assign supremacy to either courts or ADR. It assigns differentiated roles within a common legal architecture.[38] Courts remain indispensable where the law must speak publicly, where weaker parties require institutional protection, and where disputes exceed the private sphere of settlement. ADR, by contrast, is most defensible where it enhances responsiveness, expertise, participation, and proportionality without severing its connection to legal standards and judicial protection. The proper relationship between state justice and ADR is therefore neither one of hostility nor one of absorption. It is a relationship of conditional integration, in which procedural plurality is accepted, but only under criteria that preserve the public foundations of justice.[39]

5. Conclusion

The relationship between state justice and alternative dispute resolution cannot be adequately understood through the language of substitution, rivalry, or institutional hierarchy alone. Courts and ADR mechanisms perform different functions, respond to different categories of disputes, and embody different normative strengths. Yet that differentiation does not remove the need for legal ordering. The central question is not whether public adjudication should yield to private or semi-private mechanisms in the name of efficiency, nor whether courts should retain an exclusive monopoly over the resolution

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35 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10/06/1958, Article V(2)(b); UNCITRAL Model Law on International Commercial Arbitration, adopted 21/06/1985, as amended on 07/07/2006, Article 34 and Article 36; Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, Judgment of 01/06/1999; Case C-168/05, *Mostaza Claro*, Judgment of 26/10/2006. See also Case C-40/08, *Asturcom Telecomunicaciones*, Judgment of 06/10/2009.

36 See UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, adopted 21/06/1985, amended 07/07/2006, Article 18, Article 34, Article 35.

37 See *Hopt K. J.*, *Steffek F.* (eds.), Mediation: Principles and Regulation in Comparative Perspective, Oxford, Oxford University Press, 2013.

38 See *Genn H.*, Judging Civil Justice, Cambridge, Cambridge University Press, 2010.

39 See *Welsh N. A.*, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, Washington University Law Quarterly, Vol. 79, n.º 3, 2001, 787-861.

of disputes. The real issue is whether ADR may operate as a legitimate component of a system of justice that remains committed to due process, equality, public accountability, and effective judicial protection.

The analysis developed in this article supports a model of complementarity rather than one of displacement. ADR is normatively justified where it improves procedural adequacy, promotes meaningful participation, enhances expertise, or offers proportionate responses to disputes that do not always require the full authority of adjudication. Its legitimacy, however, is conditional and not self-standing. It depends on the preservation of basic procedural guarantees, the protection of weaker parties, the non-privatisable character of certain disputes, and the continuing supervisory responsibility of courts. A defensible legal order is therefore not one that celebrates ADR as an autonomous substitute for public justice, but one that integrates ADR within a structured framework of allocation, limitation, and judicial control. Only within such a framework can procedural plurality be reconciled with the public foundations of justice itself.

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The Principle of Good Faith in Mandatory Court-Annexed Mediation: Legal Nature, Violations, and Enforcement Challenges

The article examines the principle of good faith as a fundamental legal standard governing mandatory court-annexed mediation and analyzes its normative significance for ensuring the legitimacy, fairness, and effectiveness of mediation as a consensual dispute resolution mechanism. The study argues that good faith extends beyond an ethical aspiration and constitutes an autonomous procedural obligation binding mediators, parties, legal representatives, and other participants throughout the mediation process. Through doctrinal and comparative legal analysis, the article conceptualizes the substantive content of good-faith participation, including genuine engagement in negotiations, adequate preparation, timely exchange of relevant information, cooperation with the mediator and opposing party, participation by representatives possessing full settlement authority, and the prohibition of abusing mediation for strategic or procedural advantage. Particular attention is devoted to the legal and ethical obligations of mediators, emphasizing that professional discretion must be exercised consistently with the principles of legality, fairness, party self-determination, and social justice. The article further identifies and systematizes the principal manifestations of bad-faith conduct by both mediators and lawyers, including sham participation, intentional delay, misuse of confidential information, undisclosed conflicts of interest, restrictions on party self-determination, adversarial litigation tactics, and the instrumentalization of mediation for procedural gain. Drawing upon the legal frameworks of the European Union, the United States, and selected comparative jurisdictions, the study evaluates different approaches to enforcing the duty to negotiate in good faith while preserving the confidentiality of mediation. Special emphasis is placed on the Georgian model of mandatory court-connected mediation, examining the mediator's reporting obligations, procedural consequences of bad-faith participation, and the unresolved tension between judicial oversight and confidentiality. The article concludes that effective enforcement of the good-faith principle requires a carefully balanced legal framework that distinguishes objectively verifiable procedural misconduct from confidential negotiation conduct, thereby safeguarding both procedural accountability and the essential confidentiality of mediation. Such an approach strengthens public confidence in mediation and contributes

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to its sustainable institutional development as an integral component of modern civil justice systems.

Keywords: *good faith; mediation principles; mediator ethics; good-faith negotiations; court-connected mediation; professional ethics; mediator discretion; mediated settlement agreement; alternative dispute resolution (ADR).*

1. Introduction

Good faith, as a universal legal principle, is recognized as one of the fundamental normative principles governing the mediation process and is binding upon all participants therein[1], including the mediator.[2] "An intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.[3] The practical implementation of the principle of good faith constitutes a central issue in both the theory and practice of mediation. [4] The procedural significance of this principle has become even more pronounced with the expansion of mandatory court-annexed mediation.[5] In the context of mandatory court-annexed mediation, the parties are required to participate in the mediation process, although they are under no obligation to reach a settlement. The effective discharge of this procedural obligation necessarily entails compliance with the standard of good faith, thereby ensuring that participation in mediation does not degenerate into a purely formal exercise undertaken solely to create the appearance of compliance with the court's referral order.

As a prerequisite for membership in the Georgian Mediators Association, mediators are required to provide a written declaration affirming their commitment to the Charter of Adherence to the Principles of Mediation, which states: "I solemnly affirm that I shall remain independent and impartial and shall discharge my duties as a mediator in good faith, with due regard to the needs and best

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1 See Article 4(2) of the Professional Code of Ethics for Mediators of the LEPL "Georgian Mediators Association". See also: *Sourdin T.,* Good Faith Mediation –Developing Trends from the Antipodes, University of Newcastle (Australia), 2014. For example, good faith has now emerged as the most widely adopted standard of conduct prescribed by both the federal legislation of Australia and the legislation of its states and territories for persons participating in alternative dispute resolution (ADR) processes and negotiations. *See ibid.*

2 See: *Kovach K.K.,* Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic, South Texas Law Review, Vol. 38, 1997, 557-623.

3 *Moore J.M.,* Volunteered or Voluntold: Effectiveness of Good Faith Clauses on Court-Ordered Mediation Court-Ordered Mediation, J. Disp. Resol., Vol. 2025, Issue 2, 2025, republished by University of Missouri School of Law Scholarship Repository, 2026, 6.

4 For a discussion of the principle of good faith in the mediation process, see: *Chitashvili N., Bichia M., Barnabishvili G., Gatserelia A.,* and *Egnatashvili D*., in: *Kandashvili I.* (ed.), Commentary on the Law of Georgia on Mediation, Publishing House "Universali", Tbilisi, 2024, 68-77; for a further discussion of the principle of good faith in the mediation process, see: *Chitashvili N.,* Fundamentals of Mediation Ethics*,* Publisher "Meridiani", Tbilisi, 2024, 74-76.

5 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 9.

interests of the parties. I shall uphold the law, the fundamental principles of mediation, and the Code of Professional Ethics for Mediators."

A common objective of all systems of professional ethics, including those governing mediation, is the prevention of professional misconduct, dishonesty, conflicts of interest, and bad faith. The mediation legislation of numerous jurisdictions imposes upon mediators the obligation to conduct mediation in accordance with the highest ethical standards, thereby fostering public confidence in the mediation process and promoting trust in the competence, integrity, and good faith of these neutral third parties.[6]

A mediator is prohibited from engaging in, or facilitating, unlawful, immoral, or bad-faith conduct.[7] The principle of good faith vests the neutral third party with a general authority to exercise oversight over the fairness and legality of both the mediation process and its outcome. Accordingly, a mediator is required to refuse to sign a settlement agreement where its terms are unlawful, fundamentally unfair[8] to one of the parties[9], unconscionable[10], or otherwise contrary to universally recognized standards of social justice.[11] It is precisely by virtue of the principle of good faith that the mediator is under a duty to seek to prevent manifestly unjust outcomes in the course of the mediation process.[12] Good faith constitutes the normative principle that incorporates the imperatives of morality and justice into the mediator's exercise of discretion and serves as the primary normative benchmark governing the exercise of that discretion.[13]

It is widely acknowledged that the requirement of good faith applies with particular force to parties and their legal representatives in alternative dispute resolution proceedings. [14] Within the context of mediation, a party's good-faith participation is frequently regarded as an integral component

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6 Standards of Practice For California Mediators, Preamble.

7 Bar Code of Conduct for Attornes-at-Law, Finland, <https://asianajajat.fi/wp-content/uploads/2025/05/B-01-Code-of-conduct-for-attorneys-at-law-2023.pdf> [07.07.2026]. See: *Trevor M.B., Palo G.,* EU Mediation Law and Practice, Oxford University Press, 2012, 108.

8 Jams Mediators Ethics Guidelines, § VII, 2013; *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 394.

9 Georgia Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, adopted 1995, updated 2012. § IV. A, 30.

10 German Mediation Act, 21 July, 2012, § 2 (5); *Rützel S., Wegen G., Wilske S.,* Commercial Dispute Resolution in Germany, 2nd ed., C.H. Beck, München, 2016, 206.

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14 *Kovach K.,* Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, 4 Disp. Res. Mag. 9, 1997; Symposium, Focus on Ethics in Representation in Mediation, 4 Disp. Res. Mag., Winter 1997; *Kovach K.,* The Good Faith in Mediation – Requested, Recommended, or Required – A New Ethic [article], Symposium: The Lawyer's Duties and Responsibilities in Dispute Resolution South Texas Law Review, Vol. 38, Issue 2, 1997, 575-624.

of the mediation process itself, serving to preserve the distinctive nature of mediation. Indeed, the benefits inherent in mediation cannot be fully realized in the absence of good-faith participation.[15]

Accordingly, the principle of good faith is of particular relevance and indispensable importance precisely because mediation differs fundamentally from all previously established methods of dispute resolution, which are characteristically adversarial in nature.[16] Absent a requirement of good-faith participation, "the mediation process would undergo a transformation, assuming the characteristics of adversarial proceedings."[17]

2. The Scope and Substance of the Obligation of Good-Faith Participation and Representation in Mediation

Good faith participation in mediation entails a range of interrelated procedural and substantive obligations. These include undertaking adequate and competent preparation for the mediation,[18] including the collection and assessment of relevant evidence and objective information, and allocating sufficient time for meaningful engagement in the process[19]. Parties are expected to attend scheduled mediation sessions within a reasonable time[20], participate to the minimum degree necessary to ensure the effectiveness of the proceedings[21], and provide the mediator with all documentation reasonably required for the proper conduct of the mediation[22]. They should also draw attention to any missing information that may be material to the resolution of the dispute[23] and cooperate fully with the mediator throughout the process. Good faith participation further requires parties to respond to proposals made by other bargaining representatives for the agreement in a timely manner,[24] to

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15 *Kovach K.,* Good Faith in Mediation – Requested, Recommended, or Required – A New Ethic, 38 S. Tex. L. Rev., 1997, 590-592 (Specific advantages are identified, including the facilitation of dialogue, the collaborative resolution of disputes, and procedural flexibility, all of which are liable to be undermined in the event of bad faith conduct).

16 Ibid., 583.

17 Ibid., 593.

18 *Kovach K.K.,* Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic, South Texas Law Review, Vol. 38, 1997, 622-633.

19 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 12.

20 Ibid., 5.

21 *Korobkin R.,* Negotiation Theory and Strategy, Authority Rule 16, Aspen Publishing, e-book, 2024.

22 *Alexander N., Shouyu Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Second Edition, Kluwer Law International, The Netherlands, 2022, 351. Pursuant to the Rules of the Singapore International Mediation Centre (SIMC), all parties are under a duty to conduct themselves in good faith throughout the mediation process. In addition, each party is required to act in good faith in preparing for mediation and in participating therein (Singapore International Mediation Centre (SIMC), Rule 6.9). The untimely submission of documents to the mediator may adversely affect the evaluation of a party's compliance with the duty of good faith and may diminish the prospects of achieving a successful mediated outcome.

23 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 12.

24 Ibid*.,* 5.

acknowledge the other party as a legitimate participant in the mediation process,[25] to communicate in a manner characterised by mutual respect,[26] giving due consideration to the other party's perspective[27] in the development of mutually beneficial settlement options[28], and to engage cooperatively with the other party throughout the mediation[29].

Good faith participation further requires parties to give genuine consideration to proposals made by the other party or its bargaining representatives with a view to reaching settlement and to provide reasons for their responses to those proposals.[30] In addition, parties are expected to exchange documents and objective information relevant to their respective positions[31] and to disclose, in a timely manner, all relevant information other than that which is confidential or commercially sensitive[32]. They should participate in the mediation, either personally or through duly authorised representatives possessing full settlement authority, [33] or promptly disclose any limitations on such authority where they exist. [34] Good faith also requires parties to refrain from from capricious or unfair conduct that undermines freedom of association or collective bargaining,[35] and, where applicable, to comply with their obligation to bear the remuneration of the neutral third party.

Accordingly, the minimal meaningful participation standard[36] requires parties to participate in mediation in a reasonable and constructive manner[37] by taking reasonable steps and making genuine

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25 Ibid., 6.
26 Ibid., 12.
27 Ibid.
28 Ibid.
29 *Trevor M.B., Palo G.,* EU Mediation Law and Practice, Oxford University Press, 2012, 122.
30 *Sourdin T.,* Good Faith Mediation –Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 6.
31 For a discussion of the failure to meaningfully respond to the opposing party's position, mediation brief, or case summary by presenting a substantive counter-position, see: *Jasmaniar, Nurhaedah,* Principle of Good Faith in Peace Agreements via Mediation, Journal of Law, Politic and Humanities (JLPH), Vol. 4, No. 2, January 2024, 67. For instance, where the subject matter of the parties' negotiations is the purchase of a co-ownership share in immovable property, an objective assessment of the property is required. A party who impedes the expert's valuation process by refusing to grant access to the immovable property shall be considered to have acted in breach of the principle of good faith.
32 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 5.
33 *Alexander N., Shouyu Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Second Edition, Kluwer Law International, The Netherlands, 2022, 351; *Korobkin R.,* Negotiation Theory and Strategy, Authority Rule 16, Aspen Publishing, ebook, 2024.
34 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 12.
35 Ibid., 6.
36 *Sherman E.,* Good Faith Participation in Mediation: Aspirational, Not Mandatory and Disp. Resol. Mag., 1997, 16.
37 *Kovach K.,* Good Faith in Mediation – Requested, Recommended, or Required – A New Ethic, 38 S. Tex. L. Rev. 575, 1997; Head 6 (3) b of Draft Bill of Ireland, Civil Liability and Courts Act 2004 of Ireland, Art. 15; *Trevor M.B., Palo G.,* EU Mediation Law and Practice, Oxford University Press, 2012, 181-182; *Weston M.A.,* Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality, 76 Indiana Law Journal, Vol. 76, Issue 3, 2001, 643; *Alexander N.M.,* Global Trends in Mediation, Kluwer Law International, 2006, 422.

efforts[38] to negotiate towards settlement. Rather than imposing an obligation to reach agreement, the standard seeks to ensure a level of participation sufficient to preserve the integrity of the mediation process while maintaining the procedural flexibility that constitutes one of the defining characteristics and principal advantages of ADR.[39]

As noted above, good faith, insofar as it applies to a party and its legal representative, also entails an obligation to provide truthful information in the mediation process. [40] Where, during a private session, it becomes apparent that a party intends to present a misleading proposal to the other party, which may result in the conclusion of a mediated settlement agreement through deception or without informed consent, the mediator is obliged to inform the initiating party that, although the mediator would not breach the principle of confidentiality by reason of such a proposal, the mediator would nevertheless be required to terminate the mediation process.

A breach of the principle of good faith that undermines the legitimate interests of any participant in the mediation process, a minor, third parties, or public order should constitute grounds for terminating the mediation. "Bad faith participation in a mediation occurs when one participant ... neglects an affirmative material obligation owed to another participant, the mediator, or the court."[41] However, the mediator is not subject to an obligation to inform the court of a party's bad faith conduct unless such disclosure falls within the statutory exceptions to the principle of confidentiality established by law (Article 10 of the Law of Georgia on Mediation).

The obligation to conduct negotiations in good faith does not entail that: (a) a representative engaged in negotiations is obliged to make concessions in the course of the negotiation process; or (b) such representative is under an obligation to secure the conclusion of a mediated settlement agreement.[42]

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38 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 3.

39 *Sherman E.F.,* Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required, 46 SMU. L. Rev. 2079, 1993, 2089, 2096-2103. For a comprehensive analysis of the mechanisms of judicial review concerning the application and enforcement of the principle of good faith, see: *Alfini J.J., McCabe C.,* Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law, Arkansas Law Review, Vol. 54, No. 2, 2001, 171-207.

40 *Thompson P.N.,* Good Faith Mediation in the Federal Courts, Ohio State Journal on Dispute Resolution, Vol.26:2-3, 2011, 365. The French jurist Pothier, in his treatise *On Obligations*, maintained that contractual good faith at the stage of concluding a contract excludes not only deception in any form, but also the concealment of any fact or circumstance in which the person entering into the contractual relationship has a legitimate interest. Thus, acting in bad faith includes the suppression or concealment, for the purpose of personal gain, of information that is material to the other party. Accordingly, as recognized by the above-mentioned French scholars, good faith is founded upon sincerity and loyalty in the performance of obligations assumed toward the other party, as well as upon the prohibition of deception, concealment of relevant information, and dishonest conduct. See: *Khunashvili N.,* The Principle of Good Faith in Contract Law*,* TSU Doctoral Dissertation, 2014, 16 (in Georgian).

41 *Carter R.L.,* Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations, 2002 J. Disp. Resol., 2002, 372.

42 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle Australia, 2014, 6.

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters authorizes Member States to introduce or encourage mandatory recourse to mediation and to prescribe appropriate sanctions,[43] provided that such legislation does not impede the parties' exercise of their right of access to justice.

Pursuant to this regulatory discretion, a number of Member States of the European Union have established systems of mandatory court-connected mediation under which the parties are required to appear in person at court-referred mediation sessions and, once the mediation process has commenced, to make a good-faith effort to negotiate. In international mediation practice, it is also common for mediation agreements to incorporate an express good-faith negotiation clause, requiring the parties to engage in negotiations in good faith throughout the mediation process. [44]

Such an obligation is frequently embedded within institutional mediation rules.[45] Accordingly, the obligation to negotiate in good faith may arise even in circumstances where the parties have expressly undertaken, by virtue of a contractual arrangement, to pursue mediation as the preferred mechanism for dispute resolution prior to resorting to judicial proceedings. Moreover, an agreement to submit a dispute to private mediation may validly incorporate contractual remedies, including stipulated penalties, in the event of a failure to comply with the obligation to initiate private mediation proceedings and to participate in a prescribed number of mandatory mediation sessions provided for under the agreement.

In cases involving an alleged breach of a good-faith negotiation clause, the court, upon application by a party, may be required to determine whether the parties discharged their obligation to conduct the mediation process in good faith and whether their decision to discontinue the mediation and subsequently institute judicial proceedings was consistent with the standards of good-faith conduct applicable within the mediation framework.[46]

Given that the Civil Procedure Code of Georgia establishes an obligation for the parties to appear and participate in court-connected mediation, while providing for corresponding sanctions in

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[43] The imposition of judicial sanctions for breaches of the principle of good-faith negotiation is envisaged, inter alia, under the legislation of Italy and Poland: Article 8 (5) of Decree 28/2010 of Italy, Code of Civil Procedure Article 116 (2); Civil Procedure Code of Poland, 2005, Art. 103 (1) (2). The mediator bears an obligation to inform the court of a party's failure to comply with the duty to conduct negotiations in good faith, see: *Trevor M.B., Palo G.,* EU Mediation Law and Practice, Oxford University Press, 2012, 194. The requirement to conduct negotiations in good faith within the mediation process is likewise recognized under the legislation of Latvia and Lithuania; see: Mediation Act of Latvia, Art. 11, 18 June, 2014; Republic of Lithuania, Law on Mediation, 15 July 2008. See also: *Alexsander N.,* International and Comparative Mediation, Legal Perspectives, Wolters Kluwer Law and Business, 2009, 229.

[44] The parties participating in the mediation process are equal insofar as each party bears an identical obligation, within a voluntarily initiated mediation process, to act in good faith and to undertake genuine efforts to achieve an agreement as discussed in: *Kandashvili I.,* Mediation: An Effective Means of Dispute Resolution: A Practical Guide, Tbilisi, 2022, 92.

[45] UNCITRAL Conciliation Rules, adopted by the United Nations Commission on International Trade Law in 1980, Article 11 – The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

[46] Cour Cass le civ 08.04.2009, #08-10866, cited in: *Alexsander N.,* International and Comparative Mediation, Legal Perspectives, Wolters Kluwer Law and Business, 2009, 229.

the event of non-compliance (Article 187[6]), the mediator is required to notify the court of the following information: (1) the commencement and conclusion of the mediation process; (2) the achievement of a mediated settlement agreement or the termination of mediation due to the parties' failure to reach an agreement; and (3) the appearance and participation of the parties in the mediation proceedings.[47] The requirement of good-faith negotiation is essential for ensuring the proper quality of mediation and the fairness of the process, as it serves to prevent the reintroduction of adversarial dynamics into mediation and to safeguard against the abuse of the parties' right to reach a voluntary settlement.[48]

Where a party appears for the mediation but fails to afford the opposing party a genuine opportunity to engage in negotiations – for example, by insisting upon the unconditional acceptance of its claims as pleaded – or where the party's legal representative, without a valid justification, fails to secure the party's attendance at the two mandatory court-connected mediation sessions[49], such conduct in Georgian law shall be construed as a refusal to participate in court-connected mediation, and the mediation shall not be deemed to have commenced.

In the latter circumstance, the mediator is required to take all legitimate and reasonable measures to establish direct communication with the party and to provide the information on mediation prescribed by Article 8(1) of the Law of Georgia on Mediation, in order to ensure that the refusal to participate in mediation has been expressed personally by the party on the basis of an informed decision (Article 4(3) of the Professional Code of Ethics for Mediators of the LEPL "Georgian Mediators Association"). Where a party gives an informed refusal to participate in mediation, the mediator is entitled either to request that the party confirm, in writing, its refusal to engage in the mandatory mediation process or to notify the court directly of the party's decision.[50]

At the same time, any notification submitted by the mediator to the court concerning a party's failure to comply with the court's referral order must be founded upon objective circumstances rather than the mediator's subjective assessment. Accordingly, the mediator must possess clear and ascertainable factual grounds for concluding that the party has expressly declared, or has otherwise unequivocally demonstrated, its refusal to participate in the mediation process.[51]

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47 Uniform Mediation Act, § 3(c) (2003). See also Article 7(3) and Article 9(4) of the Law of Georgia on Mediation, as well as Article 6(3) of the Professional Code of Ethics for Mediators of the LEPL "Georgian Mediators Association".

48 *Weston M.A.,* Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Needfor Good-Faith Participation, Autonomy, and Confidentiality, 76 Indiana Law Journal, Vol. 76, Issue 3, 2001, 643; *Weston M.A.,* Confidentiality's Constitutionality: The Incursion on JudicialPowers to Regulate Party Conduct in Court-Connected Mediation, Harvard Negotiation Law Review, Vol.8, (29) 2003.

49 In a number of jurisdictions, a party's right to terminate the mediation arises only after the party has participated in a prescribed number of mediation sessions. See: *Alexsander N.,* International and Comparative Mediation, Legal Perspectives, Wolters Kluwer Law and Business, 2009, 227.

50 Similarly, in the context of court-annexed mediation in the United States, the mediator is generally under an obligation to notify the referring court of a party's non-compliance with the court's mediation order where such non-compliance is manifested by the party's refusal, from the outset, to participate in the mediation process. See: *Thompson P.N.,* Good Faith Mediation in the Federal Courts, Ohio State Journal on Dispute Resolution, Vol. 26:2-3, 2011, 426.

51 *Thompson P.N.,* Good Faith Mediation in the Federal Courts, Ohio State Journal on Dispute Resolution, Vol.26:2-3, 2011, 427.

Where a party has predetermined that it will not modify its litigation position, has no intention of reaching an agreement in mediation even on a hypothetical basis, and refuses to hear or consider any settlement proposal advanced during the mediation, the commentary literature recommends that, as a matter of compliance with the standard of good-faith conduct, the party should disclose this position to the court before the commencement of the mediation process.[52] Failing to do so, while nevertheless participating in mediation without any genuine willingness to explore the possibility of settlement, constitutes a breach of the principle of good faith and results in the unnecessary delay of the administration of justice.

Since it is neither feasible, through legislative regulation nor by reference to generalized mediation practice, to anticipate exhaustively every conceivable manifestation of bad-faith conduct by a party, the United States Federal Rules of Civil Procedure recognize this difficulty by prohibiting parties from using the mediation process "to harass another party, to cause unnecessary delay, or to increase the costs of litigation." [53]

For legal representatives, the requirement of good faith additionally constitutes an ethical obligation. It encompasses the duty to provide clients with comprehensive information regarding the advantages of mediation; to encourage the client's personal participation in the mediation process; to cooperate with the mediator in a constructive and reasonable manner; to develop an appropriate representation strategy for mediation; to facilitate, in good faith and within a collaborative framework, an objective assessment with opposing counsel of the legal risks associated with judicial determination of the dispute; to adopt a collaborative rather than adversarial approach; to formulate proposals that reflect the parties' shared interests; and to promote the realization of the client's legal, psycho-emotional, and personal interests, while facilitating the client's ability to make informed decisions.[54]

With respect to third parties participating in the mediation process, the requirement of good faith entails an obligation to support the realization of the parties' best interests, to facilitate the effective resolution of the conflict, and to contribute to the parties' emotional validation. Where third parties participate for the purpose of providing expert assistance, they are required to exercise their professional expertise diligently, in good faith, and for the benefit of the parties' legitimate interests.

3. Procedural Manifestations of a Mediator's Bad-Faith Conduct

The Legal Significance of the Principle of Good Faith Applicable to Mediators. A mediator's good faith constitutes one of the fundamental guarantees of the legitimacy, fairness, and public credibility of the mediation process. Unlike judicial proceedings, where the legitimacy of the administration of justice is secured primarily through institutional independence and procedural safeguards, the legitimacy of mediation rests predominantly upon the mediator's personal and professional good faith. For this reason, contemporary legal scholarship regards good faith not merely

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[52] Ibid, 426.

[53] Federal Rule of Civil Procedure, 16 (b) (1).

[54] For a comprehensive analysis of this issue, see: *Kimberlee K.,* New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in A Non-adversarial Approach to Problem Solving Mediation, 28 Fordham Urban Law Journal, 935, 2001.

as an ethical value, but as an autonomous legal principle that defines both the limits of the mediator's professional discretion and the normative standards governing its exercise.[55]

The mediator's professional role is fundamentally founded upon the trust of the parties. Ethical obligations serve as the normative basis for the legitimacy of the mediation profession. Accordingly, impartiality, party self-determination, and good faith should not be understood merely as ethical ideals, but as binding normative obligations arising from the mediator's professional status and the nature of the mediation function.[56]

In view of the universal character of the principle of good faith, a mediator's bad-faith conduct cannot, as a rule, be confined solely to manifest breaches of the rules of professional ethics. Rather, it may be manifested through any act or omission that is incompatible with the objectives of mediation, infringes the parties' right to self-determination, compromises the fairness of the process, or undermines public confidence in mediation and in the profession itself.

Professional good faith is a considerably broader concept than mere compliance with the specific provisions of a code of professional ethics. Accordingly, bad faith encompasses any conduct by which a mediator abuses his or her professional position, discretionary authority, or powers of procedural case management.[57]

In adopting the standard-setting approach of an adjudicative model, mediator codes of conduct are a poor fit with the conceptual and structural characteristics of this fluid, uncertain, and essentially private process. Confining the substantive and conceptual debate over mediation ethics to formal codes dangerously underestimates both the scope and the significance of choices faced constantly by intervenors in their process management role.[58] While codes of conduct offer general guidance for issues such as abuse of process, party self-determination, and good-faith bargaining, applying these principles requires the exercise of personal discretion and an understanding of context.[59]

The Mere Appearance of Neutrality and Impartiality as a Manifestation of Bad Faith. One of the most serious manifestations of a mediator's bad-faith conduct is the mere appearance of neutrality and impartiality. In such circumstances, the mediator ostensibly maintains an equal attitude toward the parties while, in reality, favouring one of them by providing assistance of unequal intensity during the negotiations, selectively relying upon or deploying information, or exercising procedural interventions that exert a disproportionate influence on the ultimate outcome of the mediation.

A mediator is under a duty to maintain value neutrality and must not permit his or her personal views, sympathies, economic interests, or preconceived stereotypes and biases to influence either the mediation process or its outcome.[60]

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55 For a discussion of the mediator's discretion, see: *Macfarlane J.,* Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model, Osgoode Hall Law Journal 40.1, 2002,

56 *Shapira O.,* A Theory of Mediator's Ethics, Foundations, Rationale and Application, Cambridge: Cambridge University Press, 2016, Chapters 1, 4 and 7.

57 Ibid., chapter 8 (professional integrity – pp. 231–254) and 11 (Fairness – pp. 302-310).

58 *Macfarlane J.,* Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model, Osgoode Hall Law Journal 40.1, 2002, 49.

59 Ibid., 55-56.

60 For a detailed discussion of this issue, see: *Izumi C.,* Implicit Bias and the Illusion of Mediator Neutrality, Washington University Journal of Law and Policy, 34(1), 2010, 71-155; *Astor H.,* Mediator Neutrality: Making Sense of Theory and Practice, Social & Legal Studies, Vol. 16, No. 2, 2007, 221–239.

Non-Disclosure of Conflicts of Interest and the Violation of Informed Consent. The concealment or incomplete disclosure of a conflict of interest should be regarded as a breach of the principle of good faith. In certain circumstances, a mediator may refrain from disclosing the existence of a conflict of interest out of a genuine desire to preserve the mediation process and to prevent the parties from terminating the proceedings and thereby losing the opportunity to negotiate. In such cases, the mediator may sincerely believe that the conflict will not impair his or her neutrality or impartiality and that it is unlikely to give rise to any actual prejudice. Nevertheless, irrespective of whether the non-disclosure has had any tangible effect on the mediation process or its outcome, the existence of an undisclosed potential conflict of interest, in itself, constitutes a breach of the duty of good faith.

Moreover, such conduct impermissibly interferes with the principle of voluntariness. By withholding information concerning a conflict of interest, the mediator deprives the parties of the opportunity to make an informed decision regarding both the continuation of the mediation process and the suitability of the mediator to continue serving in that capacity. The parties' ability to make such an informed choice constitutes an essential element of both party self-determination and the principle of voluntariness.

Accordingly, a mediator is under a duty to disclose, fully and in a timely manner, any circumstance that may objectively give rise to reasonable doubts concerning his or her independence or impartiality. Bad faith is manifested not only where an actual conflict of interest exists, but also where the mediator intentionally withholds information that deprives the parties of the opportunity to make an informed decision as to whether the mediation should proceed.

Particular attention has been devoted in the legal literature to situations in which a mediator elects to continue conducting the mediation in order to advance his or her own professional or financial interests, notwithstanding the existence of circumstances that objectively require the mediator's withdrawal or recusal.[61]

Interference with Party Self-Determination and Exceeding the Functional Limits of the Mediator's Role. One of the most significant manifestations of a mediator's bad-faith conduct is interference with the principle of party self-determination. A fundamental value of mediation is that the authority to make decisions belongs exclusively to the parties, whereas the mediator's role is confined to facilitating the parties' decision-making process. Accordingly, conduct such as coercing the parties into settlement,[62] exerting psychological pressure, exaggerating or misrepresenting the consequences of failing to reach a settlement or the burdens associated with judicial proceedings, imposing a particular settlement proposal, or otherwise exerting influence that substantially impairs a party's freedom of decision is incompatible with the mediator's duty of good faith.

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61 For a comprehensive discussion of the mediator's duty to inform the parties, see: *Michael T., Colatrella Jr.,* Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties, 15 Cardozo J. Conflict Resolution, 2014, 705-775.

62 Coercion need not threaten physical violence. Rather, coercion occurs when someone is required to choose between illegitimate options. That is, coercion might be best understood as either having no choice or as having no acceptable choice. As referred in: *Morreim H.,* Mediation: Common Practices and Ethical Boundaries, The Journal of Law, Medicine & Ethics, Vol. 52, Published online: Cambridge University Press, 2024, 329.

Where a mediator, by invoking his or her professional authority or status, effectively determines the substantive outcome of the dispute, the mediator exceeds the functional limits of the mediation role and transforms the mediation process into a form of informal arbitration.[63]

Misuse of Confidential Information in Bad Faith. The improper use of information also constitutes a form of bad-faith conduct. The disclosure, without appropriate authorization, of confidential information obtained during private sessions (*caucus*) to the other party; the use of confidential information for the mediator's own interests; or the selective disclosure of information with the purpose of strengthening one party's negotiating position constitutes a substantial breach of the principle of confidentiality in mediation**.**

Furthermore, the requirement of good faith prohibits not only the direct disclosure of confidential information but also its indirect exploitation, where the mediator, through his or her interventions or the formulation of suggestive or directional questions, seeks to signal confidential circumstances to one of the parties.[64]

Exceeding the Scope of Professional Competence and Misrepresentation of Qualifications. A mediator's professional integrity also requires the recognition of the limits of his or her own competence and the duty to disclose such limitations to the parties. Pursuant to the principle of mediator competence, conducting mediation in a matter for which the mediator lacks the necessary knowledge, experience, or skills should be regarded as bad-faith conduct, even where the mediator possesses the mandatory certification required by law and holds the formal status of a mediator.

Similarly, a mediator must not create a false impression regarding his or her qualifications, professional experience, or areas of specialization. Such conduct may undermine the parties' trust in the mediation process and constitutes a violation of the principle of informed consent. [65]

Bad-Faith Exercise of Discretion in Process Management. The requirement of good faith applicable to mediators assumes particular significance in the management of the mediation process. It constitutes bad-faith conduct for a mediator to make procedural decisions aimed at artificially prolonging the mediation, obtaining financial benefit, unjustifiably extending the duration of the process, or, conversely, prematurely terminating negotiations without a genuine and sufficient effort to facilitate meaningful dialogue between the parties.

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63 For a more extensive analysis of this issue, see the following scholarly works: *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey Bass, A Wiley Imprint, United States of America, 2011, 47-66, 82-97; *Nolan-Haley J.,* Mediation: The New Arbitration, Harvard Negotiation Law Review, Vol. 17, 2012, 61–95 (the expansion of the mediator's authority at the expense of the parties' right to self-determination); *Menkel-Meadow C.,* Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities, 38 South Texas Law Review, 1997, 421-430.

64 For an analysis of this issue, see:*Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey Bass, A Wiley Imprint, United States of America, 2011, 261-267; *Frenkel D., Stark J.,* The Practice of Mediation: A Video-Integrated Text, 3rd ed., Wolters Kluwer, 2018, 267-281.

65 For a comprehensive discussion of the mediator's duty to undertake only those matters for which the mediator possesses the requisite competence, qualifications, and professional suitability, see: *Shapira O.,* A Theory of Mediator's Ethics, Foundations, Rationale and Application, Cambridge: Cambridge University Press, 2016, 241-243.

The mediator has a duty to ensure the effectiveness, proportionality, and procedural integrity of the mediation process, as well as to safeguard the parties' genuine opportunity to participate in negotiations. Failure to comply with this obligation constitutes a breach of the principle of good faith.[66]

Conflict Between the Mediator's Economic Interests and Professional Obligations. The principle of good faith is likewise incompatible with a mediator's prioritization of his or her own economic interests over the legitimate interests of the mediation process and the parties. Such conduct includes continuing to conduct mediation solely for the purpose of obtaining remuneration where the futility of the process is evident and the mediator fails to exercise the legitimate authority to terminate the proceedings; offering additional services to the parties in circumstances giving rise to a conflict of interest; acting, following the conclusion of the mediation, as a representative or advisor of one of the parties in relation to the same dispute; or engaging in any other conduct that subordinates the mediator's neutral professional role to private interests.

The Impact of a Mediator's Bad-Faith Conduct on the Legitimacy of Mediation and Public Confidence. Accordingly, contemporary legal scholarship recognizes that a mediator's bad-faith conduct extends beyond the overt and direct violation of professional ethical rules. It encompasses any act or omission that undermines the fundamental principles of mediation, including independence, impartiality, neutrality, self-determination, confidentiality, equality, and procedural fairness.

It is precisely such deviations from the established standards of professional conduct that pose the most serious threat to the authority and legitimacy of the mediation institution, erode public confidence in the neutral third-party role, and ultimately impair the effectiveness and legitimacy of mediation as an alternative form of justice.

4. Forms of Bad-Faith Conduct by Legal Representatives in the Mediation Process

Within court-connected mandatory mediation programmes, the effective implementation of the obligation to negotiate in good faith and a proper understanding of the procedural manifestations of this obligation have assumed increasing importance.

The rule of law and the public interest in the proper administration of justice are better served by the express recognition that participation in mandatory ADR processes should be conducted in accordance with the principle of good faith.[67]

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66 For an analysis of the scope of the mediator's discretionary authority and the mediator's corresponding duty to safeguard the ethical integrity of the mediation process, see: See: *Shapira O.,* A Theory of Mediator's Ethics, Foundations, Rationale and Application, Cambridge: Cambridge University Press, 2016, 234-236.

67 National Alternative Dispute Resolution Advisory Council, Maintaining and Enhancing the Integrity of ADR Processes, (Research Report, National Alternative Dispute Resolution Advisory Council, February 2011, 34 <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_IntegrityofADRprocesses> [08.07.2026].

The Standard of Good Faith Applicable to Lawyers in Mediation. The role of a lawyer in the mediation process differs fundamentally from the traditional model of legal representation in judicial proceedings. Whereas, in adversarial litigation, a lawyer's professional duty is primarily associated with the most effective protection of the client's legal position, representation in mediation is founded upon a collaborative paradigm aimed at realizing the party's broader interests through negotiations that facilitate an informed, voluntary, and sustainable agreement. Accordingly, a lawyer's professional good faith in mediation does not merely require unwavering advocacy for the client's multifaceted interests; it also encompasses an obligation to respect the objectives of the mediation institution and its fundamental principles.

Bad-faith conduct by a lawyer in mediation does not invariably manifest itself through an overt breach of professional ethical rules. More frequently, it takes the form of procedural, tactical, or strategic actions that may not formally contravene legal requirements, yet substantially undermine the collaborative nature of mediation and impede the attainment of its primary objective – the resolution of disputes through mutual agreement. Therefore, bad faith encompasses not only direct violations of law or professional ethical obligations, but also the misuse of the functional purpose of the mediation institution and the abuse of the mediation process itself.

The Obligation of Genuine Participation in Negotiations and the Prohibition of Formal Representation. One of the most significant components of good faith in the mediation process is considered to be the obligation to participate in negotiations genuinely rather than merely nominally. Numerous scholars have emphasized that mere formal attendance at mediation, where a representative has excluded from the outset any possibility of reaching an agreement, is inconsistent with the standard of good-faith negotiation**.**

In such circumstances, mediation loses its collaborative function and is transformed into a mere formal compliance mechanism for satisfying a court-imposed requirement or a contractual mediation clause, serving as a procedural prerequisite prior to the commencement of judicial proceedings.

Good-faith participation does not entail an obligation to reach a settlement; [68] rather, it requires that the party and its representative remain genuinely willing to explore the possibility of an alternative resolution, listen to the interests and perspectives of the opposing party, and evaluate proposals objectively through a rational assessment of relevant information and potential risks.

Abuse of Mediation for the Purpose of Obtaining Procedural or Strategic Advantage. One of the most prevalent manifestations of bad-faith conduct identified in legal scholarship is the use of mediation for the purpose of obtaining a procedural or strategic advantage.[69] Such conduct may take the form of initiating or participating in mediation solely with the intention of delaying judicial proceedings, exhausting the opposing party's financial resources, gaining additional time, or weakening the opponent's procedural position.

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68 *Alexsander N.,* International and Comparative Mediation, Legal Perspectives, Wolters Kluwer Law and Business, 2009, 227.

69 *Carter R.L.,* Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations, 2002 J. Disp. Resol., 2002, 372.

In such circumstances, mediation ceases to function as a mechanism for dispute resolution and is instead transformed into an instrument of procedural strategy, which is incompatible with its voluntary and collaborative nature. For this reason, the doctrine of American law considers it impermissible to employ mediation for the purpose of harassing an opposing party, prolonging litigation, or unjustifiably increasing litigation costs.

Use of Mediation Solely for the Purpose of Obtaining Strategic Information. Particularly problematic are situations in which a representative participates in mediation solely for the purpose of obtaining specific information or gathering evidence to support subsequent judicial proceedings.[70] Attempts to use information obtained during the mediation process in subsequent litigation, to anticipate the negotiation strategy of the opposing party, or to examine and exploit the opponent's legal position are regarded in legal scholarship as among the clearest forms of abuse of the mediation process.

Collaborative negotiation cannot exist without mutual trust. Accordingly, the use of mediation merely as a means of information-gathering or strategic intelligence fundamentally undermines such trust and, ultimately, compromises the legitimacy and institutional integrity of mediation.

Misrepresentation of Facts and Limitation of the Client's Right to Self-Determination. The requirement of good faith assumes particular significance with regard to the accuracy of information and the integrity of negotiations. Although mediation does not require parties to disclose their entire negotiation strategy, it is impermissible to mislead the opposing party or the mediator concerning facts of material importance.[71] International professional ethical standards distinguish between evaluative statements inherent in the negotiation process and deliberate factual misrepresentations. While the former constitute a natural element of negotiation dynamics, the latter are incompatible with the principle of good faith and undermine the party's ability to make an informed decision.

Limitation of the Client's Right to Self-Determination. In the mediation process, good-faith representation is likewise incompatible with any limitation of the client's right to self-determination. One of the fundamental principles of mediation is that the ultimate decision-making authority belongs to the party itself and not to its representative. In providing representation, a lawyer is bound by the client's choices and expressed will.[72]

Accordingly, conduct may be regarded as bad faith where a lawyer fails to communicate settlement proposals received in the course of mediation to the client, fails to explain the legal consequences of settlement, restricts the client's direct participation, or effectively makes decisions on behalf of the client without a proper manifestation of the client's own will. In such circumstances, not

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70 *Macfarlane J.,* Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model, Osgoode Hall Law Journal 40.1, 2002, 62.

71 *Moore J.M.,* Volunteered or Voluntold: Effectiveness of Good Faith Clauses on Court-Ordered Mediation Court-Ordered Mediation, J. Disp. Resol., Vol. 2025, Issue 2, 2025, republished by University of Missouri School of Law Scholarship Repository, 2026, 7, citing*: Kovach K.K.,* Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic, South Texas Law Review, Vol. 38, 1997, 622-623.

72 ABA Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer a) … a lawyer shall abide by a client's decisions concerning the objectives of representation, cited in: *Morreim H.,* Mediation: Common Practices and Ethical Boundaries, The Journal of Law, Medicine & Ethics, Vol. 52, Published online: Cambridge University Press, 2024, 330.

only the ethical standards governing legal representation are violated, but also the principle of self-determination underlying mediation.

A lawyer's representative authority and mandate to conclude a settlement in mediation are inherently limited and may be suitable primarily for distributive negotiations. However, mediation is founded upon a multidimensional approach to creative and innovative alternatives and requires the creation of economic and human value, as well as the transformation of conflict. Therefore, the participation of the party itself is decisive, as the party constitutes the unique subject capable of identifying and articulating his or her own best interests and of expanding the range of available exchange resources within mediation – resources of which the lawyer may not necessarily possess knowledge.[73]]

Insufficient Scope of the Representative's Authority and Exclusion of the Client from the Process. Particular attention should also be devoted to the issue of the representative's authority. The effectiveness of mediation significantly depends on whether the representative possesses genuine authority to discuss settlement terms and facilitate the achievement of an agreement. Where a representative knows in advance that he or she is unable to make any decision without obtaining the client's additional approval, excludes the client from meaningful participation in the mediation process, fails to disclose to the party the significance of his or her personal involvement in mediation, and intentionally employs formal negotiations as a means of delaying the process, such conduct may be regarded as inconsistent with the principle of good faith.[74]

Transposition of Adversarial Litigation Tactics into Mediation. Another manifestation of bad-faith conduct is the mechanical transposition of adversarial litigation tactics into the mediation process. Where a representative employs intimidation, personal attacks, repeated threats of litigation, humiliation of the opposing party, or demonstrations of power during negotiations, he or she effectively replaces collaborative negotiation with a confrontational model.

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73 For a discussion of the significance of the party's direct involvement in the mediation process as a prerequisite for the effective exercise of the right to self-determination, see: *Rundle O.,* Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases, QUT Law Review, Vol. 8, No. 1, 2008, 77-92; *Bush R. A. B.,* What Do We Need a Mediator For?: Mediation's "Value-Added" for Negotiators, 12 Ohio St. J. on Disp. Resol. 1, 1996, 18-25.

74 For a discussion of the representative's influence on the party's participation in the mediation process, the party's ability to articulate its own position, and the extent of the party's genuine engagement in the mediation process, see: *Wissler R.L.,* Representation in Mediation: What We Know From Empirical Research, 37 Fordham Urban Law Journal, 2010, 441-447; For a discussion of informed consent, autonomy, self-determination, and the impact of party representation in mediation, see: *Nolan-Haley J.,* Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making, Notre Dame Law Review, Vol. 74, 1999, 775–782, 792–800; For a discussion of the lawyer's professional duty to provide the client with adequate information regarding the mediation process and to ensure the client's proper preparation for meaningful participation in mediation, see: *Klein K.K.,* Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers, North Dakota Law Review: Vol. 84: No. 3, 877-878; *Menkel-Meadow C.,* The Lawyer as Consensus Builder: Ethics For a New Practice, Georgetown Law Faculty Publications and Other Works, 70 Tenn. L. Rev., 2002, 87-88; *Kovach K.K.,* Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic, South Texas Law Review, Vol. 38, 1997, 622-623.

Contemporary mediation theory regards such conduct not as effective and competent advocacy, but rather as a denial of the very nature of mediation. This is because such an approach impedes the development of interest-based dialogue, obstructs conflict transformation, and diminishes the possibility of achieving a long-term and sustainable agreement for the client – an agreement capable of proactively reducing the likelihood of future disputes arising.[75]

The following forms of conduct by a lawyer are considered inconsistent with the duty of good faith: პosturing and without adequate basis suggesting that a court outcome is more favourable than it is or suggesting that legislation will be construed differently.[76]

5. Procedural Implications of Bad-Faith Conduct

Accordingly, violations of the principle of good faith include merely apparent or formal participation in negotiations, the use of mediation for the purpose of delaying proceedings, the absence of any genuine intention to reach an agreement from the outset, misleading the mediator or the opposing party, restricting the client's right to self-determination, undertaking representation without sufficient authority, obtaining information in bad faith, and transferring confrontational tactics characteristic of judicial proceedings into the sphere of collaborative negotiation.

These forms of conduct are recognized in contemporary legal scholarship as among the most prevalent violations of the principle of good faith and constitute the primary challenges that must be addressed in order to ensure the effectiveness of mediation, maintain public confidence in the institution, and secure fair outcomes. Such conduct on the part of a representative gives rise to an obligation on the mediator to terminate the mediation process where the mediator is unable to manage and prevent the parties' bad-faith conduct.[77]

Where bad-faith conduct is manifested through formal attendance at mediation, participation without the requisite authority, or the involvement of a representative who lacks genuine decision-making authority, the mediator is required to inform the parties that he or she will have to terminate the mediation process[78] and notify the court that mediation could not be deemed commenced due to

75 For a discussion of the inadequacy of applying adversarial representation methodologies within the mediation process and the imperative need to adopt a collaborative approach, see: *Klein K.K.,* Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers, North Dakota Law Review: Vol. 84: No. 3, 878-882.

76 *Sourdin T.,* Good Faith Mediation – Developing Trends from the Antipodes, University of Newcastle (Australia), 2014, 12.

77 *Shapira O.,* A Theory of Mediator's Ethics, Foundations, Rationale and Application, Cambridge: Cambridge University Press, 2016, 266. See also, The Family Mediation Canada (FMC) Code of Professional Conduct, Article 13.1(b) and (c) <https://www.aboutrsi.org/library/family-mediation-canada-code-of-professional-conduct> [08.07.2026]. See also Florida Rules for Certified and Court-Appointed Mediators, Rule 10.420(b)(4), (termination upon fraud or unconscionability), <https://flcourts-media.flcourts.gov/content/download/219330/1981926/Mediator-Rules-Tab-3.pdf> [07.07.2026].

78 See Articles (1) and 187^6 (1) of the Civil Procedure Code of Georgia. Similarly, see: *Jasmaniar, Nurhaedah,* Principle of Good Faith in Peace Agreements via Mediation, Journal of Law, Politic and Humanities (JLPH), Vol. 4, No. 2, January 2024, 67.

the party's failure to genuinely participate in the process or due to the participation of a representative lacking the actual authority to make decisions.

Such mediation is qualified as a refusal by the party to participate in mandatory mediation and shall not be considered to have commenced. The mediator is required to inform the parties that the court may impose sanctions prescribed by law for failure to appear for the purpose of genuine participation in mediation or for effectively refusing to engage in good-faith negotiations within mandatory mediation.

Such information provided to the parties is essential to enable the lawyer/client to understand the consequences of refusing to participate in the mediation process and to make an informed decision regarding participation in mediation.

Where a party or representative fails to participate in the mediation process with full authority, refuses to commence mediation despite appearing at the mediation session, or deliberately and manifestly obstructs the party's participation in the mediation process, the mediation must not be classified as terminated due to failure to reach an agreement. In such circumstances, negotiations have not, in fact, commenced, and the opposing party has not been afforded a genuine opportunity to engage in negotiations. Accordingly, in such cases, the mediator's notification to the court should classify the mediation as not having commenced, thereby ensuring that accurate information regarding the commencement or non-commencement of mediation is provided to the court for the purposes of statistical analysis of mediation outcomes.

The opposing party, in turn, retains the right to bring a complaint before the relevant ethics commission against the lawyer representing the other party *vis-à-vis* the violation of the duty to negotiate in good faith, on the grounds that such conduct deprived the party of a genuine opportunity to participate in meaningful negotiations within the mediation process.

Both national and international practice demonstrate that the assessment of court-connected mediation centres is based upon differentiated statistical reporting, which includes not only the total number of cases referred to the centre, but also the number of cases in which mediation has actually commenced and the number of cases in which the commencement of mediation has not been achieved.

Where a breach of the duty of good faith relates directly to the conduct of a party or its representative during the mediation process, including statements made in the course of negotiations, positions expressed, or information exchanged between the parties, rather than to objectively verifiable circumstances such as appearance at mediation without adequate authority or the manifest and intentional restriction of the client's participation in the process, the mediator is not authorized to disclose to the court or any other body the specific manner in which the duty of good faith was breached.

Disclosure of such information would inevitably result in the revelation of confidential information obtained during the mediation process, thereby contradicting one of the fundamental principles of mediation – the protection of confidentiality – and undermining public confidence in the mediation institution.

In such circumstances, the mediator's primary obligation is to attempt, within the framework of the mediation process, to remedy the party's or representative's bad-faith conduct, explain the incompatibility of such conduct with the objectives and ethical standards of mediation, and encourage the parties to continue negotiations in accordance with the principle of good faith.

Where the party or representative fails to discontinue such bad-faith conduct and the behaviour substantially impedes the achievement of the objectives of mediation, the mediator has both the authority and, indeed, the obligation to terminate the mediation process in order to prevent an unjustified delay in the administration of justice. Upon terminating mediation, however, the mediator is not entitled, due to the duty of confidentiality, to disclose the specific circumstances identified during the process or the substance of the parties' communications that formed the basis for such a decision.

In such circumstances, the opposing party is not deprived of legal remedies. Where bad-faith conduct has been committed by a lawyer or another professional representative, the affected party may submit a complaint to the competent professional ethics body and request consideration of the issue of disciplinary responsibility. This mechanism ensures the enforcement of the duty of good faith without compromising the principle of confidentiality in mediation.

Accordingly, the assessment of such situations requires particular caution on the part of the mediator in order to preserve, on the one hand, the integrity of the mediation process and, on the other hand, to prevent the unjustified disclosure of confidential information by the mediator.

6. Scope of Judicial Control over the Enforcement of the Principle of Good-Faith Negotiation

Georgian judicial practice has not yet developed an effective enforcement mechanism for ensuring compliance with the obligation to participate in mandatory mediation or with the principle of good-faith negotiation. Although the Civil Procedure Code of Georgia contains relevant provisions allowing, in certain circumstances, the imposition of sanctions upon a party, courts have, in practice, rarely applied sanctions on the grounds of an unjustified refusal to participate in mandatory mediation. As a result, this legislative mechanism remains largely declaratory in nature, while the practical enforcement of the duty to negotiate in good faith has not been adequately ensured.

At the same time, the resolution of this problem is closely connected with the principle of confidentiality in mediation. In particular, one of the most challenging theoretical and practical issues is determining the extent to which courts should be empowered to assess the good-faith participation of parties in mandatory mediation without undermining confidentiality or diminishing the parties' trust in the institution of mediation. Therefore, it is necessary to establish an appropriate balance which, on the one hand, ensures the effective enforcement of the obligation of good-faith participation and, on the other hand, fully preserves one of the fundamental principles of mediation – the principle of confidentiality.

A mediator is not entitled to testify before a court regarding the quality or manner of the parties' participation in the mediation process, as statements made or actions undertaken by the parties during mediation may not be used as evidence against them.[79] The mediator is entitled only to determine whether the mediation process has commenced, whether the parties appeared for participation in the two mandatory mediation sessions, whether the parties and/or their representatives ensured the involvement of persons possessing full authority to participate in the process, and whether the mediation concluded with an agreement or was terminated due to the failure to reach an agreement.

If mediators were under a duty to report to the court on the substance of the parties' communications or the quality of their participation during mediation, this could substantially undermine the effective realization of the principle of self-determination. Legal scholarship has long recognized that imposing a general duty of good faith in mediation may adversely affect the manner in which parties interact both with one another and with the mediator. Faced with the prospect that their conduct may later be evaluated and reported to the court, parties are likely to adopt a more cautious approach and become less willing to disclose their genuine interests, concerns, or potential concessions. Such an outcome would strike at the very core of mediation by compromising its ability to provide participants with an open, confidential, and supportive environment conducive to the consensual resolution of disputes. Moreover, where parties perceive that the mediator's assessment of their participation may have procedural consequences, the free flow of information is likely to be inhibited, thereby diminishing the effectiveness of the mediation process and impairing one of its defining characteristics.[80]

Any other information relating to the quality of negotiations conducted during mediation, where such information may be established through confidential communications or materials exchanged within the process, must remain protected within the confidential and safe space of mediation.[81]

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79 See Article 104 (1^1) of the Civil Procedure Code of Georgia. The prohibition against the use as evidence of confidential information obtained in connection with mediation constitutes one of the most significant safeguards of party protection within mediation law and derives directly from the principle of confidentiality. Pursuant to Article 18 of the WIPO Mediation Rules (effective from July 1, 2021): Unless otherwise agreed by the parties, the mediator and the parties shall not introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding: (i) any views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (ii) any admissions made by a party in the course of the mediation; (iii) any proposals made or views expressed by the mediator; (iv) the fact that a party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by the other party; (v) any settlement agreement between the parties, except to the extent necessary in connection with an action for enforcement of such agreement or as otherwise required by law.

80 *Carter R.L.,* Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations, 2002 J. Disp. Resol. (2002), 377.

81 Regarding this issue, see the critical scholarly analysis of a United States case in which, upon the court's request, a mediator testified in judicial proceedings concerning an alleged violation of the duty to negotiate in good faith, referring to one party's purported bad-faith conduct during negotiations. The practice of compelling or permitting mediator testimony in such circumstances has been subject to serious criticism in the scholarly commentary on the case. See: *Reiter E., Pollack D.,* Good Faith and Responsibility in Mediation, Texas Lawyer, Expert Opinion, 2026, <https://www.law.com/texaslawyer/2026/01/15/good-faith-andresponsibility-in-mediation-/> [11.07.2026].

This issue remains insufficiently examined within Georgian law and requires further comparative legal, doctrinal, and practical research. Of particular importance is the identification of criteria on the basis of which the assessment of good-faith participation may be carried out without violating the principle of confidentiality. Accordingly, this area should, in the future, become one of the priority and most significant fields of research within the study of mediation law.

7. Conclusion

The principle of good faith in the field of mediation constitutes not merely an ethical orientation, but a fundamental legal standard that underpins the legitimacy, effectiveness, and fairness of the mediation process. The present research demonstrates that good faith cannot be reduced to a general behavioural requirement applicable solely to the parties. Rather, it constitutes a multi-dimensional legal obligation that equally binds mediators, parties, and their representatives, while shaping the legal and ethical integrity of both the mediation process and its outcome.

The findings of this research establish that bad-faith conduct in mediation represents a significantly broader concept than a manifest breach of law or a formal violation of professional ethical standards. It encompasses a wide range of conduct, including the use of mediation as a means of delaying proceedings, merely formal or superficial participation in the process, misrepresentation of material facts, non-disclosure of conflicts of interest, improper use of confidential information, the transposition of adversarial litigation strategies into the mediation setting, and the instrumentalization of mediation for purposes incompatible with its nature. Such conduct fundamentally undermines the collaborative character of mediation and obstructs the development of genuine interest-based dialogue.

This article demonstrates that the effective realization of the obligation of good-faith participation requires a principled distinction between situations in which bad faith is manifested through objectively ascertainable circumstances – such as the absence of requisite authority or the deliberate avoidance of genuine participation in mediation – and situations in which the alleged breach concerns the substance of negotiations, the positions expressed by the parties, or confidential information exchanged within the mediation process. In this context, the scope of judicial control must be carefully delineated in a manner that simultaneously ensures the effective enforcement of good-faith obligations and preserves one of the fundamental pillars of mediation – the principle of confidentiality. The maintenance of such a balance constitutes an indispensable condition for the effective functioning of mandatory mediation.

Furthermore, the research demonstrates that, notwithstanding the existence of an applicable legislative framework, Georgian legal practice has not yet developed a consistent and effective judicial approach to the enforcement of good-faith participation obligations or to the application of appropriate sanctions for their violation. This circumstance highlights the necessity for the further refinement of both legal regulation and practical enforcement mechanisms. In particular, the development of a coherent model capable of ensuring effective scrutiny of good-faith participation without compromising the confidentiality of mediation should constitute a priority area for future research. Such a model would establish a robust institutional foundation for the continued development of mediation as an effective alternative mechanism for dispute resolution and the enhancement of access to justice.

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Analysis of Legislative Amendments Implemented to Enhance the Effectiveness of Mediation in Georgia

The article analyzes the contemporary stage of development of the mediation institution in Georgia and the significance of the legislative amendments implemented in December 2025 in the context of improving the effectiveness of mediation. The study reviews the practical implementation of the Georgian Law on Mediation, the main trends in the development of both private and court-annexed mediation, the institutional formation of the mediation profession, and the practical functioning of court mediation centers.

Particular attention is devoted to the analysis of legal and practical challenges that have emerged in the application of the existing regulatory framework. These include, inter alia, the refinement of enforcement mechanisms for settlement agreements reached within court mediation, the legal model governing the appeal of disciplinary decisions concerning mediators, the legislative regulation of special authorization for representation in mediation proceedings, and the improvement of rules governing the refund of state court fees. The paper argues that these amendments significantly strengthen the effectiveness of mediation as an alternative dispute resolution (ADR) mechanism, enhance legal safeguards for users, foster greater trust in mediation, and contribute to the further institutional development of the field in Georgia.

Keywords: *mediation; court mediation; private mediation; mediated settlement; mediator; alternative dispute resolution (ADR); enforcement of mediation settlement agreements; legal regulation of mediation.*

1. Legal Reform and Institutional Evolution

Similar to many European states, mediation as a novel dispute resolution mechanism has been actively established in contemporary Georgia. In particular, on 1 January 2020, the Law of Georgia "On Mediation" [1] entered into force, which provided a strong impetus for the systematic introduction of this dispute resolution mechanism, including in a mandatory framework.

At this stage, both society and the business sector, as well as disputing parties, were offered an unprecedented reform – by its nature truly novel – in the form of private mediation proceedings[2]. This mechanism enables disputing parties, in the event of a dispute, to initiate formal mediation directly with one another without resorting to court proceedings.

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1 <https://matsne.gov.ge/document/view/4646868?publication=2> [26.06.2026].

2 Ibid.

In cases where an agreement is reached through mediation, the parties are afforded the possibility of judicial confirmation of the mediated settlement and its subsequent enforcement[3]. This constitutes a unique legal instrument, enabling disputing parties to regulate their conflicts independently and, at the same time, to prevent further escalation of disputes through an efficient and structured alternative dispute resolution framework.

Moreover, it should be noted that, in the case of private mediation proceedings, disputing parties do not forfeit their right to subsequently apply to the court, which constitutes a constitutionally guaranteed right[4]. On the contrary, they are afforded the possibility of suspension of the limitation period for claims[5], as provided for under the Civil Code of Georgia. This development likewise represents an achievement of the new legislative framework and serves as an additional procedural safeguard and incentive for disputing parties to engage with and make broader use of this emerging dispute resolution platform.

The Law of Georgia "On Mediation" has also served as a prerequisite for the establishment of a new profession – the profession of mediator – which has been subject to institutional regulation at the legislative level. In particular, based on the law, the Legal Entity under Public Law (LEPL) "Georgian Mediators Association" [6] was established.

This body represents a professional association of mediators operating in Georgia and, on the basis of statutory authority, regulates key aspects of the profession, including standards for admission to the profession[7], professional deontology[8], continuous professional development of practitioners[9], and the promotion of the profession more broadly. As a result of these institutional developments, interest in the profession has been steadily increasing, and the number of practicing mediators continues to grow[10].

The practical implementation of mediation is primarily facilitated by two key prerequisites that ensure its real effectiveness. On the one hand, these include the mandatory referral of disputes subject to court-annexed mediation, a mechanism that has been increasingly reinforced through active judicial involvement year by year. On the other hand, the establishment and operationalization of new court mediation centers play a decisive role, a process that is being effectively implemented through cooperation between the professional association and the judiciary.

In this regard, mediation centers have already been established and are operational on the basis of the following courts, where case referral to mediators is actively conducted:

Tbilisi City Court Mediation Center; Tbilisi Court of Appeals Mediation Center; Rustavi City Court Mediation Center; Telavi District Court Mediation Center; Gurjaani District Court Mediation Center; Dedoplistskaro District Court Mediation Center; Mtskheta District Court Mediation Center;

3 See Article 13 of the Law of Georgia on Mediation.
4 See Article 31 of the Constitution of Georgia.
5 Refer to Article 12 of the Law of Georgia "On Mediation".
6 <www. Mediators.ge> [26.06.2026].
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10 <https://mediators.ge/ka/mediators/all/worldwide/all/all/0/1/> [26.06.2026]. As of today, the professional association comprises approximately 350 registered mediators.

Gori District Court Mediation Center; Bolnisi District Court Mediation Center; Kutaisi City Court Mediation Center; Kutaisi Court of Appeals Mediation Center; Batumi City Court Mediation Center; Akhaltsikhe District Court Mediation Center.

Against the backdrop of the above-described developments, and in the context of existing mediation practice and the application of the relevant legislative framework, several fundamental challenges have emerged in recent years. On the one hand, the necessity of regulating these issues has become objectively evident; on the other hand, their timely, appropriate, and effective regulation is essential for the further development of the mediation institution.

Failure to address these challenges adequately could have led to a realistic risk of reduced user engagement with the mechanism in practice, thereby hindering the continued growth and developmental prospects of this emerging profession, which otherwise possesses significant potential.

In this context, particular importance must be attributed to the legislative amendments introduced in December 2025 by the Parliament of Georgia to the Law of Georgia “On Mediation,” the Civil Procedure Code of Georgia, and the Law of Georgia “On Common Courts.” These amendments were developed by the LEPL “Georgian Mediators Association” as early as 2024 and subsequently submitted to the Parliament of Georgia for consideration.

2. Key Directions of the Reform

a) Improvement of the Enforcement Mechanism for Settlements Reached within Court Mediation

One of the key challenges within the contemporary mediation practice in Georgia has been the establishment of an effective enforcement mechanism for settlement agreements reached through court-annexed mediation. In particular, prior to the amendments of December 2025, under Article 272, paragraph “ღ^1” of the Civil Procedure Code of Georgia, a mediated settlement reached within court mediation – upon the return of the case to the court – served as an automatic ground for the termination of proceedings by the judge. Consequently, the parties were required to initiate a new separate proceeding[11] to request judicial confirmation of the mediated settlement, for which they were additionally required to pay a court fee of 150 GEL.

In effect, under such circumstances, where a party had to return to court for the second time merely to obtain confirmation of an already achieved settlement and incur additional procedural costs, mediation ceased to function as a time- and cost-efficient mechanism. As a result, instances emerged in practice where parties attempted not to formalize the content reached in mediation through the mediation procedure itself, in order to avoid the termination of ongoing proceedings. Instead, after concluding mediation, they would discontinue the mediation process and subsequently, within the renewed judicial proceedings, request confirmation of the settlement agreement by the court.

The continuation of such practice posed a significant risk of diminishing interest in mediation and weakening the incentives for mediators. Accordingly, it became both necessary and imperative to introduce legislative amendments. On this basis, the content of Article 272, paragraph “ღ^1” of the

[11] See Chapter XLIV^{13} of the Civil Procedure Code (version prior to the December 2025 amendments.

Civil Procedure Code was revised, granting the judge hearing the case the authority to approve a mediated settlement upon the parties' joint request and only thereafter terminate the proceedings.

This amendment is expected to significantly increase user satisfaction with mediation, as it ensures that the judicial process is concluded within a single procedural framework, eliminating the need to initiate separate proceedings solely for the confirmation of a mediated settlement.

b) Formation of a Unified Legal Model for Appealing the Ethical Liability of Mediators

The second, and no less significant, reform concerned the issue of appealing decisions rendered by the Ethics Commission in cases of alleged ethical misconduct by a mediator. Prior to the legislative amendments of December 2025, this matter remained entirely unregulated within the legal framework of Georgia.

In this regard, it was deemed appropriate to introduce corresponding amendments to the Organic Law of Georgia "On Common Courts," so that, similarly to judges and lawyers, this category of disputes would fall within the jurisdiction of the Disciplinary Chamber of the Supreme Court of Georgia, through a single-instance complaint mechanism.

Otherwise, decisions issued by the Ethics Commission of the Georgian Mediators Association would have been subject to a three-instance judicial review procedure, akin to the appeal of any administrative act. Such a framework would have placed mediators in a discriminatory position, as in the case of judges and lawyers, decisions of the Judicial Disciplinary Panel or the Bar Association's Ethics Commission are reviewed exclusively by the Disciplinary Chamber of the Supreme Court of Georgia.

In contrast, the newly established mediation profession would have remained outside this harmonized regulatory approach. This inconsistency has ultimately been rectified through the legislative amendments, ensuring that mediators are subject to the same procedural guarantees and regulatory model as judges and lawyers, thereby aligning the profession with established standards of institutional equality and legal coherence.

c) Institutional Recognition of Representation in Mediation and Expansion of Procedural Powers

For years, Article 98 of the Civil Procedure Code of Georgia (CPC) has provided a standard defining cases in which special authorization is required, consistently including, among other instances, representation before arbitral tribunals. In order to ensure institutional parity, as well as to further promote mediation and increase public awareness of it, representation in mediation proceedings has been added to the list of powers requiring special authorization.

This amendment is expected to serve as an additional foundation for enhancing the visibility and broader dissemination of mediation as an alternative dispute resolution mechanism.

d) Harmonization of State Court Fee Refund Rules with Mediation Practice

Finally, an issue identified within existing mediation practice concerns the regulation of state court fee refunds. In particular, under Article 49(2) of the Civil Procedure Code, settlement of a dispute at the preparatory stage results in the full refund of the court fee paid by the claimant.

However, under Article 49(2^1), the fact of reaching a mediated settlement within court mediation previously entitled the claimant only to a 70% refund.

This discrepancy constituted an inconsistent and discriminatory approach toward outcomes achieved through mediation. Ultimately, this issue has also been addressed through legislative reform. As a result, in cases where parties reach a mediated settlement at the preparatory stage of proceedings, they are now entitled to a full refund of the court fee, in line with Article 49(2), thereby ensuring equal treatment of mediation outcomes within the procedural framework.

Given the above considerations, it is evident, on the one hand, that mediation plays a significant role as a modern dispute resolution mechanism in both the global context and in Georgia, particularly in terms of the effective settlement of disputes. On the other hand, from a Georgian perspective, it is crucial to properly analyze accumulated practice and to timely regulate identified needs, so that this dispute resolution mechanism does not lose its momentum of widespread adoption, but instead gains broader user engagement and evolves into a more efficient and practical instrument. In this direction, legislative standards and regulatory frameworks are clearly continuing to develop.

3. Conclusion

In conclusion, it may be stated that the development of the mediation institution in Georgia represents a significant legal and institutional reform aimed at promoting the efficient, expeditious, and cost-effective resolution of disputes. The Law of Georgia "On Mediation," which has been in force since 2020, together with subsequent legislative amendments, has substantially strengthened both court-annexed and private mediation practices and created tangible incentives for their use.

Despite the progress achieved, challenges identified in practice – particularly in relation to enforcement mechanisms of settlements, procedural costs, and ethical oversight – required further legislative refinement, which has been partially addressed through the 2025 amendments. These reforms have improved the effectiveness of mediation and strengthened its institutional resilience.

Ultimately, mediation in Georgia is developing as a competitive alternative dispute resolution mechanism; however, its long-term success will continue to depend on the ongoing enhancement of practical efficiency and the continuous adaptation of legal regulation to real-world needs.

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Davit Gvenetadze*

Asymmetrical Arbitration Clauses, Validity, Features, and Evolving Judicial Approaches

Asymmetrical Arbitration Clauses (AACs) occupy a contentious and increasingly important space in contemporary arbitral practice. While these clauses have long been used in commercial relationships marked by unequal bargaining power (particularly in finance, distribution, and cross-border supply arrangements) their juridical status remains dissimilar in various states. AACs challenge foundational principles of arbitration, including party autonomy, equality of arms, and procedural fairness, and they force courts and arbitral tribunals to confront the tension between contractual freedom and structural imbalance. Although some legal systems readily uphold such clauses as commercially pragmatic expressions of negotiated risk allocation, others treat them with marked suspicion, invoking public policy, doctrines of unconscionability, or procedural equality to deny enforceability.

This article examines the conceptual essence of AACs, the doctrinal arguments provided against them (potestativity, lack of mutuality, imbalance, and unconscionability) and the highly diverse national responses across major jurisdictions. By analyzing comparative case law and the broader normative debates in international arbitration, the article seeks to demonstrate whether and under what circumstances AACs should be enforceable. The objective is not merely to catalog divergent judicial attitudes, but to identify common (or at least, widely spread) approach that can guide practitioners in predicting enforceability and drafting enforceable dispute resolution clauses in unbalanced commercial relationships.

Keywords: *Asymmetrical Arbitration Clauses (AACs); Equality of Arms; Gross Disparity; Mutuality of Obligation; New York Convention (NYC); Potestativity; UNCITRAL Model law; Unconscionability.*

1. Essence of Asymmetrical Arbitration Clauses

Symmetrical dispute clauses or agreements give each party equal rights in relation to the resolution of disputes: both parties can proceed through a tiered escalation from management, to senior management, to mediation and then to courts or arbitration; or to proceed in a specific jurisdiction or to arbitrate in a particular forum. Conversely, Asymmetric[1] arbitration clauses offer a

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[1] Asymmetrical Arbitration Clauses (AACs) are also referred to as One-sided or Unilateral clauses. See: *Lingkanaya J. et al.,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 131.

different perspective, they grant uneven rights to one party as to what type of dispute resolution may be used (mediation, arbitration, Med-Arb, etc.), which jurisdiction will be preferred (e.g. refer to arbitration in a particular seat) or what procedures will be applied (e.g. appoint an arbitrator).[2] AACs are most often included in contracts where the parties' commercial standing is not of equal footing.[3]

As the AACs only give one party the advantage of choosing whether the dispute should be resolved by arbitration or litigation, it follows that the party entitled to decide has a certain advantage. For the beneficiary party, AACs can represent an effective risk management mechanism as the latter will have the security and flexibility to initiate proceedings in the most attractive jurisdiction at the time of the dispute. This however only applies when the AAC is deemed valid. The party with the greater bargaining power usually has a better chance of persuading the other party to reserve the right to choose between the various options for settling disputes. However, for the economically weaker party, it does not necessarily always have to be disadvantageous to agree to an AAC. Depending on the legal system, it could be a case where the AAC is invalid or unenforceable, which in turn could give the economically weaker party an advantage.[4]

Unfairness reflected by one party having better rights than the counterparty has given rise to a number of reactions. In many courts, party autonomy, in agreeing to the asymmetry, is upheld,[5] meaning that once parties agreed on such clause, it can be enforced. On the other hand, the reasoning of invalidity of AACs is mainly based on the principle of equality. In this regard, one may refer to the principle of equal treatment of parties by for example article 18 of UNCITRAL Model law.[6] Others usually point such substantive or contract law provisions as article 3.2.7[7] of UNIDROIT Principles.[8] Mentioned framework reveals that AACs test the boundaries between contractual freedom and

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2 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 347, 350.

3 *Lingkanaya J. et al.,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 131.

4 *Respondek A.,* Marina Lowenthalm F., The Troubled Waters of Asymmetric Arbitration Clauses, Law Gazette, January 2020, <https://lawgazette.com.sg/feature/asymmetric-arbitration-clauses/> [10.01.2026].

5 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 347.

6 Under article 18 of UNCITRAL Model Law the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. See: UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

7 According to Article 3.2.7 of UNDROIT Principles (Gross Disparity) a party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract.
See: UNIDROIT Principles of International Commercial Contracts 2016, UNIDROIT (International Institute for the Unification of Private Law).

8 *Struzhko A.,* Belarus: Asymmetrical Arbitration Agreement: Validity and Enforcement, 08 February 2021, <https://www.mondaq.com/arbitration-dispute-resolution/1033446/asymmetrical-arbitration-agreement-validity-and-enforcement> [10.01.2026].

procedural fairness. Their validity largely depends on whether courts prioritize autonomy or equality, a tension that defines much of the global jurisprudence on AACs.

2. Principle of Equal Treatment

The principle of equal treatment is fundamental to the concept of justice, in international arbitration as in any state court system. Arbitration conventions, rules and national laws unanimously impose a requirement, either express or implied, that the parties be treated equally throughout the arbitral process (e.g. 2017 CIETAC Investment Arbitration Rules, Art. 20(1);[9] 2013 HKIAC Rules, Art. 13.1;[10] 2017 ICC Rules, Articles 5(2), 22(4), 37(2); 2014 LCIA Rules, Articles 14.4, 14.5; 2017 SCC Rules, Articles 17(4), 17(5), 23(2); ICSID Arbitration Rules, Art. 20(2); 2017 SCC Rules, Arts 17(4), 17(5), 23(2); 2017 SIAC Investment Arbitration Rules, Articles 7.1, 9.2, 16.1;[11] 2010 UNCITRAL Arbitration Rules, Art. 17(1)).[12] It is widely acknowledged that Article V(1)(b)[13] of the NYC, excluding enforcement of an award when a party was unable to present its case, supports equality of treatment.[14] The said Article points out that, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

National arbitral laws and rules further codify the said obligation. for example, English Arbitration Act 1996, S. 33;[15] German Code of Civil Procedure, S. 1042;[16] Law of Georgia on

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9 Article 20.1 (Conduct of the Proceedings) stipulates that, the arbitral tribunal shall examine the case in any way it deems appropriate, unless otherwise agreed by the parties or otherwise provided by the applicable law. Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to both parties to present their case. See: China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation), <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en> [10.01.2026].

10 Article 13.1 of HKIAC Rules states that, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute, the effective use of technology, information security, and environmental impact, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case See: 2024 HKIAC Administered Arbitration Rules, <https://www.hkiac.org/sites/default/files/ck_filebrowser/2024%20HKIAC%20ADMINISTERED%20ARBITRATION%20RULES%20-%20English.pdf> [21.01.2026].

11 Investment Arbitration Rules of the Singapore International Arbitration Centre 1st Edition, 1 January, 2017, <https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Investment-Rules-2017.pdf> [25.01.2026].

12 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 350.

13 See: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> [25.01.2026].

14 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 348.

15 Under Section 31(1), (a) of English Arbitration Act 1996 the tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of

Arbitration, Art. 3;[17] Dutch Code of Civil Procedure, Art. 1036(2);[18] Russian Law on International Commercial Arbitration (N. 5338-1), Art. 18;[19] Serbian Arbitration Act (46/2006), Art. 33; Spanish Arbitration Act (60/2003), Arts. 15(2), 24(1). While equal treatment is universally guaranteed once proceedings begin, jurisdictions diverge on whether the dispute resolution agreement itself must reflect equality from the outset; The key doctrinal tension arises because equality applies to the conduct of proceedings, whereas AACs concern pre-procedural rights. Courts must therefore decide whether pre-dispute inequality undermines procedural equality itself. The answer varies widely in jurisdictions.

3. Arguments Against Asymmetrical Arbitration Clauses

3.1. The Potestative Nature

Critics can argue that AACs are invalid because they create a potestative condition, placing the contract's performance (specifically, the procedural path) at the discretion of one party. In this regard, the concept of "Caractere potestatif" should be explained, which is used in French law to describe a situation where performance of a contract is dependent to one of the contracting parties.[20] According to article 1170 of the French Civil Code, a potestative condition is one which makes the execution of the agreement depend upon an event that one of the contracting parties has the power to bring about or to prevent. Article 1174 of the same Code adds that any obligation is null when it has been contracted subject to a potestative condition on the part of the party who binds himself.[21] Parallel can also be drawn between ACCs and Asymmetric Jurisdictional Clauses since both attribute favorable procedural options to one party only, and certain judicial precedents related to the latter help to identify common

his opponent. See: Arbitration Act 1996, <https://www.legislation.gov.uk/ukpga/1996/23/contents> [04.02.2026].

16 As per Section 1042(1) of the German Code of Civil Procedure the parties are to be accorded equal treatment. Each of the parties is to be given an effective and fair legal hearing. See: Code of Civil Procedure, <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> [04.02.2026].

17 Under Article 3 of the Law of Georgia on Arbitration, the parties to arbitration proceedings have equal rights. Each party must be given a full opportunity to present their position. See: Law of Georgia on Arbitration, Parliament of Georgia, <https://www.giac.ge/files/LawonArbitration_1698653049.pdf> [17.02.2026].

18 Article 1036 of Dutch Code of Civil Procedure indicates that subject to the provisions of this title, the arbitral proceedings shall be conducted in such manner as agreed between the parties or, to the extent that the parties have not agreed, as determined by the arbitral tribunal. See: Code of Civil Procedure, <http://www.dutchcivillaw.com/civilprocedureleg.htm> [17.02.2026].

19 Article 18 of Russian Law on International Commercial Arbitration stipulates that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. See: Law of the Russian Federation on International Commercial Arbitration, <https://mkas.tpprf.ru/en/lawstatus/legal_status/law/> [17.02.2026].

20 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 354.

21 Banking and Finance Disputes Review, Norton Rose Fulbright, Issue 07, November 2015, 8, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/banking-and-finance-disputes-review---issue-7.pdf?revision=&revision=4611686018427387904> [24.02.2026].

features of the said clauses. The French Supreme Court decision in Banque Rothschild[22] suggested that asymmetrical jurisdiction clauses were inequitable and therefore unenforceable. The Court held that an asymmetrical jurisdiction clause is void by reason of it being a Potestative Condition. In another case, Apple Sales International v. eBizcuss,[23] a contract was concluded between Apple, registered in Ireland, and its French authorised reseller, eBizcuss. The governing law was Irish law. The contract included an asymmetric jurisdiction clause under which eBizcuss was bound to commence proceedings before the Irish Courts; in contrast, the clause allowed Apple to commence proceedings in France or any other jurisdiction within which Apple sustained a loss. Despite the express limitation on eBizcuss to start proceedings in the Irish Courts, it issued in France. Apple objected to the French Court's jurisdiction and argued that the correct forum for the claim was the Irish Courts. eBizcuss countered that the asymmetrical jurisdiction clause was unenforceable and the question was ultimately referred to the French Supreme Court. The court held that asymmetrical jurisdiction clauses are valid under French law, once each party can identify, in advance of starting legal proceedings, the jurisdictions which may be competent to hear a potential dispute. On the condition that asymmetrical jurisdiction clauses comply with this foreseeability requirement, they are enforceable.[24]

Review of asymmetric jurisdiction clauses demonstrates that the mere presence of procedural imbalance is not, in itself, determinative of invalidity. Rather, the decisive criterion emerging from French jurisprudence is whether such asymmetry preserves a sufficient degree of legal certainty and predictability for both parties. The transition from the strict approach in *Banque Rothschild* to the more nuanced foreseeability test in *Apple Sales International v. eBizcuss* underscores a broader doctrinal shift toward functional enforceability. Accordingly, asymmetrical clauses are increasingly upheld where they allow the weaker party to anticipate, ex ante, the potential forum of dispute resolution. This evolution supports the view that asymmetry, when structured within clear and foreseeable limits, can coexist with fundamental principles of fairness and party autonomy in international dispute resolution.

3.2. Lack of Mutuality

Mutuality of Obligation is a common law doctrine under which both must be bound, or neither is bound. Professor of Melbourne university, Peter Ashford provides own argument in favor of AAC by explaining that contract provisions need not give the parties the same positions, and it is not logically sound to require this. If the law required the terms of contracts to be symmetrical such that the parties merely traded the same thing for the other, no exchanges would take place.[25] While this

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[22] See: X v. Banque Privée Edmond de Rothschild Europe, Court of Cassation, Civil Division, First Civil Chamber, September 26, 2012, 11-26.022, (in French).

[23] See: Apple Sales International et al. v. EBizcuss.com, European Court of Justice, C-595/17, October 24, 2018.

[24] Fieldfisher, Asymmetrical Jurisdiction Clauses in International Dispute Resolution, 23/08/2016, <https://www.fieldfisher.com/en/insights/asymmetrical-jurisdiction-clauses-in-international-dispute-resolution> [24.02.2026].

[25] *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 354.

reasoning may hold for substantive contractual terms, we cannot share this position, since AACs are not ordinary contractual terms, rather they set particular procedural framework under which arisen dispute will be heard and which leads to severe financial, legal or other consequences for the losing party. So, AACs must be analyzed in material and procedural contexts simultaneously. The British courts have consistently held that AACs as valid and enforceable under the English Law. This, however, was not always the case. Until 1986, the English law required mutuality in an arbitration agreement, such that parties must be given the same rights to submit disputes to arbitration. In the case of Pittalis v. Sherefettin,[26] however, Lord of Justice Michael John Fox stated that he saw no reason why an agreement that conferred the right to refer to arbitration on only one party should not be a valid arbitration. The Court then redefined the mutuality requirement by explicating that there is no lack of mutuality in an agreement between two persons who agreed to give the right to submit to arbitration to only one party.[27] As it seems, English law demonstrates an expansive conception of party autonomy, treating procedural asymmetry as commercially rational rather than inherently defective.

3.3. An Imbalance and Unconscionability

Generally, AAC is imbalanced, as it serves the interests of only one party. One of the parties to the clause has to adapt to the unfavorable terms of the clause. This gives way to two grounds for invalidity: imbalance between the parties and unconscionability. With respect to the first ground for invalidity, some scholars believe that AACs violate article 6 of the European Convention on Human Rights.[28] In essence, the argument here refers to the right to a fair trial. More specifically, the right to have equal opportunity to present one's case before a court. This argument is based on a misinterpretation or a misunderstanding of the concept in question. The principle of a Fair Trial means that the parties have equal procedural rights once the proceedings have begun. In other words, equal footing before a specific forum not with regards to the choice of forum.[29] Article 6.1. of the ECHR explicitly states that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As for the second ground for invalidity (unconscionability), it might be unconscionable for a party to exploit its economically powerful position or ignore the party who agrees to a unilateral arbitration clause without understanding the unfair advantage it gives to its contract partner by insisting upon acceptance of a unilateral arbitration clause. This argument might not be convincing because unconscionability requires both procedural and substantive unconscionability. Procedural unconscionability is manifested by unfair surprise. Though, it is difficult to argue that such a condition

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26 See: Pittalis and Others v. Sherefettin, Court of Appeal (Civil Division), 1 QB 868, 27 February 1986.

27 *Lingkanaya J. et al,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol.16, № 1, June 2021, 136.

28 European Convention on Human Rights, <https://www.echr.coe.int/documents/d/echr/convention_ENG> [05.03.2026].

29 *Lingkanaya J. et al,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 135.

is satisfied in the context of AACs where both parties negotiated the agreement and accepted the AAC.[30] Substantive unconscionability arises when one party has significant bargaining power over the other; if one party used hidden language in the contract, whether it be language included in a different provision, or language that is overly complex and hard to understand; if any illegal conduct is identified in the contract, or if coercion exist.[31] Accordingly, AAC that was agreed by parties, cannot be necessarily deemed as unconscionable; at first the competent authority must check whether one or more from above-listed factors caused to include AAC in the contract. Unconscionability introduces an individualized, fact-sensitive test that directly addresses power imbalance. Unlike mutuality or potestativity, it does not presume invalidity but evaluates the contract environment (a method better aligned with the complexities of cross-border commerce).

4. National Approaches Across Jurisdictions

The enforceability of AACs reveals a deep conceptual divide between legal systems regarding contractual autonomy, procedural fairness, and the role of arbitration in cross-border commerce. While AACs are a common drafting technique in complex commercial transactions (often designed to allocate dispute-resolution risks or protect the interests of finance providers) their treatment varies substantially in different countries. This divergence is shaped not merely by doctrinal differences between civil law and common law traditions, but also by competing visions of party equality, the function of arbitral procedure, and the permissible limits of contractual imbalance. Generally, civil law states, such as Russia and China, tend to object to the use of AACs. In contrast, common law system states, including United Kingdom and Singapore are supporting validity of AACs.[32] Other jurisdictions, such as Germany, India, Turkey, and the United States, occupy intermediary positions marked by internal doctrinal tensions, inconsistent case law, or distinctions between individually negotiated agreements and standard-form contracts.

This chapter maps the fragmented global landscape governing AACs. Through examination of key jurisdictions, it illustrates how divergent legal cultures generate different outcomes despite addressing analogous contractual structures. The analysis demonstrates that the principal determinants of validity (such as the clarity of arbitration intent, the timing of option exercise, the presence of unequal bargaining power, and the broader public-policy notion of fairness) are interpreted through significantly different normative lenses. Ultimately, the chapter argues that understanding these cross-jurisdictional variations is indispensable for drafting enforceable AACs in international transactions and for anticipating enforcement risks in multi-jurisdictional disputes.

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30 *Scherer M.,* The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses? July 18, 2013 Kluwer Arbitration Blog, <https://legalblogs.wolterskluwer.com/arbitration-blog/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/> [05.03.2026].

31 Substantive Unconscionability in Contracts Explained, Upcounsel, <https://www.upcounsel.com/substantive-unconscionability> [05.03.2026].

32 *Lingkanaya J. et al,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 133.

4.1. China

Notably, in China, the same level courts or even lower courts might decide differently on the same issue. This is because case law does not possess precedential value in the country.[33] Article 7 of the Interpretation of the Supreme People's Court concerning Some Issues on the Application of the "Arbitration Law of the People's Republic of China" states that Where the parties agree that a dispute may be submitted for arbitration with an arbitration agency or filed with the People's Court for commencement of legal proceedings, the arbitration agreement shall be invalid, unless one party has submitted an arbitration application to an arbitration agency but the other party failed to object within the time limit stipulated in the second paragraph of Article 20 of the Arbitration Law.[34] In Geox Trading Ltd. v. Riqing Group-Ricco Rachel Trading Co., Ltd.,[35] the asymmetrical arbitration clause provided both the seller and buyer with the choice of arbitration; additionally, the seller was permitted to approach the court at the buyer's place. The court held that this agreement was invalid under Article 7 of the PRC law.

A similar decision was made in Chen Youhua v. DBS Bank (China) Co., Ltd.,[36] and Hainan Kangda Loan Co., Ltd. v. Hainan Xinyangguang Junan Real Estate Development Co., Ltd. et al,[37] [38] the courts invalidated, on similar grounds, asymmetrical arbitration agreements permitting one party to choose between litigation and arbitration and constraining the other party to litigation.[39] Fiber Optic Communication Network Company Ltd. v. China Development Bank,[40] was adjudicated by the Beijing Financial Court in October 2022 and made public in late 2023, and it marks the first instance where the court explicitly recognizes the validity of an asymmetrical arbitration agreement under the PRC law.[41] Based on Chinese case-law on AACs, it can be observed that the country's judicial system rejects ACCs, although aforementioned relatively recent exception (Fiber Optic Communication Network Company Ltd. v. China Development Bank), may become one of the prerequisites for a thorough reconsideration these clauses.

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33 Ibid, 136, 137.

34 See: Interpretation of the Supreme People's Court concerning Some Issues on the Application of the "Arbitration Law of the People's Republic of China, December 26, 2005, <https://cicc.court.gov.cn/html/1/219/199/201/672.html?utm> [18.04.2026].

35 See: Geox Trading (Shanghai) Limited v. Riqing Group-Ricco Rachel Trading Co., LTD., Intermediate People's Court of Beijing Municipality, (2015) Er Zhong Min Te Zi No. 12930, (In Chinese).

36 See: Chen Youhua v. DBS Bank (China) Co., Ltd. Shanghai Branch (2016) Jing 02 Min Te No. 93, (In Chinese).

37 See: Hainan Kangda Loan Co., Ltd. v. Hainan Xinyangguang Junan Real Estate Development Co., Ltd. et al (2020) Qiong Min Xia No. 2, (In Chinese).

38 *Zaheeruddin M.,* Validity of Asymmetrical Clauses in Arbitration Agreements, Architecture Image Studies, Vol. 6, Issue 3, 2025, 463, 464.

39 *Zhao F., Ma H., Li L.,* Asymmetrical Arbitration Agreements Under PRC Law, Kluwer Arbitration Blog, April 26, 2024, <https://legalblogs.wolterskluwer.com/arbitration-blog/asymmetrical-arbitration-agreements-under-prc-law/> [18.04.2026].

40 See: Fiber Optic Communication Network Co., Ltd. v. China Development Bank (2022) Jing 74 Min Te No. 4, (In Chinese).

41 *Zhao F., Ma H., Li L.,* Asymmetrical Arbitration Agreements Under PRC Law, Kluwer Arbitration Blog, April 26, 2024, <https://legalblogs.wolterskluwer.com/arbitration-blog/asymmetrical-arbitration-agreements-under-prc-law/> [18.04.2026].

4.2. Germany

German Law does not forbid the use of AACs. This applies at least in cases where the clause had been freely negotiated. The same cannot be said if the clause had been integrated into the agreement through the use of General Terms and Conditions. Section 307 of the German Civil Code states that, provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

In its decision,[42] the Federal Court of Justice (Bundesgerichtshof, BGH) determined a case in which such unreasonable disadvantage existed. According to the court, this would be the case if, at the time the appeal was lodged, the contracting party of the AAC's beneficiary did not know whether the benefitting party would be exercising their right of option. The party therefore runs the risk of having its action (that it had brought before the competent state court) become inadmissible due to objections towards arbitration. Such unreasonable disadvantage can be eliminated by a supplementary agreement which obliges the user of the AAC to exercise its right to decide whether it wants to resolve the dispute through arbitration or litigation at the request of the other party. The additional agreement also needs to address the consequences of a refused or delayed decision. The Federal Court of Justice did not decide directly in its decision that the use of an AAC in general would be null and void.

Therefore, it can be assumed that an AAC is valid to the extent that it contains a clause protecting the disadvantaged party from the inadmissibility of an action brought before a Court because the beneficiary party decided to exercise its right to the option afterwards.[43] In brief, the key issue is not asymmetry itself but transparency and timing of option exercise.

4.3. India

The status of AACs in India is unclear, in light of inconsistent decisions by Indian courts. The starting point under Indian law is that there must be mutuality in an arbitration agreement. The Delhi High Court held that an AAC is not valid until the point at which the party exercises its option to arbitrate – prior to that, there is a lack of mutuality (Union of India vs Bharat Engineering Corporation).[44] However, the Calcutta High Court subsequently upheld the validity of an AAC (New India Assurance Co Ltd v. Central Bank of India & Ors.).[45]

The Calcutta High Court expressly declined to adopt the reasoning of the Delhi High Court and held that an AAC constitutes a valid arbitration agreement from the outset. It is also likely that the Indian courts will take into account the balance of convenience, the interests of justice and similar considerations when deciding whether the Indian courts have jurisdiction under a contractual choice of forum or court clause. Indeed, such considerations may be "essential in the interests of international

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42 See: III ZR 133/97, Federal Court of Justice (BGH), September 24, 1998, (In German).

43 *Respondek A., Marina Lowenthalm F.,* The Troubled Waters of Asymmetric Arbitration Clauses, Law Gazette, January 2020, <https://lawgazette.com.sg/feature/asymmetric-arbitration-clauses/> [21.04.2026].

44 See: Union of India v. Bharat Engineering Corporation (1977) Case no. 57, ILR 1977 Delhi 57, 1977.

45 See: New India Assurance Company Ltd.v. Central Bank of India & Others (1984) Case no. 76, 1985 Cal 76, 23 August 1984.

trade and commerce of the better relations between the countries and the people of the world" (Black Sea Steamship U.L. Lastochkina ODESSA USSR v. Union of India AIR).[46]

Although not dealing with the point directly, more recent cases may indicate that the Indian courts are comfortable with some asymmetry between the parties' rights in arbitration clauses. The Supreme Court of India in TRF Ltd v. Energy Engineering Projects Ltd.)[47] reiterated that a clause entitling one party to appoint an arbitrator alone and without the input of the other is valid. The High Court of Judicature in Bombay also dealt with a clause whereby one party was solely entitled to appoint the arbitrator and did not consider it necessary to examine whether that aspect of the clause was valid (Arbitration Application No. 65 of 2016).[48] It can be outlined that, India is transitioning from formalistic mutuality concerns to a more pragmatic commercial view, though judicial inconsistency persists; Indian courts increasingly accept asymmetry where commercial justification and fairness considerations are evident.

4.4. Russia

Enforcement of AACs in Russia is complex,[49] and courts' position has altered over time, e.g., the case of *Red Burn Capital v ZAO Factoring Company Eurocommerz*[50] appeared to confirm that the Russian courts were sympathetic to unilateral option clauses in finance transactions. In that case, the Federal Cassation Court of the Moscow Region considered it reasonable for the finance party to be able to elect between different dispute resolution fora, because the finance party bore the risks associated with advancing a loan.[51] Later, the Supreme Commercial Court considered the case of Russian Telephone Company v. Sony Ericsson Mobile Communications,[52] and explained that the clause in question referred all disputes arising out of the supply agreement between the parties to arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. However, the clause provided for only one of the parties to the contract (Sony Ericsson) to have the right to apply to any competent court. When a dispute arose the Russian Telephone Company filed a claim with a Russian court. The court dismissed the claim, referring the dispute to arbitration on the basis of Article 148(1)(5) of the Russian Code of Commercial Procedure (which requires the commercial court to dismiss a claim that is subject to an arbitration clause). The appellate courts (first

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46 See: Black Sea Steamship U.L. Lastochkina ODESSA USSR v. Union of India AIR 1976.

47 See: TRF Ltd v. Energo Engineering Projects Ltd, July 3, 2017.

48 International Arbitration Report, Issue 9, Norton Rose Fulbright, October 2017, 27-28, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-9.pdf?revision=c9a5375e-5aff-4a71-a492-18c9305047d6&revision=5248112395077387904> [21.04.2026].

49 *Lingkanaya J., et al,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 135.

50 See: *Red Burn Capital v ZAO Factoring Company Eurocommerz* (Case No. A40-59745/09-63-478), Federal Arbitrazh Court, 28 December 2009.

51 Unilateral Option Clauses: Unenforceable in Russia, Hogan Lovells, <https://www.lexology.com/library/detail.aspx?g=6e96bf72-f2f2-4af4-951f-c604fb2c5c9c&utm_source=chatgpt.com> [21.04.2026].

52 See: Russian Telephone Company v. Sony Ericsson Mobile Communications, 1831/12, Supreme Arbitrazh Court of the Russian Federation, June 19, 2012.

appeal and cassation) both confirmed that there were no reasons to declare this clause invalid, and therefore dismissed the claim. The Supreme Commercial Court disagreed and, overturned the lower courts' judgments. It ruled that the dispute resolution clause in question was invalid because it gave the right to choose the forum for dispute resolution to only one party. The position of commercial court came as a surprise since there has been a steady court practice in Russia confirming the validity of such clauses.[53]

At the end of 2018 the Supreme Court put an end to the contradictory practice by publishing the Digest that determined that a unilateral option clause violated the principles of competitiveness and equality of the parties, breached the equality of the parties' rights and was therefore invalid to the extent that such clause provided for inequality in forum choice options. The Digest does not formally have a precedential value, but it provides valuable guidance to the approach which the Russian courts will likely pursue in relation to unilateral option clauses.[54] In light of the case law, it may be assumed that today Russia takes a strict stance against AACs, driven by public-law notions of procedural equality rather than contractual autonomy.

4.5. Singapore

The Singapore Court of Appeal confirmed the validity of an AAC in Dyna-Jet Pte. Ltd. v. Wilson Taylor Asia Pacific Pte. Ltd.[55] [56] The court confirmed that a dispute resolution agreement constituted a valid arbitration agreement, even if it only granted one party the right to elect to arbitrate a dispute.[57] The clause provided that at the election of one party (Dyna-Jet), a dispute may be referred to and settled by arbitration. This was the first[58] case where the Singapore Court of Appeal ruled on the validity of an asymmetrical arbitration clause under Singapore law.[59] The Court also held that, where the electing party elects to commence proceedings by way of litigation, the right to arbitrate the underlying dispute is lost and the arbitration agreement becomes incapable of being performed.[60]

53 Thomson Reuters Practical Law, <https://uk.practicallaw.thomsonreuters.com/6-521-2664?transitionType=Default&contextData=(sc.Default)&firstPage=true> [21.04.2026].

54 Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion, Kluwer Arbitration Blog, <https://legalblogs.wolterskluwer.com/arbitration-blog/unilateral-option-clauses-russian-supreme-court-puts-an-end-to-the-long-lasting-discussion/#:~:text=Unilateral%20option%20clauses%20(also%20known,particular%20dispute%20to%20another%20forum> [21.04.2026].

55 See: Dyna-Jet Pte. Ltd. v. Wilson Taylor Asia Pacific Pte. Ltd., Court of Appeal of the Republic of Singapore, SGCA 32, 2017.

56 *Zaheeruddin M.,* Validity of Asymmetrical Clauses in Arbitration Agreements, United Arab Emirates University, Academy of Entrepreneurship Journal Vol. 31, Issue 2, 2025, 3.

57 Singapore Court Confirms Validity of Asymmetric Arbitration Agreements, CMS, UK, 30 Nov 2016, <https://cms.law/en/gbr/legal-updates/singapore-court-confirms-validity-of-asymmetric-arbitration-agreements> [26.04.2026].

58 And perhaps the last so far, since no other court decision can be found referring to ACCs in Singapore.

59 *Papadima, R.,* Asymmetrical Arbitration Clauses: Global Overview, 2022 Kluwer Law International, 9.

60 Legal 500 Country Comparative Guides 2025, Singapore, International Arbitration, Duane Morris, Selvam LLP, 7, <https://www.legal500.com/guides/chapter/singapore-international-arbitration/?export-pdf> [26.04.2026].

Court's stance enables us to say that generally Singapore emphasizes commercial certainty regarding ACCs, but deeper analysis would be impossible at the moment, since the expansive judicial practice on ACCs has not yet been established.

4.6. Turkey

Previously Turkish courts have adopted an extensive approach towards the interpretation of arbitration clauses. The Court of Appeal held that a clause which gave one party a right to initiate both litigation and domestic arbitration while the other was restricted to litigation was invalid (11th Civil Chamber, decision No. 3257).[61] The court cited reasons of due process and the right to be heard.[62] The court also held that the intent to arbitrate was not clear and absolute because the agreement allowed one party to initiate both litigation and arbitration.[63]

Later the Court of Appeal recognized the validity of an asymmetric forum selection clause that gave one party the right to bring proceedings before a foreign court and before the courts of the other party's country/place of business (11th Civil Chamber, decision No. 4646).[64] [65]

However, later the 15th Civil Law Division of the Court of Cassation rendered a judgment[66] which invalidated a bilateral arbitration clause, merely because there was a limited option between arbitration and litigation.[67] Considering these cases, Turkey appears to be shifting toward a more liberal, autonomy-oriented view, though further jurisprudence is needed to confirm this trend since courts' position varies time after time on the issue.

4.7. United States

US courts are divided, some uphold AACs, finding no lack of mutuality, others deem them unconscionable, especially in consumer contexts. Those upholding include cases: Harris v. Green Tree

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61 See: Decision No. 2009/3257 E., Court of Appeal of Republic of Turkey, 11th Civil Chamber, 2009.

62 International Arbitration Report, Issue 9, Norton Rose Fulbright, October 2017, 27, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-9.pdf?revision=c9a5375e-5aff-4a71-a492-18c9305047d6&revision=5248112395077387904> [21.04.2026].

63 *Papadima R.,* The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be, Scholarly Works Faculty Scholarship, Campbell University School of Law, 2021, 591, 592, See Citation: *Petit et al.,* supra note 3, at 27 (citing Court of Cassation, 11th Civil Law Division, Feb, 15, 2011, Decision no. 2011/1675.

64 See: No. 2015/9758-2016/4646, Court of Appeal of Republic of Turkey, 11th Civil Chamber, April 25, 2016.

65 International Arbitration Report, Issue 9, Norton Rose Fulbright, October 2017, 27, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-9.pdf?revision=c9a5375e-5aff-4a71-a492-18c9305047d6&revision=5248112395077387904> [21.04.2026].

66 See: No. 2016/4735., 2017/259 K., Court of Appeal of Republic of Turkey, 15th Civil Chamber, 2017.

67 *Papadima R.,* The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be, Scholarly Works Faculty Scholarship, Campbell University School of Law, 2021, 592, See Citation: Abdilkadir Guzeloglu, Fatma Esra Guzeloglu, Use Extreme Caution: Recent Judgment of the Turkish Court of Cassation Emphasizes the Importance of Clear Wording of the Arbitration Clauses, GUZELOGLU, March 13, 2017.

Fin Corp.,[68] reasoning that the mere fact that one party retains the option to litigate some issues in court, while the other party must arbitrate all claims does not make the arbitration agreement unenforceable; Doctor's Assocs., Inc. v. Distajo[69] holding that under Connecticut law, an arbitration clause allowing only one party to seek judicial recourse for certain claims is not void for lack of mutuality, because the consideration for the contract as a whole covers the arbitration clause as well.

In contrast, Bragg v. Linden Research, Inc.[70] applied California law, holding that an arbitration clause was procedurally unconscionable as a take-it-or-leave-it contract of adhesion, and substantively unconscionable for forcing the weaker party to arbitrate claims but allowing the stronger party a choice of forums, imposing high costs for arbitration, designating an inconvenient forum for arbitration and imposing confidentiality on the arbitration proceedings. Similarly, US ex rel. Birckhead Elec., Inc. v. James W. Ancel, Inc.[71] applied Maryland law, the court refused to enforce an arbitration clause in a construction subcontract that provided "All disputes ... at the Contractor's sole option, be resolved by arbitration". The court held that arbitration agreement is not supported by mutual consideration.[72]

Another example is the case Arnold vs. United Companies Lending Corp.[73] in which the Supreme Court of Appeals of West Virginia found unfair the ACC in the contract between the lender and borrower and, consequently, unenforceable. The court stated that the relative positions of the parties, a national corporate lender on one side and elderly, unsophisticated consumers on the other, were grossly unequal.[74] The US approach mirrors its general unconscionability doctrine: highly contextual, protective in consumer contexts, and deferential in commercial relationships.

4.8. United Kingdom

The first reported judgment[75] in the UK on the enforceability of one-way arbitration clauses is *Baron v. Suderland Corporation*,[76] rendered in 1966. Here, the Court held that "*mutuality*" was

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68 See: Harris v. Green Tree Fin Corp., 183 F.3d 173, U.S. Court of Appeals for the Third Circuit – 183 F.3d 173 (3d Cir. 1999).

69 See: Doctor's Associates, Inc. v. Distajo, 944 F. Supp. 1010, U.S. District Court for the District of Connecticut – 944 F. Supp. 1010 (D. Conn. 1996), March 14, 1996.

70 See: Bragg v. Linden Research, Inc., 487 F.Supp.2d 593, U.S. District Court for the Eastern District of Pennsylvania, (E.D. Pa. 2007), May 30, 2007.

71 See: Birckhead Electric, Inc. v. James W. Ancel, Inc. et al, No. 1:2013cv02498, U.S. District Court for the District of Maryland, Northern Division, 16 (D. Md. 2014), June 5, 2014.

72 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 360.

73 See: Arnold vs. United Companies Lending Corp., 511 S.E.2d 854, 204 W.Va. 229, U.S. Supreme Court of Appeals of West Virginia, (W. Va. 1998), December 11, 1998.

74 *Ustinov I.,* Unilateral Arbitration Clauses: Legal Validity, LLM International Business Law, Tilburg University, 2020, 16.

75 Unlike the UK, the judicial practice on AACs is relatively new in Dubai; prior to 2024, only one reported case existed on ACCs. In a case from 2018, a bank filed proceedings before the Dubai courts on the basis of a clause which provided the bank with the choice between arbitration and litigation. The Dubai Court of Cassation (COC) accepted the validity of the clause (COC Appeal No. 1116/2018). In 2024, two decisions were rendered on the same issue, in COC Appeal No. 1522/2023 an asymmetrical arbitration clause was

necessary for a valid arbitration agreement, and defined it to mean that all parties to an agreement should have "*equal procedural rights.*" Since one-way clauses gave only one party the right to commence proceedings, the court held that the clause gave the parties unequal procedural rights and was, therefore, void. In 1985, this position was reiterated in *Tote Bookmakers v. Development and Property Holding*.[77] [78] Though such an approach changed later, and British courts have consistently found asymmetric clauses enforceable;[79]

In the NB Three Shipping v. Harebell Shipping,[80] a dispute settlement clause granting one party only the right to suspend arbitration proceedings was upheld. The dispute resolution clause provided that the courts of the UK shall have the jurisdiction to resolve any dispute, however the Owners' (NB Three) shall have the option to bring any dispute to arbitration. Here, the High Court granted the Owners a suspension under Section 9 of the 1996 English Arbitration Act as it deems that refusing a suspension of court proceedings would not comply with the parties' agreement over their choice of forum. The British courts have held that the beneficiary of an AAC must, at an early stage of the dispute resolution process, elect a particular dispute resolution mechanism.[81]

In another case, Law Debenture Trust Corporation Plc v. Elektrim Finance BV,[82] a request to suspend (stay) arbitration proceedings was granted. This is because under the parties' AAC, the right to seek settlement through arbitration was subject to the option to litigate. The court decided that an additional advantage for one party does not invalidate the right to litigate as in practice, many contractual provisions give an advantage to one party only. The courts deem that the imbalanced nature of the AAC does not invalidate it. This is because once a dispute has arisen, and any of the parties has chosen a forum under the arbitration agreement, there should be no room left to resort to other forums. Therefore, the imbalanced right of the parties is effectively restored at the stage where

upheld, while in COC Appeal No. 735/2024 the Dubai Court of Cassation refused to enforce what it considered a "*unilateral arbitration clause*". See *Boghossian N.,* Asymmetrical Arbitration Clauses: A Perspective from Dubai, Kluwer Arbitration Blog, April 15, 2025,<https://legalblogs.wolterskluwer.com/arbitration-blog/asymmetrical-arbitration-clauses-a-perspective-from-dubai/> [26.04.2026].

76 See: Baron v. Suderland Corporation, [1965] EWCA Civ J1210-1, Court of Appeal, County Borough of Sunderland, December 10, 1965.

77 See: Tote Bookmakers Ltd v. Development & Property Holding Co Ltd., 21 Dec 1984 [1985] 2 WLR 603, Ch D.

78 Navigating the Labyrinth: Indian Courts on One-Way Arbitration Clauses, *Siddharth S. Aatreya* (National Law School of India University), Kluwer Arbitration Blog, August 30, 2017, <https://legalblogs.wolterskluwer.com/arbitration-blog/navigating-the-labyrinth-indian-courts-on-one-way-arbitration-clauses/> [21.04.2026].

79 *Ashford P.,* Is an Asymmetric Disputes Clause Valid and Enforceable?, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, Issue 3, 2020, 356.

80 See: Harebell Shipping v. NB Three Shipping, [2004] EWHC 2001, High Court of Justice of England and Wales, October 13, 2004.

81 *Lingkanaya J. et al,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 136.

82 See: Law Debenture Trust Corp Plc v. Elektrim Finance BV, [2005] EWHC 1412 (Ch), High Court of Justice, Commercial Court, July 01, 2005.

the real settlement of the dispute will take place. Hence, the AAC in the case was deemed valid.[83] Accordingly, British law validates AACs on autonomy grounds, provided election mechanisms are exercised promptly and predictably.

5. Conclusion

The analysis of ACCs reveals a legal landscape characterized by divergences and a persistent negotiation between commercial pragmatism and procedural fairness. AACs, by design, disrupt traditional expectations of parity in dispute resolution. As a rule, they allow one party (typically the financially or structurally dominant party) to retain strategic control over the choice of forum while restricting the weaker party to a single procedural avenue. This built-in inequality has naturally triggered judicial discomfort in many jurisdictions, especially those whose arbitration laws strongly emphasize equal treatment and foreseeability. Yet courts have not converged on a uniform response, and the resulting jurisprudence underscores the inherently contextual nature of the inquiry.

A key insight emerging from analysis is that legal systems tend to approach AACs through the lens of their core values. Common law jurisdictions, prioritizing freedom of contract and commercial efficacy, generally treat AACs as acceptable manifestations of party autonomy. Civil law jurisdictions, conversely, often elevate equality of treatment, foreseeability, and substantive fairness, thereby scrutinizing AACs more closely for signs of imbalance or abuse. Even within these broad families, however, approaches diverge: for example, not restricting ACCs Germany gives special importance transparency and timing constraints of ACCs, while Russia's jurisprudence has evolved from tolerance to explicit doctrinal restrictions grounded in competitive equality. This diversity highlights a more fundamental point: AACs do not neatly fit the binary categories of "Valid" or "Invalid." Their enforceability is inseparable from the circumstances of their formation and the functions they serve in a specific commercial context. A clause freely negotiated between sophisticated parties, each represented by counsel and fully aware of its implications, may reasonably be seen as a legitimate tool of risk allocation. By contrast, an AAC inserted into a contract of adhesion, obscured by complex language or coupled with significant economic pressure, may raise serious concerns about procedural and substantive unconscionability.

Moreover, AACs raise broader normative questions about international arbitration itself. Arbitration is premised on voluntariness, equality of arms, and mutual expectations regarding procedural fairness. If dispute resolution mechanisms become instruments through which economically dominant actors can systematically structure advantage, the legitimacy of arbitration as a fair and neutral system may be called into question (particularly in sectors where AACs are routinely employed and negotiation space for weaker parties is minimal). For this reason, a rigorous judicial inquiry into the presence of coercion, informational asymmetry, or undue influence is not merely doctrinally justified; it is essential to maintaining the credibility of international arbitration. At the same time, over-regulating AACs or treating them as presumptively invalid may undermine

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[83] *Lingkanaya J. et al,* Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law, Pandecta, Vol. 16, № 1, June 2021, 136.

commercial certainty and impede efficient risk management strategies in cross-border transactions. Parties often select asymmetry not to disadvantage the counterparty arbitrarily, but to create flexibility where one party's exposure to enforcement risks, regulatory constraints, or market volatility is substantially higher. In such contexts, a nuanced legal framework that respects commercial realities while safeguarding procedural fairness is indispensable.

Taken together, the case law suggests that the optimal approach is neither categorical acceptance nor categorical prohibition. Instead, AACs should be subject to a context-sensitive, fact-driven assessment**,** one that accounts for the parties' respective bargaining power, the clarity and foreseeability of the clause, the extent of negotiation, the commercial rationale for asymmetry, signs of procedural or substantive unconscionability, and the proportionality of the resulting procedural imbalance. When these factors indicate genuine autonomy, informed consent, and a commercially grounded rationale, AACs should be enforceable. When they reveal exploitation, informational asymmetry, or disproportionate procedural disadvantage, courts are justified in withholding enforcement.

In conclusion, ACCs sit at the intersection of contract doctrine, procedural fairness, and international commercial policy. Their treatment must balance the foundational principles of arbitration with the practical realities of global commerce. A principled, jurisdiction-specific, and context-driven analysis (rather than a rigid doctrinal rule) best preserves both party autonomy and the integrity of the arbitral process. As international trade continues to globalize and contractual structures grow increasingly complex, the judicial scrutiny of AACs will remain central to ensuring that arbitration continues to function as a fair, efficient, and reliable mechanism for resolving transnational disputes.

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Between Return and Protection: The Judicial Dilemma in the International Parental Abduction

The aim of the Convention on the Civil Aspects of International Child Abduction is to protect the welfare of the child and to make sure that the proceedings under the Convention are promptly carried out. At the heart of this issue lies the conflict between the wish to protect the welfare of the child and the legal, cultural and religious differences between the states involved in the dispute. The starting point for the discussion herein is the institution of parental responsibility and the right to a happy childhood. Both these components determine the proper understanding of the child's welfare, which generally entails a return to the situation prior to the abduction. The criterion of the child's welfare is an element of the principle of law and the general referring clause. It is a paramount value in family-law relations and takes precedence when resolving a conflict between the child's interests and those of the parent. The parents are obliged to act in the interest of their child, and parental abduction contradicts this principle. A parent who acts contrary to a judicial decision or without the other parent's consent is merely pursuing their own interests, which need not necessarily be regarded as consistent with the child's welfare. It is certainly not an appropriate solution to suddenly change the place of residence or school of the minor, or to deprive them of contact with their peers or other family members. The person responsible for the harm caused to the child is the one who has a duty of care towards the child.

Keywords: *parental abduction; child's rights; protection of the child; welfare of the child; principle of law; general reference clause; Hague Convention.*

1. Introduction

The Convention on the Civil Aspects of International Child Abduction[1] has introduced a procedure for returning a child to the country where his or her previous centre of life was located. The mechanism of return is one of the tools for coping with wrongful actions of parents, which leave a mark on the psyche of their children. In certain countries, such activities are additionally penalised, which strengthens protection from the legal and social perspectives. In some cases, this has a deterrent effect and the prospective perpetrators abstain from undertaking such actions for fear of consequences.

The main assumptions of the Convention include: securing the welfare of the child and ensuring efficient proceedings resulting, as a rule, in the return to the minor's last place of residence. The application of the Convention is not an easy task, given the legal and ethical dilemmas usually related

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1 Convention on the Civil Aspects of International Child Abduction, UNTS, vol. 1343, 25/10/1980, 89.

to such matters. The legal-theoretical and legal-dogmatic analysis allows us to list the problems faced by legal practitioners. The analyses were carried out on the basis of judicial decisions issued under Polish law. The aim of the study is to point to particular dilemmas and link them with a proper understanding of the criterion of the welfare of the child in the context of parental abduction. At the same time, it can be said that the interpretation of this concept requires the development of consistent standards of interpretation due to the conflict between the formal application of mechanisms for the child's return and the child's welfare.

2. The Welfare of the Child (the Good of the Child)

The welfare of the child criterion is the basis for formulating legal provisions governing the situation of minors. It is an interdisciplinary concept because this topic is of interest to specialists, particularly those in the fields of law, psychology, pedagogy, and sociology. At the same time, this criterion has a cross-branch character when looking at the legal system from a theoretical-legal perspective[2]. The welfare of the child is naturally associated with family law. However, in judicial practice, it is also approached in administrative, criminal, and civil cases, i.e. where the context of a minor child arises, and it is necessary to make a decision concerning their situation. The paramount importance of this criterion obliges courts to take it into account in every case where it is necessary to safeguard the situation of a minor. Therefore, the welfare of the child appears in the arguments of the parties and the court as one of the essential substantiation elements[3] which determines the direction of interpretation.

The term 'child's welfare' is of a vague nature, which entails many options for interpretation. The term is understood in the following ways: 1) "is a value protected by Article 72 of the Constitution, as well as an imperative in the interpretation of all provisions concerning the youngest"[4] , 2) "constitutes the nucleus of all provisions on the rights of the child, being the proverbial 'spirit of the law'"[5], 3)"personal interests, i.e. the concern for his/her physical and spiritual development and proper preparation for work according to their talents and in accordance with the social interest, as well as the property interests of the minor manifested in the appropriate management of their property, the proper use of the income derived from it and preserving the substance of this property as intact as possible"[6], 4) "the situation of the child, where it is a situation postulated in the light of the moral doctrine dominant in our society, and more precisely specified in legal regulations and established judicial

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2 The features of the inter-branch and interdisciplinary nature of this criterion have been described in: *Hanas K.,* Criterion "The Good of the Child" in the Legal Order. Between the Normative Structure and Judicial Case Law, Maribor, Institute for Local Self-Government Maribor, 2023.

3 For more detail on the validation-derivative approach, see: *Leszczyński L.,* O wykładni prawa i jej wymiarze praktycznym. Kontekst sądowego stosowania prawa, „Archiwum Filozofii Prawa i Filozofii Społecznej", Nr 2(23), 2020, 66-80.

4 *Borysiak W.,* [in:] *Safjan M., Bosek L. (eds.),* Konstytucja RP, t. 1: Komentarz, art. 1–86, Warszawa, 2016, 1650, 1661.

5 *Stojanowska W.,* Dobro dziecka w aspekcie sprawowania nad nim władzy rodzicielskiej, „Studia nad Rodziną", Nr 4/1(6), 2000, 55.

6 *Marciniak J.,* Treść i sprawowanie opieki nad małoletnim, Warszawa, 1975, 10.

jurisprudence"[7]. The phrases cited above show that it is difficult to construct a single definition, although such attempts have clearly been made. These difficulties arise from the nature of the term. The indeterminate nature of this concept gives the court many possibilities for interpretation. However, the simplest approach when considering a particular case, is to ask how the child's situation will look in the future and what decision will be beneficial for the child's development. Finding these possible solutions is not easy and requires taking protective measures by issuing custody orders, the involvement of institutions and their control over what happens to the child, hearing the minor in the presence of a psychologist, the participation of the representative of the child in the proceedings and many other aspects.

From the legal-theoretical perspective, this criterion may constitute an element of both a general reference clause [8], and a legal principle[9]. According to L. Leszczyński, "the reference (reference clause) is the fragment of a separate grammatical unit of the legal text (legal provision), which indicates the authorisation to use extralegal criteria, while the very name of these criteria, which forms part of the clause, determines the type of extra-legal reference and the resulting direction of assessment."[10] Examples of other general reference clauses include: the welfare of the minor, the principles of social coexistence, and the welfare of the family. General reference clauses allow referring to extra-legal values in the process of applying the law, and are therefore an excellent tool allowing for a flexible approach to interpretation. On the other hand, legal principle is the 'central idea' of a legal system or part thereof[11], or, according to another definition, 'a form of an order to implement values'[12]. The presence of a specific legal principle within a given part of the legal system obliges the court to apply that normative framework. The judicial body should therefore find a solution and adopt a line of interpretation that both take into account the obligation to protect specific values arising from the legal principle. For example, if contact with the child is not maintained as a result of alienation by one of the parents, the court may, in order to safeguard the child's situation, issue appropriate care orders or a ruling to secure contact in order to keep the bond between the parent and the child.

The Convention on the Rights of the Child[13] is of the utmost importance in formulating arguments and interpreting the concept of the welfare of the child. It uses the concept of parental responsibility, in contrast to the institution of parental authority functioning in Polish law. Such an approach means a complete departure from the objective treatment of the child, as authority is considered associated with the patriarchal family model. It also means that, in the course of the proceedings, minors are at the centre of attention and can have their own representatives. As can be seen, the child-parent relationship is viewed in a different way when the concept of parental

7 *Haak H.,* Władza rodzicielska. Komentarz, Toruń, 1995, 49.
8 *Hanas K.,* Criterion "The Good of the Child" in the Legal Order. Between the Normative Structure and Judicial Case Law, Maribor, Institute for Local Self-Government Maribor, 2023, 41-50.
9 Ibid., 51-76.
10 *Leszczyński L.,* Tworzenie generalnych klauzul odsyłających, Lublin, Wydawnictwo UMCS, 2000, 10-11.
11 *Wronkowska S., Zieliński M., Ziembiński Z.,* Zarys teorii prawa, Poznań, Przedsiębiorstwo Wydawnicze Ars Boni et Aequi, 1997, 9, 25.
12 *Kordela M.,* Zasady prawa. Studium teoretycznoprawne, Poznań, Wydawnictwo Naukowe UAM, 2012, 101.
13 United Nations Convention on the Rights of the Child, UNTS, vol. 1577, 20/11/1989, 3.

responsibility is adopted. The child also has the right to a happy childhood, which stems from, inter alia, the Declaration of the Rights of the Child[14], along with corresponding rights to play, education, a safe and stable environment, and ties with both parents. The institution of parental responsibility and the right to a happy childhood indicate that the child requires protection not only from external threats, but also from wrongful actions of their own parents, who are obliged to care for the well-being of their own child.

In the context of the Convention on the Civil Aspects of International Child Abduction, the very preamble thereto contains the phrase: "the interests of children are of paramount importance in matters relating to their custody." The Convention explicitly states that the welfare of the child constitutes a paramount value and is given priority. Additionally, the preamble also provides for the principle of the prompt return of the child to the state of their habitual residence, which determines the way the criterion in question is to be understood. This means that the prompt return to the previous place of residence is in the welfare of the child. Thus, the return mechanism should not constitute an overly complicated procedure, but the application of the Convention's provisions generates ethical and legal dilemmas.

3. The Length of Proceedings

The first of the problems related to the interpretation of the provisions of the Convention is the proper understanding of the timeframe within which the return proceedings should be concluded. In Article 11 of the Convention, there are two terms referring to the duration of the proceedings. In the first sentence of the mentioned article, the term 'expeditiously' appears: *The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children*. It can be inferred from the further part of the provision that the procedural body does not delay if the proceedings take six weeks from the date of receipt of the application to the date of the decision: *If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be*. Excessively lengthy proceedings are contrary to the principle of protecting the child's welfare[15] and may have a negative psychological impact on the minor. Shortening the time limit to consider the case would require the development of specific mechanisms, in particular reducing the time within which the parent may respond to the application, and the electronic transmission of mailing or via a court official, which makes notification more difficult. Moreover, the six-week deadline is in practice too short to also allow for appellate

[14] Declaration of the Rights of the Child, adopted by the General Assembly of the League of Nations, 1924, as well as on childhood: *Archard D.,* Children Rights and Childhood, 3rd ed., New York, 1993.

[15] Judgment of the Supreme Court of 25 April 2023, case ref. no. II CSKP 2340/22, LEX No.: 3585398; Judgment of the Supreme Court of 28 February 2024, case ref. no. II NSNc 293/23, LEX No.: 3690147.

proceedings. There are other factors that affect the duration of the proceedings. The parties tend to receive or submit correspondence at the very last possible moment, send correspondence with formal deficiencies, or rely on the 'grave risk' grounds, which may necessitate the conduct of evidential proceedings. These elements certainly form part of the procedural tactics adopted by the parents, which is detrimental to the minors. It is certainly a dilemma as to the extent of raising attorneys' awareness about this issue in a situation where they represent a parent who intends to abduct or has abducted a child, and there is a high probability that the court will issue a return order. An interesting situation – and also a dilemma at the same time – may arise when, as part of legal consultancy, the attorney suggests to the client to change the former's place of residence and move to another country, rather than applying to the competent authority for a decision on matters concerning the child or initiating care proceedings. Such action has legal consequences for the parent who commits the wrongful abduction. It may also have consequences for the attorney in terms of disciplinary liability, particularly if the abduction is a criminal offence in the country concerned.

As part of the amendment to the Polish Code of Civil Procedure,[16] Article 156^1 was introduced. According to the content of the said legal provision, the presiding judge may instruct the parties at a hearing, as necessary, on the probable outcome of the case based on the claims and evidence submitted so far. This instruction may include, in particular, expressing an opinion regarding: the interpretation of legal provisions that may apply to the case and the facts that, at a given stage of the case, may be considered not indisputable or sufficiently proven. Indeed, in some situations, this may influence the faster conclusion of the proceedings, as the judge manages to convince the parties to settle the dispute amicably.

The duration of the proceedings concerning the return of a child was also addressed by the European Court of Human Rights[17]. In its view, any delays in examining a case under The Hague Convention must be justified, as such delays affect the child's situation; the six-week time limit is not rigid, but national authorities should hear the case without undue delay and the return of the child should be ordered promptly[18]. National authorities must not allow delays that result in the 'legalisation of the situation'. Situations arising on the part of the state, involving a significant caseload for the judge, which results in failure to fulfil tasks within the specified time limits, are also unacceptable. Upon receipt of an application, it should be processed without delay in view of the need to comply with the time limit set out in the Convention. The obligation to ensure the efficiency and effectiveness of proceedings rests with the signatory states to the Convention.

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16 Code of Civil Procedure of 17 November 1964, consolidated text: Journal of Laws of 2006, item 468, as amended.

17 At the same time, the European Court of Human Rights examines cases of parental abduction with a view to determining whether there has been a violation of the right to respect for private and family life: *X v. Latvia*, [2013] ECtHR, application No. 27853/09; *S. Povse and D. Povse v. Austria*, [2013] ECtHR, application No. 3890/11.

18 *Carlson v. Switzerland*, [2008] ECtHR, application No. 49492/06; *K.J. v. Poland*, [2016] ECtHR, application No. 30813/14.

4. Interpretation of 'Grave Risk'

'Grave risk' is another vague phrase that needs to be interpreted during the law application process, based on specific factual elements. This concept may be understood in various ways, but it always requires juxtaposing with the welfare of the child. This precondition is set out in Article 13b of the Convention and means that the court may refuse an application for a return order if a parent opposing the surrender of the child proves that “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”. A grave risk means, in particular: the risk of physical and psychological violence against the child or, exceptionally, also against the parent who has committed the wrongful detention or abduction, the risk of sexual exploitation, the unavailability of medical treatment in the country of permanent residence, return to a country affected by armed conflict[19]. Obvious threats to the child's welfare prevent an immediate return decision. It is argued in the case-law that a serious breach of the welfare of an abducted child means placing the child in an unbearable situation[20]. The risk of damage should be grave and actual[21]. Moreover, it is not sufficient to find during the proceedings that it would be better for the child to remain at their current place of residence[22]. A change in the parent's life situation does not justify parental abduction and a complete change in the child's environment. The body that is authorised to thoroughly examine the child’s educational model, family situation, relations with parents, grandparents or peers is a court in the country from which the child was abducted. The Convention court may not issue a negative decision even if the evidence shows that the child’s situation will be more favourable than previously[23]. Different decisions would be contrary to the purpose of the Convention. It is therefore unacceptable to base a negative decision on the circumstances of the child’s integration into a new environment, the child’s more modest living conditions, a lower standard of healthcare or the insufficient educational competence of the parent applying for the child's return[24]. These are elements that do not fit into the body of the grave risk clause.

The strategy also comprises invoking the fact of domestic violence in a situation where no previous reports of an alleged crime have been filed. Allegations of violence will only appear when it is necessary to prepare arguments for the Hague process. This takes place relatively late and is difficult, in some situations, to believe the allegations of a parent who, in addition, is unable to produce documents from the country of previous residence, the content of which would confirm this fact.

The court assesses a child’s welfare also upon hearing the minor. In such a situation, it is necessary to take into account the maturity of the child and the degree of his or her autonomy in

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[19] Judgment of the Supreme Court of 12 April 2024, case ref. no. II CSKP 859/23, LEX No.: 3703774.

[20] Judgment of the Supreme Court of 22 January 2026, case ref. no. I CSK 3451/25, LEX No.: 4016404; judgment of the Supreme Court of 18 July 2024, case ref. no. I CSK 2151/24, LEX No.: 3738840.

[21] Judgment of the Supreme Court of 16 May 2025, case ref. no. II CSKP 1209/24, LEX No.: 3865262.

[22] Judgment of the Supreme Court of 22 January 2026, case ref. no. I CSK 3451/25, LEX No.: 4016404.

[23] Judgment of the Supreme Court of 14 May 2025, case ref. no. II CSKP 1134/24, LEX No.: 3865623.

[24] Judgment of the Supreme Court of 17 June 2021, case ref. no. I CSKP 360/21, LEX No.: 3207947.

expressing their position[25]. Hearing the minor helps the judge to make a decision. The problem may be that the child is influenced by a parent or is too young, so the participation of an expert witness in psychology is always necessary. There are cases where the child expresses opposition as to the return. In such a situation, the opposition expressed by the child may constitute an independent basis for rejecting the application for return, which is grounded in case law. The courts assess a child's state of maturity and degree of autonomy at the moment of expressing his or her position[26].

5. The Cultural and Legal Barriers

Emerging cultural barriers can turn out to be a challenge when applying the Convention. These concern differing interpretations of the child's welfare in a specific case, due to the customs and traditions upheld by one of the parents and the family values. These barriers may stem from the parents' religious beliefs, their understanding of the role of the family, and their perceptions of parenting models and parental authority, especially within a patriarchal family model. Consequently, the very nature of parental abductions may also be understood differently. Next, it is worth mentioning the changing social environment. This concerns cases where a parent decides to undergo a gender transition, which would be contrary to the views of the other partner, and against this backdrop, an intention to alienate the child arises, resulting in abduction.

With cultural barriers and a lack of mutual understanding, this may be solved through mediation or cooperation with a family assistant, participation in workshops that improve parenting skills, which can help in gaining mutual understanding of the situation the parties have found themselves in.

Legal barriers, on the other hand, can include a lack of access to information on legal regulations, a failure to update this information, and a lack of assistance from competent bodies in the event a child abduction has been reported.[27] The role of the police is worth noting here. When a parent reports the abduction of a child, the officer should contact the relevant entity, which will provide legal assistance and support to the parent at the stage of initiating the Hague procedure and in further activities. Non-governmental organisations and central authorities also need to cooperate with law firms that train lawyers in Convention matters. It would be of paramount significance to maintain an international database of lawyers specialised in conducting Hague proceedings, detailing their competence, e.g. communication and language skills, including sign language.

Another problem is the situation where a certain country is not a signatory to the Convention. There are problems with legal barriers affecting the effectiveness and efficiency of such procedures. However, these barriers can intermingle with cultural barriers. Julia A. Todd refers to an interesting example. She presents a case study with an Anglo-Pakistani motif, in which Pakistan was not a signatory state to the Convention. The mother argued that Pakistan did not have protection for children similar to that under English law that, and she was afraid of legal proceedings in that country.

[25] Judgment of the Supreme Court of 8 July 2025, case ref. no. II CSKP 151/25, LEX No.: 3914154.

[26] Ibid.

[27] Certain aspects are pointed to by M. Białecki in: *Białecki M.,* Analiza praw i obowiązków podmiotów uczestniczących w postępowaniu o nakazanie powrotu dziecka w ramach Konwencji haskiej o cywilnych aspektach uprowadzenia dziecka za granicę, „Polish-Italian Studies in Toruń", 2025, 91-108.

Ultimately, the Convention court ruled that the case would be governed by Muslim law anyway and ordered a return. The mother's concerns were also about the possible influence of the father's family on the justice system.[28]

6. Conclusion

Proceedings concerning parental abductions should be effective and efficient in order to fully protect the welfare of minors. The provisions of the Convention on the Civil Aspects of International Child Abduction establish a return mechanism in line with the principle of protecting the welfare of the child. The application of the Convention generates legal and ethical dilemmas. While the former can be mitigated to a greater extent, ethical dilemmas are far more complex. Ethical dilemmas are rooted in cultural and religious differences, whereas legal dilemmas require cooperation between state authorities and the courts. This leads to delays in the hearing of cases, which in itself undermines the welfare of minors. It should be noted that parental abduction and the welfare of the child may be perceived differently in various communities, hence the need for an individualised approach to resolving ethical dilemmas. It is unlikely that a standard can be developed which would reconcile the efficiency of proceedings with the need for an individual assessment of the child's welfare within its cultural context. Therefore, the assessment of these aspects is the responsibility of competent courts of the country of child's permanent residence.

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[28] *Todd J. A.,* The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?, Indiana Journal of Global Legal Studies, Vol. 2, Nr 2, 1995, 561, http://www.jstor.org/stable/20644600 [24.05.2026].

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Harmonization of Legal Systems for the Enforcement of International Mediation Settlement Agreements in the Context of Normative Diversity and Regulatory Fragmentation**

The article examines the harmonization of legal systems governing the recognition and enforcement of international mediated settlement agreements (IMSAs) in the context of normative diversity and regulatory fragmentation. It critically analyzes the Singapore Convention on Mediation as the first universal legal instrument establishing a cross-border enforcement regime for mediated settlement agreements and evaluates its interaction with domestic legal systems, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), and the EU Mediation Directive. The study identifies the principal legal and institutional obstacles to effective implementation, including divergent domestic enforcement mechanisms, inconsistent interpretation of key legal concepts, reservations adopted by Contracting States, the public policy exception, and the absence of harmonized international standards governing mediator accreditation and professional ethics. Particular attention is devoted to Georgia's implementation of the Convention and the conceptual inconsistencies arising from the interaction between international and domestic legal frameworks. Employing doctrinal, comparative, and policy-oriented legal methodologies, the article argues that the effectiveness and legitimacy of the international enforcement regime depend not only on legislative harmonization but also on coherent judicial interpretation, institutional capacity, and regulatory convergence. It concludes that achieving a predictable, coherent, and effective global enforcement framework requires coordinated international cooperation, evidence-based legal reform, and a multidimensional approach to legal harmonization that accommodates the diversity of national legal traditions while strengthening mediation as a credible mechanism for resolving international commercial disputes.

Keywords: *International mediated settlement agreements (IMSAs); Singapore Convention on Mediation; enforcement of mediated settlement agreements; legal harmonization; regulatory fragmentation; cross-border dispute resolution; UNCITRAL Model Law; EU Mediation Directive; mediation; international commercial disputes.*

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1. Introducton

In the contemporary legal and economic landscape, the rapid expansion of international trade and cross-border commercial transactions has generated an inevitable need for effective and flexible mechanisms to resolve transnational commercial disputes characterized by jurisdictional diversity. [1] Within this context, alternative dispute resolution (ADR) mechanisms have assumed a pivotal role in safeguarding legal and economic stability, while preserving long-term commercial relationships. From a broader perspective, the growing emphasis in legal scholarship on multimodal regulatory frameworks and systems within the global economy clearly underscores the importance of harmonized enforcement mechanisms across diverse jurisdictional infrastructures.[2] Consequently, the liberalization of the enforcement regime governing international mediated settlement agreements, together with its emancipation from the domestic constraints imposed by the *lex fori*, has emerged as a determining factor in enhancing the institutional effectiveness of mediation.[3] By ensuring a high degree of legal certainty and predictability, the effective enforcement of international mediated settlement agreements ultimately promotes the broader utilization of mediation as a preferred mechanism for the resolution of international commercial disputes.[4]

The existence of harmonized enforcement regimes facilitates international trade by enabling disputing parties to pursue and enforce mediated settlement agreements beyond national borders. In turn, this promotes economic growth, enhances social welfare, and contributes to the efficiency and effectiveness of the administration of justice.[5] The enforcement of international mediated settlement agreements constitutes a fundamental legal guarantee for the institutionalization of mediation, reinforcing its normative legitimacy and consolidating its status as a widely recognized, coherent, and systematically structured mechanism of dispute resolution.

Predictably, one of the principal impediments to the widespread adoption of mediation lies in the absence of a coherent and universally recognized legal framework governing the enforcement of international mediated settlement agreements (hereinafter, *IMSAs*). The persistence of domestic

1 *Binder P.,* International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, United Nations Commission on International Trade Law, 2025 Kluwer Law International BV, 2019, 551.

2 *Kern C.A.,* Multinational Rules and Systems of Dispute Resolution in an Era of the Global Economy, in: *Miki K. (ed.)*, Technology, the Global Economy and Other New Challenges for Civil Justice, Intersentia Uitgevers N.V., Cambridge, 2021, 61-97.

3 For a detailed discussion, see: *Esplugues C., Iglesias L.,* Mediation and Private International Law: Improving Free Circulation of Mediation Agreements Across the EU, Policy Department C: Citizens' Rights and Constitutional Affairs, Brussels, 2016, 10, 2-27; *Meidanis H.P.,* Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform, Journal of Private International Law, 16 (2), 2020, 275-299.

4 *Palao G. (ed.),* The Singapore Convention on Mediation: A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Edward Elgar Publishing, Cheltenham, UK, 2022, 120.

5 The United Nations General Assembly has recognized that the use of mediation offers significant benefits, including reducing the incidence of disputes resulting in the termination of commercial relationships, facilitating the administration of international transactions, and generating substantial savings in the administration of justice. As noted in: *Curlewis L., Raubenheimer E.,* International Recognition and Enforcement of Mediation Agreements, 45 (1), 2024, 214-215.

enforcement barriers discourages parties engaged in international commerce from opting for mediation as an alternative to formal judicial dispute resolution, thereby undermining its practical attractiveness in cross-border transactions. Recognizing the need to establish a harmonized legal framework for the enforcement of IMSAs, the United Nations adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation[6] on 20 December 2018, widely referred to as the Singapore Convention on Mediation. The Convention was opened for signature on 7 August 2019 and entered into force on 12 September 2020.

Georgia was among the first States to accede to the Singapore Convention on Mediation. On 7 August 2019, the Minister of Justice of Georgia signed the Convention in Singapore, thereby affirming the country's strategic commitment to establishing itself as a regional hub for mediation[7]. The Convention is designed to confer legal legitimacy upon international settlement agreements resulting from mediation and to facilitate their efficient cross-border enforcement. In functional terms, it is widely regarded as the mediation counterpart to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in the field of international arbitration.[8] For Georgia, participation in the Convention serves as an important catalyst for the development of international trade, foreign investment, and cross-border commercial relations, while simultaneously strengthening the institutional framework of mediation and enhancing access to justice.[9]

Accordingly, the Convention seeks to establish a uniform and harmonized legal framework for the enforcement of international mediated settlement agreements. It is widely regarded as a potentially transformative instrument, as it substantially reduces the legal and institutional barriers that have historically impeded the cross-border enforcement of mediated settlements.[10] Much like the role

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6 United Nations Convention on International Settlement Agreements Resulting from Mediation No. 14-26, 22/06/2021 – United Nations Convention on International Settlement Agreements Resulting from Mediation, 2019.

7 *Kandashvili I.,* Mediation: An Effective Means of Dispute Resolution, Tbilisi: Sezani Publishing, 2022, 285–286 (in Georgian).

8 *Chaisse J., Xueliang Ji., Shaping* the Future of Transnational Tax Dispute Settlement: The Path to Mediation, 14 Colum. J. Tax L. 30, 2023, 30-61; *Sambold A.M.,* The Singapore Convention on Mediation: Why It Matters and Where the U.S. Stands, ABA, November 2025, <https://www.americanbar.org/groups/dispute_resolution/resources/just-resolutions/2025-november/singapore-convention-mediation-why-it-matters-united-states/?utm_source=chatgpt.com> [10.06.2026]; *Chua E.,* The Singapore Convention on Mediation and the New York Convention on Arbitration: Comparing enforcement mechanisms and drawing lessons for Asia, Asian International Arbitration Journal, 2020, 16, (2), 113-138; *Tan K.,* The Singapore Mediation Convention vs the New York Convention: Same difference? 2020, <https://ilareporter.org.au/ 2020/11/the-singapore-mediation-convention-vs-the-new-york-convention-same-difference-kevin-tan/?utm _source=chatgpt.com> [10.06.2026].

9 Georgia amongst the first Signatories of the Singapore Convention on Mediation of Trade Disputes, https://caucasuswatch.de/news/1900?utm_source=chatgpt.com [10.06.2026]; Georgia ratifies the United Nations Convention on International Settlement Agreements Resulting from Mediation <https://unis.unvienna.org/unis/en/pressrels/2022/unisl324.html> [10.06.2026].

10 *Peters N.,* The Enforcement of Mediation Agreements and Settlement Agreements Resulting from Mediation, Corp. Mediat J., 2019, 1-2, 13-19, in: *Bungenberg M., Fröhlich M., Giegerich T., Zdraveva N. (eds.),* Alternative Dispute Resolution in the Western Balkans, European Union and its Neighbours in a Globalized World, Vol. 20, Springer, 2025, 220.

performed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the *New York Convention*) in the field of international arbitration, the Singapore Convention on Mediation is intended to strengthen the institutional standing of mediation, enhance its credibility, and consolidate its position as an effective and practically enforceable mechanism for the resolution of international commercial disputes. [11]

2. The Effectiveness and Legitimacy of the Enforcement Regime for International Mediated Settlement Agreements in the Context of Domestic Jurisdictional Barriers

The adoption of the Singapore Convention on Mediation represents a significant milestone in the development of international mediation and reflects a robust multilateral effort to strengthen the cross-border enforcement of mediated settlement agreements. Nevertheless, its broader effectiveness continues to be constrained by a number of substantive and procedural challenges. Foremost among these is the diversity of national legal systems and the varying degrees of their institutional and legislative readiness to incorporate and implement the Convention's provisions within domestic legal frameworks. Unlike international arbitration, which benefits from the relatively consistent application of the New York Convention, mediation continues to be characterized by fragmented approaches to the interpretation and application of harmonized legal standards, resulting in divergent national practices and inconsistent enforcement outcomes.[12]

A considerable number of signatory States have yet to adopt the legislative measures necessary to implement and give effect to the Convention, while among those that have enacted implementing legislation, the nature, scope, and quality of implementation vary substantially. Consequently, prospective Contracting States continue to confront a range of unresolved legal and policy questions.

The first category of concerns relates to the manner in which States exercise the reservations permitted under the Convention. For instance, should the Convention apply to settlement agreements involving governmental entities, and should its application be contingent upon the parties' explicit agreement to opt into the Convention's enforcement regime?

The second category of issues is more complex and concerns the domestic legal architecture required to ensure the Convention's effective operation. In particular, it raises the question of what legislative reforms and procedural rules must be adopted at the national level to ensure that

[11] A similar approach is reflected in the academic literature: *Silvestri E.,* The Singapore Convention on Mediated Settlement Agreements, A New String to the Bow of International Mediation? Access to Justice in Eastern Europe, Iss. 3(4)/2019, 5; *Zhao Y.,* The Singapore Mediation Convention: A Version of the New York Convention for Mediation?, J. Priv. Int. L., 17(3), 2021, 538–559; *Wen X. (an introduction by Finder S.),* Comparative Analysis of the Singapore Convention in Light of the New York and Hague Choice of Court Conventions, in: *Ali S. (ed.),* Comparative and Transnational Dispute Resolution, 1st ed., Routledge, NY, 2023, 170-196.

[12] For a comparative analysis of the differences between the enforcement requirements applicable to international mediated settlement agreements and arbitral awards, see: *Zeller B., Trakman L.,* Mediation and Arbitration: the Process of Enforcement, Unif. L. Rev. 24, 2019, 449-466; *Chao A. (ed.), Zhao Y.,* Mediation and Alternative Dispute Resolution in Modern China, Hong Kong, Springer, 2022, 157.

international mediated settlement agreements (IMSAs) are recognized and enforced in full conformity with the Convention's requirements.[13]

The legal scholarship reveals divergent approaches concerning the grounds for refusing the enforcement of international mediated settlement agreements. According to one line of reasoning, stringent enforcement requirements – commonly referred to as the intensive review approach – serve as an essential safeguard against the enforcement of unlawful or defective settlement agreements, thereby preserving the integrity of the legal system and upholding the rule of law. By contrast, proponents of the opposing view contend that judicial scrutiny of individual enforcement requirements necessitates an extensive examination of both the objective circumstances surrounding the settlement and the quality and integrity of the mediation process itself. Such an approach, they argue, risks undermining the fundamental objective of the Singapore Convention on Mediation, namely, to establish an efficient, accessible, and enforcement-oriented framework for the recognition and enforcement of international mediated settlement agreements. This perspective therefore advocates a narrow, pro-enforcement approach, under which judicial review is confined to the limited grounds expressly prescribed by the Convention.[14] The inherent tension between the voluntary nature of mediation and the compulsory enforcement of mediated settlement agreements gives rise to the risk of excessive legal formalism, which may erode the creative and consensual character of the mediation process while diminishing the level of protection afforded to its confidentiality. Excessive judicial formalization of enforcement proceedings may consequently undermine the very attributes that distinguish mediation from adjudicative dispute resolution. Furthermore, the intensity of judicial scrutiny exercised by national courts in assessing the preconditions for enforcement constitutes a central determinant of the effectiveness of the international enforcement regime. The scope of such review directly influences the balance between safeguarding procedural fairness and preserving the Convention's pro-enforcement objectives, thereby shaping both the practical effectiveness and the normative legitimacy of the enforcement framework.[15]

The ambiguity of the Convention's terminology further complicates the domestic implementation of this international legal instrument. In particular, the absence of precise definitions of the key concepts of “international” and “commercial” gives rise to divergent judicial interpretations regarding the Convention's scope of application. Such interpretative uncertainty not only undermines the uniform application of the Convention across jurisdictions but also weakens the predictability and consistency of the international enforcement regime, thereby compromising one of the Convention's principal objectives – the establishment of a coherent and harmonized framework for the recognition

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[13] *Chong S., Steffek F.,* Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention, University of Cambridge Faculty of Law, Paper no. 16/2024, 484.

[14] See, inter alia, *Silvestri (2019),* at 10; Yokomizo and Mankowski, as cited in Palao (2022), 156–180. These authors examine the distinction between the mandatory and discretionary grounds for refusing enforcement and critically assess whether the application of stringent enforcement requirements is consistent with the underlying objectives and normative spirit of the Singapore Convention on Mediation.

[15] *Anderson Q.D., Alexander N., Howard A.,* UNCITRAL and the Enforceability of IMSAs: The Debate Heats up, Part 2, Singapore International Dispute Resolution Academy, Kluwer Mediation Blog 2016; See also: *Hopt K. J., Steffek D.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, 2013, 30.

and enforcement of international mediated settlement agreements.[16] The Convention permits Contracting States to formulate reservations and, within the limits prescribed by its provisions, to exclude or modify the application of certain obligations within their domestic legal systems. While such flexibility facilitates broader participation in the Convention, it simultaneously increases the risk of divergent implementation and reduces the predictability and uniformity of its application across jurisdictions.

This challenge is particularly evident in civil law jurisdictions such as Germany, where the interaction between the Convention and the existing domestic and supranational legal framework has given rise to a differentiated regulatory approach. As a Member State of the European Union, Germany has already implemented the Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters (the EU Mediation Directive), which provides the principal legal framework governing mediation within the European legal order. Consequently, for Member States and legal practitioners operating within the European Union, the Directive continues to constitute the primary normative framework regulating mediation, while the relationship between the Directive and the Singapore Convention raises complex questions concerning their concurrent application and normative interaction.[17] However, even within the European Union, no comprehensive set of supranational procedural rules governing the enforcement of international mediated settlement agreements (IMSAs) currently exists.[18] With respect to the recognition and enforcement of IMSAs originating from other EU Member States, a range of existing European Union legal instruments continues to apply and remains relevant in light of Article 7 of the Singapore Convention on Mediation, which preserves the operation of more favourable domestic and international enforcement regimes.

Accordingly, should jurisdictions such as Germany become Parties to the Singapore Convention, they will be required to determine how the Convention's enforcement regime for IMSAs should be integrated into their existing domestic procedural and substantive legal frameworks.[19] This process inevitably raises complex questions concerning the interaction between the Convention, the EU legal order, and national legislation, particularly with regard to ensuring coherence, legal certainty, and the uniform application of cross-border mediated settlement agreements.

An additional and increasingly significant challenge concerns the absence of harmonized international standards governing mediator accreditation, professional qualifications, and ethical conduct. The considerable divergence in national requirements relating to mediator certification, competence, and professional regulation raises fundamental concerns regarding procedural fairness, neutrality, and mediator competence, all of which may ultimately influence the perceived legitimacy and enforceability of international mediated settlement agreements. The lack of internationally recognized quality assurance mechanisms thus remains a structural obstacle to the development of a coherent and reliable global enforcement regime for mediation.

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[16] For a legal discussion on the above-mentioned issue, see: *Alexander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation. A Commentary, 2nd ed., Kluwer Law International BV, The Netherlands, 2022, 73-86*; Zeller, Trakman* (2019), 453; *Zhao (2022),* 103-104; *Silvestri (2019),* 5-8.

[17] *Chong, Steffek* (2024), 485-486.

[18] Kern in: *Miki* (2021), 73.

[19] *Chong, Steffek* (2024), 485-486.

Georgia implemented the Singapore Convention on Mediation through the adoption of the Law of Georgia on Mediation and the incorporation into the Civil Procedure Code of Georgia of a dedicated chapter regulating the recognition and enforcement of international mediated settlement agreements. At the same time, Georgia exercised the right to formulate two reservations under the Convention. First, the Convention shall not apply to settlement agreements to which Georgia itself is a party, nor to agreements involving any governmental authority or any person acting on behalf of a governmental authority. Second, the Convention shall apply only where the parties to the settlement agreement have expressly agreed to its application[20].[21] While these reservations reflect the flexibility afforded to Contracting States under the Convention, they also illustrate how national implementation choices may affect the scope and practical operation of the Convention's enforcement regime.

The definition of an international mediated settlement agreement within the contemporary Georgian legal framework is associated with a number of theoretical and practical challenges arising from the fragmented nature of both international and domestic legal regulation. The primary difficulty stems from the restrictive scope of the definition established by the Singapore Convention on Mediation[22], under which an international mediated settlement agreement is confined to a written agreement resulting from the mediation of an international commercial dispute. This conceptual limitation is closely linked to the criteria governing the determination of the Convention's international element and, consequently, may exclude from its enforcement regime mediated settlement agreements that possess an unmistakable transnational dimension but do not arise from commercial disputes. Such a restrictive approach narrows the Convention's material scope of application and leaves a significant category of cross-border mediated settlements outside the harmonized international enforcement framework, notwithstanding their international character. [23]

A second significant challenge arises from the conceptual and terminological inconsistency between domestic legislation and the applicable international legal instruments. The Law of Georgia on Mediation and the Civil Procedure Code of Georgia independently define the concepts of *mediation*, *mediated settlement agreement*, and *international mediated settlement agreement*, resulting in a fragmented normative framework. In particular, the Civil Procedure Code adopts a broader conception of international mediation than that embodied in the Singapore Convention on Mediation. From this perspective, it may encompass any mediation conducted outside the territory of Georgia or involving a foreign mediator, irrespective of whether the underlying dispute is commercial or non-commercial in nature. This normative divergence gives rise to considerable interpretative uncertainty as to the proper legal classification of a particular mediated settlement agreement and, consequently, the legal regime governing its recognition and enforcement. The resulting lack of conceptual

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20 On this issue, see also Abramson, as cited in *Titi & Fach-Gómez* (2019), 373.

21 Singapore Convention on Mediation, Jurisdiction Profiles, Georgia, <https://www.singaporeconvention.org/jurisdictions/georgia?utm_source=chatgpt.com> [10.06.2026].

22 *Abramson H.,* New Singapore Convention on cross-border mediated settlements: Key choices. (Chap. 19), 369-370 in: *Titi C., Fach-Gómez K. (Eds.),* Mediation in international commercial and investment disputes Oxford University Press, 2019 <https://digitalcommons.tourolaw.edu/scholarlyworks/648> [10.06.2026].

23 *Kandashvili I. (ed.),* Commentary on the Law of Georgia on Mediation, “Universali”, Tbilisi, 2024, 263–278 (in Georgian).

coherence undermines legal certainty and may impede the consistent application of the enforcement framework in cross-border disputes. [24]

3. Conceptual Framework and Methodological Foundations of the Research

The interaction between domestic enforcement regimes and international legal instruments assumes critical importance within the broader normative and regulatory framework governing the cross-border enforcement of mediated settlement agreements. It is within this context that the Singapore Convention on Mediation emerges as a legal instrument of particular significance, warranting comprehensive examination from both doctrinal and academic perspectives. An in-depth analysis of the Convention, however, cannot be undertaken in isolation. Rather, it necessitates a systematic assessment alongside other influential international and supranational legal instruments, most notably the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018),[25] as well as Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (the EU Mediation Directive). Examining these instruments within a unified analytical framework facilitates a comprehensive evaluation of the degree of normative convergence and divergence in the regulation of international mediated settlement agreements and provides a sound basis for assessing the effectiveness, coherence, and practical operation of contemporary cross-border enforcement regimes.

Within legal scholarship, the theoretical foundation for the study of both harmonized and domestic enforcement regimes governing mediated settlement agreements should be anchored in the concept of legal harmonization. This conceptual framework provides the principal analytical lens through which the interaction between national legal systems and transnational legal norms may be systematically examined. Within this paradigm, it becomes imperative to undertake fundamental research into the manner in which domestic legal systems engage with transnational regulatory frameworks, the mechanisms through which legal convergence is promoted – or, conversely, resisted at the national level – and the role that legal institutions play in facilitating or constraining these harmonization processes. Such an approach enables a comprehensive assessment of the extent to which international legal instruments are capable of fostering normative coherence while accommodating the diversity of domestic legal traditions and procedural structures.

The theoretical foundation of such research should be grounded in the theory of legal transplants, which warrants further fundamental inquiry not merely as a technical process of normative transfer or institutional transplantation, but as a complex cultural, institutional, and socio-legal phenomenon. From this perspective, scholarly attention should be directed toward examining the mechanisms through which international legal instruments become institutionalized within domestic

[24] See in detail, ibid.

[25] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018. Until 2018, the said instrument was designated as the *Model Law on International Commercial Conciliation (2002);* see *Binder* (2019), 552.

legal orders, as well as the legal, institutional, political, and cultural factors that facilitate or impede their reception and implementation.

This analytical approach underscores the importance of future research aimed at advancing a more nuanced understanding of legal harmonization processes and identifying the structural, institutional, and socio-cultural preconditions that determine the successful reception, integration, and effective operation of international legal norms at the domestic level. Such an inquiry is indispensable for evaluating not only the formal incorporation of international legal instruments into national legal systems but also their practical effectiveness in achieving substantive legal convergence across jurisdictions.

The study of the enforcement regimes governing international mediated settlement agreements encompasses several interrelated and systemic dimensions. First, it requires a comparative examination of the principal international legal instruments in order to identify their normative convergences and divergences, with particular emphasis on their respective scopes of application and the procedural architecture governing the recognition and enforcement of mediated settlement agreements. Such an analysis provides the basis for assessing the extent to which these instruments contribute to the harmonization of cross-border enforcement mechanisms.

Secondly, scholarly inquiry should examine the manner in which these legal instruments address the inherently indeterminate public policy exception, the divergent and often eclectic judicial interpretations[26] to which it has given rise, and the challenges associated with reconciling procedural differences across jurisdictions. Particular attention should be devoted to evaluating whether the existing regulatory framework strikes an appropriate balance between preserving national procedural autonomy and ensuring the uniformity, predictability, and effectiveness of the international enforcement regime.

The extent to which the absence of harmonized standards governing mediator accreditation and professional qualifications impedes the recognition and enforcement of international mediated settlement agreements (IMSAs) likewise requires rigorous scholarly examination. Finally, from the perspective of legal policy, it is essential to determine whether contemporary efforts to achieve regulatory harmonization in the field of mediation are purposeful, coherent, attainable, and normatively desirable in light of the diversity of legal cultures, social norms, institutional traditions, and procedural systems that characterize the global legal landscape.[27]

Equally important is the advancement of both academic and policy-oriented understanding of the degree to which contemporary multilevel international legal instruments achieve legal harmonization, normative coherence, and practical effectiveness. Particular scholarly attention should

[26] *Alexander N.,* International and Comparative Mediation, Legal Perspectives, Wolters Kluwer Law & Business, 2009, 66. The public policy exception constitutes a potentially hazardous ground for refusing enforcement. See: *Sasson M.,* Public Policy: Is this Catch-All Provision Relevant to the Legitimacy of International Commercial Arbitration? Kluwer Law International, 2022 /1 Comment; Bungenberg (2025), 10-11, 76-81.

[27] For a discussion of procedural rules and multinational dispute resolution systems, see *Kern in: Miki* (2021), 62–63, 66–68, 79–82. According to Professor Kern, procedural law encompasses enforcement mechanisms, which should be regarded as an integral part of the dispute resolution system rather than a separate and independent stage of proceedings. See *Kern in: Miki* (2021), 62–63.

be devoted to the legal prerequisites for enforcement, including the appropriate scope of judicial intervention and the limits of legitimate judicial review in enforcement proceedings. A comprehensive analysis of effective enforcement regimes should therefore extend beyond identifying jurisdictional divergences among competing regulatory models. It must also take into account the cultural and social diversity of States, the absence of internationally harmonized accreditation frameworks for mediators, and the conceptual ambiguities embedded in the legal terminology defining international and commercial mediation. Only through such a multidimensional analytical framework can the effectiveness, legitimacy, and long-term sustainability of the international enforcement regime for mediated settlement agreements be properly evaluated.

A further challenge to the harmonization process arises from the lack of terminological precision employed by the drafters of the Convention with respect to the enforcement of international mediated settlement agreements. In particular, the Convention does not clearly distinguish or comprehensively define several key legal concepts, including "enforcement," "reliance" on a mediated settlement agreement, and the "granting of "relief"[28]. The absence of clear conceptual boundaries between these notions substantially impedes their uniform interpretation and consistent application across jurisdictions.[29]

Comparative analyses conducted across multiple legal systems likewise underscore the existence of significant terminological uncertainty, particularly regarding the conceptual and functional distinction between recognition and enforcement. This issue has emerged as one of the principal doctrinal challenges in the field, with legal scholarship demonstrating that the inconsistent use of these concepts gives rise to considerable practical difficulties in the cross-border recognition and enforcement of international mediated settlement agreements.[30] Such conceptual ambiguity undermines legal certainty, fosters divergent judicial interpretations, and ultimately weakens the Convention's objective of establishing a coherent, predictable, and harmonized international enforcement regime.

Research on the harmonization of enforcement regimes governing international mediated settlement agreements requires a multimethodological approach, grounded in doctrinal, comparative legal, qualitative empirical, normative, and policy-oriented methodologies. The doctrinal method should be employed to examine the legal instruments, fundamental legal principles, and normative provisions embedded within the relevant regulatory frameworks, thereby enabling a systematic assessment of the coherence, effectiveness, and internal consistency of the existing legal architecture.

Alongside the comparative legal method, particular emphasis should be placed on the functional method, which facilitates an analysis of the nuanced processes of national adaptation and judicial interpretation of international legal instruments. This approach contributes to a more comprehensive understanding of the dynamic interaction between supranational and domestic legal regimes. Through functional analysis, areas of regulatory fragmentation should be systematically identified and

[28] Abramson in: *Titi & Fach-Gómez* (2019), 369-370.
[29] *Palao* (2022), 116, 120.
[30] *Tsuvina T., Ferz S.,* The Recognition and Enforcement of Agreements Resulting from Mediation: Austrian and Ukrainian perspectives, Access to Justice in Eastern Europe, 2022 4(16), 32-54.

conceptually mapped, thereby providing a structured basis for determining the need for further legal harmonization and regulatory convergence.

The empirical component of the research should be founded on the collection and analysis of qualitative data obtained through coordinated engagement with judges, dispute resolution practitioners, legal scholars, policymakers, and other institutional stakeholders involved in the implementation of the relevant international and domestic regulatory frameworks. Such an empirical approach enables researchers to identify practical trends in enforcement proceedings, to uncover structural barriers that remain obscured by formal regulatory frameworks, and to examine the perceptions and policy considerations of those responsible for the development and implementation of mediation law and practice.

This integrated methodological framework facilitates the effective synthesis of doctrinal analysis and empirical inquiry, thereby bridging the gap between legal theory and institutional practice. At the same time, it provides a robust analytical foundation for identifying normative inconsistencies, institutional deficiencies, and implementation gaps that continue to impede the development of a coherent, predictable, and effective international enforcement regime for mediated settlement agreements.

From an empirical perspective, comparative research on domestic and international enforcement regimes should be conducted on the basis of a carefully structured jurisdictional typology. The selection of jurisdictions for empirical analysis should be organized according to the following criteria:

(a) Status of participation in the Singapore Convention on Mediation – States that have ratified the Convention; States that have signed but not yet ratified it; and States that have neither signed nor become Parties to the Convention. (b) Legal tradition – Common law, civil law, and mixed legal systems. (c) Degree of integration into the European legal order – European Union Member States, associated States, and non-associated (third) countries. (d) Level of institutionalization of mediation and effectiveness of the justice system – Jurisdictions possessing mature and well-established mediation systems, as distinguished from those in the early stages of institutional development. (e) Regulatory framework governing mediation – Jurisdictions that have implemented the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), those operating under the EU Mediation Directive, and jurisdictions relying predominantly on domestic legislative standards. (f) Cultural context of mediation – States characterized by a well-established culture of mediation and consensual dispute resolution, as contrasted with jurisdictions that continue to place primary reliance on formal judicial mechanisms. (g) Enforcement regime – Jurisdictions possessing robust legal and institutional mechanisms for the recognition and enforcement of mediated settlement agreements, as opposed to those with comparatively weak enforcement guarantees. (h) Level of economic development – High-, middle-, and low-income jurisdictions, thereby enabling an assessment of the relationship between economic development and the effectiveness of mediation enforcement systems. (i) Standards governing mediator qualifications – Jurisdictions operating under centralized accreditation and professional regulatory frameworks, as contrasted with those relying on decentralized or unregulated certification models.

Such a multidimensional classification provides a robust methodological foundation for comparative empirical analysis by enabling the systematic identification of the institutional, legal, economic, and socio-cultural variables that influence the implementation and effectiveness of international enforcement regimes. Moreover, it facilitates the evaluation of how differing regulatory environments affect the harmonization of international mediated settlement agreements and supports the formulation of evidence-based recommendations for future legal and policy reforms.

Using normative and policy-oriented legal methodologies, future research should critically examine the normative foundations of the existing regulatory framework, explore the dynamics of interaction between supranational and domestic legal regimes, assess the legitimacy of State regulatory choices, and evaluate the extent to which current enforcement mechanisms effectively advance the underlying policy objectives of international dispute resolution. Particular attention should be devoted to determining whether the existing legal architecture achieves an appropriate balance between national regulatory autonomy and the broader objective of legal harmonization, while simultaneously ensuring legal certainty, procedural fairness, and effective cross-border enforcement.

Research directed toward the harmonization of enforcement regimes for international mediated settlement agreements should ultimately contribute to the development of evidence-based legal policy and the identification of future reform priorities. By generating empirically informed and normatively grounded policy recommendations, such research may facilitate the refinement of both domestic and international regulatory frameworks and strengthen the institutional capacity of mediation. In this way, it may promote the evolution of mediation into a genuinely effective, credible, and widely accessible mechanism for the resolution of international commercial disputes, while reinforcing the coherence, predictability, and legitimacy of the global enforcement regime.

4. Conclusion

In conclusion, the harmonization of enforcement regimes governing international mediated settlement agreements constitutes one of the most significant challenges of contemporary transnational commercial law. As a landmark international legal instrument, the Singapore Convention on Mediation undoubtedly provides a solid foundation for the institutionalization of mediation and the enhancement of its global legitimacy. Nevertheless, the effectiveness of the Convention depends to a considerable extent on the readiness of domestic legal and procedural systems to implement its provisions consistently, the uniform incorporation of its normative framework into national legal orders, and the predictability of judicial practice in enforcement proceedings.

The normative diversity of domestic legal systems, regulatory fragmentation, and persistent terminological ambiguities continue to impede the emergence of a coherent international practice concerning the recognition and enforcement of international mediated settlement agreements (IMSAs). Particularly complex are the divergent approaches adopted by Contracting States in exercising the reservations permitted under the Convention, the expansive judicial interpretation of the public policy exception, and the absence of harmonized transnational standards governing mediator accreditation and professional qualifications. Collectively, these factors directly influence the perceived legitimacy, credibility, and enforceability of mediated settlement agreements. In this regard, the inherent tension between the voluntary nature of mediation and the compulsory enforcement of its outcomes necessitates the achievement of a carefully calibrated balance – one that safeguards the fundamental values of mediation without undermining the effectiveness of the enforcement regime.

Together with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) and the EU Mediation Directive, the Singapore Convention forms a multilayered regulatory architecture whose interaction frequently generates normative inconsistencies and interpretative complexity. Accordingly, legal harmonization should not be understood merely as a process of formal legal unification, but rather as a dynamic and context-sensitive undertaking that accommodates the diversity of national legal cultures, institutional traditions, and socio-legal environments while fostering convergence around shared regulatory objectives.

The effective operation of international legal norms at the domestic level depends not only upon the existence of an adequate legislative and procedural infrastructure but also upon coherent judicial interpretation, institutional capacity, and the broader regulatory environment within which those norms are implemented. Consequently, the continued development of enforcement regimes for international mediated settlement agreements requires evidence-based legal policymaking, inter-disciplinary research, and coordinated international cooperation. Only through such a comprehensive and integrated approach can a more coherent, predictable, and legitimate global framework for the enforcement of mediated settlement agreements be achieved, thereby strengthening mediation as an effective, credible, and widely accessible mechanism for the resolution of international commercial disputes.

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Ten Years of the European Succession Regulation – The Approach of the Portuguese Courts

As the European Succession Regulation celebrates its tenth anniversary after its entry into force, it seems to be advisable to study and analyse the main rulings issued by the courts that apply its provisions on a day-to-day basis. This paper aims to identify, disclose and appreciate the main decisions issued by the Portuguese Courts of Appeal and by the Portuguese Supreme Court within the key topics of the Regulation itself, such as the scope of its application, the concept of succession, the use of the habitual residence connecting factor for purposes of determining the jurisdiction and the applicable law to a specific succession, and some international public policy (ordre public) considerations. The paper also notes some of the main subject matters that surprisingly have not yet been addressed by the Portuguese Courts of Appeal nor by the Portuguese Supreme Court, such as the provisions of the Regulation related with the agreements as to succession, the possibility to choose the applicable law to the succession of the deceased, renvoi considerations, among others.

Keywords: *applicable law; courts; European Succession Regulation; harmonization; jurisdiction; jurisprudence; Portugal.*

1. Introduction

The increase of movement by citizens and assets all across the European Union has unequivocally transformed the way people organize their lives and also their succession[1]. Such growing migration of citizens and assets between different Member States has proportionally increased the potential emergence of conflicts regarding the applicable law and jurisdiction in terms of inheritance proceedings. Additionally, as it is said by Helena Mota, the diversity of substantive and procedural rules applicable across all Member States tends to create significant difficulties both for heirs who may inherit assets located in a Member State other than that in which they reside, but also for individuals wishing to engage in advance succession planning who own assets in more than one

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1 According to Jennifer Bost, back in 2013 approximately eleven million EU citizens had already exercised their free movement right under the applicable EU treaties, which can present several issues for succession purposes, since it is likely that such citizens' estate and heirs are spread out through several Member States – see *Bost J.*, Nothing Certain About Death and Taxes (and inheritance): European Union Regulation of Cross-Border Successions, Emory International Law Review, Vol. 27, Issue 2, 2013, 1146-1147. As it is referred by Mariusz Zalucki, "[a]fter all, when abroad, people often get married and settle down without changing their citizenship, they acquire property abroad, and finally, they die" – see *Zalucki M.*, Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future, Iowa Law Review, Vol. 103, 2018, 2318.

State or intend, upon retirement, to transfer their residence to another country in order to spend the final years of their lives there[2].

In fact, the legal uncertainty generated by such situation, together with the risk of conflicting decisions issued by the authorities of different States and the failure to respect the citizens' wishes and legitimate expectations in succession matters, called for the establishment of a common framework of Private International Law and procedural rules[3]. Such a framework was intended, on one hand, to ensure that all courts and other authorities applying European Union law would apply the same law, follow uniform rules of jurisdiction and recognise and enforce one another's decisions, and, on the other hand, to enable individuals to exercise a degree of self-determination with regard to the law governing their succession, whilst safeguarding the interests of statutory heirs and creditors[4].

Hence, the European Union, similarly to what has been the case in several different areas, called upon itself the legislative competence to regulate the subject matter of international successions[5]. With that regard, the European Succession Regulation (Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession) (hereinafter, the "Regulation") plays a key role as a response mechanism to the increasing complexity of legal relations of citizens that present close connections with more than one country, Member State of the European Union or not. As it is stated by Anabela Gonçalves, the main goals of the Regulation are to eliminate the barriers to the free circulation of persons, in order for them to be able, within the European freedom, security and justice system, to more easily organize in advance their succession, naturally safeguarding the protection of the deceased heirs, relatives and creditors' rights[6].

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2 *Mota H.*, A autonomia conflitual e o reenvio no âmbito do Regulamento (UE) n.º 650/2012 do PE e do Conselho, de 4 de Julho de 2012, RED – Revista Electrónica de Direito, Issue 1, 2014, 4.

3 Since the XIX century, scholars have defended and proposed to implement a set of uniform conflict of law rules concerning issues of succession – see *Pazdan M., Zachariasiewicz M.*, Highlights and Pitfalls of the EU Succession Regulation, Problemy Prawa Prywatnego Międzynarodowego, Issue 26, 2020, 126. As Paul Terner explained back in 2007, "[t]he rapidly growing interest in the harmonisation of the law of succession is based on the increased importance of its international elements and the realisation that the law of succession cannot, in fact, exist in total national isolation. The more Europe grows together and the more people move within Europe, the more international aspects are involved in cases of succession" – *Terner P.*, Perspectives of a European Law of Succession, Maastricht Journal of European and Comparative Law, Vol. 14, Issue 2, 2007, 148-149.

4 *Mota H.*, A autonomia conflitual e o reenvio no âmbito do Regulamento (UE) n.º 650/2012 do PE e do Conselho, de 4 de Julho de 2012, RED – Revista Electrónica de Direito, Issue 1, 2014, 4.

5 *Mota H.*, O presente e o futuro das relações familiares e sucessórias internacionais no Direito da União Europeia. Um ponto da situação, RED – Revista Electrónica de Direito, Issue 1, 2015, 4.

6 *Gonçalves A.*, As linhas gerais do Regulamento Europeu sobre Sucessões, Cadernos de Direito Privado, Issue 52, 2015, 4. As the Author stresses out, "[…] the preparatory work for the Regulation reveals the idea that the discrepancy between conflict of laws and rules of international jurisdiction, as well as the variety of authorities competent to decide on matters relating to international successions in the various Member States, created a risk of segmentation of international successions, hindered the resolution of these issues and, ultimately, constituted an obstacle to the free movement of persons within the Union. The unification of conflict of laws and rules of international jurisdiction applicable in all Member States ultimately aims to

Notwithstanding all the abovementioned and the relevance of the European Succession Regulation within its scope of application, the fact is that, as it is stated in the Coimbra Court of Appeal (*Tribunal da Relação de Coimbra*) ruling dated from 25 March 2025[7], the Regulation does not intend to achieve any type of harmonisation or unification of European substantive succession law, but rather ensure and establish common rules for the Member States bound by it, in several relevant areas of Private International Law related with succession matters[8].

The primary objective of this study is to analyse the approach adopted by the Portuguese Courts of Appeal and the Portuguese Supreme Court with regard to the issues falling within the scope of the European Succession Regulation[9]. To that end, a comprehensive review of the relevant case law was undertaken, leading to the identification of a number of judicial decisions addressing the core issues arising under the application of the Regulation. These decisions, analysed in the sections that follow where appropriate, shall be critically assessed. Whenever deemed necessary or conducive to a better understanding of the issues at stake, the discussion of the case law will be complemented by references to both Portuguese and international legal doctrine.

2. The Concept of Succession within the European Succession Regulation

It is well known that not only the uniformization of conflicts norms plays a key role within Private International law, but also the uniformization of the concepts that must be considered within such Private International law instruments. Bearing that in mind, in order to guarantee a correct application of the European Succession Regulation, it is essential to understand the concept of succession for such purposes.

With that regard, the Lisboa Court of Appeal (*Tribunal da Relação de Lisboa*), in its ruling dated from 9 February 2023[10], expressly referring to article 3, paragraph 1, subparagraph (a) of the

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increase legal certainty and security in the resolution of international successions, facilitate the prior organization of succession and simplify the resolution of disputes relating to multi-jurisdictional successions" [free translation] – *Gonçalves A.*, As linhas gerais do Regulamento Europeu sobre Sucessões, Cadernos de Direito Privado, Issue 52, 2015, 4.

7 Ruling from the Coimbra Court of Appeal, 25 March 2025, process no. 86/23.0T8CLB.C1, judge Hugo Meireles.

8 Within such ruling, and as a consequence of the previously referred conclusion, the Coimbra Court of Appeal decided that: "[s]ince the Regulation is not designed to regulate substantive succession law, its application cannot directly and automatically determine the validity or invalidity of a will. Its function is merely to designate the applicable law and the competent jurisdiction by reference to which the validity of the will must be assessed" [free translation].

9 Similarly, but concerning German case law, see *Kohler C.*, Application of the Succession Regulation by German courts – Selected Issues, Problemy Prawa Prywatnego Międzynarodowego, Issue 26, 2020, 27-43, where the Author identifies the following main topics that have been handled by the German courts: jurisdiction, applicable law and some practical constraints regarding the European Certificate of Succession. As per a similar approach concerning the Hungarian courts rulings related with the European Succession Regulation, see *Nagy, C.*, EU Private International Law in Family and Succession Matters: The Hungarian Judicial Practice, Pécs Journal of International and European Law, Vol. II, 2021, 93-105.

10 Ruling from the Lisboa Court of Appeal, 9 February 2023, process no. 4932/20.1T8ALM-A.L1-2, judge Jorge Leal.

Regulation, decided that for the purposes of the Regulation, "[…] the concept of succession had an autonomous meaning, encompassing all Civil Law aspects of succession upon death, that is, all forms of transfer of assets, rights and obligations by reason of death, irrespective of whether the transfer results from a voluntary disposition upon death or from intestate succession"[11]. Notwithstanding, and following to the provisions set forth in article 1, paragraph 2 of the Regulation, the Court also decided that the Regulation did not apply to certain areas of Civil law other than succession law, and, in particular, it did not apply to rights and assets created or transferred outside the framework of a succession, such as *inter vivos* gifts[12].

Considering that, in such judicial pleading, three different requests had been presented by the parties to the Court's attention, it was also decided that without prejudice of the said exclusion, topics related with *colatio* (hotchpot), the reduction of gifts, advancements or legacies when determining the respective shares of the various beneficiaries, should be considered within the material and substantive scope of application of the Regulation, and therefore it was decided that "[t]he claim seeking the application to the defendant of the sanction for concealment of estate assets (*sonegação de bens*) provided for in article 2096 of the Portuguese Civil Code[13], namely a declaration that the defendant had forfeited his or her rights to the concealed assets for the benefit of the remaining heirs, fell within the scope of the Regulation"[14], thus deciding that jurisdiction would, in principle, lie with the courts of the Member State of the deceased's last habitual residence, pursuant to article 4 of the Regulation.

Such decision has later been confirmed by the Portuguese Supreme Court (*Supremo Tribunal de Justiça*), in its ruling dated from 15 June 2023[15], where it was decided that, in short, the matters arising in connection with the succession of the deceased, including the claim for a judicial declaration of concealment of estate assets (*sonegação de bens*) based on allegedly improper withdrawals and transfers made during the deceased's lifetime, together with the claim for the restitution of those funds to the estate, and which bear a direct and decisive influence on the distribution of the hereditary estate,

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11 Free translation.

12 In Anabela Gonçalves words, "[a]rticle 3(1) establishes a broad concept of succession, encompassing all forms of transfer upon death. In accordance with the principle of the unity of succession, it covers both intestate succession and voluntary succession by way of dispositions upon death. As is apparent from Recital 37 of the Regulation, "[f]or reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether they are located in another Member State or in a third State" – *Gonçalves A.*, Os limites materiais do Regulamento Sucessório Europeu, As palavras necessárias – Estudos em comemoração dos 30 anos da Escola de Direito por ocasião do centenário de Francisco Salgado Zenha, UMinho Editora, Braga, 2023, 144 [free translation]. On the other hand, according to Ferenc Szilágyi, "[t]he unitary approach means that all the matters related to succession are subject to a single legal system, thus governing succession from its inception to the distribution of the estate, including liability for debts under succession" – *see Szilágyi F.*, The Option to Choose The Law Applicable to Succession Under the EU Succession Regulation, Iustrum Aequum Salutare, Vol. XVII, Issue 1, 2021, 150.

13 Portuguese Civil Code, Decree-Law no. 47344/66, 25/11/1966.

14 Free translation.

15 Ruling from the Portuguese Supreme Court, 15 June 2023, process no. 4932/20.1T8ALM-A.L1.S1, judge Luís Espírito Santo.

should be assessed as a whole and in a uniform manner, and that, consequently, the Regulation attributed international jurisdiction to deal with the dispute to the courts of the State in which the deceased had his or her last habitual residence, that in case was in Germany, rather than in Portugal.

Additionally, and still on the general topic in hands, the Portuguese Supreme Court also decided, in its ruling dated from 30 November 2022[16], to disregard the application of the Regulation to a situation where the validity of a legal transaction was being analysed, since it considered the scope of the whole situation out of the scope of application of the Regulation, even if the interested party argued that the effect of such invalidity would entail the inclusion of the transferred assets in the deceased's hereditary estate, and therefore it related to the deceased's succession and inheritance proceedings. In the end, the Portuguese Supreme Court ruled that even if that had been the case, such circumstance was not enough to consider the Regulation to be applicable for the purposes of determining the Portuguese courts jurisdiction.

3. The Temporal Application of the European Succession Regulation

One of the topics related to the application of the European Succession Regulation that has often been raised before the Portuguese Courts concerns the temporal application of the Regulation itself. In fact, in the words of Beatriz Fernandes, "[t]he decisive element for the determination of competence of the Regulation to regulate a succession is the date of the death of the deceased"[17]. As it is referred by Carl Friedrich Nordmeier, the period of time established between the approval of the Regulation and its entry into force – approximately three years – aimed to provide all the interested parties, such as notaries, lawyers and courts, a necessary amount of time in order to get to know the new rules to be implemented[18].

With this regard, the Portuguese Supreme Court, in its ruling dated from 6 July 2023[19], has clearly stated that the Regulation was only applicable to the succession proceedings when the deceased person had died after 17 August 2015, decision that subscribes the understanding behind articles 83 and 84 of the Regulation. Therefore, within the referred judicial proceeding, it was defined that before any analysis concerning the establishment of the habitual residence at the time of death of the deceased took place – as per article 21 of the Regulation -, it was mandatory to confirm the potential application of the Regulation from a temporal perspective.

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16 Ruling from the Portuguese Supreme Court, 30 November 2022, process no. 3902/19.7T8FNC-A.L1.S1, judge Luís Espírito Santo.

17 *Fernandes B.*, Os Pactos Sucessórios no Regulamento Europeu das Sucessões – Sobre a qualificação como sucessório de um pacto para efeitos da aplicação do Regulamento (UE) n.º 650/2012 do Parlamento Europeu e do Conselho, Almedina, Coimbra, 2024, 81.

18 *Nordmeier C.*, Derecho Internacional Privado de las Sucesiones en la Unión Europea: la determinación del derecho aplicable en el nuevo Reglamento 650/2012, de 4 de Julio de 2012, Revista de la Secretaría del Tribunal Permanente de Revisión, Year 2, Issue 3, 2014, 177.

19 Ruling from the Portuguese Supreme Court, 6 July 2023, process no. 2724/20.7T8CBR.C1-A.S1, judge Sousa Lameira.

The same understanding is behind another ruling from the Portuguese Supreme Court, dated from 27 February 2024[20], whereas the Supreme Court decided that article 65 of the Portuguese Civil Code – the conflicts' provision concerning the applicable law to the succession -, was to be applied instead of article 21 of the Regulation, since the deceased had died in 17 September 2013. Within this decision and considering that the validity of a will was being questioned in the proceedings, the Portuguese Supreme Court expressly referred to nos. 3 and 4 of article 83 of the Regulation, and considered, based on the understanding of João Gomes Almeida, that "[t]he favor validitatis embodied in paragraphs 2 to 4 of Article 83 is, however, subject to a future and uncertain event: namely, that the deceased dies on or after 17 August 2015. These provisions do not allow for the application of the rules of the Regulation to the succession of persons who died before 17 August 2015. This means that the general rule set out in paragraph 1 of Article 83 applies in full: the provisions of the Regulation, including paragraphs 2 to 4 of Article 83, are only applicable to the succession of persons who died on or after 17 August 2015. From the standpoint of the law as it ought to be, this solution is open to criticism because it does not allow citizens to plan their succession with complete legal certainty; however, it is the solution that results from a combined reading of Articles 83 and 84 of the Succession Regulation"[21]. In the end, the Supreme Court decided that article 65 of the Portuguese Civil Code was to be applied, instead of the relevant provisions of the Regulation.

On a distinct topic, the Évora Court of Appeal (*Tribunal da Relação de Évora*), in its ruling dated from 30 June 2022[22], referring to article 83 paragraph 4 of the Regulation, decided on the validity of a choice of law provision included in a will that had been executed prior to the entry into force of the Regulation, where the deceased had chosen the laws of Granada to be applicable to the succession[23]. Notwithstanding, the Court also noted that, according to the said laws of Granada, the fact that the deceased had married after the execution of the said will implicated the revocation of the previously executed testamentary dispositions, including the ones where the deceased had selected the applicable law to the succession, and therefore that, since the deceased had died after 17 August 2015,

20 Ruling from the Portuguese Supreme Court, 27 February 2024, process no. 6431/13.9TBOER.L1.S3, judge Antonio Magalhães. A similar decision was issued, again, in the ruling from the Portuguese Supreme Court, 28 May 2024, process no. 6453/15.5T8VIS.C1.S1, judge Catarina Serra.

21 *Almeida J.*, Apontamentos sobre o novo direito de conflitos sucessório, Revista do CEJ, Issue 2, 2nd semester, 2014, 30-31 [free translation].

22 Ruling from the Évora Court of Appeal, 30 June 2022, process no. 1119/21.0T8LL2-A.E1, judge José Manuel Barata.

23 According to the said provision of the Regulation, "[i]f a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession". As it is explained by Anabela Gonçalves, the possibility to choose the applicable law to the succession according to article 22 of the Regulation, and the inherent increase of party autonomy within international successions, corresponds to one of the foundations of the Regulation itself – see *Gonçalves A.*, As linhas gerais do Regulamento Europeu sobre Sucessões, Cadernos de Direito Privado, Issue 52, 2015, 14. On the other hand, Ilaria Viarengo states that "[t]his choice of law represents a relevant change in fields such as divorce and succession, which traditionally contain provisions from which the parties cannot derogate" – see *Viarengo I.*, Choice of law agreements in property regimes, divorce, and succession: stress-testing the new EU Regulations, ERA Forum, Vol. 17, 2016, 544.

the applicable law to the succession was to be determined according to article 21 of the Regulation, and that in the specific case the habitual residence of the deceased, at the time of death, was in Portugal.

On a different note, but also bearing in mind the application of the Regulation, the Lisboa Court of Appeal, in its ruling dated from 8 February 2024[24], expressly disregarded the application of the Regulation to a case where the deceased had British nationality, given the scope of articles 83 and 84 of the Regulation, and since the United Kingdom had left the European Union in 31 January 2020[25], and therefore that the Regulation would not be applicable to the specific situation of the deceased, that died in 22 March 2013. In the end, the Court held that the applicable law should be determined according to the conflicts' rules deemed applicable to the situation, which ended up directing for the application of the habitual residence of the deceased, not according to the terms of the Regulation, but rather due to the application of article 20 of the Portuguese Civil Code, expressly applicable to conflicts of laws related with plurilegislative legal systems, such as the United Kingdom.

By way of conclusion, it shall be noted that even if the topic in hand will tend to disappear from the Portuguese courts' debate, due to the fact that the more time passes, the less probable is that a death happens to take place before the date established in articles 83 and 84 of the Regulation, by now it is well settled between the Portuguese case law that the Regulation is undoubtedly to be applied to the deceased's succession if the death occurs after 17 August 2015, thus allowing any interested party to unequivocally be certain of the potential use, or not, of the direct and indirect choice of law mechanisms foreseen in the Regulation, according to the date of the death of the deceased.

4. The Habitual Residence Connecting Factor According to the European Succession Regulation

As it is established in article 21 paragraph 1 of the Regulation, unless otherwise provided for in the Regulation itself, the law applicable to the succession as a whole of a deceased person after 17 August 2015 shall be the law of the State in which the deceased had his habitual residence at the time of death[26]. Notwithstanding, the same provision, in its paragraph 2, establishes a potential correction

24 Ruling from the Lisboa Court of Appeal, 8 February 2024, process no. 820/21.2T8TVD-A.L1.8, judge Marília dos Reis Leal Fontes.

25 According to recital no. 82 of the Regulation, "[i]n accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom and Ireland of notifying their intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol".

26 The same connecting factor is used in article 4 of the Regulation, where it is stated that "[t]he courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole". In fact, the use of the same connecting factor corresponds to the correlation *forum-ius*, that demonstrates that, in principle, there should be a coincidence between the applicable law (*ius*) and the court with international jurisdiction over the case – see *Monteiro A., Dias R.*, Residência habitual à luz do Regulamento Europeu das Sucessões, RLJ – Revista de Legislação e de

mechanism, whereby it is stated therein that where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State[27].

As it is explained by Anabela Gonçalves, the fact that the Regulation opted for the selection of the law of the habitual residence of the deceased as the main connecting factor for choice of law purposes within the Regulation resides in the need to ensure a real connection and proximity between the succession itself and the life of the deceased[28]. With this regard, and even though the Regulation does not provide any specific legal definition of *habitual residence*[29], the truth is that such absence of a legal definition is somehow mitigated by the wording of recitals 23 and 24 of the Regulation, both of which present relevant indications towards the undetermined concept's densification, similarly to what could have been provided by a specific normative provision[30].

Jurisprudência, Year 151, Issue 4034 (May/June), 2022, 283. Notwithstanding, such coincidence between the applicable law to the succession and jurisdiction is not absolute – see *Kramar S., Vucko K.*, A guide to the implementation of the Succession Regulation (EU) no. 650/2012, Croatian Law Centre, 2020, 34.

27 According to António Pinto Monteiro and Rui Dias: "[t]he exception clause included in this provision should serve to allow a court to avoid applying the law of the last habitual residence when such application proves unreasonable or inappropriate in light of all the elements of the case" [free translation] – see *Monteiro A., Dias R.*, Residência habitual à luz do Regulamento Europeu das Sucessões, RLJ – Revista de Legislação e de Jurisprudência, Year 151, Issue 4034 (May/June), 2022, 291. In other words, and as underlined by Lajos Vékás, "[t]here is an *escape clause,* which helps the reasonable solution of extraordinary situations. When the overall assessment of all the factual circumstances of the case indicates that the deceased was manifestly more closely connected with another law (typically to the law of the state of his/her citizenship), the latter law has to be applied" – *see Vékás L.*, Behind the European Succession Regulation: Differences in the Substantive Law of Succession of Member States, ELTE Law Journal, Issue 1, 2023, 21.

28 *Gonçalves A.*, As linhas gerais do Regulamento Europeu sobre Sucessões, Cadernos de Direito Privado, Issue 52, 2015, 11. As it is noted by Angelika Fuchs, "[t]he main connecting factor, the habitual residence of the deceased at the time of death, was unknown to the laws of most of the Member States before the entry into force of the Succession Regulation" – see *Fuchs A.*, The new EU Succession Regulation in a nutshell, ERA Forum, Vol. 16, 2015, 120.

29 Even though the Regulation itself does not provide for a specific definition of habitual residence, "[…] both doctrine and practice benefit from the definition established in the Court of Justice of the EU (hereinafter: CJEU) case law in relation to the Regulation 2201/2003. Therefore, the habitual residence should be understood as the "centre of existence". The definition is based on the facts and it is not referred to the person's will. In consequence, the determination of jurisdiction requires an assessment of the facts about the testator in recent years and on the day of death" – see *Lewandowska-Mroczkowska M.*, Jurisdiction in the Succession matters under the Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 in the face of Polish International Civil Procedure, Social Transformations in Contemporary Society, Vol. 7, 2019, 153.

30 *Monteiro A., Dias R.*, Residência habitual à luz do Regulamento Europeu das Sucessões, RLJ – Revista de Legislação e de Jurisprudência, Year 151, Issue 4034 (May/June), 2022, 287. Notwithstanding, as it is noted by Hana Jánošková, "[…] the absence of a clear definition of habitual residence creates uncertainty in determining the "lex successionis" (applicable law) in an absence of "professio iuris"" – see *Jánošková H.*, Current issues of Succession Law in Europe in terms of Regulation EU no. 650/2012 of 4th July 2012, Current Issues of Science and Research in the Global World, Studienzentrum Hohe Warte in Wien, Vienna, 2014, 77.

With this regard, and as it is stressed by António Pinto Monteiro and Rui Dias concerning the use of the term *habitual* for the purposes of article 21 and recitals 23 and 24 of the Regulation, a good orientation to establish such *habitual residence* connecting factor should result from a combination between an objective and a subjective elements, although with a strong prevalence from the first one[31]: while the objective element that should guide interpretation corresponds to a material element, that may be subdivided in two aspects – a quantitative (the duration of the stay of the deceased in a specific territory) and a qualitative (in which are relevant the nature and features of the stay of the deceased in the said territory) -, the second one rather corresponds to a psychological element that is linked with the potential willing of the deceased[32]. Notwithstanding, both Authors reinforce the need to not over evaluate the subjective element, under penalty of generating unfair and unbalanced solutions[33].

As Carl Friedrich Nordmeier refers, the selection of the habitual residence as a connecting factor for purposes of determining the applicable law mainly constitutes a political decision, which corresponds to a general strategy to determine the choice of the applicable law rather that with respect to the law of the nationality, which tends to be badly perceived[34]. In fact, considering that the freedom of movement of citizens is one of the European Union's cornerstones within its legal and political strategies, "[…] and taking into consideration the fact that this movement is growing every day and many citizens even though they are residents of a Member State, for various reasons (for example, for work, education, etc.) are relocated to another Member State whose citizens they are not, then it is obvious that habitual residence is more appropriate than citizenship, but nevertheless citizenship is not excluded, and is taken into account" under specific circumstances[35].

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31 Since the Regulation does not provide any reference to the will of the deceased with this regard.

32 *Monteiro A., Dias R.*, Residência habitual à luz do Regulamento Europeu das Sucessões, RLJ – Revista de Legislação e de Jurisprudência, Year 151, Issue 4034 (May/June), 2022, 289-291. According to Blandina Soares, Eugénia Amara, Paula Pott, Pedro de Lacerda and Rute Teixeira Pedro, some relevant circumstances to be considered when determining the habitual residence of the deceased may be the duration and regularity of the deceased's stay in a country, the conditions and reasons for the deceased stay in such country, the potential presence of the deceased's family and the organization of his/her social life, the location of most of the deceased's assets and the deceased's nationality – see *Soares B., Amaral E., Pott P., Lacerda P., Pedro R.*, Os Regulamentos Europeus – Impacto na Atividade Registral e Notarial, Conselho Superior da Magistratura Ed., Torres Novas, 2020, 65.

33 *Monteiro A., Dias R.*, Residência habitual à luz do Regulamento Europeu das Sucessões, RLJ – Revista de Legislação e de Jurisprudência, Year 151, Issue 4034 (May/June), 2022, 291.

34 *Nordmeier C.*, Derecho Internacional Privado de las Sucesiones en la Unión Europea: la determinación del derecho aplicable en el nuevo Reglamento 650/2012, de 4 de Julio de 2012, Revista de la Secretaría del Tribunal Permanente de Revisión, Year 2, Issue 3, 2014, 179. As it is stated by Magdalena Pfeiffer, the introduction of the connecting factor of habitual residence, instead of the deceased's nationality, "[…] was one of the most substantial political and conceptual decisions of the legislators during the drafting process. Although the connecting factor of habitual residence is rather new within succession legal relations, the concept of habitual residence itself is not a new one within PIL. This connecting factor is perceived as a criterion which corresponds best with the mobility of persons within the EU and is the most frequently found connecting factor within EU PIL" – see *Pfeiffer M.*, Legal certainty and predictability in international succession law, Journal of Private International Law, Vol. 12, Issue 3, 2016, 572.

35 *Musliu F., Ahmeti A.*, Legal Regulation of Succession in European Union Law, Case Study: Regulation no. 650/12 of the European Union, Acta Universita Danubius Relationes Internationales, Vol. 11, Issue 1, 2018, 10.

Relating to the application of the habitual residence connecting factor, the Guimarães Court of Appeal (*Tribunal da Relação de Guimarães*) decided, in its ruling dated from 20 January 2022[36], that the laws of France should be applicable to the succession of the deceased due to the fact that the deceased had its habitual residence in France at the time of the death, and even though all the assets to be included in the inheritance proceedings were located in Portugal[37]. Moreover, and given the need to protect the potential expectations of someone whose succession is concerned in a country such as Portugal, where the emigration community is large, and where it was foreseen, prior to the entry into force of the Regulation, according to the Portuguese conflicts rules, that the nationality connecting factor was to be applied, the Guimarães Court of Appeal also stated that "[a]t this stage, the way to honour the expectations of certain future deceased persons and the expectations disrupted by this Regulation lies in disseminating information about the changes it introduces. In particular, all those who wish their personal status in matters of succession to continue to be governed by the law of their nationality, and who have changed or may in the future change their habitual residence to a country other than that of their nationality, should be made aware that they must expressly declare this choice in accordance with Article 22 of the Regulation"[38]. Even though it is not common practice for Portuguese courts to provide for such a clear and political message, in the case the Guimarães Court of Appeal may have felt that there was not enough dissemination of the modifications introduced by the Regulation within the applicable law to plurilocated situations, and therefore that the Portuguese emigrant community could possibly be caught by surprise by the connecting factor to be applied under the terms of the Regulation itself[39].

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36 Ruling from the Guimarães Court of Appeal, 20 January 2022, process no. 511/21.4T8FAF.G1, judge Sandra Melo.

37 Within its decision, the Guimarães Court of Appeal noted that in the case, the main core of the deceased family's relations were situated in France, since both the deceased and his descendants lived in France at the time of death. Moreover, the Court excluded the application of the exceptions established in articles 5 (there was no choice of law declaration in the case), 7 and 9 (since both implied a choice of law by the deceased), 10 (concerning the location of the assets of the inheritance, since it presupposes that the habitual residence of the deceased is not located in any Member State, which did not apply in the situation) and 11 (the *forum necessitatis* clause did not apply since the French authorities were competent according to the terms of the Regulation) of the Regulation.

38 Free translation. The same preoccupation is shared in the ruling from the Guimarães Court of Appeal, 30 January 2025, process no. 62/24.5T8VFL.G1, judge António Figueiredo de Almeida, where the court, even though accepting the application of the Regulation based on the provisions set forth in article 21, stated that the habitual residence connecting factor presents an inconvenient for Member States such as Portugal, due to its significantly relevant emigrant community, based on the fact that in Member States with a traditionally relevant emigrant community, the tradition dictates the use of the nationality connecting factor, concluding that the general rule established in article 21 of the Regulation may affect the legit expectations of the nationals of such Member States.

39 As it is noted by João Gomes de Almeida, "[d]etermining the applicable law for transnational succession is a matter of particular interest, since, according to some authors, inheritance law is one of the branches of law that best reflects the legal identity of a state legal system. This characteristic translates into (i) highly differentiated regulation of inheritance law in the various Member States and (ii) significant difficulties in any process of unification thereof" – see *Almeida J.*, Direito de Conflitos Sucessórios: Alguns Problemas, Almedina, Coimbra, 2012, 14.

In a different decision, the Évora Court of Appeal, in its ruling dated from 9 June 2022[40], decided that even though the deceased had died in Portugal, where he had been living for almost one year, that did not allow to confirm that he had its habitual residence in Portugal, even more if during more than two decades, the deceased had lived in the Netherlands. In order to reinforce its decision, the Court also stated that the deceased had only come to Portugal when his wife had gone to Canada to take care of one of her ascendants, which demonstrated the temporary feature of this decision to move to Portugal, and also that the deceased had moved without any of his belongings, and finally that when he had to give an address to the Portuguese Social Security, the deceased provided his address in the Netherlands. In the end, the Court decided that the habitual residence of the deceased was in the Netherlands, and not in Portugal, and therefore that the applicable law to the succession was the Dutch law. The implications of such determination were somehow relevant, since the deceased had died in a marital status, and therefore the spouse would be entitled to a different hereditary portion depending on the applicable law[41-42].

Within the aperture inherent to the application of the habitual residence connecting factor set forth in article 21 of the Regulation, the Guimarães Court of Appeal, in its ruling dated from 22 May 2025[43], decided that the Portuguese courts were competent to rule on a succession of a deceased who was a Portuguese citizen, even though for the last eight years his domicile was in Spain, given the fact that the moving to Spain only related to the deceased's physical debility and age, in order for her to reside with a daughter, since staying alone in Portugal was no longer an option. The Guimarães Court of Appeal expressly referred to recital no. 23 of the Regulation, where it is stated that "[i]n order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation"[44].

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40 Ruling from the Évora Court of Appeal, 9 June 2022, process no. 2981/19.1T8PTM.E2, judge Maria João Sousa e Faro.

41 Contrarily to what happens in Portugal, where if the deceased dies and has a spouse and ascendants, the inheritance must be split between them – see article 2161, paragraph 1, of the Portuguese Civil Code -, the Dutch legal system provides for a different solution, more beneficial to the surviving spouse, as it was referred by the Court.

42 Differently, the already mentioned ruling from the Lisboa Court of Appeal, 9 February 2023, process no. 4932/20.1T8ALM-A.L1-2, judge Jorge Leal, expressly decided that "[w]here it is established that, towards the end of her life, the deceased moved to Germany and resided there in the home of one of her daughters, dying in that country approximately one and a half years later at the age of ninety, and where it is further established that she had previously worked in Germany before retiring and moving to Portugal with her husband, it must be concluded that Germany was the country of the deceased's last habitual residence", further declaring that the Portuguese courts lacked jurisdiction, which belonged to the German courts.

43 Ruling from the Guimarães Court of Appeal, 22 May 2025, process no. 1484/23.4T8VRL.G1, judge Paula Ribas.

44 The Court also referred, within this case, to recital no. 24 of the Regulation, where it is stated that "[i]n certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in

In fact, considering the flexibility inherent to the application of article 21 of the Regulation, and bearing in mind that the use of the habitual residence connecting factor demands the existence of a close and stable connection between an individual and the Member State of the last residence, the Court called upon itself to analyse the specific circumstances of the case, inclusively to take into account the duration of the residence of the deceased in Spain, the reasons behind such decision to move from Portugal, the most relevant connection between the deceased and its personal, familiar, professional and economic interests[45]. In the end, the Court decided that the applicable law to the deceased's inheritance proceeding should be the Portuguese law.

On a significantly different decision, the Porto Court of Appeal (*Tribunal da Relação do Porto*), in its ruling dated from 27 January 2026[46], explicitly decided that, even if the interested party within the pleading had brought to the Court's attention that the deceased always maintained a close proximity to Portugal, that all the deceased's children had been born in Portugal, that some of the deceased's children still lived in Portugal, that during the years the deceased always visited Portugal during a part of the year, and only in the close proximity to the death such visits had stopped due to the deceased health conditions, and also that the deceased had an apartment located in Portugal that was only sold due to health conditions of the deceased, it was possible to conclude the following: "[u]nlike many emigrants who, in the final stage of their lives and with significantly improved financial circumstances, choose to return to Portugal to spend their remaining years there, the deceased did not do so and remained in France".

The Court also stated that the deceased and the respective spouse had further "[…] reduced their ties with Portugal, a factor that is relevant in the present case, as evidenced by the alleged sale of the apartment they owned in Vila do Conde. Accordingly, […] the question of the international jurisdiction of the Portuguese courts could not have been decided differently from the manner adopted in the appealed decision. This is because the habitual residence of the deceased at the time of death would, in any event, have had to be regarded as being in France". In the end, the Porto Court of Appeal decided on the international incompetence of the Portuguese courts, that therefore had no jurisdiction to decide on the merits of the dispute.

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particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances".

45 As it is referred in the ruling from the Coimbra Court of Appeal, 10 January 2023, process no. 160/21.7T8CLB.C1, judge Henrique Antunes, "[t]he Court of Justice has already held that the use of the adjective "habitual" in the connecting factor indicates, on the one hand, that the residence must display a certain degree of stability and regularity and, on the other hand, that the transfer by a person of his or her habitual residence to a Member State reflects that person's intention to establish himself or herself there and to make it, on a stable basis, the centre of his or her interests" [free translation].

46 Ruling from the Porto Court of Appeal, 27 January 2026, process no. 1516/25.1 T8VCD.P1, judge Rodrigues Pires.

Notwithstanding any of the abovementioned decisions, the Guimarães Court of Appeal, in its ruling dated from 6 February 2025[47], went even farther in its interpretation.

In the said decision, the Court, after referring to recitals 23 and 24 of the Regulation, and to the second paragraph of article 21 – which establishes the exception that enables the application, to the succession, of a law that presents, in the specific case, a closer connection compared to the law of the habitual residence of the deceased at the time of death -, decided that the court that judged the case in first instance should hear again the parties within the proceedings, in order to confirm if there was any other significant connection between Portugal and the deceased, beside the execution, in Portugal, of a will where the deceased had selected the Portuguese law to be applicable to the succession, in order to ascertain the international competence and jurisdiction of the Portuguese courts to decide on the merits of the dispute. In this case, the Court clearly referred to the distinction between the law applicable to the succession, on one hand, and the international competence of the Portuguese courts to decide on the case according to article 4 of the Regulation, on the other. In the end, the Guimarães Court of Appeal declared that "[i]n our view, however, a decision reached on such a simplistic basis – namely, that the choice of Portuguese law automatically entails a choice of forum and jurisdiction – appears to disregard entirely the scheme established by the Regulation discussed above. It effectively applies, in matters of jurisdiction, a rule relating to the substantive law governing the succession, even though these two issues are addressed in distinct and unquestionably autonomous chapters of the Regulation, as has been demonstrated. Indeed, the law applicable to succession proceedings is one thing; the choice of the forum competent to conduct those proceedings is quite another. As has already been noted, the primary connecting factor for jurisdiction under the Regulation is the deceased's habitual residence. As we have seen, the determination of what is to be regarded as the deceased's habitual residence leaves a certain degree of discretion, as is apparent from Recitals 23 and 24 referred to above"[48].

Concerning this subject matter, and as it is taught by Anabela Gonçalves, there is a clear advantage on coinciding the applicable law to the succession and the international jurisdiction to deal with the succession proceedings of the courts of that same jurisdiction: "[t]he alignment between forum and applicable law offers the advantage that the court competent to determine the succession will apply its own national law, thereby reducing recourse to foreign law. Such an outcome lessens the likelihood of judicial error and promotes the sound administration of justice, as the court will be applying the legal system that it knows best"[49]. With this regard, and even though the unity of the succession's principle presupposes that, in principle, there should be a coincidence between a Member State's jurisdiction and the chosen applicable law to the succession, is it is also important to refer to article 6, subparagraph a) of the Regulation, where it is stated that where the law chosen by the deceased to govern his succession pursuant to article 22 is the law of a Member State, the court seised pursuant to article 4 may, at the request of one of the parties to the proceedings, decline jurisdiction if

[47] Ruling from the Guimarães Court of Appeal, 6 February 2025, process no. 1910/22.0T8GMR-A.G1, judge Anizabel Sousa Pereira.

[48] Free translation.

[49] *Gonçalves A.*, As linhas gerais do Regulamento Europeu sobre Sucessões, Cadernos de Direito Privado, Issue 52, 2015, 11 [free translation].

it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets.

Even though such provision does not explicitly apply to the situation decided by the Guimarães Court of Appeal, since in such case it was the courts of the Member State of the chosen law applicable to the succession that decided that the habitual residence connecting factor should be applicable, since the choice of law to the succession does not imply a choice of jurisdiction, the truth is that the Guimarães Court of Appeal seems to have handled the question it was brought before it within the spirit of that said provision of the Regulation.

On an different decision, the Évora Court of Appeal, in its ruling dated from 13 November 2025[50], referring to the universal scope of application of the Regulation to situations that present a close connection with both European Union Member States and non-European Union States[51], according to article 20 of the Regulation, was called to decide upon a situation where it had been requested the suspension of the succession judicial proceedings in Portugal, considering that there was already a lawsuit in course within the Queensland Court of Appeal (Australia) in order to confirm the domicile of the deceased ad the date of death. Within the case, given the fact that it would be possible to reach two contradict decisions within both the judicial proceedings – the one in Australia and the other in Portugal, due to the fact that the situation entailed real connections with several States[52] -, and bearing in mind that, according to articles 580 paragraph 3, and 980 subparagraph d) of the Portuguese Procedural Civil Code[53], the decision to be issued by the Portuguese courts related to the last domicile of the deceased would prevail under any circumstance before the Portuguese courts, the Court ended up deciding that there was no need to suspend the succession judicial proceedings in Portugal[54].

On another decision, the Lisboa Court of Appeal, in its ruling dated from 13 March 2025[55], decided that "[t]he legal concept of habitual residence is to be inferred from the factual circumstances established in the case and corresponds to the place that constituted the centre of the deceased's life at the time of death. Such a determination does not require absolute certainty or a single inevitable

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50 Ruling from the Évora Court of Appeal, 13 November 2025, process no. 775/24.1T8LLE.E1, judge Sónia Moura.

51 According to the said ruling, "[…] the provisions of the European Succession Regulation concerning conflicts of laws must be considered applicable *erga omnes*, i.e., as including the relations with States not bound by the Regulation".

52 As it is stated in the decision: "although the deceased was a British national, he was resident in Portugal, maintained no meaningful connection with the United Kingdom, and owned substantial assets in Portugal. The administrator of the hereditary state (*cabeça-de-casal*), on the other hand, points to the fact that the deceased lived for a period in Gibraltar, where he is said to have executed a will, and that he subsequently resided in Australia with a partner, with whom he had a son who is still a minor, and where he also left assets".

53 Portuguese Procedure Civil Code, Law no. 41/2013, 26/06/2013.

54 The Court also stated that, in Portugal, within the proceeding destined to confirm the jurisdiction of the Portuguese courts, it would be admissible any legally allowed probe mechanism according to Portuguese law, including documents and witnesses, as it happened in the specific situation.

55 Ruling from the Lisboa Court of Appeal, 13 March 2025, process no. 404/22.8T8CSC.L1-2, judge João Paulo Raposo.

conclusion; rather, it may be based on an evaluation of the factors deemed most significant among a number of relevant circumstances and on the relative weight accorded to the available evidence"[56].

Within such ruling, the Lisboa Court of Appeal ruled that, in the end, the fact that the deceased had previously established his habitual residence in Portugal back in 2016 for his retirement, living there at a rented home with his partner and constituting the centre of his life interests, was sufficient to frame his stay in Portugal within the notion of habitual residence established under the terms of the Regulation, notwithstanding his continued ownership of real property in Brazil. That, alongside with the circumstance that the deceased had died in Brazil, having travelled there in order to seek medical treatment for the sequelae of SARS-CoV-2 pneumonia, did not negate the existence of that connecting factor with Portugal, and therefore the Portuguese law was to be applied according to the terms of article 21 of the Regulation.

In yet another interpretation quest concerning the determination of the habitual residence of the deceased, this time for the purposes of applying article 4 of the Regulation, the Évora Court of Appeal, in its ruling dated from 18 September 2025[57], decided that the Portuguese courts had no international jurisdiction to rule over a case, considering that the deceased, even though born in Portugal, "[…] had died in Luxembourg in April 2018, had resided there from 1971 to 2013 and again for more than one year immediately preceding his death, had worked there, married a Luxembourg citizen and had children with her, that three of his four children and his two grandchildren resided there, that he had been buried there in accordance with his expressed wishes, and that he declared himself to be resident in Luxembourg in formal acts relating to the acquisition of a motor vehicle and the alteration of the matrimonial property regime in 2008 and 2016, it must be held that Luxembourg constituted the deceased's last habitual residence, notwithstanding the fact that he lived in Portugal between 2005 and 2016 following his wife's retirement"[58].

Moreover, pursuant to article 21 of the Regulation, the Porto Court of Appeal, in its ruling dated from 10 April 2025[59], decided that since the deceased had both Portuguese and French nationality, that he had residence both in Portugal and France, that he was in France at the time of the execution of a will that revoked a previously executed will in Portugal and that he was living in France at the time of death, that it was possible to conclude that the deceased's habitual residence at the time of death was France, considering that at such moment he presented a closer connection with France rather than Portugal, and therefore that the applicable law to his succession was French law[60].

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[56] Free translation.

[57] Ruling from the Évora Court of Appeal, 18 September 2025, process no. 157/22.0T8ENT.E1, judge Ricardo Miranda Peixoto.

[58] Free translation.

[59] Ruling from the Porto Court of Appeal, 10 April 2025, process no. 827/20.7T8OAZ.P1, judge Manuela Machado.

[60] Within such ruling, the Porto Court of Appeal also decided that "[t]he will executed by the deceased, being formally valid under French law, where the deceased held both French and Portuguese nationality, and where the testamentary disposition was made in France, the State in which he was habitually resident at the relevant time and in which he subsequently died, in accordance with the formal requirements prescribed by the law of the place of execution, is effective to revoke an earlier will executed in Portugal. This conclusion is reinforced by the fact that the disposition upon death falls, with regard to its formal validity, within the

From the analysis of all the abovementioned rulings it is possible to conclude that the use of the habitual residence connecting factor established in the Regulation is opened to interpretation, and that such interpretation may vary from court to court, and from one legal system to another. Such level of unpredictability has somehow been mitigated by the guidelines foreseen in recitals 23 and 24 of the Regulation, but nevertheless it is possible to confirm, from the referred Portuguese case law, that courts tend to issue contradictory decisions even when applying the same criterion, which may be considered a source of uncertainty. Notwithstanding, the truth is that given the potential number of complex connections that may be susceptible of existing between one citizen and several States, a strict and hard connecting factor that would not enable a certain degree of flexibility within the determination of the applicable law to the succession and to jurisdiction determination, would be contrary to recent developments under Private International law, and hence undesirable. Although this subject composes one of the biggest challenges inherent to the application of the Regulation, the more decisions are produced by courts all around the European Union, the more certainty and predictability will exist within the determination of the applicable law to the succession. Hence, it will be necessary to wait for further developments that will unequivocally contribute to the densification of the connecting factor *habitual residence* to be applied for the purposes of the Regulation.

5. Public Policy *(Ordre Public)* Considerations

As it is stated in article 35 of the Regulation, the application of a provision of the law of any State specified by the Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. Being that the case, it is worth noting that one of the main problems that may arise related with *ordre public* considerations and the application of the Regulation relates with the potential situation where a Member State in which a share part of the inheritance has to be reserved to some forced heirs of the deceased – as it happens in Portugal, with the established forced succession (*sucessão legitimária*)[61] – has to apply, to the merits of a potential dispute, provisions from any other legal system in which such forced heirs do not exist, and therefore in which there is no need to reserve any portion of the hereditary estate, the reserved share, to any heirs of the deceased[62].

connecting factors set out in points (a) to (d) of Article 27(1) of Regulation (EU) no. 650/2012" [free translation]. On a similar decision concerning the validity of a will executed under foreign law, the ruling from the Lisboa Court of Appeal, 30 May 2023, process no. 343/21.0T8RGR-A.L1-7, judge Luís Filipe Pires de Sousa, also decided that a will that had been executed in Canada, back in 16 May 2018, without attending to the formalities imposed by Portuguese Law, but in accordance with the laws of Canada concerning the formalities to be attended within the execution of a will, should be considered valid and therefore accepted for the purposes of sharing the hereditary state of the deceased in Portugal, according to Portuguese Law, pursuant to the provisions set forth in article 27 paragraph 1 subparagraph a) and paragraph 2 of the Regulation, provisions that, according to the Lisboa Court of Appeal, with regard to the formal validity of written dispositions upon death, establishes a system of alternative connecting factors designed to maximise the likelihood that such dispositions will be regarded as formally valid.

61 See articles 2156 and subsequent of the Portuguese Civil Code.

62 For a detailed and rich analysis on the topic, see *Riva I.*, The Impact of the EU Regulation on Cross-Border Successions in the Legal Systems of Member States – Ten Years After its Entry into Force, Edizione Scientifiche Italiane, The Italian Law Journal Book Series, Issue 7, Napoli, 2025, 13-49.

With regard to such *ordre public* considerations, the Lisboa Court of Appeal, in its ruling dated from 19 November 2019[63], clearly remembered that the international public policy exception operates *a posteriori*, that is, as an exception to the application of a foreign legal system that would, otherwise, be applicable to the situation. The Court also stated that "[w]here a foreign legal rule is applicable, the court must determine whether its application would offend the fundamental principles of the international public policy of the Portuguese State, leading to an intolerable result, whether from the perspective of prevailing ethical and legal standards (*bons costumes*) or from that of the fundamental principles of Portuguese law. If such is the case, the court must prevent that manifestly unacceptable outcome by refusing to apply the provisions of the foreign law that would otherwise govern the matter".

More specifically concerning to the Portuguese international *ordre public*, the Lisboa Court of Appeal also differentiated it from the Portuguese domestic public policy concept, stating that "[w]hereas the latter refers to the body of mandatory rules within the Portuguese legal system, operating as a limitation upon private autonomy and freedom of contract, the former is confined to the essential values of the Portuguese State. Only where those fundamental interests are jeopardised is it impossible to accept the legal outcome produced by a foreign legal system"[64].

The specific question raised before the Lisboa Court of Appeal related with the potential relevance of the Portuguese international public policy towards the protection of forced heirs, in case a spouse[65]. In fact, according to articles 2156 and 2157 of the Portuguese Civil Code combined, the spouse is considered a protected/forced heir (*herdeiro legitimário*) and therefore is entitled to a

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63 Ruling from the Lisboa Court of Appeal, 19 November 2019, process no. 28325/17.9T8LSB.L1-7, judge Micaela Sousa.

64 As it is referred by Ines Medic, "[i]n private international law public policy has a special function, different from its function in the context of purely domestic law. While in domestic law it usually coincides with the body of statutory mandatory rules, which cannot be set aside through party autonomy; in private international law it plays a different role. It serves as a limit of tolerance with regard to repugnant or otherwise unacceptable outcome of the application of foreign law and to unacceptable foreign judgments" – see *Medic I.*, Public Policy exception and EU Succession Regulation – Croatian Perspective, Liber amicorum Gašo Knežević, Univerzitet u Beogradu, 2016, 193. For a similar definition, see *Devaux A.*, The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?, The International Lawyer, Vol. 47, Issue 2, 2013, 238.

65 The controversies that arise with this regard are not new and have been addressed by several authors. Amongst others, see *Zalucki M.*, Impact of the EU Succession Regulation on statutory inheritance, Comparative Law Review, Issue 23, 2017, 237, in which is said that "[a]pplying the solutions in practice, specifically with reference to the Succession Regulation No. 650/2012 post 17 August 2015, may often mean that the citizens of other countries may be surprised at the legal succession solution. Although the differences are not significant, the absence of a given person within the circle of statutory heirs in another legal system or the order of naming heirs may be surprising. Thus, citizens may lose trust in the law". The same Author refers that "[t]he rights of heirs and other persons close to the deceased, and the creditors of the inheritance must be effectively guaranteed. The current state, where there are differences between specific rules of national laws, cannot guarantee them, especially in the area of statutory succession, testamentary inheritance, the protection of the persons close to the deceased and the liability for inheritance debts. Therefore, it must be considered whether at the level of the European Union there is a possibility of further institutional harmonization of succession law" – see *Zalucki M.*, The future of Succession Law in the EU. A proposal, Future Law, eds. *Botelho C., Veiga F.*, 2020, 583.

reserved share of the hereditary estate of the deceased. Notwithstanding, and even if the Portuguese Civil Code establishes such a degree of protection over the spouse, it would be necessary, in order to confirm the application of article 35 of the Regulation, to confirm if such a protection was deemed to be included in the essential values and fundamental interests of the Portuguese State[66].

In the case, the Lisboa Court of Appeal decided that even though the hereditary protection of the surviving spouse had progressively expanded in Portugal, "[…] such protection cannot be regarded as an essential or core element of the Portuguese constitutional order, particularly since the Constitution of the Portuguese Republic[67] leaves the regulation of the effects of death on marriage to ordinary legislation (see Article 36(2) of the Portuguese Republic Constitution)", and that, therefore, such consideration would allow for the adoption of different legislative solutions to the specific case[68-69].

Although the decision handed down by the Lisboa Court of Appeal does not, at least in this instance, deserve our censure, the truth is that the arguments used to justify it do not seem to be credible. When the Court says that Portuguese law has traditionally guaranteed that children receive at least a portion of their parents' estate, a rule inspired by considerations of public interest and public policy, and that the same cannot be said of the succession rights of the surviving spouse, the truth is that it seems to be forgetting that the inclusion of the surviving spouse as a forced heir of the deceased dates back to 1977[70], and is strongly correlated with the entry into force of the Portuguese Republic Constitution of 1976, after the Portuguese 25th of April revolution. That premise, alongside the idea that the principle of equality between spouses has been foreseen in article 36 of the Portuguese Republic Constitution since 1976, the date of the implementation of the said Constitutional text, seems to provide the surviving spouse with a degree of hereditary protection close to the one established for descendants.

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66 Historically, the reserved share of the hereditary estate in Portugal (*legítima*) that must be safeguarded to the forced heirs has been seen, by the Portuguese Courts of Appeal, as included in the concept of international public policy. For such purposes, see, amongst others, the ruling from the Portuguese Supreme Court, 23 October 2008, process no. 07B4545, judge Pires da Rosa, the ruling from the Lisboa Court of Appeal, 7 March 2017, process no. 2341/13.8TBFUN.L1-7, judge Cristina Coelho, or even the ruling from the Portuguese Supreme Court, 16 May 2018, process no. 2341/13.8TBFUN.L1.S1, judge Roque Nogueira.

67 Portuguese Republic Constitution, 10/04/1976.

68 The situation involved the application of the laws of Mozambique to the succession of the deceased, according to the application of article 21 of the Regulation, and to whether the application of such inheritance legal system, in case of not including the surviving spouse as a forced heir, should be deemed not applicable to the situation due to international public policy considerations.

69 Within its ruling, the Lisboa Court of Appeal also declared that "[n]ot all provisions of Portuguese succession law form part of the international public policy of the Portuguese State. It is, however, clear that the Portuguese legal system has consistently protected the succession rights of children, including those born out of wedlock, by safeguarding their reserved share of the estate through restrictions imposed upon gratuitous dispositions made by their parents. Such protection is ensured, inter alia, by Articles 2157, 2159, 2168 and 2169 of the Portuguese Civil Code. By contrast, no such conclusion may be drawn in respect of the surviving spouse. Whereas Portuguese law has traditionally guaranteed that children receive at least a portion of their parents' estate, a rule inspired by considerations of public interest and public policy, the same cannot be said of the succession rights of the surviving spouse" [free translation].

70 By virtue of the Decree-Law no. 496/77, of 25 November 1977.

An alternative path that could have been followed, from an argumentative point of view, by the Lisboa Court of Appeal, could have been based on the premise that, since 2018, with the entry into force of Law no. 48/2018, from 14 August 2018, it is admissible, provided the respective conditions are met, for spouses to reciprocally renounce their status as forced heirs of each other, which seems to suggest a weakening – merely theoretical, and always dependent on the mutual will of both spouses – of the spouses' inheritance rights[71]. Perhaps based on this premise it would be possible to consider valid the idea that the hereditary protection of the spouse does not fall under the international public policy reserve of the Portuguese State. However, this was not the Court's position nor line of thought, and therefore the decision, albeit for different reasons, does not deserve our complete approval.

In any case, with regard to such topic, and in the words of Rui Manuel Moura Ramos, which are relevant within this subject matter, "[i]t is not the mere absence of a system of forced heirship – stemming from the recognition of the deceased's unrestricted freedom to dispose of his or her property upon death – that is capable, in itself, of offending international public policy (still less the fact that such a system may be structured differently from that of the forum). Rather, what may trigger the application of the public policy exception are the consequences that, in a particular case, result from the application of the rules of a foreign legal system that does not recognise forced heirship, where those consequences are especially shocking to the legal conscience of the forum. This approach, which gives due effect to the exceptional nature of the public policy exception, implies that the application of a foreign law recognising the principle of complete testamentary freedom may be contrary to international public policy in certain circumstances, whilst not raising any such concerns in others. The decisive factor in drawing this distinction is whether the application of the foreign law to the specific case would manifestly offend the fundamental principles upon which the forum's conception of justice is based"[72].

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71 For purposes of a more detailed study about such possibility and the relevance in a Private International Law context, see *Patrão A.*, A renúncia recíproca à condição de legitimário em Direito Internacional Privado: entre o estatuto sucessório e o estatuto matrimonial, Revista Julgar, Almedina, Coimbra, Issue 40, 2020, 153-180.

72 *Ramos R.*, Sucessão legitimária e ordem pública internacional, Estate, Succession and Autonomy – New assets and new trends, eds. *Xavier R., Silva N., Rosas M.*, UCP Press, Lisboa, 2024, 183 [free translation]. The Author complements that "[a]ccordingly, it must be rejected that the mere absence of a system of forced heirship in the law governing a cross-border succession – or the fact that such a system is structured differently, whether with regard to the beneficiaries entitled thereto or the extent of the protected share, from the model adopted by the forum State – should necessarily trigger the application of the international public policy exception. Such an approach is not only inconsistent with the nature and operation of that general clause, which requires a case-by-case assessment, but also lacks any sound rational foundation. Moreover, it stands in clear tension with the prevailing policy considerations that currently inspire succession laws in many jurisdictions, including Portuguese law, particularly the increasing emphasis placed upon private autonomy and, in this context, upon the wishes of the deceased. This conclusion is further reinforced by the fact that, where the issue arises within the framework of a European Union Regulation, due weight must be accorded to the broader European legal context in which the question is situated" – *Ibid.*, 189. A specific situation where the application of the international public policy exception was raised, this time before the Italian courts, respects to a case where a foreign law, to be potentially applied by Italian courts, should be considered applicable or not based on the circumstance that an agreement as to succession was admitted under that same foreign law, and forbidden in Italy. Being that the

6. Agreements as to Succession and Other Subject Matters Regulated in the European Succession Regulation Not Yet Discussed Within the Portuguese Courts of Appeal and the Portuguese Supreme Court

Contrarily to what could be expected, there are certain grey areas of the Regulation that have not yet been addressed by the Portuguese Courts of Appeal or by the Portuguese Supreme Court. Given the nature and the complexity of such subject matters, it would be somehow expected that some issues should have already been discussed before the Portuguese courts. Nevertheless, the truth is that some of them, contrarily to the subject matters previously discussed in this paper, have not yet been subject to Portuguese case law appreciation[73].

As per the agreements as to succession, their definition for the purposes of the Regulation is set forth in article 3 paragraph 1 subparagraph b), where they are defined as an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement. Such definition corresponds, on a larger or smaller scale, to the one established in article 2028 of the Portuguese Civil Code, where it is stated that contractual succession occurs when, by contract, someone renounces the inheritance of a living person, or disposes of their own inheritance or the inheritance of a third party that has not yet been opened. Therefore, the agreement as to succession defined in the said provisions of article 3 of the Regulation corresponds to the Portuguese succession contracts.

It is important to note that, according to paragraph 2 of article 2028 of the Portuguese Civil Code, succession contracts are only permitted in the cases provided for by law, being all others null and void. As per the allowed succession agreements according to Portuguese law, they are only admitted in the exceptional cases foreseen in article 1700 of the Portuguese Civil Code, which establishes this possibility when disposing of one's own inheritance, or that of a third party, within the framework of a prenuptial agreement. Hence, it is possible to affirm that succession contracts are tendentially prohibited in Portugal, what raises the relevance of the topic within the application and framework of the European Succession Regulation[74].

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case, and according to the opinion of Maria Cristina Gruppuso, even though the prohibition of execution of agreements as to succession under the terms of article 458 of the Italian Civil Code could be considered a rule of internal public policy, it did not correspond to an international public policy rule, given the fact that such prohibition did not correspond to an "[…] essential and absolutely mandatory" principle of Italian law, to the point that it should hinder the application of a foreign law – *see Gruppuso M.*, Private International Succession Law case study. Agreements as to succession, public policy and protection of forced heirs under EU Regulation no. 650/2012, Cross-border couples property regimes in action before the Courts, Dykinson, S.L., 2022, 206.

73 According to Tibor Szócs, during the first three years application of the Regulation, the following subject matters had somehow raised several discussions within the legal doctrine and case law in Hungary and other Member States: the uncertainty of determining the law applicable to the admissibility of joint wills, the scope of the law governing the substantive validity of wills, *renvoi* in the rules of the Regulation, and also some specific procedural issues – see *Szócs T.*, The European Succession Regulation from the Perspective of the First Three Years of its Application, ELTE Law Journal, Issue 1, 2023, 45-61.

74 If succession contracts are tendentially forbidden in Portugal, and given their relevance within the organization, in advance, of a living person's succession, it would be expected that Portuguese citizens

According to article 25 paragraph 1 of the Regulation, an agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under the Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

As it is stated by Beatriz Fernandes concerning the said provision, "[t]he reference to the hypothetical succession law is of crucial importance. This follows from the diversity and particularity with which the substantive laws of the various Member States treat agreements as to succession. Were the provision not to determine the applicable law by reference to the time at which the agreement is concluded, a subsequent transfer of the future deceased's habitual residence to a State whose legal system does not permit such agreements could give rise to a period of legal uncertainty between the conclusion of the agreement and the opening of the succession. In the final analysis, the effects of a succession agreement that was validly concluded might ultimately cease to be recognised as legally permissible"[75].

The same article 25 establishes in its paragraph 2 that an agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, according to the Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded. It further states that an agreement as to succession which is admissible pursuant to the said provision shall be governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, with which it has the closest connection[76].

Notwithstanding, paragraph 3 of article 25 also determines that notwithstanding paragraphs 1 and 2 of the same provision, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have been chosen in accordance with article 22 of the Regulation, on the conditions set out therein. The said possibility, besides increasing legal security and certainty, also

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could have opted to resource to the mechanism provided by article 25 of the Regulation in order to validly execute a succession agreement under the terms of a different legal system. Nevertheless, that circumstance has not yet been addressed by any identified ruling of the Portuguese Courts of Appeal or the Portuguese Supreme Court.

75 *Fernandes B.*, Os Pactos Sucessórios no Regulamento Europeu das Sucessões – Sobre a qualificação como sucessório de um pacto para efeitos da aplicação do Regulamento (UE) n.º 650/2012 do Parlamento Europeu e do Conselho, Almedina, Coimbra, 2024, 131-132.

76 Given its factual nature, the use of the closest connection factor needs to be assessed according to the circumstances of each specific case, which can raise serious underlying difficulties in its application considering the variable factors of the situation, a circumstance that may ultimately generate legal uncertainty in determining the applicable law – *Fernandes B.*, Os Pactos Sucessórios no Regulamento Europeu das Sucessões – Sobre a qualificação como sucessório de um pacto para efeitos da aplicação do Regulamento (UE) n.º 650/2012 do Parlamento Europeu e do Conselho, Almedina, Coimbra, 2024, 134.

seems to increase the odds of validity of the agreement as to succession, something that is to be welcomed within the context of international successions[77].

In any case, the truth is that, given the general prohibition of the execution of agreements as to succession in Portugal, it would be expected that some decisions by the Portuguese Courts had already focused their attention on the topic, given the potential resource by Portuguese citizens to the potential use of article 25 of the Regulation. Even so, until this moment, at least that we are aware of, no ruling verses over this specific provision.

Moreover, within all the analysed decisions, no ruling from the Portuguese courts was found that related with the potential difficulties inherent to the interpretation of the *renvoi* provisions of the Regulation, specifically article 34[78], and to the determination of the applicable law according to article 22 of the Regulation, in this case based on a tacit choice of law, as it seems to be allowed according to the opinion of Carl Friedrich Nordmeier[79]. With regard to the latter of the topics, and without prejudice of the premise that party autonomy for choice of law purposes tends to contribute to legal certainty and predictability[80], the truth is that the potential interpretation of tacit acts that could lead to a choice of law pursuant to the said provision of the Regulation could lead to a certain degree of uncertainty and legal insecurity. In any case, no question has yet been handled by the Portuguese Courts of Appeal or by the Portuguese Supreme Court regarding such potential interpretation difficulties.

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[77] Notwithstanding, as it is referred by Agata Srokowska, "[t]he choice of applicable law is one of the manifestations of the autonomy of the will of the subjects in private international law. However, it is a manifestation of great significance. By allowing the choice of law, the legislator grants the competence to indicate the law applicable to a particular relationship (that is, the law to which that relationship is subject, to which it owes its legal existence) to the subjects of that relationship. Thus, it can be said that it shares its legislative powers with these subjects" – *Srokowska A.*, Choice of Law of Succession (Professio Juris Successoria) in the Light of the Regulation EU No 650/2012: Case Study – Analysis of the Preliminary Ruling in the Case C-21/22, Wybór Prawa Do Dziedziczenia (Professioiuris Successoria) W Świetle Rozporządzenia UE, 2022, 119.

[78] For a detailed analysis of such provision, see *Köhler A.*, General Private International Law institutes in the EU Succession Regulation – Some remarks, Anali Pravnog fakulteta Univerziteta u Zenici, Issue 18, 2016, 175-179.

[79] According to the Author, "[w]hereas an express choice of law gives rise to few interpretative difficulties, an implied choice, which must be inferred from the terms of a disposition upon death, requires a detailed examination of the disposition in question. By way of example, the second sentence of Recital 39 refers to references made to specific provisions of the law of the State whose nationality is possessed by the deceased. In addition, factors such as the language in which the disposition is drafted, the motives of the testator expressed therein, or the structuring of the succession in accordance with the requirements of the testator's national law may constitute indications of an implied choice of law. It should also be noted that the criteria governing an implied choice must be determined autonomously under EU law, rather than by reference to the law chosen" – *Nordmeier C.*, Derecho Internacional Privado de las Sucesiones en la Unión Europea: la determinación del derecho aplicable en el nuevo Reglamento 650/2012, de 4 de Julio de 2012, Revista de la Secretaría del Tribunal Permanente de Revisión, Year 2, Issue 3, 2014, 190-191.

[80] As it is referred in *Nagy C.*, What functions may party autonomy have in international family and succession law? An EU perspective, Nederlands Internationaal Privaatrecht, Vol. 30, Issue 4, 2012, 579.

7. Conclusion

As it is possible to conclude from all the above-mentioned rulings from the Portuguese Courts of Appeal and from the Portuguese Supreme Court, there are several topics that have been raised before the courts in Portugal concerning the application of the European Succession Regulation.

Within such topics, the main discussion has centred itself around the specific application of the habitual residence connecting factor for the purposes of articles 4 and 21 of the Regulation, given its undetermined nature and the lack of a definition provided by the Regulation itself, despite recitals 23 and 24[81]. Within this subject matter, it was possible to confirm that Portuguese case law has been interpreting such *habitual residence* connecting factor in broad terms, which has been leading to different decisions to be ruled in relatively similar cases, increasing unpredictability and uncertainty within international successions.

On the other hand, even though there has already been a ruling from the Lisboa Court of Appeal concerning the application of the international public policy exception, the truth it that it would be expectable that, given the contours of the Portuguese forced inheritance provisions – *sucessão legitimária* -, some more questions concerning this subject matter would already been addressed by the courts, something that did not happen. The same happens with the topic of agreements as to succession, given their tendential prohibition according to the Portuguese Civil Code. Nevertheless, until this moment, no ruling concerning the interpretation and application of article 25 of the Regulation has been issued.

Considering that, according to article 84, the Regulation shall apply from 17 August 2015, it can be deemed reasonable that not so many questions have yet been raised before the Portuguese Courts of Appeal or by the Portuguese Supreme Court. Notwithstanding, and given the complexity of some of the subject matters provided for in the Regulation, it is expected that in the upcoming years, more decisions related with the application of the Regulation's provisions will appear before the Portuguese courts. Being that the case, we will revisit, later, the position to be adopted by Portuguese case law, in order to assess it from a critical and constructive point of view.

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[81] As it is stated by Maksymilian Pazdan and Maciej Zachariasiewicz, "[d]ue to its very nature, ambiguities will continuously arise with respect to the connecting factor of the habitual residence. Although the choice of habitual residence by the EU legislature is to be welcomed, it will fall upon the European Court and the national judicatures to navigate carefully in applying this concept" – see *Pazdan M., Zachariasiewicz M.*, The EU succession regulation: achievements, ambiguities, and challenges for the future, Journal of Private International Law, Vol. 17, Issue 1, 2021, 113.

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The Diversity of Forms of Housing Policy Implementation in the Context of *Rent to Buy* and Their Impact on the Polish Legal Order

The article analyzes the influence of the British rent to buy (Right to Buy) on the shape of the diverse forms of implementation of housing policy in Poland. The starting point is the genesis of British housing policy after the Second World War, including the evolution of regulations enabling tenants to purchase council housing, from limited solutions provided for in interwar legislation to the extensive reforms of the 1970s and 1980s implemented during the government of Margaret Thatcher. The author indicates that solutions inspired by the British model, including the system of discounts and buyouts, contributed in Poland to a permanent reduction of municipal housing stock and the strengthening of the primacy of private ownership in housing policy.

Keywords: *Rent to Buy****;*** *Housing Policy****;*** *Right to Buy****;*** *Housing Cooperatives****;*** *Polish Legal System.*

1. Genesis and Evolution of the *Rent to Buy* Model in the United Kingdom

Rent to buy emerged from the need to ensure that lower-income individuals, newly entering the labour market, could obtain the right to their own home. In 1945, when the United Kingdom faced the most severe housing shortage in its history, it became necessary to implement programmes based on publicly funded housing construction. Large-scale building investments provided access to homes for a significant part of English society.

The Housing Act[1] 1936 enabled local authorities to sell council houses to their tenants. The purpose of this regulation was to provide citizens with the conditions necessary to establish a family and maintain a household by ensuring the availability of affordable and accessible housing for lower-income individuals who would not have been able to purchase private property. However, the Act introduced a number of restrictions intended to ensure the fulfillment of its objectives, maintain the stability of local communities, and prevent a market collapse resulting from a shortage of council housing. These restrictions were based primarily on economic criteria: council housing was to be available only to individuals with the lowest incomes and the greatest housing needs.

Early in the 1970s, the United Kingdom experienced significant political and social changes, accompanied by modifications to the restrictions governing the sale of council housing. In 1972, a reform was introduced that allowed tenants to purchase their dwellings from local authorities while bypassing a substantial portion of the previously established limitations. During the Conservative governments of the 1980s, the Right to Buy policy gained significant prominence under the leadership

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1 Housing Act 1936, 26 Geo 5 & 1 Edw 8, <https://www.legislation.gov.uk/ukpga/1936/51/pdfs/ukpga19360051_en.pdf > [01.01.2026].

of Margaret Thatcher. At that time, the process of selling council housing was accelerated, which led to a substantial increase in the number of owner-occupiers. Although this model of housing policy initially appeared highly beneficial both for citizens and for the state, it gradually evolved from a policy grounded in social and property-related objectives into a partisan political instrument. The regulations introduced by the Conservative Party were not adequately adapted to local needs. The possibility for tenants to acquire their dwellings became a universal entitlement, and the success of the policy was increasingly assessed primarily on the basis of the volume of housing sales it generated.

It soon became apparent that the housing policy model adopted in the United Kingdom contained a significant flaw. The government ceased to initiate new council housing investments. As a result, the market began to experience a shortage of housing available to low-income individuals. Consequently, the housing system in the country was effectively transferred into the hands of the private sector, which in turn led to an increase in both housing purchase prices and rental costs. At the same time as the expansion of the sector of properties purchased for rental purposes, investment in housing offering affordable rents declined. As a result of the reforms introduced during the government of Margaret Thatcher, the number of council dwellings decreased from approximately 6.5 million to 1 million, while the stock of social housing was reduced by 1.5 million units.

Since the late 1980s, the private housing rental market has been systematically developed through legal regulations. Under conditions of strong commercialization of the housing sector, there are currently no clear indications of a rapid improvement in the situation. Since the mid-1990s, average housing prices have increased almost fivefold, and in 2020 alone – during the COVID-19 pandemic – an additional increase of 8.5% was recorded[2]. As can be observed, the shortage of social housing caused by government policy has become a mechanism enabling private investors to raise prices and engage in speculation on the real estate market.

2. Polish Housing Policy in the Context of the *Rent to Buy* Model

The actions taken by the British government influenced Polish housing policy. The tendency to promote a homeownership-based model is, moreover, a phenomenon observed more broadly in many European countries, particularly in states with lower levels of income.[3]. This trend has persisted for many years. According to a report published by the European Statistical Office[4] approximately 70% of European Union citizens live in homes they own, while the remaining 30% rent their dwellings. The highest rates of homeownership were recorded in Romania (around 96%), followed by Slovakia

2 *Dąbrowiecki Ł.,* Wielki kapitał winduje ceny mieszkań. Europejczycy mają dość – chcą postawić mu tamę [Big Capital Drives Up Housing Prices. Europeans Have Had Enough – They Want to Stop It], <https://oko.press/wielki-kapital-winduje-ceny-mieszkan-europejczycy-maja-dosc-chca-mu-postawic-tame> [01.02.2026].

3 *Frączyk J.,* Najbogatsi w Europie żyją w wynajętych mieszkaniach. Polacy wolą własne [The Wealthiest in Europe Live in Rented Apartments. Poles Prefer Ownership], <https://businessinsider.com.pl/finanse/makroekonomia/wynajem-a-wlasne-mieszkanie-bogaci-wybieraja-wynajem-my-odwrotnie/z6k1310 > [10.01.2026].

4 Eurostat, Owning or Renting? What Is the EU's Housing Situation?, < https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/wdn-20211230-1 > [19.02.2026].

(92%), Hungary and Croatia (91% each), and Lithuania (89%). Poland also belongs to the group of countries with a high proportion of private homeownership; according to the same data, approximately 86.8% of citizens reside in their own homes. In contrast, Germany presents a different situation, where the rental model has traditionally prevailed, with only about 49% homeownership recorded in 2020. Against this backdrop, the influence of policies promoting homeownership – such as the *Rent to Buy* model – becomes particularly apparent, as they have indirectly contributed to the consolidation of an ownership-based housing policy in many European countries, including Poland.

The validity of this thesis is further supported by the fact that in Poland, occupants of cooperative and municipal housing were allowed to purchase their dwellings for a nominal fee relative to market value. The Act on Cooperatives of 29 October 1920[5] did not define the concept of a housing cooperative. It only specified the obligations of the founders, the procedure for establishment, the necessary governing bodies, and the legal basis for operation, namely the cooperative's statute. In the aftermath of war-related destruction, it became crucial to increase state activity in addressing citizens ' housing needs. Article 67(5) of the Constitution of the People's Republic of Poland of 22 July 1952 stated that "in the interest of the family, the Polish People's Republic strives to improve housing conditions, develops and supports various forms of housing construction with the participation of citizens, particularly cooperative housing, and ensures the rational management of housing resources."[6]. As a result of these efforts, Resolution No. 269 of the Presidium of the Council of Ministers of 8 May 1954[7] was introduced, concerning housing cooperatives and the role of cooperatives in residential construction. The legislative intentions were explicitly emphasized in the resolution, including the desire to make use of areas allocated by the state for housing purposes. The legal act distinguished between two types of cooperatives: building and housing cooperatives, and cooperative associations for the construction of single-family homes. Building and housing cooperatives were granted the ability to focus their statutory activities on either single-family housing (detached or terraced) or multi-unit residential buildings. The essence of this arrangement was that cooperatives transferred houses and apartments to their members solely for use; the cooperatives themselves continued to manage and operate the properties. The role of the state was to support cooperatives in construction by providing state-owned land, material assistance, and supplying the entities with the necessary building materials and resources.

Currently, Article 17^{14} of the Act on Housing Cooperatives[8] regulates the conditions and procedure for acquiring separate ownership of a dwelling by a cooperative member or by a non-member who holds a cooperative ownership right to that dwelling. It should be noted that this

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5 Ustawa z dnia 29 października 1920 r. o spółdzielniach (Act on Cooperatives of 29 October 1920), Journal of Laws 1920 No. 111, item 733.

6 Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 r. (Constitution of the Polish People's Republic of 22 July 1952).

7 Uchwała nr 269 Prezydium Rządu z dnia 8 maja 1954 r. w sprawie spółdzielni mieszkaniowych i zadań spółdzielczości w zakresie budownictwa mieszkaniowego (Resolution No. 269 of the Presidium of the Government of 8 May 1954 on Housing Cooperatives and the Tasks of the Cooperative Movement in Housing Construction), Monitor Polski 1954 No. 59, item 792.

8 Ustawa z dnia 15 grudnia 2000 r. o spółdzielniach mieszkaniowych (Act on Housing Cooperatives of 15 December 2000), Journal of Laws 2024, item 558.

provision has undergone a significant amendment concerning the non-equivalence of the consideration required. Until 2009, a cooperative member requesting the conversion of their cooperative right was obliged only to repay any outstanding debt to the cooperative and to pay fees equivalent to the construction costs of the dwelling. In cases where a tenancy right was converted into separate ownership, the member was required to repay any public assistance received by the cooperative only if such aid had been granted, and then only at its nominal value. It is necessary to agree with the position expressed by the Constitutional Tribunal of Poland in 2008, which stated that: "The legislator waived any supplementary payment by the member to the cooperative to cover the construction contribution, including the portion of building modernization costs attributable to the specific dwelling. Consequently, the financial benefit obtained by the cooperative in exchange for the transferred dwelling bears no relation whatsoever to its market value."[9]. This provision reflected the original concept of converting cooperative rights to a dwelling into full ownership. The process of transforming these property rights was characterized by numerous legislative errors and omissions, which arose with successive amendments to the Act on Housing Cooperatives. The legislator's actions were gradually corrected by the Constitutional Tribunal of Poland, which issued more than twenty extensive rulings concerning various provisions of cooperative housing law.[10]. The rulings addressed both fundamental principles and very specific issues, which, due to the large number of existing cooperative rights to dwellings, carried significant social and economic implications. It is important to note that the currently applicable Article 17[14] of the Act on Housing Cooperatives remains mandatory, meaning that housing cooperatives are legally obliged to transfer ownership of dwellings to their members upon request.

3. Conclusion – Effects of Implementing Solutions Inspired by the *Rent to Buy* Model in Poland

As a result of the transformations illustrated by the British real estate market[11] and the regulations allowing Poles to purchase cooperative dwellings, numerous negative effects have emerged in the housing market. The reduction of social housing through the introduction of buyout opportunities, high property prices, and correspondingly increased rental costs in major cities have forced certain groups engaged in professional activities to leave metropolitan areas. This development leads to a range of adverse implications.

First, it initiates a process of social polarization within large urban agglomerations, creating areas marked by significant disparities between the wealthiest and the poorest residents. Second, it negatively affects the financial stability of these cities, as original inhabitants often continue to commute to work locally, yet spend the majority of their income in their new places of residence,

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9 Constitutional Tribunal of Poland, judgment of 17 December 2008, case no. P 16/08.

10 *Kośnik L.,* Czy rząd zainteresuje się największą grupą uczestników rynku mieszkaniowego? Formuły pożegnalne [Will the Government Take Interest in the Largest Group of Participants in the Housing Market?], „Nieruchomości" 2024, no. 9, 45.

11 CPRE, Family Housing – The Power of Concentration, London 2008, < https://www.cprelondon.org.uk/wp-content/uploads/sites/10/2020/11/Family_Housing_Report2009.pdf > [20.01.2026].

thereby impacting the local economy. Third, pressure on the housing sector and infrastructure in rural areas intensifies, as these areas become increasingly attractive to the incoming population.

As can be observed, the Polish system incorporates numerous legal solutions inspired by Thatcherite housing policy. Discounts represented one of the key instruments supporting the development of a private ownership model in housing policy. Following the example of the *Right to Buy* scheme, the Polish state applied these measures primarily to municipal dwellings and, to a lesser extent, within support programmes for individuals with limited financial means.

The implementation of a private ownership system within housing policy often relies on mechanisms that facilitate citizens' acquisition of dwellings. Various forms of support are employed for this purpose, including hybrid systems that combine tenancy with ownership. The state can achieve this by introducing instruments such as discounts or preferential sales conditions. In Poland, this process was particularly visible during the period of systemic transformation and in the subsequent years, for example, until 2012. At that time, the state or local government authorities widely transferred residential units to tenants with substantial discounts. Although the scale of this phenomenon has diminished as housing stock has become depleted, legal provisions allowing for the application of similar solutions still exist.

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Easement of Necessity in Austrian and Georgian Law

This article examines the law of easement of necessity in Georgian and Austrian law. In Austrian law, the institution is governed primarily not by the Austrian Civil Code itself, but by the Notwegegesetz of 1896. The Austrian model is characterised by three central features. First, it treats the necessary way as a subsidiary and judicially shaped exception to the exclusivity of ownership. Secondly, it subjects the claim to a structured proportionality assessment centred on the absence or inadequacy of access, the needs of the dominant land, the least burdensome route and the exclusion of claims caused by the applicant's striking carelessness. Thirdly, Austrian law integrates compensation, land-register effects and the later modification or extinction of the granted easement into the statutory regime.

The article analyses Austrian Supreme Court case law on ordinary use, zoning and building purposes, the impact of motorisation on adequate access and the requirement that the burden on the neighbouring land remain limited. On that basis, it argues that Austrian law offers a comparatively differentiated framework for balancing access needs and property protection. The Austrian solution may therefore serve as a useful point of reference for the doctrinal clarification and procedural refinement of Georgian law.

Keywords: *Easement of necessity, Civil Code of Georgia, Civil Code of Austria, Notwegegesetz, Austrian property law, landlocked land, servitudes, neighbour law, comparative private law, property access, compensation.*

1. Introduction

The institution of easement of necessity addresses a classical conflict in property law. One owner cannot properly use land because the plot lacks a sufficient connection to the public road network or another route required for its ordinary use. The neighbouring owner, however, is entitled to insist on the exclusivity and integrity of their own property. The law must therefore determine under which conditions one parcel may be burdened for the benefit of another and according to which standards necessity, proportionality and compensation are to be assessed.

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For comparative purposes, Austrian law is of particular interest because it belongs to the same broad continental private-law tradition as Georgian law, yet regulates this issue through a comparatively detailed special statute. The Austrian approach does not treat the matter merely as an unwritten implication of general neighbour law. Instead, it organises the institution through a separate statutory framework that combines substantive conditions, judicial shaping of the route, compensation, land-register annotation and the later modification or extinction of the burden.

The aim of this article is to analyse the normative and practical treatment of easement of necessity in Austria and Georgia and, on that basis, to identify solutions that may improve the protection of property rights and the resolution of neighbour disputes.

The article first explains the legal regulation of easement of necessity in Austrian law, especially the relationship between the Notwegegesetz and the Austrian Civil Code. It then turns to Georgian law. In a further step, it examines the practice of the Austrian and Georgian Supreme Courts. Finally, it draws a comparative discussion from both doctrine and case law.

2. The Concept of Easement of Necessity in Austrian Law

2.1. Definition of an Easement of Necessity

In Austrian law, the relevant institution is the *Notweg* under the *Notwegegesetz* of 7 July 1896. The point is important at the outset because the first comparative instinct may be to look for a direct equivalent in the Austrian Civil Code. Yet the decisive operative rules are set out in the *Notwegegesetz*, while the Austrian Civil Code appears mainly as a statutory cross-reference in section 1 of that Act.[1]

Section 1 of the *Notwegegesetz* proceeds from the idea that a property may require legal access when it lacks the route necessary for ordinary management or use. The provision uses the term *Wegeverbindung* and expressly clarifies that it includes both an actual constructed path and access without an existing physical road. The provision is framed broadly enough to capture both complete landlocking and situations of inadequate access. At the same time, the Act is subsidiary. It does not apply where access can be obtained through expropriation, through the gratuitous use of foreign land under section 365 of the Austrian Civil Code, or under another special statutory regime.[2]

This statutory architecture already reveals a fundamental structural difference from the Georgian model under Article 180 of the Civil Code. Austrian law does not place the necessary way inside the code as a general neighbour-law norm. It constructs the institution as a special statutory mechanism that intervenes only when ordinary ownership logic would otherwise leave the land functionally unusable or significantly impaired.

Section 3 of the *Notwegegesetz* further indicates the forms which the necessary way may assume. The *Notweg* may consist in a footpath, a cattle drive, or a carriage road, or in the extension of already existing access rights. Austrian law therefore recognises from the outset that the form of

1 Notwegegesetz, RGBl. № 140/1896, § 1; ABGB, JGS № 946/1811, § 365.
2 Notwegegesetz, RGBl. № 140/1896, § 1; ABGB, JGS № 946/1811, § 365.

access depends on the nature and use of the dominant land and is not limited to one single technical type of route.[3]

Austrian legal literature reaches the same structural conclusion. Höfle describes the law of necessity as a narrowly framed institution of property law designed to secure the functional usability of land without dissolving the general priority of undisturbed ownership (Höfle 2009, 1-6). In a similar vein, Iro treats the Notweg as an exceptional, statutory burden justified only by concrete necessity and shaped by proportionality (Iro 2013, 169-171).

2.2. Conditions for Granting an Easement of Necessity

The first central condition is inadequate access. Austrian case law repeatedly states that the question whether a property requires a *Notweg* cannot be assessed merely by reference to the land's present factual use. The benchmark is rather whether the land has the access needed for its ordinary management or ordinary use. That assessment is objective and use-related. The Supreme Court has made clear that where land is included as building land, the necessary access must be judged not only by current temporary use, but by the building purpose that follows from its legal designation.[4]

The second important condition concerns proportionality and subsidiarity. Section 2 of the *Notwegegesetz* declares an application inadmissible where the benefit of the requested *Notweg* does not outweigh the disadvantages caused by the burdening of the neighbouring property. This places the Austrian solution firmly within a balancing framework. The statutory inquiry is therefore not exhausted by showing that access would be useful. The applicant must show a legally relevant necessity and the court must compare the benefit to the dominant land with the disadvantages to the servient land.[5]

The third limiting condition is the exclusion of cases caused by the applicant's own conduct. Section 2 also excludes the claim where the lack of access is attributable to the applicant's *auffallende Sorglosigkeit*. Austrian Supreme Court case law equates this concept with gross negligence, as held in section 1324 of the Austrian Civil Code. The Court The Supreme Court has also stressed that the concept is not to be applied mechanically. The purchase of land without sufficient access does not automatically amount to gross negligence. Whether the applicant acted with *auffallende Sorglosigkeit* depends on the circumstances of the individual case.[6]

The fourth condition concerns the concrete design of the route. Section 4 states that the type, scope and direction of the *Notweg*, as well as the detailed modalities of its use, must be determined by the needs of the land. At the same time, the burden on the affected neighbouring property must be kept as low as possible and the applicant's expense must likewise be minimised. Austrian law thereby combines necessity with route optimisation. The claimant is not entitled to the most comfortable or

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[3] Notwegegesetz, RGBl. № 140/1896, § 3.

[4] Austrian Supreme Court, 26/09/2003, 3 Ob 183/03p; Austrian Supreme Court, 11/12/2002, 7 Ob 208/02t; Austrian Supreme Court, 11/05/2011, 7 Ob 228/10w.

[5] Notwegegesetz, RGBl. № 140/1896, § 2; Austrian Supreme Court, 02/02/1994, 7 Ob 616/93.

[6] Notwegegesetz, RGBl. № 140/1896, § 2; ABGB, JGS № 946/1811, § 1324; Austrian Supreme Court, 29/09/2025, 4 Ob 207/24f; *Streller R.,* Auffallende Sorglosigkeit im Notwegerecht, Immolex, 2020, 274.

economically ideal path, but only to a path that adequately serves the dominant land while least impairing the servient one.[7]

Section 4 also contains substantive protection for specially sensitive areas. The available material shows that the grant of a *Notweg* is limited where buildings, enclosed courtyards, or gardens attached to dwellings would be affected. This confirms that Austrian law treats the necessary way as an exceptional interference with ownership, which must remain within narrow functional limits.[8]

A final condition of practical importance under Austrian law is compensation. Section 5 provides that the owner requiring the *Notweg* must pay appropriate compensation in a capital amount for all damage caused to the burdened land. The statute expressly extends the inquiry to disadvantages suffered by persons entitled to use the land, such as tenants or other users, even though the claim itself belongs directly to the owner of the burdened parcel. The Austrian model, therefore, does not understand the necessary way as a gratuitous neighbourly sacrifice. It is a compulsory burden accompanied by a monetary equalisation of the harm caused.[9]

This understanding is also reflected in Austrian commentary literature. The Notweg is generally classified as a statutorily shaped, servitude-like burden that may be imposed only where no adequate alternative access exists and only to the extent required by ordinary use (Höfle 2009, 27-34; Iro 2013, 170-172). Austrian writing, therefore, supports the view that the Notwegegesetz is neither a mere neighbourly accommodation rule nor a functional equivalent of unrestricted easement law. It is a narrowly confined corrective mechanism within property law.

2.3. Rights and Obligations of Property Owners

The rights and duties of the two property owners follow directly from this statutory structure. The owner of the landlocked or inadequately connected parcel has a right to request judicial access, but only within the conditions just described. The right is limited to what is necessary for ordinary management or ordinary use. Austrian case law, therefore, emphasises that the *Notwegegesetz* must be interpreted restrictively. The institution is meant to enable or facilitate the use of land, but not to maximise convenience or to relieve an owner from every practical disadvantage connected with a difficult location.[10]

Conversely, the neighbouring owner is under a duty to tolerate the granted route once the statutory conditions are fulfilled, but only to the extent defined by the court. The servient owner is not deprived of protection. Austrian law gives the servient owner at least four safeguards: First, the balancing test under section 2; second, the requirement under section 4 that the route be chosen in the least burdensome way; third, the entitlement to compensation under section 5; and fourth, later judicial adaptation or extinction of the route where circumstances change.[11]

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[7] Notwegegesetz, RGBl. № 140/1896, § 4.
[8] Notwegegesetz, RGBl. № 140/1896, § 4(3).
[9] Notwegegesetz, RGBl. № 140/1896, § 5; Austrian Supreme Court, 27/06/2006, 3 Ob 235/05p.
[10] Austrian Supreme Court, 19/10/1976, 5 Ob 634/76; Austrian Supreme Court, 15/12/2017, 1 Ob 216/17x.
[11] Notwegegesetz, RGBl. № 140/1896, §§ 2, 4-5, 24.

The dynamic nature of the Austrian model is especially visible in section 24. If a *Notweg* later becomes unnecessary, the court may terminate the easement of necessity upon application. The same provision also addresses the consequences of subsequent changes and allows the court to decide whether previously paid compensation must be partially refunded. This means that the Austrian necessary way is not conceived as an immutable and permanent burden in every case. It remains tied to the actual persistence of necessity.[12]

The judicial process also has property-law effects beyond the immediate dispute. Section 11 requires the court to order the annotation of the initiation of proceedings in the land register, while section 13 makes the court responsible for deciding on the grant of the *Notweg*, its concrete design, compensation and the payment deadline. The institution is therefore deeply integrated into Austrian land and procedural law and is not merely a declaratory statement of neighbourly duties.[13]

3. The Concept of Easement of Necessity in Georgian Law

3.1. Definition of an Easement of Necessity

Article 180 of the Civil Code of Georgia is entitled "Easement of necessity". It is part of the chapter on Neighbourhood Law and contains a provision that is particularly relevant to landowners who lack proper access to public roads or essential utilities such as electricity, gas and water supply networks. In such circumstances, the landowner is entitled to request that a neighbouring property owner permit the use of their land for the establishment of the necessary connection, provided that the circumstances are objective.[14] The legal concept of an easement of necessity is closely linked to other property rights and the grounds for the claim may allow the court to consider alternative means of achieving the same result as per Article 180 of the Civil Code of Georgia. However, it is important to note that these alternatives are subject to different conditions.[15] The requirement for an easement of necessity, as an extreme request against a neighbouring landowner,[16] necessitates an evaluation to determine whether other feasible alternatives have been exhausted.

3.2. Conditions for Granting an Easement of Necessity

The legal interest in establishing an easement of necessity derives from the factual circumstances in which the landowner is entitled to make such a demand under Article 180 of the Civil Code. This entitlement may be held by an individual or a legal entity and the nature of their legal

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12 Notwegegesetz, RGBl. № 140/1896, §§ 24-25.

13 Notwegegesetz, RGBl. № 140/1896, §§ 11, 13.

14 *Zoidze B.,* Georgian Property Law, 2nd ed., Tbilisi, 2003, 125-128 (in Georgian); *Akkermans B.,* The Principle of Numerus Clausus in European Property Law, 427; *Depoorter B. W. F., Parisi F.,* Fragmentation of Property Rights, 35-37.

15 Compare Civil Code of Georgia, Legislative Herald of Georgia, 26/06/1997, Arts. 233, 242, 247-248.

16 *Carter C. R., Carter D. R.,* Real Estate Transactions, 785-786; *Walt A. J., Raphulu T. N.,* The Right of Way of Necessity: a Constitutional Analysis, 475.

interest will differ accordingly.[17] The origin of this interest can stem not only from the factual situation but also from intentional actions, where one owner might seek to assert their claim without conditions.[18] The identity of the party making the request, whether an individual or a legal entity, is a critical factor in determining the necessity of the access.[19] To illustrate this point, one may consider a scenario in which an individual seeks access to a residential property, as opposed to a company requesting access for the purpose of transporting goods, such as the laying of a continuous pipeline.[20] Furthermore, questions have been raised concerning the scope of easement of necessity, including its length and width. This represents a significant encroachment on the adjacent landowner's property and therefore, it must be appropriately justified.[21]

3.3. Rights and Obligations of Property Owners

The right to an easement of necessity arises only in situations where no reasonable alternative exists and access is dictated by necessity. However, this does not preclude claims for access based on other rights in rem, such as building rights or servitudes.[22] Ultimately, necessity remains the decisive factor in regulating the legal relationship.

The concept of an easement of necessity establishes a structured system of obligations between property owners, arising directly from Article 180 of the Civil Code of Georgia and developed through consistent court practice. These obligations are not based on the parties' agreement but stem from the normative force of the law, reflecting the principle of neighbourly tolerance and the need to balance competing ownership interests.[23]

The owner of the neighbouring, encumbered land is under a legal obligation to tolerate the use of their property when the strict prerequisites for an easement of necessity are fulfilled. This duty is mandatory and does not depend on the landowner's consent, as it is imposed by law in situations of objective necessity. Such necessity exists when a land plot is wholly or substantially deprived of access to a public road or essential infrastructure, making its proper use impossible or significantly hindered.[24]

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[17] *Chanturia L. (ed.),* Commentary on the Civil Code of Georgia, Book II (Property Law), 107-110 (in Georgian).

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[19] *Chambers R.,* The Law of Property, 138-155; *Jackson P.,* Easements of Necessity, 134-135.

[20] *Shotadze T.,* Property Law, 271-272 (in Georgian); Atabegashvili D., The Issue of the Necessary Way in Neighbourly Relations, 105-106 (in Georgian).

[21] Compare *Erp S.,* European and National Property Law, 6-7.

[22] Bichia M., Defining the Legal Nature of Shared Rights, TSU "Journal of Law", № 2, 2022, 38-40 (in Georgian).

[23] *Shengelia E., Leonidze I.,* Easement of Necessity and Related Topical Issues in Notarial Practice, 20-21 (in Georgian); *Carter C. R., Carter D. R.,* Real Estate Transactions, 788.

[24] *Nachkebia A.,* Explanations of Civil Law Norms in the Practice of the Supreme Court of Georgia (2000-2013), 77-80 (in Georgian); *Rusiashvili G., Sirdadze L., Egnatashvili D.,* Civil Law (Collection of Cases),

This obligation is not unlimited: the interference must be proportionate, restricted to what is strictly necessary and implemented in a way that minimizes the burden on the neighbouring property. The courts emphasize that the encroachment must correspond to the functional purpose of the benefited land and should not result in excessive or unjustified harm, such as unnecessary demolition of existing structures or disproportionate restriction of use.

At the same time, the owner of the landlocked property, who seeks to establish an easement of necessity, bears significant obligations. Most importantly, they carry the burden of proof and must demonstrate that all legal conditions are fully satisfied, including the absence of reasonable alternatives and the objective necessity of access. Georgian judicial practice makes clear that partial fulfilment of these conditions is insufficient. The claimant must also act in good faith, meaning that the necessity cannot be the result of their own actions, such as voluntarily removing an existing access route or creating artificial obstacles. Furthermore, the requested access must be proportionate to the intended use of the property and cannot exceed what is required for its normal functioning.

A central obligation of the benefited owner is the duty to compensate the neighbouring landowner. Georgian courts consistently affirm that tolerance of an easement of necessity must be accompanied by fair compensation. This includes not only direct economic loss, such as reduced land value or limited use, but also broader impacts associated with the encumbrance. Compensation may take different forms, including one-time or periodic payments and must be determined in a reasonable and proportionate manner, avoiding excessive financial burden on the claimant while ensuring fairness to the affected owner.

The relationship between the parties is therefore characterized by reciprocity: one party must tolerate a legally justified interference, while the other must justify the necessity and compensate for its consequences. Both are bound by the overarching principles of necessity, proportionality and fairness, which guide the court in assessing each case individually. Easement of necessity is not merely a technical restriction on property rights but a legal mechanism designed to ensure the functional use of land while preserving the essential balance between neighbouring owners.

4. Court Perspectives

4.1. Austrian Court Practice

From a procedural perspective, Austrian law resolves *Notweg* disputes through a strongly shaped judicial process rather than through a purely abstract declaration of rights. Section 13 provides that the court decides on the grant of the *Notweg*, its design, the compensation to be paid and the deadline for payment. The court therefore determines not only whether access is owed, but also the exact legal and factual configuration of the relationship between the parcels.[25]

In the Austrian model, the judge does not merely confirm the existence of necessity. The judge determines the precise route by selecting its kind, extent, direction and conditions of use under section

358 (in Georgian); *Sakhokia L.,* Legal Features of the Acquisition and Rights to Land Plots Necessary for the Construction of Energy and Other Infrastructure Facilities, 101 (in Georgian).

25 Notwegegesetz, RGBl. № 140/1896, § 13.

4. Public interests may also enter the procedure. The material relating to section 11 indicates that where public concerns are relevant, the competent administrative authority is to be involved. This confirms that Austrian law situates the necessary way at the intersection of private property law, land registration and administrative considerations.[26]

The procedural setting is also linked to non-contentious proceedings. The RIS materials on the Act identify its amendment history with the *Außerstreit-Begleitgesetz* and the structure of the statute confirms that the proceedings are not designed as an ordinary damages action. Instead, they are intended to produce a judicially organised servitude tailored to the concrete facts of the land and the parties involved.[27]

Austrian Supreme Court practice under the *Notwegegesetz* is extensive and comparatively consistent. Several lines are particularly significant for the present article.

First, the courts define the need for access by reference to ordinary use rather than to the owner's temporary factual pattern of use. In a leading line of case law reflected, among others, in decisions 7 Ob 208/02t, 3 Ob 235/05p and 7 Ob 228/10w, the Supreme Court held that the need for a *Notweg* is not assessed solely by present factual use. If a plot is included in a development plan as building land, its need for access must be measured by that legal status. This is highly relevant for comparative analysis because it ties the doctrine of necessity to the normative function of the parcel, not merely to its present convenience.[28]

Second, Austrian case law has adapted the concept of ordinary use to modern mobility. The Supreme Court has repeatedly stated that the *Notwegegesetz* is intended to enable or facilitate the use of land and that progressing motorisation has increased the need for adequate vehicular access. This line appears in older case law and is reaffirmed in more recent decisions. I would change that to: "Particularly notable is 4 Ob 207/24f, decided on 29 September 2025, in which the Court confirmed that the owner of building land intended for residential use is, in principle, entitled to access by passenger car, lorry and vehicles serving public welfare needs, subject to the concrete design of the Notweg and the statutory balancing of interests. The case thus shows that modern Austrian law does not reduce the notion of necessity to a purely pedestrian minimum. At the same time, the dispute also shows the practical structure of Austrian Notweg litigation: neighbouring owners resisted vehicle access to a building plot and invoked abuse of rights and gross carelessness, but the Court nevertheless held that access suitable for residential use could, in principle, include access by passenger car and lorry.[29] However, the decision is also important because the Supreme Court did not itself determine the final width or technical design of the route. It set aside the lower courts' decisions and remitted the

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[26] Notwegegesetz, RGBl. № 140/1896, §§ 4, 11, 13.

[27] Notwegegesetz, RGBl. № 140/1896, § 9; Außerstreitgesetz, BGBl. I № 111/2003.

[28] Austrian Supreme Court, 11/12/2002, 7 Ob 208/02t; Austrian Supreme Court, 26/09/2003, 3 Ob 183/03p; Austrian Supreme Court, 27/06/2006, 3 Ob 235/05p; Austrian Supreme Court, 11/05/2011, 7 Ob 228/10w.; *Rainer H.,* Von Bauplätzen und Notwegen, immolex, 2020, 245-247.

[29] Austrian Supreme Court, 19/10/1976, 5 Ob 634/76; Austrian Supreme Court, 15/12/2017, 1 Ob 216/17x; Austrian Supreme Court, 29/09/2025, 4 Ob 207/24f.

case for further fact-finding, including expert assessment of the concrete route, its width, the burden on the servient land and compensation.

Third, the courts continue to insist on the statute's exceptional character. The Supreme Court has repeatedly declared that the *Notwegegesetz* must be interpreted narrowly. This restrictive orientation does not mean that the institution is ineffective. Rather, it means that the court will not grant a *Notweg* where the application is based merely on convenience, route preference, or an attempt to externalise the consequences of an owner's own grossly careless planning. The restrictive approach is therefore the doctrinal counterpart to the significant interference with the neighbouring owner's property.[30]

Fourth, the balancing of interests remains central in practice. A route may not be granted if the disadvantages to the burdened parcel outweigh the benefits to the dominant parcel. The Court has also clarified that, for this purpose, the relevant disadvantages are those of the property burdened by the *Notweg*. This reflects the statutory wording of section 2 and ensures that judicial reasoning remains attached to the actual proprietary burden created by the order.[31]

Fifthly, the applicant's conduct remains an important doctrinal filter. The Supreme Court has expressly held that *auffallende Sorglosigkeit* under section 2 corresponds to gross negligence. The category is especially relevant where an owner acquires land or intensifies its use while ignoring obvious access defects. At the same time, the case law does not convert every unsuccessful planning choice into gross negligence. This nuance is important because it allows Austrian law to distinguish between bad faith or highly careless conduct, on the one hand and ordinary risks of ownership or changed patterns of use, on the other.[32]

Several additional Austrian decisions sharpen the doctrinal picture. In 6 Ob 711/84, the Supreme Court accepted in principle that a Notweg may also serve access connected with the exercise of a trade or handicraft, but it stressed that the requested route must still remain confined to what is objectively necessary. The decision is important because it shows that ordinary use under the Notwegegesetz is not confined to a bare residential or pedestrian minimum; at the same time, the Court did not abandon the requirement that the burden imposed on the neighbouring parcel remain strictly necessary.[33]

Another useful line of authority is 1 Ob 62/22g, in which the Supreme Court underlined that the Notwegegesetz is not a substitute enforcement mechanism for rights that should be pursued on another legal basis. The dispute arose out of an access conflict in which the applicant sought to use the Notweg procedure although the real controversy concerned the scope of pre-existing legal relations. The Court rejected that approach and reaffirmed the subsidiary nature of the statutory remedy. In doctrinal terms, the decision matters because it preserves the boundary between the Notweg as an exceptional access remedy and ordinary private-law claims based on contract, servitude or other title.[34]

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30 Austrian Supreme Court, 19/10/1976, 5 Ob 634/76; Austrian Supreme Court, 15/12/2017, 1 Ob 216/17x.

31 Notwegegesetz, RGBl. № 140/1896, § 2; Austrian Supreme Court, 02/02/1994, 7 Ob 616/93.

32 Notwegegesetz, RGBl. № 140/1896, § 2; ABGB, JGS № 946/1811, § 1324; Austrian Supreme Court, 29/09/2025, 4 Ob 207/24f; *Streller R.,* Auffallende Sorglosigkeit im Notwegerecht, Immolex, 2020, 274.

33 Austrian Supreme Court, 14/12/1984, 6 Ob 711/84.

34 Austrian Supreme Court, 18/05/2022, 1 Ob 62/22g.

4.2. Georgian Court Practice

When bringing a claim in respect of a right to an easement of necessity, the claimant must indicate the preconditions laid down in Article 180 of the Civil Code of Georgia: (a) they must be the owner of the plot of land; (b) the plot must not have an adequate connection to a public road; (c) the use of the neighbouring plot as an easement of necessity must be dictated by the actual location of the property and its use in accordance with its functional purpose; (d) the neighbouring plot of land must constitute the only proportionate means of achieving the aim. The object of proof is determined by reference to which of these facts are contested by the owner of the neighbouring plot; and, in view of the procedural nature of the objections, the burden of proof is allocated between the parties.

The Supreme Court of Georgia has emphasized that the establishment of an easement of necessity is characterized by both material and procedural features and it serves as a legally binding means to uphold the right of ownership. When a dispute arises concerning the establishment of an easement of necessity, the court addresses the claim based on specific criteria outlined in Article 180. A claim for the right to an easement of necessity is valid when the plaintiff meets all the conditions specified by law: The plaintiff must be the owner of the land in question; The land plot must lack a proper connection to a public road; The use of a neighbouring land plot as an easement of necessity must be justified by the actual location of the land and its functional purpose; The neighbouring land plot must be the only proportional means of achieving access to the property. These prerequisites ensure that the establishment of an easement of necessity is both legally sound and contextually justified, preserving the balance between the property owner's rights and the neighbouring landowner's interests. In this case both the plaintiff and the defendants had a mutual obligation to tolerate interference with their land and, where applicable, to pay compensation.[35]

According to Part 1 of Article 180 of the Civil Code, the restriction of ownership is permissible only under objectively necessary circumstances, such as when the land plot of the owner making the request is inadequate or entirely unsuitable for use without an easement of necessity.[36] This would require the use of another's land.

The court clarified that in instances where the land is co-owned and already has an easement of necessity, all co-owners have an equal right to use the property. Consequently, it would be improper for one co-owner to demand an easement of necessity from the common property or from neighbouring owners.[37]

The court recognised and upheld the claim filed by the company against the proprietor of a private land plot for the construction of the Baku-Tbilisi-Ceyhan oil pipeline. The court expounded upon the legal principles that an easement of necessity constitutes a right of way and that, under Article 180 of the Civil Code, the owner of the neighbouring plot has an obligation to tolerate its use. This obligation is linked to the application of this legal provision, rather than the acquisition of

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35 Decision of the Supreme Court of Georgia № 3კ/1245-02, 05/03/2003.

36 Decision of the Supreme Court of Georgia № 3კ-689-03, 11/07/2003.

37 Decision of the Supreme Court of Georgia № ას-218-909-03, 05/11/2003 and № ას-1034-1269-05, 14/03/2006.

construction rights or an easement of necessity.[38] The company had acquired the land for the construction of an oil pipeline and to effectively utilise the acquired plot, the company required access to the oil network.

The court emphasised that the company's interest should be balanced against the public interest of implementing state infrastructure projects. It is, however, important to note that the development of judicial practice under Article 180 of the Civil Code of Georgia does not automatically justify restricting the property rights of individuals or private owners in connection with specific infrastructure projects. Consequently, the court did not address the issue of compensation in this case.[39]

The Supreme Court of Georgia further clarified that, based on Article 180 of the Civil Code of Georgia, a neighbouring landowner is only obliged to tolerate the use of their property if an easement of necessity crosses it. In this particular case, the property on which the disputed road ended was not clearly established. The claimant had voluntarily removed the existing connection, thereby worsening the situation. The Chamber concluded that this did not exempt the neighbouring landowner from the obligation to tolerate easement of necessity. In a separate case, the Supreme Court of Georgia elucidated that the onus is on the plaintiff to substantiate that the contested road has not been privatised and that they are obliged to utilise it in conjunction with the defendant as a requisite thoroughfare. The Court of Appeal's decision was based on a single piece of evidence supporting the plaintiff's claim, which was deemed inadequate to substantiate the assertion.[40]

The court determined that the Land Reform Commission had acted in an arbitrary manner during the distribution of land plots. Specifically, the Commission failed to consider the inclusion of a road measuring several metres in width, which was situated between the plots belonging to the disputing parties. This road was not included in the claimant's land registration certificate. However, the claimant subsequently amalgamated this road with their own plot, thereby effectively nullifying the road and subsequently demanding an easement of necessity from the neighbouring landowner.[41]

In another case, the Chamber noted that the necessity of using the disputed road must be established, as without it, the proper use of the land plot would be impossible. The claimant contended that the destruction of the common property road violated his legal rights, as the defendant's actions had impeded access to drinking water and obstructed entry to his yard. In contrast, the defendant contended that the road in question was privately owned by them and had never been a public rural road. The Chamber speculated that there might have been a public rural road between the parties in the past, which the neighbours used to access their land. In this case, it is essential to determine whether the proper use of the disputed road was hindered due to the arbitrary actions of the defendant.[42]

The fact that the plaintiff had used the land belonging to the defendants could not be used as a basis to impose the compensation amount suggested by the defendants on a monthly basis. The

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38 Decision of the Supreme Court of Georgia № ას-1416-1548-04, 21/04/2005.

39 Decision of the Supreme Court of Georgia № ას-123-464-05, 11/05/2005.

40 Decision of the Supreme Court of Georgia № ას-140-474-05, 17/05/2005.

41 Decision of the Supreme Court of Georgia № ას-9-378-05, 02/06/2005.

42 Decision of the Supreme Court of Georgia № ას-1283-1519-05, 08/06/2006.

Chamber concluded that neighbours, through whose land an easement of necessity passes, should be compensated. This compensation could be agreed upon as a one-time payment or, in some cases, as multiple payments determined through reasonable judgment. The court deemed it inappropriate to impose a monthly payment of 200 GEL on the plaintiff, as this would impose an undue burden on him. Consequently, the court ruled that the plaintiff should pay a reduced amount of 20 GEL. The Chamber rejected the plaintiff's argument that compensation should not be required on the basis that the defendants were not registered as owners in the public registry. The Chamber clarified that land in the legal use of an individual is considered their property, irrespective of its registration status.[43]

The court has determined that the legal restriction of ownership stipulated in Article 180 of the Civil Code is rooted in the principle of neighbourly tolerance, as enshrined in neighbourhood law. The obligation to tolerate easement of necessity is not contingent on the subjective will of the landowner but is instead governed by the normative will of the law, which fundamentally distinguishes it from agreements stipulated within the same Code. Consequently, the establishment of an easement of necessity can be decreed by a court order, even in the absence of the parties' consent.[44]

The necessity for intrusion on a neighbouring plot must be justified by objective circumstances, specifically when the plot is completely or largely isolated from public roads. Furthermore, it is incumbent upon the court to ascertain whether a previously extant road, necessary for the proper use of the land, has been cancelled. The term “easement of necessity” is understood to encompass both pedestrian thoroughfares and motor roads.[45]

The Supreme Court of Georgia determined that the Court of Appeal had issued an unanticipated ruling by dismissing the claim, as it had neglected to address the issue of replacing the unsuitable defendant with the appropriate one. The Court of Appeal had considered the neighbour of the claimant seeking easement of necessity as the inappropriate defendant because it did not determine whether the road, whose use the plaintiff sought to prevent from encroachment, passed solely through this neighbour's land or also through the land of another neighbour.[46]

In one of the cases, the court clarified that the amount offered by the Baku-Tbilisi-Ceyhan Pipeline Company to the neighbouring landowner constituted compensation under Article 180 of the Civil Code, rather than the purchase price or the expropriation amount for the land plot.[47]

The Court of Appeal determined that the legal basis for the claim was not Article 180 of the Civil Code of Georgia and that the subject of the claim was not the establishment of an easement of necessity, but rather the prevention of encroachment on the use of an existing road. The Supreme Court of Georgia elucidated that, in determining the legitimacy of the request for the prevention of encroachment, based on the requirements of Article 176 of the Civil Code, it is necessary to establish whether the land plot used as the disputed road is registered or is actually owned by the neighbouring

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43 Decision of the Supreme Court of Georgia № ას-328-648-05, 05/10/2005.

44 Decision of the Supreme Court of Georgia № ას-1108-1312-04, 18/07/2006.

45 Decision of the Supreme Court of Georgia № ას-144-486-07, 26/07/2007.

46 Decision of the Supreme Court of Georgia № ას-551-892-07, 01/02/2008.

47 Decision of the Supreme Court of Georgia № ას-802-1122-07, 22/04/2008.

landowner. It was further established that the official status of the plot as a road (its registration in the public registry) cannot affect the validity of the request to prevent encroachment.[48]

Article 180 of the Civil Code of Georgia stipulates that the establishment of an easement of necessity is only permissible in cases of genuine necessity and such a restriction on property rights is allowed only within the legal or contractual framework, in accordance with the Constitution of Georgia and the Civil Code. The Supreme Court of Georgia emphasised that partial fulfilment of the prerequisites for establishing an easement of necessity under Article 180 of the Civil Code of Georgia is unacceptable. This decision is consistent with the established practice of the Supreme Court of Georgia.[49]

In another case, the Court noted that when the prerequisites for establishing an easement of necessity, as provided by law, are met, the obligation to maintain such a road depends not on the subjective will of the landowner, but on the normative will of the law.[50] It was further emphasised that the necessity for a road must be substantiated by its historical absence. Additionally, when encroaching on a land plot with an easement of necessity, the rights of the property owner must be protected and undue burdens on the owner of the land encroached upon by easement of necessity must be avoided.

A sewer pipe installation on the owner's land requires the appropriate construction permit, project approval, the landowner's permit and/or a court decision regarding the establishment of an easement of necessity.[51]

In evaluating the expert's involvement and the expert's conclusion presented by the court, the court retains the prerogative to disregard the compensation calculation method proposed by the expert. In cases involving a one-time payment, the compensation will be calculated differently.[52] In one particular case, a neighbouring landowner sought compensation equivalent to the market value of the land, citing the construction of a gas pipeline across the centre of the plot, which rendered the remaining portion of the land unusable and deprived it of its original function.[53] It is imperative to assess the impact on the neighbouring land when calculating compensation. Photographs of the land were also discussed and it was clarified that, from a legal standpoint, they cannot be considered evidence that invalidates the expert survey.[54]

The Chamber further elucidated that an erroneous interpretation of Article 170 of the Civil Code of Georgia and the disregard for the neighbour's rights rendered the court's decision unlawful. The Court of Appeal had determined that the plaintiffs were not seeking an easement of necessity, but rather the restoration of a previously existing public road. Consequently, the Court of Appeal determined that the legal foundation for the claim was not Article 180 of the Civil Code of Georgia

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48 Decision of the Supreme Court of Georgia № ას-977-1177-08, 05/05/2009.
49 Decision of the Supreme Court of Georgia № ას-1048-1316-09, 23/03/2010.
50 Decision of the Supreme Court of Georgia № ას-443-415-2010, 26/10/2010.
51 Decision of the Supreme Court of Georgia № ას-685-641-2010, 30/11/2010
52 Decision of the Supreme Court of Georgia № ას-797-746-2010, 09/12/2010.
53 Decision of the Supreme Court of Georgia № ას-1410-1425-2011, 28/10/2011.
54 Decision of the Supreme Court of Georgia № ას-468-442-2011, 30/05/2011.

and that the dispute was not about establishing an easement of necessity, but rather preventing interference with the use of the road. However, the Court of Appeal failed to acknowledge that the plaintiffs' land was completely isolated from the public road.[55]

The restriction of the right to use an easement of necessity is inadmissible. However, it is important to note that an individual requesting the establishment of an easement of necessity does not possess the prerogative to unconditionally demand the complete or partial demolition of a building or structure owned by a neighbour. This is the case even if such demolition is claimed to be necessary for the construction of the road.[56] Instead, less restrictive alternatives for the neighbour to establish easement of necessity must be considered. In another case, The Supreme Court of Georgia elucidated that while the applicant petitioned for the prevention of encroachment by dismantling the building, the matter of demolition should only be addressed once the prerequisites for using the contested land plot as an easement of necessity have been established.[57]

It is imperative that the legal prerequisites for encroaching on a neighbour's property to create an easement of necessity be thoroughly assessed. For instance, the impossibility of connecting to a specific street must be due to objective circumstances, such as the inability to physically access another person's land or building, the inability of a vehicle to enter from a particular side, or other circumstances that prevent independent connection to a public road, regardless of the neighbouring landowner's will.[58]

To ensure the prompt registration of a legal entity's rights to a plot with the National Agency of Public Registry, a decision was submitted for enforcement. This decision addressed the granting of permission to the legal entity to utilise a neighbouring land plot for the construction of an easement of necessity, in exchange for the conditions offered to the neighbour. The decision also took into account the recognition of rights under Articles 180, 247 and 248 of the Civil Code of Georgia, with respect to the owner of the neighbouring plot. These rights encompass the conducting of oil and gas operations in favour of the legal entity/applicant, including the establishment of infrastructure.[59]

The Supreme Court of Georgia has observed that a landowner cannot be compelled to construct a new road that provides access to their property. In principle, the construction of roads does not fall within the remit of citizens and the undertaking of such construction would require disproportionately large expenses and efforts. The Court further observes that the persistent redirection of responsibility from one neighbour to another, with each individual being asked to provide an easement of necessity, serves to complicate the protection of the legitimate interests of the parties involved.[60]

The decision also stipulates that if the cadastral survey delineates the location and connection of the land plot to public roads, the court may deny the request of the parties to inspect the disputed

55 Decision of the Supreme Court of Georgia № ას-1070-1009-2015, 17/12/2015.

56 Decision of the Supreme Court of Georgia № ას-478-452-2011, 14/06/2011.

57 Decision of the Supreme Court of Georgia № ას-70-68-2014, 06/04/2015.

58 Decision of the Supreme Court of Georgia № ას-744-801-2011, 13/10/2011.

59 Decision of the Supreme Court of Georgia № ას-1332-1350-2011, 12/03/2012.

60 Decision of the Supreme Court of Georgia № ას-6-6-2012, 23/03/2012.

territory.[61] In another case, the burden of proof to challenge the circumstances outlined in the appeal, based on Articles 170, 172, 174 and 180 of the Civil Code, rested with the appellant. However, due to the appellant's non-appearance at the court hearing, the court applied the presumption that the appellant could not disprove the allegations.[62]

The Supreme Court of Georgia concurred with the Court of Appeal's explanation that the materials presented in the case did not allow for a clear conclusion. Consequently, it was impossible to determine whether a “necessary path” was being established within the framework of an already existing restriction or whether new restrictions were being imposed, potentially infringing upon the essence of the property rights associated with these plots.[63]

It is imperative to note that The Supreme Court of Georgia has repeatedly emphasised that the admissibility of a cassation appeal is not contingent solely on a discrepancy between the decision of the Court of Appeal and the established practice of the Court. The Court of Appeal's decision did not deviate from the Supreme Court of Georgia's consistent practice. The uniform and firmly established nature of such practices assumes particular significance in the interpretation of Article 180 of the Civil Code.

The cassation applicant (defendant) neither contested the existence of the prerequisites for obtaining the necessary right of way on the land plots he owned, as outlined in Article 180 of the Civil Code, nor did he dispute the sufficiency or relevance of the evidence supporting this fact, either in the counterclaim or at any stage during the court of first instance proceedings. The defendant only raised the issue of the facts presented by the plaintiff and the sufficiency of the supporting evidence at the appeal stage. It was only at this stage that the defendant claimed there had been a seizure of property for essential public needs. The court, operating under the principle of adversarial proceedings, was unable to discuss the factual circumstances that the defendant had failed to address in the counterclaim or at the court of first instance without a justified reason.[64]

The Supreme Court of Georgia rejected the cassation applicant's assertion that the court had erred in refusing to satisfy the claim on the basis that the defendant intended to file a future claim in accordance with Article 180 of the Civil Procedure Code concerning easement of necessity. The Chamber emphasised that it is the court's duty to assess whether there is a legal basis for the request to prevent the infringement of property rights in the case at hand. The court's function does not extend to evaluating potential future claims, nor does it resolve disputes based on such hypothetical grounds.[65]

The plaintiff proffered compelling evidence to substantiate the existence of the prerequisites for establishing the right of way. The court's conclusions were based on a thorough review of the case materials and expert opinions, in accordance with the procedure outlined in Article 105 of the Code of Civil Procedure. The cassation appeal did not present an admissible objection to this. Furthermore, the fact that the property owner is a religious association cannot be cited as a valid reason to deny the

61 Decision of the Supreme Court of Georgia № ას-722-678-2012, 23/07/2012.
62 Decision of the Supreme Court of Georgia № ას-125-119-2013, 20/05/2013.
63 Decision of the Supreme Court of Georgia № ას-478-454-2013, 18/07/2013.
64 Decision of the Supreme Court of Georgia № ას-1141-1187-2014, 08/12/2014.
65 Decision of the Supreme Court of Georgia № ას-1041-998-2014, 12/02/2016.

establishment of the right of way, particularly when the cassation applicant, without presenting any evidence, argued that attributing the right of use to the defendant would interfere with religious services.[66]

In accordance with the prevailing uniform practice, Article 180 of the Civil Code of Georgia imposes a restriction on the right of ownership of a land plot only when the prerequisites specified in the provision are indisputably present. Moreover, the obligation to fulfil these prerequisites remains irrespective of the proprietor's voluntary transfer of the land to a neighbour for a stipulated period or for any purpose (e.g. enhanced utilisation of the plot by the neighbour) and under any agreement (e.g. a good neighbour agreement, kinship, etc.).[67]

The Court has determined that the onus is on the plaintiff to demonstrate the necessity of establishing a right of way, as it is the sole and unalterable means of connecting the land plot. In order to substantiate their claim, the plaintiff is required to provide legally valid evidence. In this particular case, the plaintiff was unable to present facts and evidence demonstrating that establishing an easement of necessity on the defendant's land plot was unavoidable. Following a comprehensive review, incorporating the statements of the parties involved, the expert report and the on-site inspection report, the court concluded that the cassation applicant's claim lacked foundation under Article 180 of the Civil Code of Georgia and should not be sustained. Consequently, the cassation applicant's assertion concerning the necessity of constructing a road on the defendant's land plots was not substantiated, resulting in the dismissal of the claim.[68]

The Supreme Court of Georgia has further clarified that Part 2 of Article 180 of the Civil Code of Georgia provides a remedy for the owner of the land plot through which a neighbouring owner seeks to establish an easement of necessity. The onus, or burden of proof, is on the defendant to demonstrate that the absence of adequate connection to the public road was not due to the actions of the plaintiff, but rather to some form of arbitrary action on the part of the latter. The court emphasised the significance of examining cadastral drawings and orthophotos in such cases.[69]

The plaintiff's claim sought the restoration of access to the building and structure on his land, as well as the relocation of the defendants' building. The court observed that if the claim could not be satisfied based on the prerequisites outlined in Article 172 of the Civil Code, the legal basis for the plaintiff's request could stem from Article 180 of the Civil Code.[70]

The Court of Appeal erred in its assessment by failing to recognise that the plaintiff had been the initial proprietor of both plots, having initially sold the land plot to the defendant and subsequently initiated the dispute by demanding a road to access his land. In order to reach a correct conclusion, the court should have limited its decision to granting the defendant a pedestrian path of smaller width,

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[66] Decision of the Supreme Court of Georgia № ას-387-360-2017, 23/06/2017.

[67] Decision of the Supreme Court of Georgia № ას-1291-1211-2017, 15/12/2017.

[68] Decision of the Supreme Court of Georgia № ას-815-763-2017, 11/01/2018, № ას-102-100-2011, 24/5/2011 and № ას-70-68-2014, 6/4/2015.

[69] Decision of the Supreme Court of Georgia № ას-889-829-2017, 23/02/2018.

[70] Decision of the Supreme Court of Georgia № ას-1218-1138-2017, 28/06/2018.

rather than later establishing a full vehicle road.[71] In a separate case, it was determined that in the absence of an access road at the time of purchase, the responsibility for providing such a road lies with the parties involved in the transaction, rather than with the owner of the neighbouring plot.[72]

The Supreme Court of Georgia has elucidated that, under Article 180 of the Civil Code, the right to utilise another person's property for an easement of necessity constitutes a legal (non-contractual) right that enables the restriction of property use, irrespective of the neighbouring proprietor's consent. While the utilisation of a neighbouring land plot for the benefit of another can be arranged through a contractual relationship (i.e. an agreement with the neighbouring landowner), in this case, since the defendant did not agree, the plaintiff was entitled to request the establishment of the necessary right of way through court action. It can thus be concluded that the right to utilise a neighbouring land plot for the purpose of establishing a necessary connection to public roads arises in circumstances where the land plot is isolated from public roads or utility networks (such as electricity, oil, gas, or water supply) and no agreement exists between the landowners as outlined in Article 247 of the Civil Code.[73]

The Chamber determined that the circumstances outlined in the petition justify immediate enforcement, as the plaintiff's explanation regarding the potential duration of the dispute over the establishment of an easement of necessity is valid. The dispute could extend well beyond the completion deadline for the required works and failure to complete the works on time could result in significant financial losses for the plaintiff. Furthermore, the disruption of the gas supply would have a detrimental effect on a significant number of consumers.[74]

The right to an easement of necessity is formally valid if the plaintiff fulfils all the prerequisites specified by the norm.[75] The Supreme Court of Georgia further elaborated that, according to the corporation's own statement, no gas pipeline traverses the contested plot of land. Instead, the corporation requested the right to establish an easement of necessity during the rehabilitation works to deploy construction equipment. It is acknowledged by both parties that the completion of the rehabilitation works is beyond dispute and there is a consensus that no gas pipeline is present on the land in question. Consequently, the cassation applicant's request for legal encumbrance of the land is deemed to be without foundation.[76]

The pivotal issue in this matter is not the quantity of property owners whose rights will be constrained by the establishment of a requisite road, but rather the nature and extent of the restriction itself. The cassation applicant's submission of an admissible and substantiated cassation claim did not persuade the court of the absence of alternatives to the contested road, nor did it demonstrate its objective necessity. The fact that the contested road would traverse the entrance area of a public school is a contentious issue, as it could potentially pose a threat to students. Furthermore, the expert

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71 Decision of the Supreme Court of Georgia № ას-554-529-2016, 07/11/2018.

72 Decision of the Supreme Court of Georgia № ას-1513-2018(ბ), 18/02/2019.

73 Decision of the Supreme Court of Georgia № ას-1549-2018, 25/01/2019.

74 Decision of the Supreme Court of Georgia № ას-870-2018, 19/09/2018.

75 Decision of the Supreme Court of Georgia № ას-1869-2018, 25/10/2019.

76 Decision of the Supreme Court of Georgia № ას-138-2020, 03/06/2020.

opinion indicated the feasibility of arranging the road in an alternative manner, thereby further substantiating the possibility of establishing the road differently.[77]

A comparative analysis of Articles 247 and 180 of the Civil Code of Georgia illuminates that when an easement of necessity involves the encumbrance of a land plot with a specific right, the establishment of an easement of necessity clearly implies an imperative need to encumber the land with such a right.[78] The Chamber provides significant clarifications regarding the comparison of alternatives, the purpose of the territories and the consideration of negative consequences caused by the establishment of a necessary right of way, particularly when balancing the interests of the parties involved.[79]

In a particular case where the establishment of a necessary right of way was the sole issue under consideration, The Supreme Court of Georgia articulated the following: The issue of compensation did not arise within the scope of the present dispute and, naturally, The Supreme Court of Georgia cannot discuss it. However, it should not be understood in such a way that the defendants have lost the right to claim compensation.[80]

In this context, tolerance is understood to encompass not only the infringement of material rights, such as a diminution in income, the restriction of property usage, or a reduction in real estate value, but also the infringement of non-material rights. Compensation is not limited to the obligation to tolerate existing interference within easement of necessity, but also applies to any limitation, loss, deficiency, or impact that the owner must endure as a result of establishing easement of necessity.[81]

In the event that a plot of land is encumbered by an obligation pertaining to an easement of necessity and said land is utilised for commercial purposes, the compensation for the right of way may be determined on the basis of its rental value. This is due to the fact that leasing represents the most prevalent method of utilising real estate for conventional economic activities.[82] While the right of an easement of necessity implies a situation where there is no alternative, it must be based on necessity.

5. Conclusion

The right to property is a fundamental principle of private law, but it is not absolute. Easement of necessity is one of the clearest examples of how the law reconciles the owner’s freedom with the practical need to preserve the usability of land that would otherwise remain isolated or seriously impaired.

Austrian law offers a comparatively elaborate model. Under the Notwegegesetz, access is granted only on a subsidiary basis, subject to proportionality, minimal interference and compensation. The Austrian solution is doctrinally precise and procedurally structured. It links the scope of access to

77 Decision of the Supreme Court of Georgia № ას-1605-2019, 05/02/2021.
78 Decision of the Supreme Court of Georgia № ას-1058-2020, 09/02/2021.
79 Decision of the Supreme Court of Georgia № ას-936-2021, 27/10/2021.
80 Decision of the Supreme Court of Georgia № ას-58-2019, 22/03/2021.
81 Decision of the Supreme Court of Georgia № ას-786-2020, 20/01/2022.
82 Decision of the Supreme Court of Georgia № ას-172-2021, 30/03/2022.

ordinary use, requires the court to identify the least burdensome route and excludes claims arising from gross carelessness on the part of the applicant.

Georgian law pursues the same fundamental balance under Article 180 of the Civil Code, but the Austrian material suggests that some elements could be expressed more clearly and more systematically. This concerns not the basic idea of neighbourly tolerance, which is already present in Georgian law, but the judicial method for applying it in hard cases.

The comparative value of Austrian law lies, above all, in its differentiated remedial design. The Austrian model shows how access, route design, compensation, land-register effects and the eventual extinction of the burden can be integrated into a single coherent framework. This increases predictability and makes judicial balancing more transparent.

From the Austrian side, three recommendations seem especially useful for Georgian law. First, Georgian doctrine could state more expressly that easement of necessity is a subsidiary remedy of last resort and not a general corrective for every inconvenient access situation. Secondly, Austrian law shows the value of a clearer route-design methodology: the court should identify the least burdensome technically adequate route, rather than merely deciding in principle that access must be tolerated. Thirdly, the Austrian model demonstrates the practical advantages of integrating compensation, land-registration effects and subsequent modification or extinction into one coherent remedial framework. A clearer articulation of these elements in Georgian case law, or even in legislation, could improve predictability, reduce neighbour conflicts and make judicial balancing more transparent.

It is important to improve and broaden the legal understanding of easements in order to better protect private property owners' rights. A clearer and more comprehensive explanation of easements would help ensure their correct application in practice and strengthen the balance between neighboring property interests. Enhancing the legal framework and interpretation of easements can contribute to greater legal certainty, more effective dispute resolution and improved protection of ownership rights.

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Prıvıleged Shares in Joınt-Stock Companıes Under Turkısh Law

In joint stock companies, in addition to ordinary shares, it is possible to issue privileged shares. The legislature has, of course, established certain rules governing privileged shares. The purpose of these rules is to ensure the effective protection of privileged shares. To this end, the legislature has established mechanisms to safeguard the rights of privileged shareholders. Thus, the rights of privileged shareholders will not be compromised. The purpose of this study is to examine privileged shares in joint-stock companies through a doctrinal research method.

Keywords: *Privileged Share, Amendment to the Articles of Association, Special Committee of Privileged Shareholders.*

1. Introduction

In joint-stock companies, as a general rule, each share grants its holder the same rights and imposes the same obligations. This is known as the principle of equality among shares. Here, we are referring to ordinary shares. While the principle of equality is the rule in such cases, privileged rights may be granted in exceptional circumstances. According to Article 478(2) of the Turkish Commercial Code, a privilege is a superior right granted to a share regarding rights such as dividend, liquidation share, preemptive right, and voting right, or a new shareholder right not provided for by law. Under this regulation, a joint-stock company may grant certain shares priority rights over other shares regarding shareholder rights. For privilege shares to exist in a joint-stock company, as a general rule, a share or group of shares must possess differences and superiorities in shareholder rights compared to other shares.[1] The purpose of privileged shares is to prevent a power gap caused by shareholders who do not wish to exercise their participation rights. Additionally, they meet shareholders' expectations of earning higher profits.[2]

2. Principles Governing the Issuance of Privileged Shares

2.1. Regulation of Privileged in the Articles of Association

Provisions regarding the privilege must be included in the Articles of Association. It is mandatory that the privileged share be explicitly stated in the Articles of Association. The privilege may be created either through the original Articles of Association or by subsequently amending the

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1 *Şener O. H.,* Teorik ve Uygulamalı Ortaklıklar Hukuku, Seçkin Press, 1st Ed., Ankara, 2012, 526 (in Turkish).
2 *Bozgeyik H.,* Pay Sahibinin Hakları ve Borçları, Şirketler Hukuku, *Karahan S. (ed.),* Mimoza Press, Konya, 2012, 600.

Articles of Association. New privileged shares may be issued through an amendment to the Articles of Association, or existing shares may be converted into privileged shares.[3]

When creating privileged shares through a subsequent amendment to the Articles of Association, aggravated quorum requirements apply. To create privileged shares, the approval of shareholders or their representatives holding at least 75% of the capital is required. If these quorum requirements are not met at the first meeting, the same quorum requirements apply to subsequent meetings.[4]

2.2. The Requirement That Privileged Rights Be Attached to Shares

Privilege rights must generally be attached to shares. Therefore, if a share is transferred, the privilege right also passes to the transferee. There is no privilege right attached to the shareholder's person in this context. However, there is an important exception to this rule. This exception is regulated under Article 360 of the Turkish Commercial Code. It is known as a "group privilege right."[5] Further details on this matter are provided below.

2.3. Recognition of a Privilege as a Superior Right

For a share to be granted a privilege, it must be recognized as superior to other shares. The rights granted by this share must be different from and superior to the rights granted by other shares. If more rights are granted to shares than those provided by legislation, the existence of a privilege cannot be claimed since there is no difference or superiority among the shares.[6] However, there are also views in legal doctrine that consider it sufficient for a privilege to be superior only in comparison to ordinary shares, and thus interpret the concept of privilege differently.[7]

2.4. Specificity of the Privilege

The articles of association must provide a very detailed regulation of privileged shares. For example, a statement in the articles of association such as "Group A shares are privileged" is insufficient.[8] This is an general statement. The subject matter, nature, conditions, and limits of the preference must be clearly stated in the articles of association. For example, if a privilege is granted regarding dividend distribution, the articles of association must include provisions regulating the priority ratio, order, and applicable conditions. These detailed provisions must be very clear and leave no room for doubt.[9]

3 *Çebi H.,* Şirketler Hukuku, Seçkin Press, 1st Ed., Ankara, 2020, 237.
4 *Şener O. H.,* Teorik ve Uygulamalı Ortaklıklar Hukuku, Seçkin Press, 1st Ed., Ankara, 2012, 528.
5 İbid., 528.
6 *Çebi H.,* Şirketler Hukuku, Seçkin Press, 1st Ed., Ankara, 2020, 238.
7 İbid., 238.
8 *Aksu R.,* Şirketler Hukuku Ders Kitabı, Yetkin Press, 1st Ed., Ankara, 2025, 708.
9 *Şener O. H.,* Teorik ve Uygulamalı Ortaklıklar Hukuku, Seçkin Press, 1st Ed., Ankara, 2012, 529.

2.5. Prohibition on Establishing Privileged Rights Against the Public Interest

Pursuant to Article 478, Paragraph 4 of the Turkish Commercial Code: "*In joint-stock companies where more than half of the capital is owned, either individually or collectively, by the state, provincial administrations, municipalities, and other public legal entities, trade unions, associations, foundations, cooperatives, and their umbrella organizations; and in their subsidiaries where these entities hold the same proportion of capital; except for privileges that may be established on the shares they hold, no privileges as provided for in this Law may be established on other shares, on shareholders forming a specific group, on specific share groups, or on minority shareholders. This provision does not apply to joint- stock companies whose shares are traded on the stock exchange, credit institutions defined in Article 3 of Law No. 5411, or financial institutions*." According to this regulation, in joint- stock companies owned by the state, provincial administrations, municipalities, and other public legal entities, as well as trade unions, associations, foundations, cooperatives, and their umbrella organizations, and in their subsidiaries in which they hold an equal share of capital, privileges may be granted only to the shares held by these entities. However, this rule does not apply to joint-stock companies whose shares are traded on the stock exchange, credit institutions (deposit banks and participation banks), and financial institutions. In a joint-stock company, privileges granted to the state, public legal entities, and others listed in paragraph 4 of Article 478 of the Turkish Commercial Code prior to their becoming shareholders do not become invalid upon their acquisition of shares. In such cases, the privileges are merely suspended. If the entities listed in Article 478, Paragraph 4 of the Turkish Commercial Code leave the joint-stock company due to transfer or similar reasons, or if they hold a shareholding below the specified ratio, the suspended privileges may be exercised again.[10]

3. Types of Privileged Shares

3.1. Dividend Privileged

Dividend privileged may be granted in various forms.

3.1.1. Priority in Profit Distribution

The privilege may take the form of priority in profit distribution. These shares have the right to receive a portion of the profits decided for distribution before other shares. In this case, profits are distributed to the privileged shares first, followed by distribution to other shares. This method is the most important among the methods of granting profit distribution privileges. Its importance becomes evident when there is insufficient profit to distribute to all shareholders. If there is insufficient profit, it is not possible to distribute profits to other shareholders without first distributing them to the privileged shareholders holding the authorized capital.[11]

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[10] *Karasu R.,* Anonim Şirket Yönetim Kurulunda Belirli Grupların Temsil Edilme Hakkı, Ticaret ve Fikri Mülkiyet Hukuku Dergisi, Vol. 2, Issue 1, 2016, 36.

[11] *Çebi H.,* Şirketler Hukuku, Seçkin Press, 1st Ed., Ankara, 2020, 239.

3.1.2. Greater Share of Profits

Unless otherwise provided in the articles of association, the dividend is calculated in proportion to the par value of the share. Therefore, this type of privilege is an exception to the system of receiving dividends in proportion to the share. For example, in a corporation, it may be agreed that privileged shares may receive 5% more of the dividend than other shares.[12]

3.1.3. Cumulative Profit Distribution

Under this method, if the profit for the year is insufficient to cover the amount specified in the articles of association, the accumulated profit rights may be paid in full in subsequent years when the corporation generates a profit, and the shareholder holding the privileged shares may also demand this payment for past years.[13]

Pursuant to the principle of contractual freedom, these three methods adopted for profit distribution may be determined by applying at least two of them cumulatively.[14]

3.2. Privilege in Liquidation Proceeds

A privilege in liquidation proceeds refers to granting certain shares a priority over other shares regarding the distribution of the liquidation surplus. In such cases, the liquidation surplus is first paid to the privileged shares. The remaining balance is then distributed to the other shares in proportion to their paid-in capital, unless the articles of association provide otherwise. As with privilege rights regarding dividends, the Commercial Code does not contain any mandatory provisions regarding the form of privilege rights in liquidation proceeds. Therefore, privilege shares may be created in articles of association provided that the principle of good faith is observed.[15]

3.3. Privilege in Voting Rights

Privilege rights may generally be granted with respect to property rights. However, privileged voting rights constitute an exception to this general rule. Privileged voting rights may be granted by assigning a different number of voting rights to shares of equal par value. This rule strictly limits the method of granting voting privileges. Accordingly, voting privileges are granted by assigning a different number of voting rights to shares of equal par value. Privileged shares cannot be created by granting equal voting rights to shares of different par values. For example, if the par value of a share in Group A is 1 TL and the par value of a share in Group B is 5 TL, granting one voting right to each of these shares does not confer a privilege on Group A. However, a privilege may be granted by assigning different voting rights to shares with different par values. If the par value of a Group A share is 1 TL and the par value of a Group B share is 3 TL, Group B shares may be granted 6 voting rights.

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12 Ibid.

13 *Pulaşlı H.,* Şirketler Hukuku Genel Esaslar, Adalet Press, 8th Ed., Ankara, 2022, 541.

14 Ibid., 541.

15 *Çebi H.,* Şirketler Hukuku, Seçkin Press, 1st Ed., Ankara, 2020, 240.

While Group B shares should have three voting rights based on the principle of voting rights according to par value, the fact that each Group B share is granted six voting rights constitutes a voting privilege granted to Group B.[16] However, there is a limit to the privilege granted through this method. According to this limit, a maximum of fifteen voting rights may be granted to a single share. The fifteen-vote limit is determined by taking ordinary shares into account. This limitation does not apply in cases where corporate restructuring is required or where a just cause is proven. In these two cases, the local commercial court where the company's headquarters is located must review the corporate restructuring plan or the just cause and, based on this, issue a decision exempting the company from the limitation. Any amendment to the plan is subject to a court decision. If it becomes clear that the corporate restructuring will not take place or if the just cause ceases to exist, the court may revoke the exemption decision. The purpose of this measure to limit voting privileges is to contribute to transforming the organizational and operational structures of Turkish joint- stock companies from family-run businesses into a more institutionalized framework. This will bring a more professional management approach to the forefront and extend the lifespan of companies. However, this regulation limiting voting privileges is very difficult to implement in practice because it is a very strict rule and is rarely seen in practice.[17]

Voting privileges are ineffective in general assembly decisions regarding amendments to the articles of association, the granting of discharge, and the initiation of liability lawsuits. The principle of proportionality applies when these three decisions are made at the general assembly. Shareholders will exercise their voting rights in proportion to the total nominal value of the shares they hold.[18] The rationale for this is the importance of these decisions and the need to prevent voting privileges from being used as a tool of control. The underlying principle of voting privileges does not include the idea of aiding in the creation of power and control. The accepted approach is a professional management philosophy based on rational, modern, and corporate governance principles. Therefore, there is a limit to voting privileges.[19]

3.4. First Refusal Right Privilege

In capital increases conducted through external sources, the right of existing shareholders to acquire newly issued shares in proportion to their existing ownership in the company's capital is referred to as the right of first refusal. Existing shareholders have the right to acquire newly issued shares before third parties, in proportion to their existing ownership.[20] Privilege is also possible in this type of right. Privilege regarding the right of first refusal can be defined as granting shareholders who are granted privilege in acquiring new shares the right to acquire new shares issued as a result of the

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16 *Altaş S.,* Anonim Şirketler Hukuku, Seçkin Press, 3. Ed., 2023, 241 (in Turkish).

17 *Aydın F.,* Türk Ticaret Kanununda Anonim Şirketler ve Şirketler Topluluğu, Bilge Press, 4. Ed., Ankara, 2025, 98.

18 *Altaş S.,* Anonim Şirketler Hukuku, Seçkin Press, 3. Ed., 2023, 244-245.

19 Ibid., 244.

20 *Çakır Girit S.,* Anonim Şirketlerde İmtiyazlı Pay Sahipleri Özel Kurulu, LLM Dissertation, Kadir Has University Postgraduate Education Institute, 2024, 96.

company's capital increase in a proportion greater than the statutory ratio held by shareholders—in other words, granting them superiority over ordinary shares in acquiring new shares.[21] However, privilege regarding the right of first refusal is rarely seen in practice.

3.5. Group Privilege

According to Article 360 of the Turkish Commercial Code, provided it is stipulated in the articles of association, the right to be represented on the board of directors may be granted to specific share groups, shareholders forming a specific group based on their characteristics and qualities, and minority shareholders. For this purpose, the articles of association may provide that members of the board of directors be selected from among shareholders forming a specific group, specific share groups, or the minority; alternatively, the articles of association may grant the right to propose candidates for board membership. Unless there is a valid reason, the general meeting must elect the candidate proposed for board membership or a candidate belonging to the group or minority to which the right has been granted. The right to representation granted in this manner may not exceed half of the total number of board members in publicly traded joint-stock companies. Provisions regarding independent board members remain reserved. Shares granted the right to representation on the board of directors under this article are considered privileged shares. Thus, an exception has been made to the general principle defining the criteria for privileged shareholders.[22] The reason for including the group privilege as an exception is that, in joint- stock companies, the majority shareholders determine the board of directors, resulting in a strong bond forming between the majority shareholders and the board of directors. These strong bonds lead to minority shareholders being overlooked on the board of directors.[23] Therefore, group privilege ensures a strong bond between minority shareholders and the board of directors. However, board members appointed as a result of the right to representation on the board are not bound by the orders and instructions of the group they represent. Their legal status is equal to that of board members appointed in the ordinary manner. Therefore, all board members have the same rights and obligations.[24]

A candidate proposed by holders of group privileges to serve as a board member cannot be rejected by the general meeting unless there is a valid reason. If such a rejection occurs at the general meeting, a lawsuit may be filed to overturn the relevant general meeting decision. In this case, the doctrine states that if the court accepts the lawsuit, it would also imply the election of the candidate who was unjustly rejected.[25]

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21 İbid., 97.

22 *Şener O. H.,* Teorik ve Uygulamalı Ortaklıklar Hukuku, Seçkin Press, 1st Ed., Ankara, 2012, 528.

23 *Aytuğar B.,* Oy Hakkında İmtiyazlı Pay Grubunun Yönetim Kurulunda Temsil Edilme Hakkı, Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi, Vol. XXIII, Issue 1, 2019, 95-96.

24 *Gökçe S. Y.,* Belirli Grupların Anonim Şirket Yönetim Kurulunda Temsil Edilmesi İmtiyazı, Süleyman Demirel Law Review, Vol. 14, Issue 1, 2024, 694.

25 İbid., 695.

3.6. Privileged Shares Not Mentioned in the Law

The types of privileged shares are not subject to the numerus clausus principle. Privileges not provided for by law may also be created. For example, the right of a hotel's shareholders to use the facilities at the hotel constitutes a privilege.[26]

4. Protection of Privileges

4.1. The Function of the Special Committe of Privileged Shareholders

To preserve the appeal of privileged shares, it is not possible to impose restrictions on such privileges in a routine manner. For this reason, the legislature has set the special committee of privileged shareholders. The special committee of privileged shareholders shall convene in the event of resolutions to amend the articles of association that would prejudice the rights of privileged shareholders, or following a resolution by the board of directors to increase the capital under the registered capital system. This committee convenes for the purpose of "approving" or "rejecting" such decisions. Special Committes of Privileged Shareholders exist for each group of privileged shares.[27]

4.2. Procedure for Convening the Special Committee of Privileged Shareholders

The board of directors of a joint-stock company must convene the special commitee of privileged shareholders no later than one month from the date of publication of the general meeting resolution in the commercial register. If the board of directors fails to issue such a call within this period, any privileged shareholder may, within 15 days starting from the last day of the board's call period, request the local commercial court where the joint-stock company is headquartered to order the convening of the special committee of privileged shareholders. Thus, the Turkish Commercial Code imposes an obligation on the board of directors to convene the special meeting of privileged shareholders within specified timeframes. It also eliminates the risk of the special committee of privileged shareholders not being convened by granting each privileged shareholder's the right to apply to the court for a summons in the event of the board's failure to act.[28] However, there is an erroneous legal provision here. The 15-day period for privileged shareholders to file a petition with the commercial court should not be 15 days following the expiration of the period set by the board of directors for the call, but rather 14 days, because the 15-day statute of limitations begins not from the expiration of the one-month period prescribed for the board of director's call, but from the last day of that one- month period. Thus, the last day of the board of directors' notice period and the first day of the privileged shareholders' notice period fall on the same day. During this one-day period, both the board of directors may issue a notice and the privileged shareholders may file a petition with the

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[26] *Bozkurt T.,* Şirketler Hukuku, Yetkin Press, 16. Ed., Ankara, 2025, 507.

[27] *Aktaş B.,* İmtiyazlı Pay Sahipleri Özel Kurulu, PhD Thesis, Galatasaray University Social Science Institute, 2018, 60.

[28] *Altaş S.,* Anonim Şirket Genel Kurul Rehberi, Seçkin Press, 10. Ed., 2024, 169.

commercial court. Therefore, a legal amendment is necessary.[29] Despite this flawed regulation, if the privileged shareholders fail to convene within the special meeting period despite a call by the board of directors or the commercial court, the general meeting's decision to amend the articles of association is deemed approved. If, despite the summons, the special meeting of privileged shareholders cannot be held due to failure to reach the quorum, this results in the general meeting's decision remaining in limbo, which causes harm to the joint-stock company.[30] However, the Turkish Commercial Code has not clarified whether the general meeting's decision is valid if the board of directors fails to issue a summons and the privileged shareholders also fail to file a lawsuit. This matter will be clarified through judicial decisions.[31] As a result of this clarification through judicial decisions, the scope of liability for board members arising from their failure to convene the special committee of privileged shareholders will become clear. There is no provision in the Turkish Commercial Code regarding the convening of the special committee of privileged shareholders. Therefore, to the extent applicable, the provisions regarding the convening of the general meeting are applied.[32] After all, the special meeting of privileged shareholders is also a meeting where the relevant shareholders gather. Therefore, the notice of the special meeting of privileged shareholders must be published on the joint-stock company's website and in the Turkish Trade Registry Gazette. The notice must be issued at least two weeks prior to the meeting date. Shareholders listed in the share register, as well as shareholders who have provided their addresses to the company by submitting a share certificate or a document evidencing share ownership, must be notified of the meeting date, agenda, and the newspapers in which the notice was or will be published via registered mail with return receipt.[33] The agenda for the meeting of the special committee of privileged shareholders shall be determined by the party issuing the notice of the meeting. However, the content of the notice must be such that each preferred shareholder can understand that the special committee of privileged shareholders will convene at a specific place and time, and the notice must contain clear information regarding which joint-stock company the meeting pertains to, as well as the location, time, and agenda of the meeting. By its nature, the call for the meeting of the special meeting of preferred shareholders must pertain either to an amendment to the articles of association or to a resolution on a capital increase.[34]

The special meeting of privileged shareholders convenes with a majority representing at least 60% of the capital represented by privileged shares and makes decisions by a majority of the shares represented at the meeting. If these quorum requirements for the meeting and decision-making are not met, the decision of the special meeting of privileged shareholders is deemed not to have been made. The Turkish Commercial Code seeks to protect the company through strict quorums and prevent negative decisions from being adopted by a small majority.[35]

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29 *Karaköse O.,* Anonim Ortaklıklarda İmtiyazlı Pay Sahipleri Özel Kurulunun Toplantıya Çağrılması, TFM, Vol. 10, Issue 2, 2024, 273.

30 *Altaş S.,* Anonim Şirket Genel Kurul Rehberi, Seçkin Press, 10. Ed., 2024, 169-170.

31 Ibid., 170.

32 *Turgut S.,* Anonim Şirketlerde İmtiyazlı Pay Sahipleri Özel Kurulunun İşleyişi, TAAD, Vol. 11, Issue 39, 2019, 251.

33 Ibid.

34 Ibid.

35 *Altaş S.,* Anonim Şirket Genel Kurul Rehberi, Seçkin Press, 10. Ed., 2024, 170.

4.3. Situations Where a Meeting of the Special Committee of Privileged Shareholders Is Not Required

There are situations where it is not necessary to convene the special meeting of preferred shareholders. If a decision regarding the amendment of the company's articles of association in a manner that would violate the rights of privileged shareholders is adopted at a general meeting, and at least a majority representing sixty percent of the capital of the privileged shares has participated, and the holders of these shares have voted in favor of the general meeting's decision, the requirement for this decision to be additionally approved by the special meeting of privileged shareholders ceases to apply. In this case, the special meeting of privileged shareholders is not additionally convened, and approval of the general meeting's decision is not required. For example, in a joint-stock company with a capital of 100,000 TL, divided into 100,000 shares, the articles of association grant privileged rights to 10,000 shares. If, at the general meeting regarding the amendment of the articles of association, 6,000 of these 10,000 privileged shares are represented and 3,001 privileged shares vote in favor of amending the articles of association, the decision to amend the articles of association is deemed to have been approved by the special meeting of privileged shareholders, even if the decision would otherwise violate the rights of the privileged shareholders.[36]

All privileged shares in a joint-stock company may be held by a single shareholder. There is no statutory provision regarding the procedure to be followed in such a case. According to legal doctrine, in such a situation, the existence of a special committee of privileged shareholders cannot be invoked. Therefore, it is not possible for a non-existent committee to hold a meeting.[37] In such a situation, it will be sufficient for the privileged shareholder to have their approval or rejection of the general meeting resolution specifically recorded in the minutes of the general meeting or to submit a document addressed to and signed by the joint-stock company.[38]

4.4. Minutes of the Meeting of the Special Committee of Privileged Shareholders

When privileged shareholders conclude that their rights have been violated, they shall prepare minutes of the meeting at a special committee of privileged shareholders. The decision reached must be documented with a statement of reasons. The reason for requiring the minutes to include a statement of reasons is to facilitate judicial review.[39] However, there are also serious criticisms in legal doctrine regarding the requirement for the minutes to include a statement of reasons. While no justification is required when shareholders who voted against a general meeting resolution file a lawsuit against that resolution, requiring shareholders who voted against a resolution at a special committee of privileged shareholders to provide a justification is contradictory and unnecessary. Legal

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36 Ibid., 171-172.

37 *Nizamoğlu M.B.,* 6102 Sayılı Türk Ticaret Kanunu Uyarınca Anonim Ortaklıklarda İmtiyazlı Pay Sahipleri Özel Kurulu, LLM Dissertation, Bahçeşehir University, 2019, 99.

38 *Uysal E.,* Anonim Ortaklıklarda İmtiyazlı Paylar, LLM Dissertation, İstanbul Şehir University Social Science Insitute, 2015, 170-171.

39 *Altıntaş F. T.,* Anonim Şirketlerde İmtiyazlı Paylar ve İmtiyazlı Pay Sahipleri Özel Kurulu, LLM Dissertation, Ufuk University Social Science Institute, 2025, 104.

doctrine notes that requiring a statement of reasons would make it more difficult to file an annulment lawsuit.[40] This situation also creates uncertainty regarding whether multiple shareholders will present different reasons or a common reason.[41]

The Turkish Commercial Code does not regulate the content of the minutes of the special meeting of privileged shareholders. In this context, it is accepted in legal doctrine that the provision regulating the content of the general meeting minutes should be applied by analogy.[42] The minutes serve to establish key matters such as who attended the special committee of privivleged shareholders, whether the meeting was conducted in accordance with proper procedure, whether a representative from the ministry attended the meeting in cases required by law, who voted against the resolution, and under what quorum requirements for meetings and decisions the special committee of privileged shareholders was held.[43] Therefore, the minutes serve as a critical evidence.[44] This minutes, to be prepared by the privileged shareholders who participated in and voted on the decisions of the special committee of the privileged shareholders' must be submitted to the board of directors within 10 days. Additionally, along with the minutes, a list containing the signatures of at least the quorum of privileged shareholders who voted against the approval of the general meeting's decisions, as well as a common notice address to be used for any annulment lawsuit filed against the decision, must be provided to the board of directors. The minutes, along with the accompanying information, are registered and published in the Turkish Trade Registry Gazette. Failure to comply with any of these conditions results in the resolution of the special committee of the privileged shareholders being deemed not to have been adopted. In legal doctrine, there are doubts regarding the failure to register the minutes, along with the accompanying information, and publish them in the Turkish Trade Registry Gazette, as the board of directors is the body responsible for fulfilling this duty. Therefore, if the board of directors breaches its obligation to register and publish the minutes, deeming the special committee of privivleged shareholders' decision as not having been adopted would be contrary to equity.[45]

4.5. Decisions Violating the Rights of Privileged Shareholders

4.5.1. Amendment to the Articles of Association

4.5.1.1. Capital Increase

4.5.1.1.1. Capital Increase Through External Sources

In a capital increase through external sources, existing shareholders of the company and third parties contribute capital to the company to increase its capital. This capital increase may be carried

[40] *Erten C.,* Anonim Şirketlerde İmtiyazlı Paylar, PhD Thesis, Kocaeli University Social Science Instiute, 2023, 377-378.
[41] İbid., 377.
[42] *Altıntaş F. T.,* Anonim Şirketlerde İmtiyazlı Paylar ve İmtiyazlı Pay Sahipleri Özel Kurulu, LLM Dissertation, Ufuk University Social Science Institute, 2025, 104.
[43] Ibid., 105.
[44] Ibid.
[45] *Altaş S.,* Anonim Şirket Genel Kurul Rehberi, Seçkin Press, 10. ed., 2024, 172-173.

out either by raising the par value of existing shares or by issuing new shares.[46] A capital increase achieved by raising the par value of existing shares requires the unanimous consent of all shareholders. Naturally, since the decision is made by unanimous consent of all shareholders at a general meeting, a special committee of privileged shareholders is not convened.[47] In a capital increase through the issuance of new shares, existing shareholders acquire the new shares by exercising their preemptive rights in proportion to their existing shares. This prevents alienation among shareholders. However, the exercise of preemptive rights is not a mandatory right.[48] However, a capital increase is a right granted to the company. A capital increase is always possible when the conditions are met.[49] In legal doctrine, the fact that privileged shareholders with poor financial standing cannot participate in a capital increase through external sources does not constitute a violation of their rights, as this stems from the conditions for issuing new shares.[50] At this point, the type and scope of the privileged shareholder rights specified in the articles of association are important. If the existing privileged rights pertain to property rights such as profit or liquidation shares, as long as the scope of the right is preserved, the issuance of new shares – whether ordinary or privileged in the same regard – will not violate the rights of the existing privileged shareholders in the company.[51] However, since the benefit provided by a voting privilege to its holder is based on a mathematical effect, as the number of shares in a joint-stock company increases, the participation ratio of existing privileged shareholders in voting rights may decrease.[52]

4.5.1.1.2. Capital Increase Through Internal Sources

A capital increase carried out by converting reserves – including those set aside by the articles of association or a general meeting resolution that have not been earmarked for a specific purpose, the freely usable portions of statutory reserves, and funds that legislation permits to be included in the balance sheet and added to capital – is referred to as a capital increase through internal sources. Due to the nature of a capital increase through internal sources – which “generally does not impose any obligations on existing shareholders and does not alter the internal balances of the partnership” – the prevailing view in legal doctrine is that it does not require the approval of the privileged shareholders’ committee. In this type of capital increase, the internal balance of the company will not be altered; since the shares issued without consideration must have the same characteristics as existing shares – equipped with the same privileges.[53] However, there is an exception to this rule. There may be a joint-stock company where a privilege regarding profit distribution is accepted in the articles of association.

[46] *Yılmaz H.,* Anonim Şirkette İmtiyazlı Pay Sahipleri Özel Kurulu, PhD Thesis, İstanbul University Social Science Institute, 2024, 121.
[47] İbid., 121-122.
[48] İbid., 123.
[49] İbid.
[50] İbid.
[51] İbid.
[52] İbid.
[53] *Keleş Güven A. B.,* Anonim Ortaklıklarda İç Kaynaklardan Sermaye Artırımı, PhD Thesis, Galatasaray University Social Science Institute, 2023, 190.

Profits may be added to capital.[54] Here, what worsens the situation for the holder of preferred shares is not the failure to distribute profits. While shareholders could benefit from profits in a superior manner due to their privileges, the addition of profits to capital allows them to acquire the issued no-par value shares in the same proportion to the existing capital as other shareholders. Although it could be argued that no violation exists on the grounds that the company is not currently obligated to distribute dividends, in the example in question, it is not the general meeting's decision not to distribute profits that renders the privilege ineffective, but rather the decision to increase capital; if this decision is not based on a valid reason, it will violate the rights of privileged shareholders.[55]

4.5.1.2. Transition to the Registered Capital System

The registered capital system is a system that grants the board of directors the authority to increase capital within certain limits through an amendment to the articles of association. The purpose of the registered capital system is to eliminate the formalities of the authorized capital system. Under the registered capital system, the board of directors specifies the amount of the increased capital, the par values, numbers, and types of the new shares to be issued, whether they are issued at a premium or with privileged rights, whether the right of first refusal is restricted, and the conditions for its exercise. Therefore, transitioning to the registered capital system may potentially harm the rights of privileged shareholders. In this case, the scope of the authorities granted to the board of directors under the registered capital system is of great importance.[56] Consequently, a resolution of the special meeting of privileged shareholders may be required.

4.5.1.3. Capital Reduction

Capital reduction is the reduction of the authorized capital amount specified in the articles of association by a resolution of the general meeting. Capital reduction is carried out by either reducing the par value of shares or reducing the number of shares. The principle of equal treatment is a crucial distinction between these two methods. In the method of reducing the number of shares, certain shares are canceled. The canceled shares may be privileged shares or ordinary shares. Therefore, this method involves a violation of the principle of equal treatment. If ordinary shares are canceled, this benefits the privileged shareholders, and a resolution of the special committee of privileged shareholders is not required. If privileged shares are redeemed, the rights of privileged shares are impaired, and a special committee of privileged shareholders meeting is required for privileged shareholders. In the method of reducing the par value of shares, however, compliance with the principle of equal treatment exists. Therefore, in this method, a special committee of privileged shareholders resolution is not required for privileged shareholders.[57]

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[54] İbid., 191.

[55] İbid.

[56] *Cenkci E.,* Kayıtlı Sermaye Sistemi, PhD Thesis, Akdeniz University Social Science Institute, 2015, 133.

[57] *Örnek M. Y.,* 6102 Sayılı Türk Ticaret Kanunu Çerçevesinde Anonim Şirketlerde İmtiyazlı Pay Sahipleri Özel Kurulu, LLM Dissertation, Galatasaray University Social Science Institute, 2012, 71-72.

4.5.1.4. Change in the Company's Business Purpose

In joint-stock companies, the business scope is a piece of information that must be included in the articles of incorporation. Therefore, changing the business scope constitutes an amendment to the articles of incorporation. This situation may result in harm to preferred shareholders.[58] For example, a joint-stock company that sells sports equipment offers certain products at a discount to some of its shareholders. However, if this company changes its business scope by amending its articles of association to engage in mineral exploration activities, a special committee of privileged shareholder decision shall be required for privileged shareholders in this case.[59]

4.5.1.5. Change in the Company's Nationality

In a joint-stock company where privileged shares or share classes exist, and if the company's jurisdiction is changed, the key consideration is whether the privileges permitted under the current country's legislation are recognized in the new country, and whether there will be a narrowing or expansion of the rights of privileged shareholders.[60] If the company changes its nationality to a country that grants rights and benefits that are less extensive or more limited than those recognized under Turkish law, the privileged shares are violated. However, since changing the company's nationality is only possible with the unanimous consent of all shareholders or their representatives, there is no need to convene a special meeting of privileged shareholders, even if their rights may be adversely affected.[61]

4.5.1.6. Issuance of Beneficiary Certificates

The scope of beneficiary certificates is certain in the Turkish Commercial Code. Accordingly, the general meeting may decide to issue beneficiary certificates in favor of the holders of shares whose par value has been canceled in accordance with the law, creditors, or others with a similar interest in the company, either pursuant to the articles of association or by amending the articles of association. Beneficiary certificate holders cannot be granted shareholder rights; however, these individuals may be granted the right to participate in net profits, the liquidation surplus, or to acquire newly issued shares. Based on these limitations, beneficiary certificates do not represent the paid-in capital. They merely provide the opportunity to participate in the specified property rights.[62] Consequently, the issuance of income certificates may infringe upon the rights of privileged shareholders. For this reason, a special committee of privileged shareholders resolution may be required for the issuance of income certificates.

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58 *Turgut S.,* Anonim Şirketlerde İmtiyazlı Pay Sahiplerinin Haklarının Korunması, LLM Dissertation, Gazi University Social Science Insitute, 2019, 61.

59 Ibid.

60 Ibid., 60-61.

61 Ibid., 61.

62 *Şahin M.,* Türk Ticaret Kanununda İntifa Senetlerine İlişkin Yenilikler: Eski ve Yeni Döneme Dair Tartışmaların Değerlendirilmesi, İzmir Barosu Dergisi, Vol. 86, Issue 2, 2021, 106.

4.5.1.7. Extension of the Company's Term

Under Turkish law, joint-stock companies may be established for a certain term. This is very common in various sectors, such as infrastructure, in commercial life. If certain shareholders of such companies hold liquidation privilege, extending the company's term will delay the liquidation process, thereby harming the rights of shareholders holding liquidation privileges. In such cases, a resolution of the special committee of privileged shareholder is required.[63]

4.5.1.8. Merger and Acquisition

If more than one companies take the form of one company acquiring another company or companies, such a unification is referred to as a acquisition under the Turkish Commercial Code. If all companies combine their assets within the newly established company without going into liquidation, this is defined in the Turkish Commercial Code as a merger. Regardless of the merger or acquisition, the shareholders of the transferred company become shareholders of the acquiring or newly established company. At this point, any adverse disparity between the post-merger status of privileged shareholders and their current status must be evaluated by the special committee of privileged shareholders.[64] Privileged shares existing in the transferred company are granted equivalent rights or an appropriate consideration in the acquiring company. This situation must be clearly specified in the merger agreement.[65]

4.5.2. The Board of Directors' Decision on Capital Increase in the Registered Capital System

If the board of directors is granted the authority to decide on a capital increase under the registered capital system, it may be necessary to grant other authorities related to this authority as well. Decisions regarding the issuance of shares at a premium, the issuance of preferred shares to maintain the proportionality of existing preferred shares in the capital, and the restriction of preemptive rights are all related to capital increases.[66] However, it must be emphasized that the authority granted to the board of directors does not permit the issuance of new preferred shares not already provided for in the articles of association.[67]

In legal doctrine, the requirement for a resolution of the special meeting of preferred shareholders in capital increases under the registered capital system is subject to criticism. Upon transitioning to the registered capital system, the board of directors is already authorized to issue privileged shares in capital increases. Once the board of directors has been authorized within a specific framework regarding capital increases, it is unnecessary to require a special resolution of privileged shareholders for subsequent capital increases within that framework. This contradicts the objective of

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63 *Turgut S.,* Anonim Şirketlerde İmtiyazlı Pay Sahiplerinin Haklarının Korunması, LLM Dissertation, Gazi University Social Science Insitute, 2019, 63.

64 Ibid., 59.

65 Ibid.

66 *Kaya İ.,* İmtiyazlı Pay Kavramı ve Kayıtlı Sermaye Sisteminde İmtiyazlı Paylar, Anadolu Üniversitesi Hukuk Fakültesi Dergisi – Prof. Dr. Akar Öcal Armağanı, Vol. 2, Issue 3, 2016, 241.

67 İbid.

the registered capital system to eliminate formalities.[68] However, this applies only to non-public joint-stock companies. Pursuant to Article 18, Paragraph 4 of the Capital Markets Law, in publicly traded joint-stock companies, a resolution of the privileged shareholders' special committee is not required for capital increases within the registered capital ceiling.

4.6. Privileged Shares Under the Capital Markets Act

While non-public joint-stock companies are subject to the provisions of the Turkish Commercial Code, publicly traded joint-stock companies are subject to both the Turkish Commercial Code and the Capital Markets Act. According to Article 28 of the Capital Markets Act, all existing privileges must be disclosed to the public in a transparent and understandable manner during the initial public offering of capital market instruments. Within the framework of the principles established by the Capital Markets Board, and subject to exceptions where such actions are reasonable and necessary for the conduct of business, in publicly traded companies that have incurred losses for five consecutive years based on financial statements prepared in accordance with the law, privileges regarding voting rights and representation on the board of directors are revoked by a decision of the Capital Markets Board. The reason for such a regulation is that group privileges and voting privileges are related to participation in company management.[69] These two types of privileges do not pertain to property rights. Therefore, the termination of these two privileges, which cause losses and the resulting poor management, is of great importance for the company. However, considering the qualifying criterion of "cases where activities are reasonable and necessary," the Capital Markets Board cannot exercise its authority to restrict these two privileges in situations involving an economic crisis or high investments resulting from the competitive environment in the sectors where the company operates.[70]

According to Article 19(3) of the Capital Markets Act, the privilege of priority in the distribution of profits is not permitted in publicly traded joint-stock companies. Consequently, upon examining Article 28, Article 19(3), and Article 18(4) of the Capital Markets Act, the impact of privileged shares in publicly traded joint-stock companies is weaker compared to that in privately held joint-stock companies.

4.7. Filing Lawsuits Against Decisions of the Special Committee of Preferred Shareholders

It is possible to file a lawsuit against decisions of the special committee of privileged shareholders. Under Turkish law, non-existence, nullity, and annulment lawsuits filed against general assembly decisions may also be filed against decisions of the special committee of privileged shareholders when the conditions are met. In such cases, the grounds for filing a lawsuit are applied by analogy.[71]

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68 *Bahtiyar M.,* Kayıtlı Sermaye Sistemine İlişkin İki Sorunun Değerlendirilmesi, YUHFD, Vol. XIX Special Issue, 2022, 97.

69 *Bilgeç H.,* Anonim Şirketlerde Oyda İmtiyaz, PhD Thesis, Ankara University Social Science Institute, 2016, 263.

70 İbid., 264.

71 *Albaş M. S.,* 6102 Sayılı TTK Kapsamında İmtiyazlı Pay Sahipleri Özel Kurul Kararlarının Hukuki Etkisi ve Hükümsüzlük Halleri, LLM Dissertation, Doğuş University Social Science Institute, 2024, 48.

4.7.1. Action for Non-Existence

The non-existence remedy applies to decisions made by the special committee of privileged shareholders without complying with the mandatory procedural and formal requirements of the law during the process of convening the meeting and adopting the decision. For example, the absence of the required quorum for meetings and decisions of the special committee of privileged shareholders is subject to the non-existence sanction. Similarly, the failure to prepare or the forgery of the minutes of a meeting of the special committee of privileged shareholders renders the decision of that meeting subject to the non-existence sanction.[72]

4.7.2. Action for Nullity

If a decision of the special committee of privileged shareholders is valid in terms of form and procedure but violates mandatory provisions of the law or public policy, it is invalid from the moment it is adopted. The following common doctrinal example illustrates this situation: The failure to prepare the minutes of the special committee meeting of privileged shareholders in accordance with proper procedure renders the decision null. The failure to properly prepare the minutes of a special committee of privileged shareholders constitutes invalidity; this is distinct from the minutes not being prepared at all or being falsified. In the failure to properly prepare these minutes, there is a legal violation regarding form and procedure.[73]

4.7.3. Action for Annulment

According to this Article 454(7) of the Turkish Commercial Code, the board of directors may, within one month from the date of the decision (a period of prescription), file a lawsuit in the commercial court of first instance where the company is headquartered to have the general meeting's decision regarding the capital increase annulled and the general meeting's decision registered, on the grounds that the general meeting's decision does not violate the rights of shareholders, in response to the special meeting of privileged shareholders' decision not to approve the capital increase. This provision is flawed and inadequately drafted because, under the registered capital system, the board of directors should also be able to file a lawsuit when the special meeting of privileged shareholders refuses to approve the board of director's capital increase decision. Limiting the annulment action solely to general assembly decisions and excluding the board of director's decisions creates a situation contrary to the purpose of the regulation.[74] On the other hand, the law regulates not only the filing of an annulment lawsuit but also the registration of the general meeting's decision and the board of directors' capital increase decision under the registered capital system.[75]

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72 İbid., 50-51.
73 İbid., 64-65.
74 *Altaş S.,* Anonim Şirketler Hukuku, Seçkin Press, 3. Ed., 2023, 141-142.
75 Ibid., 142.

5. Conclusion

The issuance of privileged shares is possible in joint-stock companies. However, the issuance of privileged shares is subject to certain criteria. Privileged shares are governed by the articles of association. The privileged rights are attached to the shares. Privileged shares are shares that confer superior rights compared to ordinary shares. They are not regulated in a limited manner under the Turkish Commercial Code. The only type of privileged share that deviates from this general principle is the group privilege.

Regulations regarding privileged shares are not limited to the Turkish Commercial Code. There are also provisions concerning privileged shares, albeit in limited numbers, in the Capital Markets Law. However, the provisions in the Capital Markets Law are aimed at restricting privileged shares in publicly traded joint-stock companies.

To protect the rights of privileged shareholders, the legislature has established a mechanism known as the privileged shareholders' committee. Under this mechanism, the privileged shareholders' committee—which convenes and makes decisions based on specific quorums—has the authority to approve or reject decisions resulting from amendments to the articles of association that harm the rights of privileged shares, as well as decisions regarding capital increases made under the registered capital system. Lawsuits may be filed against the decisions of the special committee of privileged shareholders. However, the provision of the Turkish Commercial Code regulating the special committee of privileged shareholders contains numerous errors. These errors are of a nature that could create problems regarding the protection of privileged shares. In this regard, the necessary legal amendments should be made as soon as possible.

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Artificial Intelligence as a Double Edged Tool: The Impact on Human Rights in Conflict and Security

This paper examines the complex use of Artificial Intelligence (AI) as a double edged instrument in the context of conflict and security, analyzing its impact on human rights. While AI has demonstrated extraordinary potential to improve the efficiency of humanitarian operations, to identify human rights violations, and to support strategic decision-making, its use also inevitably raises serious ethical and legal concerns.

Through the analysis of the cases of Ukraine and China, the dual nature of AI becomes clearly evident. In Ukraine, the technology is used for the protection of civilians and the documentation of human rights violations, whereas in China it is applied for mass surveillance and the restriction of individual freedoms. Undoubtedly, this paper highlights the undeniable need for the establishment of accountable mechanisms, ethical standards, and monitoring policies in order to reduce risks and enhance benefits.

A study addressing this topic contributes to the academic literature by bridging theoretical perspectives with practical realities, examining legal and ethical challenges, and offering recommendations for the fair and human-centered use of AI in the contexts of global conflict and security.

Keywords: *Artificial Intelligence, Human Rights, Conflict, Security, Ethics, Case Studies.*

1. The Theoretical and Conceptual Framework of Artificial Intelligence in the Context of Human Rights

It is now increasingly evident that Artificial Intelligence (AI) represents one of the most profound structural transformations of the contemporary era, directly challenging the traditional understanding and protection of human rights. Unlike previous technologies, AI is no longer regarded merely as a passive tool within a broader system; rather, it increasingly functions as an active component embedded in decision-making processes, often with limited and ambiguous human control.[1]

From a theoretical perspective, contemporary scholarship is divided between two main approaches: the instrumental and the critical. The instrumental approach conceptualizes AI as a neutral

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[1] *Russell S., Norvig P.,* Artificial Intelligence: A Modern Approach, Pearson, London, 2021, 49-51.

tool, where any negative outcomes are attributed solely to human misuse.[2] However, this perspective has been widely criticized for overlooking the fact that algorithms are built upon historical datasets that frequently contain embedded structural biases. In this sense, AI cannot be considered neutral, as it may reproduce and potentially deepen existing social inequalities.

This issue becomes particularly significant in relation to the principle of non-discrimination, as enshrined in key international legal instruments such as Article 2 of the Universal Declaration of Human Rights (UDHR) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR). Algorithmic systems used in areas such as security, border control, or criminal justice may generate discriminatory outcomes without a clear legal basis and without providing effective avenues for appeal.

Another critical dimension concerns the right to privacy, protected under Article 8 of the European Convention on Human Rights (ECHR) and Article 17 of the ICCPR.[3] The use of AI in mass surveillance, including facial recognition and behavioral analysis, often exceeds the requirements of necessity and proportionality. [4]The jurisprudence of the European Court of Human Rights has consistently emphasized that interferences with privacy must be strictly justified and narrowly limited.

From the perspective of international humanitarian law (IHL), the deployment of AI in armed conflict raises new dilemmas regarding the principles of distinction, proportionality, and precaution in attack.[5]Autonomous weapons systems, which may operate without direct human intervention, challenge these principles by obscuring responsibility in cases of violations. This creates a normative gap that has not yet been fully addressed by existing legal frameworks.

In this context, a central critique of current legal regimes is that they are predominantly reactive rather than proactive. Instruments such as the General Data Protection Regulation (GDPR) have taken significant steps toward strengthening individual protection, particularly through the right to explanation in automated decision-making.[6] However, in practice, this right remains limited due to the technical complexity of algorithms and the lack of genuine transparency.

From a critical standpoint, it can be argued that the rapid development of AI has generated a power asymmetry between states or corporations and individuals. This imbalance risks undermining the principle of human dignity, which lies at the core of all international human rights instruments.[7]In the absence of clear mechanisms and effective oversight, AI may evolve into an instrument of control rather than emancipation.

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2 *Floridi L.,* Establishing the Rules for Building Trustworthy AI, Oxford University Press, Oxford, 2019, 10-13 (discussion on AI neutrality and governance frameworks).

3 International Covenant on Civil and Political Rights, New York, 1966, Art. 2 & 26; Council of Europe, European Convention on Human Rights, Strasbourg, 1950, Art. 8, 14.

4 *Pagallo U.,* The Laws of Robots, Springer, Dordrecht, 2013, 62.

5 *Sassoli M.*, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare. Cheltenham: *Edward Elgar* Publishing, 2019, 345-352.

6 *Wachter S., Mittelstadt B., & Floridi L.*, Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation. International Data Privacy Law, 2017, 7(2), 76-99, 85-92.

7 *Zuboff S.* The Age of Surveillance Capitalism: The Fight for a Human Future at The New Frontier of Power. New York: PublicAffairs, 2019, 201-208.

Furthermore, the concept of accountability remains ambiguous in the context of AI. Traditional legal frameworks are based on individual responsibility, whereas in algorithmic systems responsibility is distributed among developers, operators, and user institutions. This fragmentation of responsibility significantly complicates the provision of effective legal remedies for victims of rights violations.

Overall, the theoretical and conceptual analysis demonstrates that AI cannot be treated merely as a technological innovation, but rather as a phenomenon requiring a re-conceptualization of existing legal and ethical frameworks. Only through a critical approach grounded in international law and supported by empirical analysis can it be ensured that the use of AI remains consistent with fundamental human rights standards.

2. The Role of Artificial Intelligence in Modern Conflicts: The Case of Ukraine

The use of Artificial Intelligence (AI) in modern conflicts has transformed the way data is collected, analyzed, and verified in war zones. The case of Ukraine represents one of the clearest examples of the application of advanced technologies, including satellite imagery analysis, open-source intelligence (OSINT) verification, and real-time data processing systems, all of which have been employed to document human rights violations and war crimes.[8]

In this context, AI-based technologies have enabled faster identification of damage to civilian infrastructure, troop movements, and high-risk areas for civilian populations. The integration of satellite imagery with analytical algorithms has significantly enhanced the capacity of international actors to independently verify information emerging from the field.[9]

However, this approach is not without challenges. Although AI and OSINT contribute to greater transparency, there remains a risk of misinterpretation of data or manipulation of visual information in the absence of multi-source verification. Moreover, reliance on commercial satellite imagery raises questions regarding equal access to information and the neutrality of data used in legal and political contexts.[10]

From a human rights perspective, the use of AI in documenting violations has strengthened accountability mechanisms by enabling international organizations and investigative bodies to produce more robust and verifiable evidence. The United Nations Office of the High Commissioner for Human

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8 Office of the United Nations High Commissioner for Human Rights. (2023). Reports On The Human Rights Situation in Ukraine. United Nations. <https://www.ohchr.org/en/countries/ukraine> [01.07.2026]., International Committee of the Red Cross. (2023). Artificial Intelligence and Digital Technologies in Warfare. Geneva: ICRC, <https://www.icrc.org> [01.07.2026]., Bellingcat. (2022). Open Source Intelligence (OSINT) and Verification in the Ukraine war, <https://www.bellingcat.com> [01.07.2026].

9 Office of the United Nations High Commissioner for Human Rights. (2023). Reports on the Human Rights Situation in Ukraine. United Nations <https://www.ohchr.org/en/countries/ukraine> [01.07.2026]. Bellingcat. (2022). Open Source Intelligence (OSINT) and Verification in the Ukraine War, <https://www.bellingcat.com> [01.07.2026].

10 *Rid T.,* Active Measures: The Secret History of Disinformation and Political Warfare. New York: *Farrar, Straus and Giroux.,* 2020, 295-301; *Kello L.,* The Virtual Weapon and International Security. New Haven: Yale University Press, 2023, 88-93.

Rights (OHCHR) has emphasized the importance of digital technologies in monitoring violations, particularly in situations of armed conflict.[11]

At the same time, it should be noted that the use of AI in the context of the Ukraine conflict also raises ethical and legal dilemmas related to privacy, data security, and the potential dual-use nature of such technologies. Although in this case the technology is primarily used for documentation and the protection of civilians, the same technological infrastructure can be repurposed in other contexts for surveillance or offensive military operations.

Therefore, the case of Ukraine illustrates the dual nature of AI in modern conflicts: it can serve as a powerful tool for enhancing human rights protection and transparency, while simultaneously posing significant risks if not accompanied by clear legal and ethical frameworks governing its use.

3. Artificial Intelligence and Mass Surveillance: The Case of China

Artificial Intelligence has become a central component in the transformation of modern security and social control systems, enabling a shift from traditional forms of surveillance toward advanced digital infrastructures based on real-time data analysis.[12] In this context, the People's Republic of China represents one of the most developed cases of large-scale implementation of a comprehensive mass surveillance infrastructure, combining facial recognition technologies, intelligent cameras, and integrated national data processing systems.[13]

In China, mass surveillance has been institutionalized through extensive networks of cameras installed in public and semi-public spaces, which are connected to centralized data analytics platforms. These systems enable the instantaneous identification of individuals and the tracking of their movements in urban environments, creating a continuous monitoring environment.[14] The integration of these surveillance cameras with state databases has enabled the construction of highly detailed digital profiles of citizens.

A key element of this system is the large-scale analysis of data, where information collected from various sources including electronic communications, online activity, and financial data is processed in a centralized manner.[15] This integration of data provides the state with the capacity to build models of individual and collective behavior, enabling the identification of deviations from established administrative and social norms.

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11 Office of the United Nations High Commissioner for Human Rights. (2023).Report on the Human Rights Situation in Ukraine: 24 February 2022 – 15 March 2023. United Nations Human Rights Monitoring Mission in Ukraine (HRMMU), 2023, 10-14 <https://www.ohchr.org/en/countries/ukraine> [01.07.2026].

12 *Zuboff S.,* The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power. New York: PublicAffairs, 2019, 220-225.

13 *Qiang X.*, The Road to Digital Authoritarianism in China. Journal of Democracy, 2019, 30(1), 53-67, 53-57.

14 *Creemers R.*, China's Social Credit System: An Evolving Practice of Control. Leiden University, 2018, 20-25.

15 *Liang, F., Das V., Kostyuk N., & Hussain M. M.*, Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure. Policy & Internet, 2018, 10(4), 415-453 <https://doi.org/10.1002/poi3.183> [01.07.2026].

In some instances, this infrastructure also supports behavioral evaluation mechanisms known as social credit systems.[16]These mechanisms aim to link individual behavior with concrete administrative consequences, affecting access to public services, economic opportunities, and social benefits.

The implementation of such systems has raised significant concerns regarding privacy and the limits of state intervention in individual life. One of the main issues relates to the lack of transparency in the functioning of algorithmic systems, which makes it difficult to assess the fairness and accuracy of automated decision making.

Furthermore, there is a risk that such systems may produce biased outcomes if the datasets on which they are trained contain embedded structural prejudices. In this context, automated decision-making may disproportionately affect certain social groups, generating new forms of inequality based on algorithmic data processing.[17]

On a broader level, the Chinese surveillance model has attracted significant international attention, influencing global debates on the role of technology in governance and the limits of its use in relation to fundamental human rights.[18]

However, this system also faces technical and operational limitations. The accuracy of biometric identification can be affected by various environmental factors, while the processing of vast amounts of data requires substantial technological and infrastructural capacity. Moreover, the increasing complexity of the system raises the risk of data misuse and cyberattacks.[19]

In conclusion, the case of China illustrates an advanced model of AI-based mass surveillance in which high technological capacity is combined with mechanisms of social control. This model remains a key reference point in contemporary analyses of the relationship between technology, the state, and individual privacy.[20]

4. Conclusion

The development of Artificial Intelligence has brought about a profound transformation in the way modern states structure their security mechanisms, governance systems, and interactions with citizens, as well as in the conduct of contemporary conflicts. The analysis of the two cases examined in this paper mass surveillance in China and the use of AI in the conflict in Ukraine clearly demonstrates that this technology is not neutral, but rather embedded within political, strategic, and social structures that shape its application.

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16 *Liang F., Das V., Kostyuk N., & Hussain M. M.*, Constructing a data-driven society: China's Social Credit System as a State Surveillance Infrastructure. Policy & Internet, 2018, 10(4), 41-424. <https://doi.org/10.1002/poi3.183> [01.07.2026].

17 *O'Neil C.,* Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy. New York: Crown Publishing Group, 2016, 27-33.

18 *Qiang X.*, The Road to Digital Authoritarianism in China. Journal of Democracy,2019, 30(1), 25-39.

19 *Creemers R.*, China's Social Credit System: An Evolving Practice of Control. Leiden University, 2018, 22-27.

20 *Zuboff S.*, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power. New York: PublicAffairs, 2019, 309-326.

In the case of China, Artificial Intelligence has become an integral component of a broad state surveillance architecture, where the integration of data systems and algorithmic tools enables an advanced form of population monitoring and control. This model illustrates the potential of technology to enhance institutional efficiency and public security, while simultaneously raising important concerns regarding the limits of privacy, individual autonomy, and the balance between security and fundamental freedoms.

On the other hand, the conflict in Ukraine demonstrates that Artificial Intelligence has reshaped the nature of modern warfare, making it faster, more automated, and increasingly dependent on real-time data processing. The use of intelligent systems in battlefield analysis, drones, and information warfare shows that technology has become a decisive factor in the strategic advantage of the parties involved in conflict. This situation also highlights the growing importance of information as a central dimension of contemporary warfare.

From a broader perspective, both cases illustrate that Artificial Intelligence is contributing to the reconfiguration of relations between the state, society, and security, generating new models of governance and conflict. However, this development is accompanied by significant ethical, legal, and political challenges related to transparency, accountability, and the control of technological use.

In conclusion, it can be argued that the future of Artificial Intelligence will depend not only on technological advancement, but also on the ability of societies and international institutions to establish clear boundaries and standards for its use. The balance between innovation and the protection of fundamental democratic and human values remains the central challenge of this digital era.

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11. *Rid T.*, Active Measures. Farrar, Straus and Giroux, 2020.
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16. International Committee of the Red Cross (2023), Artificial intelligence and Digital Technologies in Warfare <https://www.icrc.org> [01.07.2026].
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18. *Wachter S., Mittelstadt B., Russell* C., Bias Preservation in Algorithmic Decision-Making. Yale Journal of Law & Technology, 23(2), 2021.
19. *Zeng J.*, Artificial Intelligence with Chinese Characteristics, Journal of Cyber Policy, 5(3), 2020.
20. *Mittelstadt B., Allo P., Taddeo M., Wachter S., Floridi L.*, The Ethics of Algorithms: Mapping the Debate. Big Data & Society, 3(2), 2016.
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Regulating Artificial Intelligence: Political and Legal Dimensions of the U.S AI Action Plan and The EU Act

This study comparatively analyzes the United States' America's AI Action Plan (2025) and the European Union's AI Act (Regulation (EU) 2024/1689) as two distinct models of artificial intelligence governance. Using comparative public policy, legal, and discursive analysis, the research examines their ideological foundations, regulatory instruments, and global implications. The findings show that the U.S. promotes an innovation-centric, market-oriented framework focused on competitiveness and technological leadership, while the EU advances a rights-based, preventive model grounded in risk classification and human rights protection. These divergent approaches contribute to regulatory fragmentation and shape the evolving architecture of global AI governance.

Keywords: *AI Regulation; America's AI Action Plan; EU AI Act; Comparative Analysis; Legal Frameworks for AI.*

1. Introduction

The fast progress of artificial intelligence (AI) is radically changing the balance of power on a global level and is affecting not only technological development but also social, economic, and political systems. This transformative process creates the need for strategic documents and legal frameworks developed by states to become essential tools for technological governance.[1] These frameworks define not only technical directions and development priorities but also reflect each country's values, political ideology, and long-term action goals.

Currently, the United States and the European Union are the two most influential powers in the field of artificial intelligence. They not only define their internal technology policies but also create global standards and norms that later affect the political and economic choices of other countries. Their strategic decisions directly impact international markets, innovation directions, and the formation of technological ecosystems.[2] The standards they set often become models for the technology policies of other countries, especially for those that are now developing their own strategic visions for the development and regulation of artificial intelligence.

Accordingly, it is essential to examine the differences and contradictions between the artificial intelligence policies of the United States and the European Union, the underlying values and

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[1] *Zaidan E., Ibrahim I.A.*, AI Governance in A Complex and Rapidly Changing Regulatory Landscape: A Global Perspective, Government Information Quarterly, Vol. 41, №2, Amsterdam, 2024, 101–120.

[2] *Brookings Institution,* The EU and U.S. diverge on AI regulation: A Transatlantic Comparison and Steps to Alignment, 2023.

ideological foundations of each, and their impact on shaping the global technological governance framework.

Recently developed important documents – the United States' America's AI Action Plan (2025) and the European Union's AI Act (2024/1689) represent two distinct political frameworks rooted in different philosophies. A comparative study of these documents provides a clear picture of their differing approaches. The U.S. document is based on a pro-innovation, market-oriented approach, whose primary goal is the full mobilization of the private sector, maximal encouragement of innovation, and the strengthening of global technological leadership.[3] This approach prioritizes creating a competitive economic environment, enhancing technological infrastructure, and reinforcing the positions of American companies in international markets.[4]

On the other hand, the European Union's „AI Act" is based on a preventive regulatory framework grounded in human rights and ethical principles, with the primary goal of ensuring that artificial intelligence technologies are developed safely, transparently, and in alignment with societal interests. The EU's approach places strong emphasis on risk-based categorization, data protection, algorithmic transparency, and the protection of consumer rights.[5]

AI is no longer merely a technological tool – it has become a central issue for economic competitiveness, national security, democratic stability, and the protection of human rights.[6] In parallel with this process, no unified legal standard has emerged at the global level to define common principles for regulating AI systems. As a result, leading political powers are developing different regulatory models, which leads to normative fragmentation and regulatory competition. In this context, particular significance is attached to the United States' America's AI Action Plan (2025) and the European Union's Artificial Intelligence Act (Regulation (EU) 2024/1689). These documents represent not only political programs but also the institutional expression of governance philosophies, which differently define the role of the state, the function of the market, and risk management strategies.

The research problem stems precisely from the coexistence of these differing approaches. In the field of AI governance, there is no universal model, creating a space of competition among global standards. As Zaidan and Ibrahim note, AI regulation occurs within a complex and rapidly changing normative environment, where different states reflect diverse political values in their legal frameworks.

This situation leads not only to regulatory fragmentation but also to structural polarization in global governance. On one hand, states that prioritize innovation and economic competitiveness seek to maintain flexible and deregulatory frameworks to avoid constraining technological development. On the other hand, in jurisdictions where human rights, safety, and trust are considered central values, stricter, preventive, and legally intensive regulations are established.[7]

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3 *White House,* Executive Order 13859: Maintaining American Leadership in Artificial Intelligence, 2019.
4 White House, Winning the AI Race: America's AI action plan, Washington D.C., 2025.
5 European Union, Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act), Brussels, 2025.
6 OECD, Artificial intelligence in society, Paris, 2025.
7 *Veale M., Borgesius F.Z.,* Demystifying the Draft EU Artificial Intelligence Act, Computer Law Review International, Vol. 22, №4, Cologne, 2021, 97–112.

Such normative diversification creates a "competition of standards" environment, in which AI regulation transforms into an instrument of geopolitical influence.[8] Regulatory models no longer define only the rules of domestic markets – they also function as mechanisms of global influence, as technology companies are compelled to comply with the jurisdiction that has either the largest market or the strictest requirements. As a result, AI governance becomes not only a legal matter but also a sphere of power and strategic competition.

2. Theoretical and Methodological Approaches

a) Theoretical Framework

From a theoretical perspective, the study relies on two main conceptual frameworks. The first is the contrast between the liberal market model and social regulatory constitutionalism.[9] The U.S. approach is based on market-oriented governance, in which the state creates a favorable environment for innovation and reduces regulatory barriers. The AI Action Plan explicitly emphasizes regulatory simplification and the leading role of the private sector. This model can be described as "Innovation-Centric Competitive Governance," where economic growth and technological leadership constitute the primary goals of policy.

The European Union model, in contrast, is based on the principles of a social market economy and rights-based governance.[10] (European Union, 2024). The preamble of the AI Act emphasizes the protection of human dignity, freedom, and equality. Its risk-based classification system (unacceptable, high, limited, minimal risk) establishes a preventive legal architecture, in which technological development is subject to prior assessment and strict compliance requirements. This model can be described as "Rights-Centric Preventive Governance."

The second theoretical perspective focuses on the analysis of global governance and geopolitics. AI regulation now goes beyond the confines of domestic policy and serves as an instrument for the distribution of international power. In the case of the European Union, the concept of the "Brussels Effect" is often applied, according to which EU regulations become a global standard because companies must comply in order to access the EU market.[11] The U.S. model, in turn, aligns more closely with the concept of techno-nationalism, where AI is considered a strategic resource for national security and a component of geopolitical competition.

Based on the theoretical synthesis, it is possible to identify two distinct types of governance. The first is an innovation-centric competitive state that prioritizes the market and technological leadership. The second is a rights-based preventive regulatory state that emphasizes human rights and the legal management of risk. The tension between these two models forms the main dynamic of contemporary global AI governance.

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8 Brookings Institution, The EU and U.S. Diverge on AI Regulation: A Transatlantic Comparison and Steps to Alignment, 2023, 30-40.

9 *Stiglitz J. E.,* Markets, Market Failures, and Development, Nashville, 1989, 20-30.

10 European Union, Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Brussels, 2024.

11 *Cave S., ÓhÉigeartaigh S. S.,* An AI Race for Strategic Advantage: Rethinking Geopolitics of Artificial Intelligence, AI and Society, Dordrecht, 2018, 1–12.

As a limitation of the study, it should be noted that the analysis is based on official documents rather than their practical implementation; moreover, the AI Action Plan is still recent, and its outcomes have not yet been fully evaluated. Nevertheless, the presented theoretical interpretation allows for an assessment not only of the specific legal texts but also of the political philosophy and global governance models underlying them.

b) Research Aim and Questions

The aim of this study is to analyze how artificial intelligence governance is conceptualized in the official documents of the United States and the European Union, what ideological and legal foundations underpin each approach, and what impact these differences have on the architecture of global technological governance. The research is not limited to descriptive text analysis; its objective is to typologize the governance models within the framework of public policy theory and to provide their theoretical interpretation.

The main research question is formulated as follows: How do the U.S. AI Action Plan and the EU AI Act create distinct political-ideological architectures for AI governance, and what global consequences arise from these differences?

Several sub-questions stem from this main question. First, how is the role of the state defined in each model – as a competitive actor that supports innovation, or as a preventive regulator? Second, how is risk conceptualized -as a natural factor accompanying innovation, manageable through standards and self-regulation, or as an object of legal prevention requiring prior classification and mandatory control? Third, what constitutes the source of normative legitimacy – economic competitiveness or human rights? Finally, does either model have the potential for global “regulatory export”?

c) Research Methodology

Methodologically, the study is based on comparative public policy analysis, legal doctrinal assessment, and normative-discursive analysis. Comparative policy analysis examines the objectives, instruments, institutional actors, and implementation logic of the policies. Legal analysis focuses particularly on the EU AI Act’s risk-based classification system, compliance obligations, sanctions, and supervisory mechanisms. Discursive analysis evaluates how AI is presented as a problem in each document – for example, the U.S. text emphasizes terms such as “innovation,” “leadership,” and “competition,” whereas the EU document highlights “risk,” “fundamental rights,” “safety,” and “trust.”

3. Analysis of the United States Artificial Intelligence Action Plan

The rapid development of artificial intelligence over the past decade has become one of the main technological trends shaping the global economy as well as social, ethical, and legal domains. In this process, the United States was among the first to respond systematically and to formulate a national strategy for AI research and development in order to ensure technological progress, national security, and global leadership.[12]

[12] *ZhangY., LiH., Chen M., WangJ.,* Artificial Intelligence National Strategy in a Developing Country, Oxford, 2024, 5-20.

The first national document, the National Artificial Intelligence Research and Development Strategic Plan, was developed in 2016 by the United States National Science and Technology Council (NSTC) and the Networking and Information Technology Research and Development (NITRD) program. The plan reflected the priority areas at that time: increasing long-term investments in AI research; developing effective collaboration between humans and AI systems; addressing ethical, legal, and social issues; ensuring system safety and reliability; creating open data repositories; implementing standardized testing platforms; and preparing the workforce for the new technological reality. This document became the foundation of federal policy, strengthening coordination between the public and private sectors and promoting technological innovation.[13]

The next significant milestone was the 2019 American AI Initiative, announced by Executive Order 13859 – Maintaining American Leadership in Artificial Intelligence. The initiative aimed to preserve the United States' global leadership and was based on five principles: promoting scientific and technological progress in AI research and civilian deployment; developing technical standards and reducing risks; retraining the workforce in AI competencies; strengthening public trust through the protection of privacy and civil liberties; and shaping an international environment that supports the export of American AI innovation and the maintenance of technological advantage.

The document tasked federal agencies with increasing investments in AI research, expanding access to open data and computing resources, reducing barriers to technology adoption, ensuring security standards, strengthening STEM education, and developing a national security action plan.

In 2023, the NSTC and NITRD published an updated National AI Research and Development Strategic Plan that addresses current technological, ethical, and social challenges. The revised strategy refines and strengthens previous principles, placing special emphasis on funding research and innovation; creating ethical and trustworthy systems; enhancing safety and transparency; ensuring data protection; strengthening human-AI collaboration; developing the workforce and STEM education; deepening international partnerships; and monitoring the social, economic, and environmental impacts of AI. The strategy aims for inclusive, ethical, and sustainable development that ensures the United States' competitiveness in the global AI market.[14]

Recent initiatives clearly reflect the United States' goal to maintain global competitiveness, create a trustworthy and secure AI ecosystem, and protect the interests of society. It is this sustainable development that laid the foundation for the 2025 plan, which further expands the initiatives and links them to global partnerships and the promotion of an innovative economy.

3.1. The Three Pillars of the 2025 U.S. AI Action Plan: Innovation, Infrastructure, and International Diplomacy

The United States' Artificial Intelligence Action Plan, adopted in 2025 is a strategic federal government document aimed at maintaining and strengthening the country's technological dominance

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[13] National Science and Technology Council, The national artificial intelligence research and development strategic plan, Washington D.C., 2016.

[14] National Science and Technology Council, The national artificial intelligence research and development strategic plan, Washington D.C., 2023, 2-5.

in the field of artificial intelligence.[15] The plan is based on three clear pillars, which are complexly interconnected and together form a unified strategic vision: innovation, infrastructure, and international diplomacy and security. Each pillar includes specific action steps and policy priorities that address the demands of modern technological development and global challenges.

The first pillar of the document aims to maximize the activation of the American private sector and research ecosystem so that the United States can create rapid technological innovations and ensure their wide application. Here, the federal government does not impose a specific technology but instead creates the conditions – regulatory, infrastructural, and financial where private innovation can expand on a large scale.

According to the document, the first goal is to remove excessive federal and state bureaucracy at an early stage, since the administration believes that unnecessary regulations could hinder innovation and limit private sector initiative. Within this framework, specific steps are outlined to identify and eliminate redundant regulations so that innovation is not obstructed. For example, the U.S. Office of Science and Technology Policy (OSTP) publishes a "Request for Information" (RFI) to gather feedback from various agencies and the public on which regulations are perceived as obstacles to the development of AI technologies.[16]

The plan emphasizes strengthening the role of NIST in developing technical standards and preparing open guidelines, which will significantly contribute to the safe, reliable, and effective use of artificial intelligence (AI) systems. NIST (National Institute of Standards and Technology) is a federal agency responsible for technical standards and supporting innovation in the United States. According to the plan, one of NIST's main tasks is to update and refine the AI Risk Management Framework, which enables companies and regulators to objectively assess and manage risks associated with AI systems.

In addition, the plan envisions improving assessment resources, which involves developing appropriate methods and tools to test the quality and safety of AI systems. It also includes the publication of specialized guidelines that provide clear recommendations and instructions for regulators and industry on the effective management and oversight of AI technologies.

The plan notes that modern large AI models and scientific research require extensive and costly computing resources. However, smaller startups and academic groups often lack easy access to such advanced technological capabilities.

Therefore, the plan proposes the development of various financial and technical mechanisms aimed at facilitating and addressing access-related challenges. These measures seek to reduce barriers to computing resources and to promote a "try-first" approach in both business and scientific domains, thereby enabling a broader range of new actors to participate in the development of contemporary AI technologies.

The plan also envisions the establishment of dedicated regulatory "sandboxes" and regional centers, where startups, researchers, and major companies will be able to rapidly test, evaluate, and

[15] White House, Winning the AI race: America's AI action plan, Washington D.C., 2025, 10-20.
[16] Ibid, 34.

ensure the safety of new technologies within a secure and controlled environment, under appropriate agreements.

Such specialized spaces are designed to support innovators in swiftly creating and practically testing new products without being hindered by overly stringent regulations or procedural obstacles. In this way, the development and deployment of technologies can take place under more convenient and secure conditions, thereby further facilitating the advancement of innovation.

The plan includes special programs designed to help address complex challenges in the field of artificial intelligence. For example, DARPA (the U.S. Defense Advanced Research Projects Agency) leads projects focused on improving the understanding of AI systems, enhancing their management, and increasing their security – particularly in situations where such systems might be attacked or misled.[17]

These investments are targeted and highly significant, as they can enable the creation of robust and reliable artificial intelligence capable of driving revolutionary changes across many sectors in the future.

The plan states that the world's leading countries possess large, high-quality datasets that are ready for use in artificial intelligence systems. The United States aims to create similar high-quality databases that safeguard everyone's rights, privacy, and ethical standards.[18]

In addition, the plan funds modern, automated laboratories that are interconnected via the internet and operate in fields such as chemistry and biology. These facilities support faster and more efficient scientific experiments and research.

The plan also emphasizes preparing the American workforce to utilize and advance artificial intelligence technologies – not only engineers but also professionals across diverse fields. To achieve this, the plan envisions strengthening vocational education, ranging from career and technical education (CTE) to retraining programs.

Under the first pillar, collaboration with security and intelligence agencies is also foreseen to protect commercial intellectual property and institutional data, as well as to create mechanisms that prevent foreign states from stealing or fraudulently exploiting technologies.

In addition, the plan includes measures to help law enforcement and federal agencies better address legal challenges related to deepfakes in court.

The first pillar aims to support American companies and startups in generating more innovations. To this end, it eases unnecessary regulations, provides access to powerful computing resources, funds research, and promotes the creation of high-quality data and proper testing.

All these steps together create a flexible and dynamic environment where companies and researchers can develop new technologies and succeed in the international market.

The second pillar is primarily devoted to infrastructure development, which is a necessary precondition for the successful and efficient functioning of artificial intelligence (AI) technologies. This pillar underscores that the effectiveness of AI systems largely depends on high-performance

[17] DARPA, AI Next Campaign, Washington D.C., 2025.

[18] *CrawfordK.,* Atlas of AI: Power, politics, and the planetary costs of artificial intelligence, Yale University Press, 2021,4-7

computing, the processing of large volumes of data, and the energy resources that ensure continuous and rapid operation.

The plan issues a clear call-“America must rebuild its AI infrastructure across the board: compute, data, energy, and the talent stack[19]...” This means it is essential to build robust, scalable, and modern infrastructure and to develop the corresponding human resources that will sustain the growth and advancement of AI technologies.

One of the plan’s key directions is the creation of technical infrastructure, including the development of data centers, high-performance computers, and energy systems. Particular attention is paid to streamlining regulations so that new, high-tech data centers can be built quickly and supporting infrastructure can be developed apace.

In addition, the plan proposes increased funding and close partnerships with the private sector, which will ensure investment flexibility and make it possible to respond rapidly and effectively to the fast-changing technological environment.

Another very important aspect of the second pillar is data management. Its objective is to establish accessible, high-quality, and secure databases, as high-quality and large-volume data serve as the essential foundation for AI research and development.

Overall, the second pillar aims to create a stable, sustainable, and innovative technical foundation that will enable the United States to maintain and strengthen its leadership in the field of artificial intelligence.

The third pillar is entirely focused on enhancing international security and global diplomacy in the field of artificial intelligence. The U.S. government recognizes that AI technologies are not only a means of economic and scientific development but also pose significant threats to national security. The plan makes it clear that “AI can be used for cyberattacks, the spread of disinformation, and the development of biological weapons,” which increases competition between states and heightens security risks. [20] In this context, the plan emphasizes the importance of collaboration with international partners and allied countries to establish unified rules and standards. These standards include:

Controlling the export of technologies to prevent their misuse or hostile application;

Establishing security protocols to ensure that AI is used safely and does not cause harm;

Reinforcing principles for the ethical and responsible use of new technologies, protecting human rights and the international order.

The plan notes that “the United States aims to create an international coalition that will safeguard American technological advantages and prevent illegal or hostile technological activities.” This entails maintaining technological leadership and supporting security at the international level.[21]

The overall goal is to establish unified and harmonized standards, which will enhance security and enable rapid response and cooperation on a global scale. It is also important to develop new regulations and controls that ensure the safe, ethical, and fair use of AI technologies.

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19 White House, Winning the AI race: America’s AI action plan, Washington D.C., 2025, 11.
20 White House, Winning the AI race: America’s AI action plan, Washington D.C., 2025, 21.
21 Ibid., 22.

The third pillar requires active international engagement, close diplomatic relations, and consistent collaboration, creating a solid foundation for AI development in a global environment that minimizes risks and maximizes safety.[22]

In short, the U.S. Artificial Intelligence Action Plan represents a comprehensive, premeditated strategy that demonstrates the country's desire to maintain and expand its leadership in AI on a global level. It also acknowledges that promoting innovation, developing technological infrastructure, and fostering international cooperation are the three pillars on which a sustainable AI ecosystem must be built. At the same time, the plan addresses social and ethical aspects-for example, workforce retraining and managing changes in the labor market-which are crucial in the long term for economic stability and adaptation to technological transformations.[23]

This long-term and multifaceted vision provided by the U.S. Action Plan lays the foundation for federal government and the private sector to work together at the intersection of innovation and security, significantly shaping the country's position in the global AI race. This approach strengthens the United States' capabilities not only in technological progress but also in political and economic advantages, which are essential in today's highly competitive global environment.[24]

Ultimately, the main message of the U.S. Artificial Intelligence Action Plan is that the rapid development of AI should be supported by a free, minimally regulated environment where innovation is encouraged and the government does not hinder the technological advancement of the private sector. The plan is based on the belief that America's global leadership in technology can be achieved through deregulation, accessible support for AI, robust infrastructure, and prioritization of national security.

While the plan promotes innovation and strengthens technological leadership, it has also been subject to criticism from various academic and civil society organizations. The primary critique concerns the plan's overtly deregulatory nature, which, as experts note, may undermine ethical standards.[25] For example, the Center for Democracy & Technology emphasizes that reducing regulations increases the risk that AI systems may produce harmful practices, further exacerbating data misuse and algorithmic discrimination.

4. Analysis of the Europian Unions Artificial intelligence Regulation (AI Act)

The creation of the European Union's Artificial Intelligence Act (AI Act) represents a significant legal step in the regulation of digital technologies and artificial intelligence. Prior to this Act, the EU underwent several stages, including the adoption of fundamental documents, the establishment of ethical principles, and the development of coordinated policies among member states.

22 Organisation for Economic Co-operation and Development, Governing with artificial intelligence: Enablers, guardrails, and engagement for trustworthy AI, OECD Publishing, Paris, 2025.
23 White House, Winning the AI race: America's AI action plan, Washington D.C., 2025, 23-24.
24 Ibid., 24.
25 Center for Democracy & Technology, Algorithmic discrimination and data governance in artificial intelligence systems, Washington D.C., 2024.

These processes laid a solid foundation for the effective and safe regulation of AI systems, which the adoption of the AI Act ultimately serves.

For years, the European Union monitored and analyzed the rapid development of AI technologies and their impact on both the economy and citizens' rights and security. In 2018, the European Commission and member states agreed on the first Coordinated Plan on Artificial Intelligence, which aimed to promote unified and targeted development of AI technologies within the European market. This document reflected efforts to strengthen investment, foster collaboration in research and innovation, and, to some extent, represented the EU's first systematic attempt to shape AI policy at the regional level.[26]

The next significant milestone was the publication in 2019 of the Ethics Guidelines for Trustworthy AI, developed by the European AI High-Level Expert Group. These guidelines affirmed that AI systems should be safe, transparent, fair, and accountable, and that their use should not violate human rights. The principles established an ethical framework that has received strong support from both regulators and business overseers.[27]

In 2020, the European Commission published a comprehensive EU Digital Strategy, in which artificial intelligence was given a prominent role. The document emphasized the promotion of innovation, data security, and the protection of citizens' rights, resulting in an increased demand for a strengthened legal framework in the AI sector. During this period, the European Union actively worked on developing relevant regulations as well as standards for AI testing, digital services, and market oversight.[28]

At the end of 2020, the European Commission adopted the White Paper on Artificial Intelligence, which was an official proposal based on previous strategies and addressed the regulatory principles for AI systems.[29] The White Paper analyzed high-risk categories, data protection, and human rights safeguards, laying the foundation for subsequent regulations, including the AI Act.

In addition, the General Data Protection Regulation (GDPR), in effect since 2018, established strict rules for the protection of personal data, which were crucial for the legal framework of AI systems. GDPR principles, such as transparency, data minimization, and citizen control, were considered fundamental in regulating AI technologies.[30]

As a result of these processes, in 2021 the European Commission presented the official proposal for the Artificial Intelligence Act, which, for the first time, created a unified, comprehensive, risk-based legal framework for regulating AI technologies. Its objectives are to protect the European digital market, promote innovation, and safeguard citizens' rights.

The European Union's Artificial Intelligence Act, which came into force in 2024, represents the world's first comprehensive legal framework for regulating AI systems. The regulation aims to ensure

[26] European Commission, Coordinated Plan on Artificial Intelligence, Brussels, 2018.
[27] European Commission, Ethics Guidelines for Trustworthy AI, Brussels, 2019.
[28] European Commission, Shaping Europe's digital future, Brussels, 2020a.
[29] European Commission, White paper on artificial intelligence: A European approach to excellence and trust, Brussels, 2020b.
[30] European Union, Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation), Brussels, 2016.

that artificial intelligence is safe, ethical, and protective of fundamental human rights. The EU's approach not only promotes technological advancement but also safeguards human rights and democratic values. As stated in the preamble of the regulation: "Artificial intelligence should be developed and used in a way that respects fundamental rights, supports democratic values and ensures societal trust".[31]

4.1. Human Rights and Social Responsibility in the European Union's Artificial Intelligence Act

One of the central features of the European Union's Artificial Intelligence Act is its values-based framework, which is directly grounded in the principles of human rights protection and the foundations of a democratic society. The EU recognizes that alongside the development of artificial intelligence technologies, it is essential to regulate their use so that fundamental rights-such as the right to privacy, trust, and equality-are not violated. The document establishes precise and strict requirements, stipulating that AI systems must not be used as tools for social or political control, discrimination, or the infringement of individual choice. Consequently, the AI Act clearly states that technologies must be developed and deployed to earn and maintain public trust, which is regarded as a critical prerequisite for their successful and widespread adoption within the European context.

The Act also emphasizes the fair and inclusive development of society, which entails preventing algorithmic discrimination, ensuring the safety of the social environment, and maintaining human oversight in decision-making processes. In this context, users' rights have been given particular importance-when interacting with AI systems, individuals must understand what they are engaging with and be able both to access information and, if necessary, request human review of decisions. This approach not only establishes a new standard of transparency but also fosters a culture of responsibility and accountability, which is essential for building public trust in AI.[32]

From a human rights perspective, the Act also underscores that technological innovation must not harm the environment or social stability. The document includes ecological requirements, labor safety standards, and mechanisms for protecting consumer rights, representing an innovative and forward-looking step in contemporary technological regulation. As a result, this part of the AI Act creates a digital technology ecosystem that is simultaneously innovative, ethical, and responsible.

4.2. Risk-Based Approach in the European Union's Artificial Intelligence Act

Another important and innovative component of the European Union's Artificial Intelligence Act is its risk-based regulatory approach, which provides a clear framework for the legal assessment and management of AI systems. The document classifies AI systems into four distinct risk categories: unacceptable, high, limited, and minimal risk.

[31] European Union Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Brussels, 2024.

[32] *Veale M., Borgesius F. Z.,* Demystifying the European Union Artificial Intelligence Act, Computer Law Review International, Cologne, 2024, 6-15.

The unacceptable risk category includes systems that, by their nature or intended use, cause unimaginable harm or violate fundamental human rights. Examples include social scoring systems that assess citizens' behavior or technologies designed to deliberately manipulate behavior. The use of such systems within the EU is prohibited, reflecting a strict principled stance that civil liberties and fundamental rights take precedence over technological development and commercial interests.[33]

The high-risk category includes AI systems that are widely used in critical sectors – such as education, employment, law enforcement and judicial institutions, healthcare, and infrastructure. These systems have the potential to directly impact human lives, and therefore, they are subject to strict regulations. These regulations include rigorous data quality controls, transparency requirements, documentation, mandatory system and algorithmic assessments, and, importantly, human oversight at every stage of the process. This approach serves as a mechanism for prevention and risk mitigation, promoting the safe and ethical use of AI systems.

The limited and minimal risk categories include technologies whose impact or potential threat is less critical. Regulations for these systems are less stringent, providing a dynamic environment for innovation and technological development, where small and medium-sized enterprises have space to create new AI solutions, while still being required to meet basic safety standards.[34]

The risk-based approach is one of the most influential and innovative components of EU AI regulation, creating a hybrid yet effective system of legal oversight over digital technologies. It enables regulators to act in a targeted and proportionate manner on specific technologies, supporting not only a safe and responsible digital environment but also the healthy and ethical development of technological innovation in Europe.[35]

5. Comparative Analysis of the U.S. Artificial intelligence Action Plan and the Europian Union's Artificial intelligence Act

The U.S. AI Action Plan and the EU AI Act are guided by different values, economic, and strategic priorities. To better understand these differences, it is useful to compare them across key thematic areas, making it easier to see how their approaches to AI development and regulation diverge.

Deregulation vs. Preventive Control

The U.S. AI Action Plan clearly favors deregulation and private sector freedom. Its aim is to ensure that excessive rules do not hinder innovation and to prevent delays in technological progress. In contrast, the EU approach is based on preventive, risk-based regulation, placing public interests, ethics, and human rights above technological advancement.

33 European Union, Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Brussels, 2024, 38–45.

34 Ibid., 45-47.

35 For a detailed discussion of this issue, see: *Jozak T.,* 2024 EU AI Act: A detailed analysis, Brussels, 2025, 26-30.

Private Sector vs. Government Oversight

The U.S. plan emphasizes the central role of the private sector, considering that technological breakthroughs originate primarily from industry and that the government should not impede this process. In contrast, the EU regulation focuses on ensuring that technology serves the public good and individuals, imposing strict requirements on high-risk systems-including mandatory transparency, mechanisms for human intervention, and data controls.

AI Infrastructure and the Global Market

The U.S. AI Action Plan highlights achieving technological sovereignty through robust infrastructure, aiming to prevent dependence on other countries for critical technologies. The EU document does not explicitly prioritize sovereignty; however, it seeks to ensure that European standards have global influence, as reflected in the objectives of the AI Actfacilitating technology exports, establishing standards in the global market, and supporting industrial competitiveness .

Security and Geopolitics

The U.S. Action Plan places special emphasis on national security. For the United States, artificial intelligence is not only an opportunity but also a potential threat, as it could be used for cyberattacks or the development of biological weapons. Therefore, America seeks to ensure that allied countries adopt similar regulations and to prevent the transfer of such technologies to rival nations. In this regard, the European Union takes a more preventive and peaceful approach. It does not focus on adversary countries or attempt to exert geopolitical control over technology. Instead, it establishes clear rules that AI systems must follow, aiming to mitigate risks while respecting human rights and democratic values.

Industrial Growth vs. Environmental Principles

The U.S. AI Action Plan is primarily focused on industrial growth and the large-scale development of technological infrastructure. However, the document pays relatively little attention to environmental standards or ecological sustainability. In contrast, the EU AI Act explicitly requires technological development to comply with labor safety, social responsibility, and environmental standards.

6. Conclusion

Based on the analysis, it can be said that in the U.S. model the state is understood as a competitive actor that supports innovation. It creates incentives, reduces regulatory barriers, and sees risk as a natural and manageable part of technological progress. In this approach, risks can be addressed through flexible standards and sectoral self-regulation. In contrast, in the European Union model, the state acts as a preventive regulator. It treats risk as an object of legal intervention and applies prior classification and mandatory control, especially for high-risk systems. The main source of normative legitimacy in the United States is economic competitiveness and global leadership, while in the European Union it is based on the protection of fundamental rights, safety, and public trust. Regarding the potential for "regulatory export," the EU model, due to its strong legal framework and large market size, has greater capacity to shape global standards. However, the innovative strength and technological dominance of the United States create an alternative, market-based form of influence. As a result, global AI governance becomes an arena of both normative and strategic competition.

The fundamental differences between these two strategies highlight the need for a global AI governance model that integrates technological dynamism with principles of social responsibility. The U.S. model, with its flexibility and promotion of innovation, is ideal for the rapid deployment of new technologies and enhancing market competitiveness. However, its deregulated nature can sometimes create challenges regarding ethics, privacy, and security.

The EU's structural and normative approach demonstrates greater balance, but it may slow technological innovation and introduce excessive bureaucracy, which can sometimes limit market speed and flexibility. However, a major advantage of this approach is that it protects human rights and serves the public interest, which is a crucial factor for fostering societal trust and long-term development.

Collaboration and compromise between these two approaches form the foundation for the sustainable global development of artificial intelligence. Maintaining technological innovation and dynamism requires federal and international standards that ensure safety and ethically justified use. At the same time, social responsibility and the protection of human rights should not be viewed as barriers but as equally essential components of the system, ensuring that technology has a positive impact on human life.

As a result, global AI policy requires a multifaceted and balanced approach that, on one hand, acknowledges and leverages the U.S. innovative model, while on the other, incorporates the EU's ethical and legal principles. This balance will create a trustworthy and inclusive digital environment that fosters not only economic development but also cultural and social diversity, security, and the reinforcement of human rights globally. Such a comprehensive, value-based approach will serve as the foundation for the sustainable, responsible, and globally equitable development and regulation of artificial intelligence.

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Salome Sigua*

Beyond Consent: Children's Data Protection, Parental Power, and the Limits of Privacy in the Age of Sharenting

This article critically examines the legal status of minors as data subjects within contemporary data protection frameworks, with a particular focus on the limitations of consent as the primary legal basis for processing children's personal data. While instruments such as the General Data Protection Regulation establish enhanced safeguards for minors, the reliance on parental consent raises significant doctrinal and practical concerns, especially in digital environments shaped by asymmetries of power, information, and technological literacy.

The paper explores the concept of "sharenting" as a growing phenomenon that challenges traditional controller – data subject relationships, arguing that parents increasingly function as de facto data controllers of their children's digital identities without corresponding regulatory accountability. By analysing international and regional legal instruments, including the United Nations Convention on the Rights of the Child, as well as selected national approaches, the article highlights structural gaps in existing frameworks, particularly regarding consent verification, cross-border inconsistencies, and enforcement limitations.

The study further interrogates the tension between parental authority and the child's independent right to privacy, especially in cases involving children of public figures, where reduced expectations of privacy may undermine effective protection. Drawing on empirical insights and comparative legal analysis, the article argues for a conceptual shift from a purely consent-driven model towards a responsibility-based and risk-oriented approach that better reflects the realities of children's digital lives. It concludes by proposing that effective protection of minors' personal data requires not only legal reform but also the reconfiguration of parental obligations within the broader data protection ecosystem.

In doing so, it contributes to the emerging debate on the need to reconceptualise children's data protection beyond individual consent towards systemic accountability frameworks.

Keywords: *Personal data protection; consent; sharenting; privacy; minors; parental responsibility; digital identity; regulation.*

1. Introduction

The protection of personal data and the right to respect for private life are widely recognised as foundational guarantees of contemporary legal orders, firmly embedded within the European data

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protection architecture. However, their application to minors reveals structural and normative tensions that challenge the coherence of existing legal paradigms, particularly in the context of rapidly evolving digital environments. In these settings, children can no longer be conceptualised merely as passive subjects of protection; rather, they emerge as data-producing actors situated within complex socio-technical systems that continuously generate, process, and circulate their personal information. This transformation problematises traditional assumptions of autonomy, consent, and control, as children's engagement with digital infrastructures often occurs in conditions marked by informational asymmetries, limited capacity for self-determination, and the absence of genuinely meaningful oversight.

Within the General Data Protection Regulation, minors are recognised as vulnerable data subjects requiring specific safeguards. Nevertheless, the Regulation relies heavily on consent – typically provided by parents or legal guardians – as a primary mechanism for legitimising the processing of children's data. This approach raises fundamental questions regarding the effectiveness and authenticity of such consent, given the inherent asymmetries in knowledge, capacity, and digital awareness between children, parents, and data controllers.

At the same time, the rise of "sharenting" – the widespread practice of parents sharing information about their children online – has exposed structural limitations within existing data protection paradigms. In such cases, parents effectively act as intermediaries who construct and disseminate their children's digital identities, often outside traditional regulatory scrutiny. This challenges the conventional understanding of the relationship between data subjects and controllers, revealing a regulatory gap in the governance of intra-family data disclosures.

This article argues that the current consent-based model is insufficient to address the complexities of children's data protection in the digital age. It seeks to critically analyse the legal status of minors as data subjects by examining international standards, including the United Nations Convention on the Rights of the Child, regional frameworks, and selected national approaches. Particular attention is paid to the tensions between parental authority and children's autonomy, the challenges of consent verification, and the implications of digital identity formation at an early age. It advances the central claim that children's data protection cannot be effectively ensured within a model that externalises decision-making to parents without imposing corresponding legal accountability.

By situating these issues within a broader doctrinal and comparative perspective, this article demonstrates the need to shift towards a more nuanced regulatory model – one that moves beyond formal consent and incorporates principles of responsibility, accountability, and risk-based protection. This approach ensures that children's rights are meaningfully safeguarded in an increasingly data-driven society.

2. European and International Legal Framework on Children's Data Protection

The protection of personal data and respect for private life constitute fundamental rights within the European Union, however, their application to minors reveals structural tensions between autonomy, protection, and parental control in the digital environment. The EU legal framework currently rests on two principal pillars: the ePrivacy Directive and the General Data Protection

Regulation. The latter has direct applicability in the Member States and establishes detailed rules governing the protection and processing of personal data. By contrast, the ePrivacy Directive aims to ensure an equivalent level of protection of fundamental rights in addition, freedoms in the electronic communications sector, particularly with regard to data processing, while also guaranteeing the free movement of such data.[1] The ePrivacy Directive covers the processing of personal data by traditional telecommunications providers within public communications networks of the European Union and obliges Member States to safeguard the confidentiality of electronic communications through national legislation. Its scope also extends to voice communications transmitted via the internet, including those conducted through social media and messaging platforms such as WhatsApp, Facebook Messenger, and Skype.[2]

Article 8 of the Charter of Fundamental Rights of the European Union recognises the protection of personal data as a fundamental human right irrespective of age, thereby extending its safeguards to children. In this regard, the principal legal instrument is the GDPR, adopted in 2016, which significantly reformed the regulatory approach to the processing of children's personal data. The Regulation identifies children as a vulnerable category of data subjects whose personal data merit specific and enhanced protection. Accordingly, where personal data relating to a child are processed, the child must be provided with clear and comprehensive information in a concise, transparent, intelligible, and easily accessible form, using language appropriate to the child.[3]

Notwithstanding the improvements introduced by the GDPR, certain issues remain unresolved. In particular, the Regulation does not explicitly address situations where minors, raising questions regarding responsibility and delineation of obligations, nevertheless use online services and products designed for adults. According to the Article 29 Working Party, online service providers should make reasonable efforts to verify that a holder of parental responsibility provides consent given on behalf of a child. The appropriate verification mechanisms may depend on the level of risk associated with the processing and the available technology. In low-risk scenarios, verification via email may suffice; conversely, in higher-risk contexts, evidence that is more robust may be required to enable the controller to verify and retain proof of consent in accordance with Article 7(1) GDPR.[4] Another significant aspect addressed by the GDPR concerns the protection of children's personal data in the context of online marketing. The Regulation calls upon companies to adhere strictly to data protection principles, in particular the principle of data minimisation, when processing children's data.[5] Similarly, the European Data Protection Board, in its guidelines,[6] emphasises that providers engaged in online marketing must exercise particular caution when offering products or services to children. Given their vulnerability, children are especially susceptible to influence, including the shaping of their preferences, attitudes, and behaviour. Certain issues remain unresolved, particularly due to the

[1] Privacy and electronic communications Directive, 2002/58/EC, art.1, para.1.
[2] Proposal for the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC, art.18.
[3] EU General Data Protection Regulation 2016/679, §38 and §58.
[4] Article 29 Working Party, Guidelines on Consent under Regulation 2016/679 (WP 259, 10 April 2018).
[5] EU General Data Protection Regulation 2016/679, §38.
[6] EDPB, Guidelines 8/2020 on the targeting of social media users, 2.09.2020.

Regulation's reliance on consent as a primary legal basis, which may be structurally inadequate in the context of children's data protection. This recognition, however, remains largely declaratory unless accompanied by effective mechanisms that operationalise such enhanced protection in practice.

Furthermore, the Convention 108+, as modernised by the Council of Europe, applies to all forms of personal data processing in both the public and private sectors and ensures the protection of data subjects, including children, against potential harm that may arise from such processing.

Finally, the Audiovisual Media Services Directive seeks, inter alia, to protect children and consumers in the audiovisual media environment. Its scope encompasses both traditional television broadcasting and on-demand audiovisual media services.[7] Following its revision in 2018, the Directive also extends to video-sharing platforms and audiovisual content disseminated via social media and online platforms. Under the AVMSD, video-sharing platform providers are required to adopt appropriate measures to protect minors from audiovisual commercial communications that may impair their physical, mental, or moral development. The most harmful content must therefore be subject to the strictest access control measures, including age verification systems, parental control tools, and other appropriate safeguards.[8]

3. The Minor as a Data Subject: Legal Status and Scope of Protection

In response to the question 'who has the right to have rights?' Hannah Arendt highlighted the paradox of universal rights, whose realisation ultimately depends on institutional recognition – an issue particularly acute in the case of minors.[9]

The United Nations Convention on the Rights of the Child establishes in its opening provision that a child is any human being below the age of eighteen years, unless majority is attained earlier under applicable national law. This definition constitutes a universally recognised legal benchmark, widely relied upon by both international and regional human rights mechanisms. The European Convention on Human Rights, through its use of the term "everyone" encompasses both adults and minors within its scope of protection.[10] The European Court of Human Rights has consistently incorporated the definition set out in the United Nations Convention on the Rights of the Child into its interpretative practice, recognising as a child any individual under the age of eighteen. This approach has been systematically applied in its case law to ensure effective protection of children's rights.[11]

With regard to data protection, the General Data Protection Regulation defines a data subject as any identified or identifiable natural person and clarifies that its scope extends to all living individuals, excluding deceased persons and unborn children.[12] As children enjoy the same fundamental rights as

7 Provision of audiovisual media services Directive, 2010/13/EU (Audiovisual Media Services Directive) (AVMSD), 2010 O.J. (L 95) 1.
8 Ibid, 1. art. 28b, paras. 1, 3.
9 *Azar F., L.,* Hannah Arendt: The Right to Have Rights'. Key concepts. Critical Legal Thinking, <https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights/> [08.04.2026].
10 Schwizgebel v. Switzerland, No. 25762/07, ECtHR 10.06.2010.
11 Güveç v. Turkey, [2009] ECHR (No. 70337/01).
12 *Feiler L., Forgo N., Nebel M.,* The EU General Data Protection Regulation (GDPR): A Commentary, Second Edition, UK, 2021, 60.

adults, the GDPR grants minors, as data subjects, a full spectrum of rights, including the right of access, the right to rectification, the right to erasure ("right to be forgotten"), the right to withdraw consent, the right to restriction of processing, the right to data portability, and the right to object to processing.[13]

An important clarification concerning the notion of identifiability was provided by the UK Supreme Court,[14] which emphasised that information need not directly refer to a specific individual in an obvious manner to qualify as personal data. A person may be identifiable indirectly, for instance, as a current or former member of a particular group, or where they may reasonably be associated with such a group by others. This broad interpretation of identifiability is particularly significant in the context of children, whose digital identities may be constructed indirectly through parental disclosures and online profiling.

In 2013, the OECD adopted revised Privacy Guidelines, which place particular emphasis on the specific needs of minors and the importance of their protection. The Guidelines underline the positive obligation of states to ensure that children are adequately informed and that their awareness is enhanced in a manner enabling them to use the online environment safely, recognise risks, and fully benefit from available opportunities. Given the specific vulnerabilities of children, particular care must be taken to ensure their meaningful participation in the digital environment without compromising their fundamental rights.[15]

The protection of minors in the context of data protection necessitates the adoption of enhanced safeguards, reflecting the child's unique socio-psychological condition. A child's age and developmental stage often limit their ability to fully comprehend the risks and potential consequences associated with the processing of personal data. Accordingly, information and protection mechanisms must be tailored to the child's level of understanding in order to ensure the effective exercise of their rights. At the same time, the rights of data subjects, including those of children, are not absolute. They may be subject to limitations prescribed by law, if such restrictions pursue legitimate aims and comply with the principles of necessity and proportionality. Thus, any interference with a child's personal data must be lawful, targeted, and proportionate within a democratic society.[16]

Although minors enjoy the same rights as adults, the question arises whether they bear equivalent responsibilities within the data protection framework. Under the Georgian Law on Personal Data Protection, a data controller is defined as any natural or legal person, or public institution, which independently or jointly determines the purposes and means of data processing and carries either out such processing directly or through a processor. Notably, the law does not specify any age requirement for acting as a controller or processor and refers broadly to any natural person. This allows for the interpretation that, under certain circumstances, a minor may also qualify as a data controller or processor. This demonstrates a formal alignment with EU standards, yet highlights the absence of detailed procedural safeguards, particularly in relation to consent verification.

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[13] EU General Data Protection Regulation 2016/679, §12-22.

[14] *Geoffrey Driver v. Crown Prosecution Service*, [2022] UK EWHC 2500 (KB).

[15] OECD Privacy Framework, 2013, 31.

[16] Protection of Minors' Personal Data – Theory and Practice, Personal Data Protection Service, [2023], 72.

4. Children's Consent in Data Protection: Legal Grounds, Parental Authority, and Verification Challenges

4.1. Legal Grounds

As previously noted a minor constitutes a data subject in the same manner as an adult and is therefore entitled to the full range of rights afforded under data protection law. One of the lawful bases for processing personal data is the consent of the data subject. However, specific rules apply with regard to the validity and authentication of consent given by children, which warrant particular attention in this subsection.

Consent to data processing must be expressed through a clear affirmative act and must reflect a freely given, specific, informed, and unambiguous indication of the data subject's wishes. Such consent may be provided, for instance, through a written statement, including by electronic means, or an oral declaration.[17] In practice, however, the distinction between valid and invalid consent becomes blurred in digital environments, where interface design and behavioural patterns may lead to formally valid but substantively uninformed consent. Furthermore, consent must relate to all processing activities carried out for the same purpose or purposes. Where consent is requested through electronic means, the request must be concise, clearly formulated, and must not unnecessarily disrupt or impair the provision of the service for which consent is sought.[18] Consent constitutes one of the six lawful bases for data processing; however, its effectiveness in the context of minors is increasingly questioned, given the asymmetry of power, information, and understanding between children, parents, and data controllers.[19] In the context of children, consent risks becoming a formalistic legal fiction, masking structural inequalities in knowledge, autonomy, and bargaining power.

According to the General Data Protection Regulation, children are regarded as a vulnerable category of data subjects due to their limited awareness of the risks, consequences, and safeguards related to the processing of personal data. Consequently, where services are offered directly to children – particularly in the context of online marketing or other data-driven activities involving children's personal data – the consent of a parent or legal guardian is required. In such cases, the data controller is under an obligation to verify that such consent has indeed been given and that it is authentic.[20]

Articles 7 and 8 of the Charter of Fundamental Rights of the European Union emphasise the importance of consent in the context of personal data processing. Nevertheless, obtaining consent does not diminish the responsibility of the controller to ensure compliance with the fundamental principles of data processing, as laid down in Article 5 GDPR, including fairness, purpose limitation, proportionality, and data quality. Accordingly, even where processing is based on the data subject's consent, this does not legitimise the collection of excessive data or processing activities that conflict with fundamental legal norms or violate the principle of fair processing.[21]

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[17] Fundamentals for a Child-Oriented Approach to Data Processing.
[18] EU General Data Protection Regulation 2016/679, Recital, para. 32.
[19] Ibid, Article 6.
[20] EU General Data Protection Regulation 2016/679, §8(2).
[21] Article 29 Working Party, Guidelines on Consent under Regulation 2016/679 (WP 259, 10 April 2018).

Pursuant to Article 4(11) GDPR, valid consent is defined as any freely given, specific, informed, and unambiguous indication of the data subject's wishes, expressed either by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to them.[22] As a rule, where the data subject has no genuine or free choice, feels compelled to consent, or would suffer detriment upon refusal, consent cannot be considered valid.[23] Similarly, where consent is embedded within non-negotiable terms and conditions, it is presumed not to be freely given. Consent is therefore invalid if the data subject is unable to refuse or withdraw it without adverse consequences.[24]

Under Article 8(1) GDPR, where the processing of personal data is based on consent in relation to the direct offering of information society services to a child, such processing is lawful only if the child has reached the age of 16. Where the child is below this age, processing is permitted only if and to the extent that consent is given or authorised by the holder of parental responsibility.

In order to obtain "informed consent" from a minor, the controller is required to provide information in a clear, simple, and child-friendly manner, explaining how personal data will be collected and used. Where a parent or legal guardian, the information supplied, must provide consent must enable that person to make a fully informed decision regarding the processing of the child's personal data

While the GDPR establishes a default minimum age of 16 for valid consent, it allows Member States to set a lower age threshold by national law, if it is not below 13. Accordingly, different age limits apply across jurisdictions, including: Austria (14), Belgium (13), Bulgaria (14), Croatia (16), Czech Republic (15), Denmark (13), Estonia (13), Finland (13), France (15), Germany (16), Hungary (16), Ireland (16), Italy (14), Latvia (13), Malta (13), the Netherlands (16), Poland (16), Portugal (13), Cyprus (14), Slovakia (16), Slovenia (15), Spain (14), Sweden (13), and the United Kingdom (13).[25] Controllers are therefore required to take into account the relevant national legal frameworks in all jurisdictions in which they operate, particularly when providing cross-border information society services. Reliance solely on the legal framework of the country of establishment is insufficient; rather, compliance must be ensured with the legal requirements of each jurisdiction in which services are offered.

This requirement is closely linked to the question of which national law is applicable -bwhether determined by the domicile of the controller or the location of the data subject. In addressing this issue, Member States must prioritise the protection of minors and ensure that the best interests of the child are a primary consideration in determining the applicable legal framework.

22 EU General Data Protection Regulation 2016/679, 4(11).
23 Article 29 Working Party Opinion on the definition of consent (WP187), 12.
24 Ibid. and EU General Data Protection Regulation 2016/679, Recital 42- 43.
25 *Schofield M.,* GDPR Age of Consent Isn't Child's Play, <https://www.skillcast.com/blog/gdpr-age-consent-not-childs-play> [10.04.2026].

4.2. Parental Authority, Age Thresholds, and National Approaches

Where information society services are provided to minors based on consent, controllers are expected to make reasonable efforts to verify that the user has reached the applicable age of digital consent. Such measures must be proportionate to the nature of the processing and the risks involved. If a user declares that they have reached the required age, the controller may take appropriate steps to verify the accuracy of that declaration. Although the GDPR does not explicitly mandate age verification, it implicitly requires such efforts, as processing based on invalid consent – such as consent given by a child below the required age – would be unlawful. Conversely, where a user declares that they have not reached the minimum age, the controller may rely on that declaration without additional verification but must obtain consent from a parent or legal guardian and take reasonable steps to verify that a person holding parental responsibility provides such consent.[26] It remains unclear whether certain online providers, particularly those offering services through wireless internet (Wi-Fi), fall within the definition of information society services, giving rise to ongoing legal uncertainty.[27]

Under the Georgian Law on Personal Data Protection, the age at which a minor may validly consent to the processing of their personal data is set at 16.[28] The legislator has incorporated the GDPR requirement that the processing of children's personal data must be carried out with due regard to the best interests of the child. Accordingly, controllers are under a legal obligation to consider and protect the best interests of minors when processing their data.[29]

In addition, the law contains further provisions ensuring the lawful processing of minors' personal data. For instance, one of the exceptions to the obligation to restrict processing upon request is the overriding interest in protecting the rights of a minor.[30] The law also fully reflects the GDPR requirement that information provided to data subjects – particularly minors – must be communicated in a clear, accessible, and easily understandable manner.[31]

The Irish Data Protection Commission has developed a set of general criteria that data controllers should observe when assessing the lawfulness of processing children's personal data. These criteria include the nature of the data processing, the sensitivity of the data involved, the type of service offered to children, issues relating to access to the collected data, and the scope of data sharing.[32] In cases involving low-risk processing, it may be sufficient for online providers to rely on a simple age-related question (e.g., whether the user has reached a certain age). However, the European Data Protection Board recommends that where higher-risk or sensitive data are processed, such a minimal approach is insufficient, and additional verification mechanisms must be implemented.[33]

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26 *Schofield M.,* GDPR Age of Consent Isn't Child's Play, <https://www.skillcast.com/blog/gdpr-age-consent-not-childs-play> [10.04.2026].
27 *Asociacion Profesional Elite Taxi v Uber Systems Spain* SL, ECLI:EU:C:2017:981, Case C-434/15.
28 Georgian Law on "Personal Data Protection", Article 7 (1), 14/06/2023.
29 Ibid, Article 7(4).
30 Ibid, Article 17(2-c).
31 Ibid, Article 24(5).
32 Data Protection Commission Ireland (2020).
33 *Van der Hof, S., Ouburg, S.,* D2.3 Methods for Obtaining Parental Consent and Maintaining Children's Rights, Leiden University, Netherlands, 2021, 21-22.

One method of age verification involves requiring the user to complete a task or puzzle designed for a particular age group, with successful completion indicating a probable age level. More robust verification methods include the submission of official identification documents.[34]

In practice, several age verification mechanisms are commonly used, including: (1) self-declaration, whereby a user simply confirms their age without additional verification; (2) transferring a nominal amount via an electronic wallet; (3) making a small payment using a bank card; (4) providing a driving licence or similar document issued only at a certain age; and (5) submitting a scanned copy of an identity document or residence permit.[35]

Significant developments in this area were introduced in the United Kingdom through the Digital Economy Act 2017, which required internet service providers offering access to pornographic content to implement age verification mechanisms ensuring that such content is not accessible to individuals under the age of 18.[36]

The United Kingdom has also established a lower age threshold for valid consent in relation to information society services than that set by the General Data Protection Regulation, fixing it at 13 years.[37] While the legislation itself does not explicitly set out the requirement of parental consent, under the UK GDPR framework,[38] the processing of personal data of children under the age of 13 requires the consent of a parent or legal guardian. Furthermore, controllers are obliged to make reasonable efforts to verify that such consent has been validly provided. At the same time, where processing is necessary for the protection of the child's best interests or is based on another legitimate ground, it may, in certain circumstances, be carried out without parental consent.[39]

A particularly complex scenario arises where families move between EU Member States that apply different age thresholds for digital consent. For example, a 14-year-old child residing in a country where the age of digital consent is 16 may initially rely on parental consent. If the same child subsequently relocates to a jurisdiction where the age threshold is 13, questions arise as to the continued validity and legal adaptability of the original consent, exposing fragmentation within the EU data protection framework. Based on the approach reflected in the GDPR and the guidance of the Article 29 Working Party, parental consent remains valid until the child reaches the applicable age of digital consent or until such consent is withdrawn. In such cases, it may be argued that the consent provided by the parent continues to apply even after relocation, unless and until it is revoked or replaced by the child's own consent. This fragmentation undermines legal certainty and reveals the structural limitations of a harmonised framework that permits national divergence in core child protection standards.

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34 *Lievens E., van der Hof S., Liefaard T., Verdoodt V., Milkaite I., Hannema T.*, The Child Right to Protection against Economic Exploitation in the Digital World, 2019, 1-6.

35 *Van der Maelen C.,* The Coming of Age of Technology, Emerging Tech for Online Verifications, Delphi, 2019, 117.

36 United Kingdom, 'Digital Economy Act 2017 c. 30 – Part 3.

37 UK Data Protection Act 2018, part.9.

38 The Regulation applies to data controllers and processors established in the United Kingdom, as well as to those who process the personal data of individuals residing in the United Kingdom.

39 United Kingdom General Data Protection Regulation,08.03.2023. art.8.1

It is essential to emphasise that the provision of consent – whether by the child or by a parent or legal guardian – does not signify the end of childhood, nor does it justify treating minors as fully autonomous adult users. Online service providers must continue to recognise and address the specific vulnerabilities of children, even where valid consent has been obtained.

France, where a model of joint consent has been introduced, provides an instructive example.[40] Under French law, parental consent and the consent of the child below the age of digital consent may be required simultaneously. While the General Data Protection Regulation does not explicitly regulate the termination of parental consent, guidance from both the Article 29 Working Party and the Information Commissioner's Office suggests that parental consent ceases to be valid once the child reaches the applicable age of digital consent, at which point the child must confirm or renew that consent independently.[41]

The French data protection framework, established under the French Data Protection Act, regulates the processing of personal data and places particular emphasis on consent as a primary legal basis.[42] Similar to both Georgian law and the GDPR, it contains specific provisions addressing the processing of minors' personal data. While it fully incorporates the requirements of Article 8 GDPR, it sets the age of valid consent at 15. Notably, French law introduces the concept of joint consent, requiring that, for children below this age, both the child and the parent or legal guardian must provide consent. In addition, data controllers and service providers are under an obligation to ensure that information regarding data processing is communicated to minors in a clear, detailed, and age-appropriate manner.

The Georgian Law of Georgia on Personal Data Protection explicitly recognises a minor as a data subject.[43] However, in the case of a child under the age of 15, the law conceptualises the minor as a data subject acting jointly with a parent or legal representative. Furthermore, the law considers the processing of children's personal data without prior consent to be justified in specific circumstances, such as for medical statistical purposes and research on rare diseases. An interesting legal issue arises where an organisation processes the personal data of a child under the age of 15 and, in accordance with the law, notifies one of the parents, but subsequently the child reaches the age of 15 and no longer wishes for such information to be shared with the parent. The law addresses this scenario by providing that, once the child reaches the age of 15, they have the right to request from all data controllers the cessation of information disclosure to their parent or legal representative.[44]

The German Federal Federal Data Protection Act does not contain specific provisions regulating the processing of minors' personal data, nor does it establish a minimum age for valid consent. In this respect, Germany relies directly on the requirements of the General Data Protection Regulation,

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40 Article 45 Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés provides:"En application du 1 de l'Article 8 du règlement (UE) 2016/679 du 27 avril 2016, un mineur peut consentir seul à un.

41 Centre for Information Policy Leadership, GDPR Implementation In Respect of Children's Data and Consent, Hunton&Williams LLP, 2018, 17.

42 French Data Protection Act No.78-17, 06.01.1978. Art.5.

43 Ibid, Article 70.

44 French Data Protection Act No.78-17, 06.01.1978, Art.70.

without introducing a lower age threshold. Consequently, the minimum age for valid consent in Germany remains 16.

It should also be noted that the terminology section of the German federal law is not as detailed or exhaustive as that found in Georgian legislation. According to Section 51 of the Federal Act, consent is defined as a voluntary expression either of will, given orally or in writing. The provision also imposes an obligation on the data controller to demonstrate, where necessary, that valid consent has been obtained. Importantly, this provision primarily applies to the processing of personal data within criminal proceedings, including both investigative and judicial stages.[45]

In addition to the Federal Data Protection Act, Germany has adopted the Telecommunications-Telemedia Data Protection Act, which largely reflects and incorporates the requirements of the European ePrivacy framework.[46] Article 20 of this Act specifically addresses the processing of minors' personal data and aligns with the core requirements of the GDPR concerning parental or legal representative consent. However, a notable distinction lies in the definition of a minor: while the GDPR establishes 16 as the age of digital consent, the German law defines a minor, for the purposes of this Act, as any person under the age of 18. As a result, online service providers bear obligations to protect the personal data of individuals up to the age of 18. Moreover, the provision emphasises that such processing must be guided by the principle of the best interests of the child, as derived from international legal instruments.[47]

In the United States, the Children's Online Privacy Protection Act defines a "child" as any individual under the age of 13, while "parent" includes both biological parents and legal guardians. Accordingly, the processing of personal data of children under 13 requires verifiable parental consent. Within the context of technological developments, obtaining consent entails reasonable efforts by data controllers to ensure that parents are informed, prior to data collection, about the nature and purpose of the processing activities.[48] The Act provides a broad definition of personal data, encompassing any information collected online that enables the identification of an individual, including name, surname, home address, personal identification number, social security number, geolocation data, photographs, videos, and similar identifiers.[49]

4.3. Verification Challenges

With regard to parental consent, data controllers are required to obtain verifiable parental consent prior to the collection, use, or disclosure of a child's personal information. This obligation also

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45 *Bäcker M., Bange M., Bergt M., Boehm F., Buchner B., Caspar J., Dix A., Golla S., Hartung J., Herbst T., Jandt S., Klar M., Kühling J., Maschmann F., Jo Pesch P., Petri T., Raab J., Sackmann F., Schnebbe M., Schröder C., Schwichtenberg S., Tinnefeld M. T., Weichert T.,* Datenschutz-Grundverordnung-BDSG, Kommentar, C.H. Beck OHG, München, Auflage 4, 2024, 2017-2022.

46 German Federal Data Protection Act (BDSG), 30.06.2017, §20.

47 *Baumann J., Baumgartner U., Benedict K., Diemar U., Gierschmann S., Hanloser S., Hansch G., Lachenmann M., Schmitz P., Wortmann M.,* Telekommunikation-Telemedien-Datenschultz-Gesetz Kommentar, C.H. Beck oHG., München 2023. Gv, 214-220.

48 Children's Online Privacy Protection Act of 1998, §312.2

49 Ibid.

extends to situations where material changes are made to existing data processing practices. The law further specifies acceptable methods for verifying parental consent, including: submission of a signed consent form electronically or by post; monetary transactions via a parent's credit card or other online payment method; telephone confirmation; and video communication combined with identity verification through government-issued identification, with the requirement that such verification data be deleted immediately after confirmation.

However, there are exceptions where prior parental consent is not required. These include situations where processing is necessary to protect the best interests or safety of the child; where data are processed solely for statistical purposes, such as identifying which platforms children visit; or where processing is of a one-time nature and arises directly from a request initiated by the child.[50]

In addition to requiring prior parental consent, the Act grants parents the right to access the personal data collected from their child. Parents may request the correction, deletion, or cessation of processing of such data. Data controllers are under a corresponding obligation to provide detailed information regarding what data have been collected, their categories, and the purposes of processing.[51]

Both written and oral consent requirements for the processing of personal data of children below the age of consent are also reflected in the policy documents of UNICEF. UNICEF emphasises that a child, as a data subject, enjoys the same fundamental rights as an adult; however, the exercise of these rights requires additional authorisation from a parent or another adult with legal responsibility.[52]

Although the parent or legal guardian is authorised to provide consent for the processing of a child's personal data, the rapid development of technology raises significant practical challenges. In particular, it is increasingly difficult to ensure that parental consent mechanisms are compatible with all technological environments. It is often unclear whether a legal representative and whether such a representative fully understands the consequences of processing the child's personal data have genuinely provided consent.[53] Some scholars argue that alternative models to parental consent may be introduced. In particular, it has been suggested that parental consent could be replaced by the consent of another responsible adult over the age of 18 who demonstrably understands the implications of the processing of a child's personal data.

In practice, children frequently obtain parental consent with ease or even impersonate their parents when registering on social media platforms and mobile applications. In light of this, it is advisable for online platforms and application providers to strengthen verification mechanisms for parental consent. One possible approach would be to require additional confirmation via electronic mail or to introduce symbolic financial verification, such as a minimal payment (e.g., one cent) from a bank account owned by the parent.

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[50] Ibid, §312.5.

[51] Ibid, §312.6

[52] UNICEF Policy on Personal Data Protection, Document Number: Policy/DFAM/2020/001 Effective Date: 15 July 2020.

[53] *Van der Hof S., Ouburg S.,* D2.3 Methods for Obtaining Parental Consent and Maintaining Children's Rights, Leiden University, Netherlands, 2021, 19.

The European Data Protection Board has emphasised that verification mechanisms must not be discriminatory and should be designed to ensure accessibility for all users. Accordingly, where credit card verification is used, service providers must ensure that alternative verification methods are available for individuals who do not possess a credit card.[54]

A further important recommendation concerns the authenticity and verification of parental consent. Under the Law of Georgia on Personal Data Protection, the processing of personal data of children under the age of 16 requires the consent of a parent or legal guardian. In turn, the data controller is obliged to take appropriate and reasonable measures to verify the existence of such consent, which necessarily implies obtaining verifiable (authenticated) parental consent.[55]

However, the law does not clearly define what constitutes "reasonable verification," nor has the Personal Data Protection Service of Georgia issued detailed standards or guidelines to clarify this requirement. By contrast, comparative legal systems provide more structured approaches. For example, United States legislation on children's online privacy explicitly defines the concept of "verifiable parental consent" and sets out detailed methods for its implementation, including: submission of a signed consent form via electronic means or postal mail; monetary transactions using a parent's credit card or other online payment instruments; telephone contact with the parent; video conferencing with identity verification; and verification against government-issued identification databases, with the requirement that such data be deleted immediately after verification.[56]

In Georgia, as well as in broader international practice, it is increasingly observed that minors may use their parents' email addresses, identity documents, or other credentials to register on online platforms, falsely claiming that parental consent has been granted. In many cases, parents are not even aware of such actions. Therefore, in order to ensure adequate protection of minors and their personal data in the digital environment, it is essential to establish robust mechanisms capable of verifying the authenticity of parental consent.

In addition to the United States, the French regulatory framework addresses the issue of parental consent verification. The CNIL (Commission Nationale de l'Informatique et des Libertés) recommends that verification mechanisms may include the submission of official documents, such as birth certificates, marriage certificates, or identity documents, reliance on trusted third-party sources, or small-scale bankcard verification through minimal payments.[57]

5. Parental Authority in the Digital Sphere: Sharenting and the Transformation of Data Control

In the majority of legal relationships involving minors, the function of safeguarding their interests and representing them is entrusted to a parent or another legal guardian. This approach is largely grounded in the doctrine of limited legal capacity developed in civil law, according to which a

[54] Ibid.
[55] Georgian Law on "Personal Data Protection", Article 7(1-2) 14/06/2023.
[56] Children's Online Privacy Protection Act of 1998, §312.5.
[57] CNIL, Seventh Reccomendation available at: https://www.cnil.fr/en/recommendation-7-check-age-child-and-parental-consent-while-respecting-childs-privacy [07.04.2026].

minor's expression of will is not fully regarded as an autonomous legal act, and its legal effect often depends on the consent and participation of a legal representative. Accordingly, the validity and binding force of legal acts performed on behalf of a minor are closely linked to the will of their representatives, thereby ensuring the protection of the child's interests within legal relations.[58] Within the legal framework governing the protection of minors' personal data, a general rule also applies whereby the processing of a child's personal data must be based on the consent of the legal representative, namely the parent. However, in the digital environment – particularly in situations where parents themselves disseminate information about their children through the practice known as "sharenting"- this authority cannot be regarded as absolute or unrestricted, as it may directly conflict with the child's independent right to privacy and emerging digital autonomy. While in civil law relations premature expression of a minor's will may potentially cause harm to the child or third parties, in the context of social media such harm is often less immediate or directly visible. Nevertheless, the legal challenge lies in maintaining a balance between parental autonomy in decision-making and the child's right to respect for private life. Consequently, such discretion must be assessed through the prism of the child's best interests, which requires determining the threshold beyond which parental actions may interfere with the child's private sphere and potentially result in adverse long-term consequences.[59]

The practice of parents sharing personal data and information relating to their minor children on social media platforms or online services is referred to as "sharenting", a term derived from the combination of "parent" and "sharing".[60] In this context, three potential legal remedies may be identified for protecting a minor against the unilateral dissemination of their personal data by a parent: the child's consent, the right to be forgotten, and the right to claim compensation for damages. Sharenting may be understood as a form of 'proxy data processing', whereby parents act as de facto data controllers of their children's digital identities without corresponding regulatory accountability. This creates a structural gap in data protection law, as traditional controller–data subject models do not adequately capture intra-family data disclosures. In this sense, sharenting represents a form of 'involuntary digital identity formation', whereby a child's online presence is constructed prior to the development of their legal and cognitive autonomy.

Empirical studies[61] indicate a significant divergence between parental and children's perspectives regarding the requirement of obtaining a child's consent before sharing information in the digital environment. Parents, as a rule, do not seek consent from their children, while children's objections often have little practical effect. This creates an imbalance of interests, leading to tension within the parent – child relationship. Part of the doctrine[62] argues that parents should fully respect the

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58 Georgian Law on "Civil Service Code", Article 63(1). 26/06/1997.

59 *Shudra, T.,* Protection of Minors' Personal Data in the Digital Environment under Divergent Expectations of Parents and Children, Journal of Personal Data Protection, No. 1, Tbilisi, 2023, 118.

60 The definition is available at: <https://www.collinsdictionary.com/dictionary/english/sharenting> [22.04.2026].

61 *Siibak A., Lipu M.,* 'Take it down!': Estonian parents' and pre-teens' opinions and experiences with sharenting, Media International Australia · February 2019, 3.

62 *Sorensen S.,* Protecting Children's Right To Privacy In The Digital Age: Parents as Trustees of Children's Rights. Children's Legal Rights Journal 36(3), 2016, 202–203.

child's privacy and refrain from disclosing their personal information, whereas another view prioritises[63] a child-centred approach, under which parental authority is exercised strictly in accordance with the child's best interests.

A significant segment of parents considers that minors, due to their developmental stage, lack the capacity to provide informed consent, and therefore their views should not be treated as legally decisive. From this perspective, parents, as legal representatives, possess an exclusive right to control the dissemination of their child's personal data. However, in practice, there is an emerging trend towards more balanced and legally reasoned approaches that incorporate the child's informed participation and respect for their privacy in the digital environment.[64] In certain areas of legal relations, it is increasingly recognised that parental authority may be limited in favour of the child's interests. Under the General Data Protection Regulation, the age range between 13 and 16 is defined as the period during which children may directly access information society services without parental consent. Accordingly, the age of 13 may be interpreted as a functional threshold for the gradual recognition of the child's digital autonomy after which parents may, in certain contexts, be expected to seek the child's consent before sharing their personal data online, particularly where such dissemination is primarily based on parental expression rights. This dynamic illustrates a structural imbalance in which the child's autonomy is systematically subordinated to parental discretion, without adequate legal safeguards.

In situations where a conflict of interest arises between a parent and a child regarding the sharing of the child's personal data, it is essential that an appropriate mechanism exists through which the minor's views can be heard and duly considered. The obligation to take into account the child's opinion has been addressed by the European Court of Human Rights, which has held that in individual cases, particularly those involving Article 8 of the European Convention on Human Rights, a child's views must be heard and given due weight in accordance with the principle of the child's best interests.[65] This jurisprudence reinforces the principle that children are not merely passive subjects of protection but active rights-holders whose views must influence decisions affecting their digital identity.

One possible preventive mechanism against the negative consequences of sharenting is the effective implementation of the "right to be forgotten" within data protection law. Although prior informed consent remains a more effective preventive instrument, the right to erasure nonetheless functions as a legally significant, structurally limited in its preventive capacity, mechanism for protecting minors in the digital environment.

A minor is also entitled to claim compensation for damages where their rights have been infringed, including because of sharenting practices. While compensation serves a compensatory function, addressing harm already caused, it does not fulfil a preventive role and cannot effectively prevent future violations, similarly to the right to be forgotten, which operates through the removal of

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63 *Steinberg S. B.,* Sharenting: Children's Privacy in the Age of Social, Gainesville, FL: UF Law Scholarship Repository, University of Florida Levin College of Law, 2017.

64 *Siibak A., Lipu M.,* 'Take it down!': Estonian parents' and pre-teens' opinions and experiences with sharenting, Media International Australia · February 2019, 1-11.

65 N.TS. AND Others v. Georgia, [2016], ECHR (N717716/12) 43-45, 70-71.

harmful content from the digital space. Consequently, although important, this remedy functions as a secondary legal instrument rather than a primary safeguard.[66] Although minors are generally recognised as autonomous rights holders entitled to seek compensation for violations of their rights, the practical enforcement of such claims is often constrained by their dependent legal status vis-à-vis their parents. At the international level, this right is enshrined in Article 12(2) of the United Nations Convention on the Rights of the Child, while at the national level it is reflected in Article 18 of the Georgian Civil Code and Article 13(1) of the Georgian Child Rights CodeHowever, in practice, given the nature of family and legal relations, initiating legal proceedings by a minor against their own legal representative is often highly complex. For instance, in United States tort law, such claims are rarely encountered in jurisprudence, and in some states, they are explicitly restricted by legislation. Similarly, in the Georgian legal context, although no explicit prohibition exists, such actions remain largely uncommon in practice due to prevailing social and familial considerations.[67] This reveals a systemic enforcement gap, where rights formally exist but remain practically inaccessible to minors.

The effectiveness of the institution of prior consent of minors as a preventive mechanism against "sharenting" is to some extent limited in cases involving children of public figures. In such circumstances, taking into account the family and social status of the minor, the child may be regarded as a person of public interest. This classification may support the view that such minors bear a certain "reduced expectation of privacy" (or diminished expectation of privacy) with respect to the publication of their image or other personal information by their parents in the public sphere. Consequently, in the case of children of public figures, the legal requirements concerning consent may be applied in a differentiated manner and may offer a weaker protective barrier for safeguarding their right to private life.

The Global Kids Online[68] network published in 2018 a significant study on what children like to do online and the barriers they encounter in digital environments. The research involved 14,733 children from nine countries who use the internet on a daily basis. The findings indicated that most children prefer using mobile phones for online activity rather than other devices. The study further revealed that children perceive their online behaviour as being largely influenced by their parents and the behavioural patterns set within the family environment. These findings support the argument that children's digital behaviour is structurally shaped by parental practices, reinforcing the need for regulatory attention to parental responsibility in data protection law.

A majority of respondents stated that they began actively using mobile phones and the internet after observing extensive device usage by their parents, often in situations where parental attention was directed more towards digital devices than towards interaction or play with their children. Children also expressed the belief that parents should play a decisive role in shaping their online behaviour and digital engagement.

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[66] United Nations Human Rights Council, Resolution on the Rights of the Child: Access to justice, A/HRC/25/L.10, 25 March 2014, United Nations Children's Fund (UNICEF), Children's Online Privacy and Freedom of Expression: Industry Toolkit, 10.

[67] *Wingerter I.,* Parent-Child Tort Immunity, 50 La. L. Rev. 1131 (1990).

[68] The Global Kids Online network is a collaborative initiative between UNICEF, the London School of Economics and Political Science, and the EU Kids Online network.

These developments demonstrate that a purely consent-based framework is no longer sufficient, necessitating a transition towards regulatory models grounded in accountability, risk assessment, and the proactive protection of children's digital identities.

6. Conclusion

The analysis undertaken in this article demonstrates that, while existing data protection frameworks formally recognise minors as rights-bearing data subjects, their effective protection remains constrained by structural limitations inherent in a predominantly consent-driven model. The reliance on parental authorisation as a proxy for children's autonomy fails to adequately reflect the complexities of digital environments, where consent is often neither fully informed nor genuinely voluntary.

The phenomenon of sharenting further exposes the inadequacy of traditional legal constructs, as it blurs the boundaries between private and public spheres and positions parents as de facto data controllers without corresponding legal responsibilities. This creates a regulatory gap in which children's digital identities may be shaped, disclosed, and permanently recorded without their knowledge or meaningful participation. The situation is particularly problematic in the case of children of public figures, where a reduced expectation of privacy may significantly weaken available safeguards.

Moreover, challenges relating to the verification of parental consent, cross-border inconsistencies, and limited enforcement mechanisms highlight the need for a more coherent and effective legal approach. Comparative insights demonstrate that, while certain jurisdictions have attempted to introduce more detailed verification standards, these efforts remain fragmented and insufficiently harmonised.

In light of these findings, this article argues for a paradigmatic shift in the regulation of children's personal data – from a formalistic reliance on consent towards a responsibility-based and risk-oriented framework. Such a model should impose clearer obligations on both data controllers and parents, recognising the latter's influential role in shaping children's digital presence. Ultimately, ensuring the meaningful protection of minors in the digital age requires not only legal reform but also a broader reconceptualisation of accountability, one that places the child's best interests and evolving autonomy at its core. Without such a shift, children's rights risk remaining formally recognised yet substantively unprotected in the digital age.

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Report from the Polish Conference: Planning – Law – Economy**

Scientific cooperation between Georgia and Poland requires the exchange of information about organized scientific conferences. It is also an opportunity to learn about topics that may be of interest to scientists from both countries. On May 23, 2025, a conference entitled "Planning – Law – Economy" ("Planowanie – Prawo – Gospodarka") was organized at the Maria Curie-Sklodowska University in Lublin. Participants discussed topics related to spatial planning instruments, cost allocation in cooperation networks, the relationship between crises and economic development, destruction of social bonds in local areas, maintenance of public roads, regional development strategies, and the role of the Polish Senate (the upper chamber of the Polish parliament) in economic policy.

Keywords: *economic crisis; municipal roads; Polish Senate; Polish voivodeship; Shapley value; social bonds; spatial planning.*

1. Introduction

On May 23, 2025, in the Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin, in Poland, was organized the scientific conference "Planning – Law – Economy". It was organized by the Department of Administrative Law and Administrative Science and the Lublin Scientific Society. The event was held under the honorary patronage of Prof. Marek Kulik, Director of the Institute of Legal Sciences at UMCS. The Scientific Committee consisted of: Prof. Jerzy Stelmasiak – chairman of the Commitee and chairman of the Department, Prof. Leszek Leszczyński, Prof. Kamil Sikora, Dr. Karol Dąbrowski, Dr. Eliza Komierzyńska-Orlińska, Dr. Dorota Lebowa, Dr. Sławomir Pilipiec, Dr. Agata Przylepa-Lewak, and Dr. Agnieszka Wołoszyn-Cichocka. The Organizing Committee worked under the chairmanship of Prof. Piotr Szreniawski, who was the originator and initiator of this scientific undertaking. The members of the Organizing Committee were: Prof. Marian Zdyb, Dr. Barbara Dudzik, Dr. Jakub Kosowski, Dr. Katarzyna Osiak-Krynicka, Dr. Marcin Roliński, Dr. Hanna Spasowska, Mateusz Dolińczyk, MA, Monika Iżewska, MA, Patryk Patoleta, MA, and Wojciech Szczotka, MA.

In the conference took part seven speakers representing the Faculty of Law and Administration, Faculty of Economics, Doctoral School of Social Sciences MCSU in Lublin, Jan Zamoyski College of Humanities and Economics in Zamość, Council of Węglin Północny District in Lublin, Law Office dr

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** The conference was held at Maria Curie-Sklodowska University in Lublin, Faculty of Law and Administration, May 23, 2025. The author would like to thank Prof. Piotr Szreniawski and the authors of the lectures for their help in preparing this report and for providing the materials.

Agnieszka Sznajder dr Jakub Sznajder s.c., and Centre for European Union Transport Projects in Warsaw.

The titles of their presentations were as follows: Prof. Anna Ostrowska, "New spatial planning instruments in response to threats to spatial order" (*Nowe instrumenty planowania przestrzennego w obliczu zagrożeń dla ładu przestrzennego*); Dr. Anna Tatarczuk, "Fair cost allocation in cooperation networks" (*Sprawiedliwa alokacja kosztów w sieciach współpracy*); Dr. Agnieszka Stolarska, "The dynamics of economic development, crises, and their effects in the context of globalization" (*Dynamika rozwoju gospodarczego, kryzysy i ich skutki w kontekście globalizacji*); Dr. Karol Dąbrowski, "Disregard for the law, destruction of social bonds, and decline in neighbourhood activity: the case of Węglin Północny district in Lublin" (*Lekceważenie prawa, destrukcja więzi społecznych i spadek aktywności sąsiedzkiej na przykładzie dzielnicy Węglin Północny w Lublinie*); Dr. Agnieszka Sznajder, "Fulfilling the obligation to maintain public municipal roads: the local plan and statutory provisions" (*Realizacja obowiązku utrzymania publicznej drogi gminnej – plan miejscowy a przepisy ustaw*); Zbigniew Mazur, M.A., "Voivodeship development strategy: legal and praxeological issues" (*Strategia rozwoju województwa. Zagadnienia prawne i prakseologiczne*); Mateusz Dolińczyk, M.A., "The role of the Polish Senate in shaping Poland's economic policy" (*Rola Senatu RP w kształtowaniu polityki gospodarczej Polski*).

2. New Spatial Planning Instruments in Response to Threats to Spatial Order

Difficulties in realizing the common good are particularly evident in the area of spatial planning. Anna Ostrowska drew attention to problems in this area. She pointed to an important change in Polish legislation, namely the introduction of general plans ("planów ogólnych") in 2023. A general plan ("plan ogólny") is adopted by a municipality. The plan defines the directions of spatial development. Its purpose is to designate planning zones, for example, zones with multifamily housing. Another spatial planning instrument is an integrated investment plan ("zintegrowany plan inwestycyjny"). Under this instrument investors finance infrastructure, not only transport infrastructure, but also social infrastructure, e.g., the construction of educational institutions.

Local spatial development plans ("miejscowe plany zagospodarowania przestrzennego") have been a basic element of the spatial planning system in Poland. However, they are not adopted by most municipalities and cover only 30% of Poland's territory. In areas where such plans are absent, municipalities issue decisions on building conditions for individual properties at the request of investors. In Poland, these administrative decisions in the field of construction law are called "wz-tki", because "building conditions" in Polish are translated as "warunki zabudowy" ("w-z"). This means that there is no plan for the entire district, but each building plot is developed differently. In this way, these administrative decisions became a symbol of Polish urban chaos and pathologies in the construction law.

In addition, the local spatial development plans were amended for individual plots of land at the request of individual investors. This did not concern families building single-family homes for their own use, but rather corporations and investment funds constructing large apartment buildings on individual plots in city centres. This illustrates the scale of the chaos. Real estate developers were also treated more favourably than small investors. For example, they were not required to designate parking spaces for commercial properties. As a result, large housing estates were created without adequate parking facilities, and streets became cluttered with cars.

To make matters worse, the government prepared and parliament passed so-called special acts ("spec-ustawy"). Some of these special acts were adopted for particular public investments that the Polish state would not have been able to implement under normal legal conditions. The Polish lawmaker created a paradox: in order to carry out a public investment, the legislature had to adopt special regulations derogating from the ordinary rules of construction law, environmental protection law, etc. These special acts were also used to favour large investors.

The most famous special act was the *lex developer*, which allowed residential developments to be located contrary to local spatial development plans. It was possible because in Poland election campaigns are financed by real estate developers, and close relationship between developers and politicians in major cities.

The first lecture concluded pessimistically: there is no coherent spatial planning system in Poland. Such a system does not exist at the regional (voivodship) level, let alone at the state level. Lobbying, circumventing the law, communication and spatial chaos, urban sprawl (so-called "zabudowa łanowa"), and the "concreting of cities" ("betonoza") are characteristic of Poland.

3. Fair Cost Allocation in Cooperation Networks

Anna Tatarczak spoke about the fair allocation of costs in cooperation networks. She understood cooperation networks broadly, as forms of collaboration between individuals and entities, not necessarily as formal networks but rather as groups of individuals cooperating with each other. She emphasized that cooperation involves not only sharing resources but also the sharing of costs. In her view, joint action enables economies of scale, that is, lower unit costs. However, as she noted, cost reduction requires the adoption of an appropriate and fair cost allocation mechanism among cooperating parties. It is important that none of the participants feel exploited. Therefore, a fair cost allocation mechanism should be developed in order to increase trust and ensure the sustainability of the relationship.

A. Tatarczak referred to the Shapley value as a tool for allocating shared costs among participants in cooperation. She considered it a practical instrument in situations where resources are shared in order to achieve economies of scale. The Shapley value allows for the calculation how much the total cost for the participants in the cooperation network will decrease when a new participant joins the network, that is, how each additional participant contributes to reducing the costs incurred by others. She also linked the Shapley value to the idea of justice.

4. The Dynamics of Economic Development, Crises, and Their Effects in the Context of Globalization

Agnieszka Stolarska presented other economic issues at the conference. In her opinion, economic development and economic growth are not always coincide. A market economy is characterized by an increase in national income, however, periods of growth are interrupted by phases of reduced economic activity, during which the growth rate declines, and both production and employment fall.

Economic fluctuations are diverse in nature. Their causes are influenced by changes in consumer and investment demand, monetary and fiscal policy, commodity prices, geopolitical situation, technological progress, and random events. Fluctuations may be accidental, seasonal, or cyclical. In contemporary economies, the intensity of cyclical economic disturbances is linked to the expansion and growing importance of the financial sector.

The business cycle consists of several phases. During the recovery phase, new investment projects are implemented, employment increases, incomes, wages, and trade turnover rise, although prices also increase. During the boom (expansion) phase, investors are optimistic, and the economy reaches full utilization of productive capacity. This is followed by a crisis, characterized by declines in stock market indices, profits, investment, employment, and trade turnover, as well as a sharp reduction in capacity utilization. The final phase is depression, when the economy remains stuck at the low level of productive capacity utilization. Business cycles can be associated with speculative bubbles.

The causes of the cyclical nature of economic activity can be divided into external and internal factors. External causes are non-economic in nature and include, for example, wars, revolutions, discoveries of new resource deposits, demographic changes, technical innovations, and natural phenomena. Internal causes are directly related to the economic system, for example, consumer demand, investment demand, and government policy. It can therefore be argued that a crisis is the price paid for a period of accelerated economic growth.

Contemporary crises have a broader global scope as a result of globalization. Globalization is shaped by scientific and technological progress, international competition, and the economic policies of individual countries. Globalization has both positive and negative aspects: environmental, economic, social, and cultural. The benefits of globalization include, for example, the free movement of goods and services, access to new markets, increased exports and trade, improved quality and efficiency, lower prices, diffusion of modern technologies and management methods, an influx of foreign investment, and an improvement in the quality of human capital. Furthermore, in today's world, global problems have reached a scale and level of complexity that cannot be solved within a single country.

In summary, Agnieszka Stolarska emphasized that the following factors are key determinants of the business cycle:

1) market economy institutions understood as the basic principles on which the economic system is based;
2) corporations, the development of the financial sector, and new opportunities for speculation arising from financial instruments;
3) innovations;
4) the rules of the monetary system;
5) private and public debt;
6) external threats, including epidemics and wars.

5. Disregard for the Law, Destruction of Social Bonds, and Decline in Neighbourhood Activity: the Case of Węglin Północny District in Lublin

Poland has a three-tier territorial division consisting of voivodeships, powiats (პოვიატი), and gminas (municipalities). Local self-government operates at each of these levels. Municipalities may be classified as urban, urban-rural, or rural. An urban municipality consists of a city, an urban-rural commune includes a small town and surrounding villages, while a rural municipality comprises several villages. Municipalities are divided into auxiliary units: "sołectwa" in rural and rural-urban, and districts in urban municipalities. "Sołectwo" is an auxiliary unit, usually comprising a single village, or a village together with its hamlets. Lublin is one of the largest city in eastern Poland and the capital of Lublin Voivodeship. The city is divided into 27 districts. Węglin Północny is a distinctive district of Lublin, is located in the southern part of the city and is characterized by single-family houses. Particularly in larger cities, a low level of residents' activity, in matters concerning the district as a common place, constitutes a significant problem. The undersigned addressed this issue in his lecture, seeking a theoretical model to explain this phenomenon.

To explain this phenomenon, three theoretical assumptions can be formulated: 1) disregard for the law as a social phenomenon; 2) the impact of disregard for the law on social bonds; 3) the social consequences of the destruction of social bonds.

Compliance with the law and disregard for the law represent competing attitudes toward the legal order. For the sake of simplification, it may be assumed that the law is either respected or disregarded. When the law is disregarded, it is effectively replaced by lawlessness. This creates a "space" where is no law. In this way, smaller or larger spaces within a city may exists outside the law. These areas become "immunized" to particular parts of the legal system. This situation arises as a result of human actions combined with a lack of adequate response from public authorities. Such spaces are not excluded from the entire legal system, nor do they exist beyond the territory of the state as a whole. Rather, their "immunity" is limited to specific parts of territory and to specific norms within the legal system. These are, for example, parts of a district in which residents or property owners disregard the law in some part of the legal system, not necessarily on a continuous basis. This situation resembles legal immunity in the Middle Ages, although it does not result from the will of public authorities, but rather from the self-will of individuals.

Disregarding the law has a negative impact on social bonds. People who disregard the law and act unlawfully create an "immunized" area. They not only break the social bonds connecting them to others, and to their neighbourhood group, but also, by spreading lawlessness, have a destructive impact on the quantity and quality of social bonds. At the same time, they may function effectively within other social groups, performing various social roles. They may destroy the neighbourly bonds while simultaneously fulfilling their professional roles in the workplace. Such a "sociological disconnect" is a typical phenomenon resulting from the performance of different social roles in different situations. People who spread lawlessness exclude other individuals from the group activities, "absorbing" them into the lawlessness they create. The social group continues to exist (because it is territorially limited and some individuals will always live in that area), but the pathological situation discourages others from living there. Ultimately other people move out of the district.

A person that disregards the law contributes to a decline in the size of the neighbourhood group and the settlement of abandoned areas by other pathological individuals, and as a result, to a reduction in quality of life and legal security. Due to the unlawful actions of individuals who disregard the law, the community fails to develop and does not improve its quality of life and level of safety, which can also be measured, for example, by the frequency and manner of use of public space. Residents affected by lawlessness avoid public spaces.

The destruction of social bonds contributes to other individuals limiting or withdrawing from activities within a given social group, particularly by reducing their neighbourhood activities in the district. As a result, not only do interpersonal relationships suffer, but nature and public property are destroyed, and contempt for animal rights increases.

Importantly, the decline in neighbourhood activity is measurable, for example, by the number of local social activities organized in the district and the number of people participating in them. The decline in neighbourhood activity and the destruction of social bonds are therefore influenced by lawlessness and by the public authorities' tolerance of such lawlessness.

Individuals who do not comply with the law (that is, who engage in unlawful activities) destroy social bonds, discouraging other residents from social activity. They discourage other residents from acting in the public sphere, effectively "excluding" them from neighbourhood activities, including by occupying their time. They "devour" that time. As a result, residents who are tired, discouraged, and intimidated become socially passive. Due to negative interactions with pathological individuals and experiences of violence, they are deprived of the will and strength to act beyond a sphere that has been appropriated by "pathological interactions" imposed on them against their will and without fault on their part. At the same time, such pathological behaviour could be easily and quickly stopped if the public authorities sought to ensure legal security in the district. The passivity of the public authorities deepens the passivity of the residents.

The lack of willingness and time on the part of residents to take action in public spaces results in a lower quality of these spaces. In such circumstances, individuals may engage in unlawful activities because social control is absent, and public authorities condone lawlessness through the inaction.

Therefore, there is a connection between the phenomenon of disregard for the law, existence, quantity (that is, the intensity, and frequency of social relations), and quality of social bonds in auxiliary units of the cities, as well as neighbourhood activity.

6. Fulfilling the Obligation to Naintain Public Municipal Roads: the Local Plan and Statutory Provisions

Another speaker, Agnieszka Sznajder, pointed to a specific but troublesome problem related to municipalities' failure to fulfil their obligation to build drainage systems for municipal roads. In Poland, public roads are divided into different categories: state, voivodeship, powiat, and municipal. Problems with road maintenance exist at every level. For many municipalities, this is associated with a lack of adequate street drainage, which is becoming a major problem with climate change and cyclical heavy rains. The lack of street drainage leads to flooding of homes.

It would seem that this issue should not raise any legal doubts. However, in the case law of Polish administrative courts, the situation is different. Polish administrative courts do not realize the statutory provision to issue a ruling in which the court would order the municipality to repair a public road so that water flowing from that road would not flood properties owned by natural or legal persons.

Everyone in Poland has the legal right to lodge a complaint against a resolution or order issued by municipal authorities if their legal interests have been violated. Similarly, he may appeal to an administrative court if the municipality does not perform the actions required by law. In such a case, the court should order the municipality to perform the necessary actions for the benefit of such a person, but at the expense and risk of the municipality. The law states that the municipality (gmina) is obliged to maintain the roads that belong to it (municipal roads). The regulations on public roads state that rainwater from the road is managed by means of drainage devices. Despite the clear wording of the regulations, if the municipality is inactive, administrative courts refuse to issue rulings in situations where rainwater floods properties, the road belongs to the municipality, and the municipality is obliged to build drainage. The current judicial interpretation of this area of administrative law is contrary to logic and leads to a violation of the constitutional right to property.

7. Voivodeship Development Strategy: Legal and Praxeological Issues

In Poland, voivodeships are territorial divisions similar to regions in other countries. They do not have autonomy, i.e., independence in legislative or executive powers, but they do have own government, independent of central government administration. In the Polish public administration system, this is referred to as voivodeship territorial self-government ("samorząd wojewódzki"). The legislative body is called "sejmik wojewódzki", and the executive body "zarząd województwa". An important act for the development of the voivodeship is the voivodeship development strategy (similar to regional development strategy in other countries), which is adopted by the "sejmik wojewódzki". Zbigniew Mazur discussed this strategy in his presentation. He examined the voivodeship development strategy from two perspectives: legal and praxeological.

He began by defining the concept of strategy, referring to the Chinese thinker Sun Tzu, dictionaries, and management textbooks. He distinguished three perspectives: philosophical, linguistic, and scientific. He then outlined the legal basis for the voivodeship development strategy. He noted that the legal procedure for the adopting this strategy includes a consultation stage involving various public entities.

In his opinion, praxeological aspects, in addition to legal ones, are important in strategy development. Therefore, a diagnosis of the voivodeship's situation (economic, social, etc.) is carried out, development goals are formulated, expected results are specified, and sources of financing are identified. He cited the development strategy of the Podkarpackie Voivodeship as an example. This Voivodeship is located in southeastern Poland and borders Slovakia and Ukraine. A SWOT analysis shows, for example, that the Podkarpackie Voivodeship – commonly considered one of the poorer regions – ranks first in Poland in terms of the proportion of households with personal computers and broadband internet access. It has a well-balanced settlement network consisting of small and medium-sized towns, and Rzeszów, the voivodeship capital, serves as a metropolitan centre with a highly developed industrial and scientific base, as well as strong tourism, infrastructure and quality of life.

The voivodeship is located on international transport routes (Via Carpatia), connecting it with Slovakia and southern countries, and it has a large international airport, "Jasionka". It is also characterized by rich natural assets and extensive forest complexes. A weakness, however, is the uneven development of subregions within the voivodeship, particularly in the southeast and east. Major problems include deficiencies in healthcare, limited access to hospitals and maternity wards, groundwater depletion, and the spread of invasive species, such as *Heracleum sosnowskyi*. The development strategy of the voivodeship assumes increased expenditure on research and development, expansion of railway infrastructure, and increased production of electricity from renewable sources.

8. The Role of the Polish Senate in Shaping Poland's Economic Policy

The Polish Senate ("Senat") is the second (upper) chamber of the Polish parliament. Mateusz Dolińczyk presented the history of the Polish Senate and the efforts to restore the second chamber in the Polish political and legal system after the fall of communism. He outlined the constitutional framework governing the activities of the Polish Senate in the context of shaping the country's economic policy from a historical perspective.

The Senate has been involved in the budget adoption procedure since the Act of April 7 1989, which amended the Constitution of 1952. He then discussed changes in the Senate's with regard to the adoption of the budget act, introduced first by the so-called Small Constitution of October 17 1992, and later by the new Constitution of the Republic of Poland of April 2 1997. The Senate can play an important role by proposing amendments to the budget bill, as demonstrated by the work on the state budget for 2022. In addition, the Senate acts through its committees and through its expert and opinion-forming activities, including discussions on Poland's economic development strategies.

9. Summary

When examining problems in Poland in the areas of spatial planning, law, and the economy, it is possible to identify both individual and collective challenges. Spatial planning does not ensure spatial order. It is often influenced by local politics and the pursuit by quick profits by real estate developers. At the same time, spatial planning has become a source of conflict within local communities.

The idea of justice would be easier to implement if cooperating entities distributed the costs of their economy activities more evenly. The economic crisis is driven by financial instruments, and paradoxically, Poland's relatively smaller exposure to aggressive global financial instruments has protected both the Polish market and Polish society. However, Poland remains exposed to the anti-development, bureaucratic policies of the European Union.

At the local level, neighbourhood communities are often unable to resolve conflicts when some residents disregard legal norms, and public authorities are passive. A different problem concerns municipal roads, where even administrative courts tend to avoid ruling in favour of private owners in disputes with municipalities over road maintenance.

Regional development strategies offer an opportunity for growth at the regional level and create a chance to increase the development potential of local communities. However, at the central level, the second chamber of parliament plays too limited role in shaping economic policy, as its powers are largely confined to proposing amendments to the draft state budget.

These issues can be linked by a common thread: without rational legislation that is taken seriously and effectively by public authorities, it is difficult to imagine sustainable economic development. If the legislator acts irrationally, the costs of a dysfunctional state fall disproportionately on the poorer classes of society, while economic crises contribute to the growth of the wealth of the richest, who are therefore better able to disregard the law. A dysfunctional state does not pursue a strategic, long-term policy and becomes, as is often called in Polish public discourse, a “cardboard state”.

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