https://icj.mruni.eu

INTERNATIONAL COMPARATIVE JURISPRUDENCE

Research Papers

11(2)
2025
ISSN 2351-6674 (online)
doi:10.13165/ICJ

MRU
Mykolo Romerio universitetas

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International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.001

INTERPRETATION OF LEGAL NORMS: LINGUISTIC HORIZONS

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Received:17 July 2025; accepted: 3 December 2025
DOI: https://doi.org/10.13165/j.icj.2025.11.02.001

Abstract. This article is devoted to the study of the relationship between the interpretation of legal norms and linguistics in the context of the philosophy of law, theory of law, and legal methodology. The purpose of the study is to identify how the symbolic systems of language and law influence the interpretation of legal norms in various cultural and historical contexts. Methodologically, the work is based on an interdisciplinary approach that combines legal methodology, cognitive science, philosophy of consciousness, and the theory of symbolic categorization. The article utilizes quantitative and qualitative content analysis, as well as comparative methods. The rationale for the decisions of the Constitutional Court of Latvia and the Constitutional Court of Indonesia are analysed. The findings show that language and law are interconnected through symbolic codes that not only shape legal thinking, but also govern the emotional and legal behaviour of legal entities. This expands traditional ideas about law, indicating the need to integrate symbolic dimensions into the theory and practice of law. The article illustrates the complexity and diversity of legal practices that go beyond rigid formalization, and emphasizes the importance of cultural and social context in the administration of justice. This article contributes to the development of legal methodology, offering a new view of law as a complex and culturally conditioned phenomenon that demands interdisciplinary analysis.

Keywords: Legal norms, Interpretation, Linguistic, Law.

Introduction

Legal interpretation in the system of positive law (Pérez Trujillano, 2024) is traditionally viewed as a process of establishing the meaning of legal norms formalized in a text. Yet in reality, especially in Anglo-Saxon legal culture and in the practical application of the judicial discretion of the Romano-Germanic legal family, interpretation performs a more complex function: it acts as a structure for organizing legal narrative, and setting accents and logical boundaries in the discourse of law enforcement.

Law enforcement practice has its own interpretative approaches that provide logical completeness to discourse, highlight key positions, and create space for emphasizing certain legal arguments. Such paradigmatic shifts can

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perform a dual function: to structure argumentation and, at the same time, to provide an audience (for example, a court or public opinion) with the context necessary to understand the legal norm. Awareness of the value of interpretation is especially characteristic of developed legal cultures with a high degree of professionalization. As the history of Western legal tradition has shown, both in the era of legal formalism and legal postmodernism, interpretation remains an arena for the professional skill of lawyers, prosecutors, judges, and other law enforcement officers due to the emphasis on differences between a professional lawyer and other members of society.

The key feature of formalized jurisprudence (Monateri, 2024) is the wish to depersonalize the judge as a subject of law enforcement. In this context, a court decision (Zaman, 2024; Pietrzyk, 2025; Aritonang, et al., 2025) becomes a product of the system and procedures, rather than the individual view or conscience of the judge. Even in modern Western societies, a judge is often forced to adhere strictly to the provisions of the law, thereby minimizing the personal element (Janicki, 2024). This helps maintain the stability and predictability of the legal order, which is one of the fundamental values of the legal system. However, although such standardization promotes legal security and equality before the law, it also deprives the system of flexibility and the ability to adapt to evolving social (Fjellborg, 2025) realities.
In modern law enforcement practice, deviations from the formally "correct" interpretation of norms are often observed, which can be considered as a kind of variability of law. Rather than errors in the conventional sense, these deviations instead represent conscious and structured interpretations conditioned by specific social context, even religion (Vilks et al., 2025) and in the broader socio-cultural scope. Law enforcement officers often adapt (McNamara et al., 2025) legal norms based on certain unspoken rules and principles that ensure flexibility in the application of law.

The ability of law enforcement officers to recognise and interpret the law is no less rigorous than formal systems, but is distinguished by a higher degree of flexibility and adaptability. In this context, deviations from the "correct" legal norm should not be interpreted as simple errors or arbitrariness, since they are conscious and justified actions reflecting the living and dynamic nature of legal traditions. They act as an element that contribute to the social impact of law enforcement within a specific legal culture. In Anglo-Saxon legal systems, such an approach is often perceived as a manifestation of the skill of the law enforcement officer and helps to strengthen public confidence in the law. At the same time, in more formalized Romano-Germanic legal systems, manifestations of such an approach are sought to be minimized or excluded, since it is perceived as a threat to the stability (Vilks et al., 2024) and predictability of law enforcement. The standardization of legal procedures and norms aims to ensure a single, objective "sound" of the law, which reduces the role of a law enforcement officer's subjective interpretation and increases the weight of text and formal rules. In the context of formalized law, interpretation is disciplined (rules are established, where any methodological deviation can be perceived as an error or abuse) but it is also within the framework of these restrictions that the struggle for the power of legal persuasion is performed. The persuasiveness of legal interpretation (Milian Gómez, 2024) is something more than dryness or emotionality - it is the point of intersection of personal legal intuition, cultural stereotypes, and the legal self-awareness of society.

The purpose of this article is to explore the significance of the linguistic element in the problem of interpretation of legal norms - to identify how emotional, historical, and idiomatic elements shape the structure of legal meaning in different cultural contexts. The article uses comparative analysis, quantitative content analysis, and qualitative content analysis.

The authors take full responsibility for the publication's content, declaring adherence to the highest standards of scientific integrity. AI-assisted technology was used in the preparation of this article for checking grammar and spelling.

1. Theoretical background

1.1. Language as a structuring element in the interpretation of a legal norm

In legal practice, the proper interpretation of legal norms plays no less an important role than the canonical text of the legal norm. Interpretation provides an opportunity to adapt established norms to a new context (Bárány, 2024), thereby performing the function of legal commentary or even practical legal development. With the introduction of stenography in court hearings (and subsequently the advent of audio and video recording of hearings), the very perception of the interpreter has changed over time: the law enforcement officer became the subject of constant observation, the interpreter's statements began to be not only recorded, but also archived, therefore he was forced to correlate statements with the possibility of future criticism, and, accordingly, with the question of his own reputation. This gave interpretation a new facet - self-reflexivity. Consequently, interpretation in law is not only a tool for finding meaning, but also an expression of power, the legal self-awareness of society, cultural memory, and institutional legitimation. The rules here are important not only for how to understand the norm, but also for who has the right to this understanding, to what extent, for what purpose (Durguti et al., 2024), and in whose interests. In the interpretation of legal norms, law as such therefore intersects with the philosophy of language (Spaić & Isibor, 2024), the theory of power, and the cultural studies of justice (Potacs, 2024).

There is a deep connection between linguistic (Ajenifari et al., 2025; Römer-Barron & Cunningham, 2024) and legal perception, since both are built on certain cognitive (Wojtczak & Zeifert, 2025) and symbolic frameworks. Changes in meanings and ways of using language lead to transformations in symbolic memory, which is responsible for the categorization, association, and management of meanings. Symbolic processes are also accompanied by psychosomatic reactions, i.e. they include emotional and legal experiences (Petrażycki, 1955). Law, like language, is based on universal constants, but specific meanings and ways of expression depend on the cultural context in which it functions as a symbolic communication system. Forms of traditional law, especially those focused on utilitarian social functions, more often use "compressed legal codes" due to the collectivity of the roles of participants in law enforcement activities. The symbolic and emotional content of such forms of law is more laconic and closely related to specific social situations. In contemporary legal postmodernism, the roles of law enforcement officers are more individualized, and more articulated and analytical legal codes (Juan et al., 2024) are used. Interpretation thus becomes a unique form of legal subjectivity.

A special type of such interpretation is legal commentary, which functions as a reference, reformulation, or critical intervention in the paradigmatic stereotypes of the legal norm. These interventions not only consolidate certain forms in the memory of society, but also create a distance in which a meaningful critical or symbolic legal statement is possible - they activate not only the meaning, but also the meta-commentary. At the same time, at the centre of legal interpretation is not just a normative legal act, but an integral complex of meanings, cultural attitudes, habits, and professional automatisms accumulated by the interpreter. In such a situation, the true criterion of successful interpretation is the subjective feeling that something truly significant has been expressed. In traditional legal systems, as well as in postmodern law, interpretation covers not only the semantic but also the structural level - interventions occur on many hierarchies, from the general structure of the legal norm’s text to the process of law enforcement. The degree of the necessary skill of the interpreter depends on the complexity of the legal form and the nature of the paradigm. For example, in postmodernism, interpretation requires a much deeper and more sophisticated approach than in most traditional legal practices. However, in legal systems that exhibit a high degree of formal complexity, considerable preparation is also required.

In cases of interpretative legal practice involving several law enforcement agents (e.g. a lawyer, a prosecutor, a judge), a clear distribution of functional roles is required. Some of them provide a stable normative and

procedural basis for the process, while others interpret it, introducing specific semantic clarifications, additions, and adjustments. In the course of law enforcement interaction, role relationships are formed between the participants, similar to elements of a discursive dialogue (Janicki, 2024): the parties can respond to each other's actions and give legal comments, thereby forming the dynamics of the procedure.

Interpretive actions may take the form of repeating known legal constructions, rethinking them, or deviating from the established interpretation. Such actions are performed within the permissible normative space, and they can introduce important accents, revealing an individual or institutional interpretative position. Historically, a similar discursive structure can be found in traditional legal cultures. So, some systems had ritualized procedures for opposing arguments and refuting them, accompanied by the interaction of legal authorities with varying degrees of freedom and status responsibility. Similar role structures can be observed in modern justice - in adversarial models of legal proceedings, where each actor plays a certain role in the general mechanism of interpreting the law.

It is important to note that even in cases where the process of interpretation appears free and spontaneous, it is rarely completely unlimited. As a rule, law enforcers interpret specific legal norms, specific precedents, or specific legal positions that are part of the general legal field recognized by society. Interpretation can be flexible, but it always correlates with legal expectations formed both on the basis of a stable tradition and as a result of institutionalized procedures. In some cases, the structure of the interpretation process is set in advance (for example, in the form of a certain order of submitting arguments, stages of consideration of court cases), in other cases the structure of the process is formed situationally, depending on specific circumstances. Thus, interpretation within the framework of legal practice always balances between institutionally fixed procedures and an individualized understanding of the normative content. This two-layered nature allows both the maintenance the continuity of legal decisions, and ensures the adaptation of the norm to a changing context.

1.2. Interpretation and legal continuity

In the perception of a legal norm, not only its content but also the recognition of its form plays a crucial role. Society is capable of critically reacting (Harigovind & Rakesh, 2025) to familiar structural elements, comparing them (Monateri, 2024) with stereotypes already fixed in the collective memory. This position is formed on the basis of an awareness of the differences between borrowed elements of tradition and new variable constructions. A tension therefore arises between continuity and interpretation, between the virtual archive of legal norms and current practice.

Legal perception, when confronted with a repeated but partially modified expression of a familiar norm, activates the mechanisms of comparison and "legal expectation". These expectations can be confirmed - then the interpretation is perceived as canonical - or violated, which can provoke criticism, doubt or, conversely, fresh interest. Thus, legal variability works as a tool for activating legal consciousness: it requires the addressee not just to assimilate the norms, but to be involved in legal thinking. This makes the legal tradition flexible and vibrant. If the legislator introduces legal novelty through a form already familiar to society - not simply by creating new legal structures, but also by rethinking established structures, then the law enforcement interpreter "revitalizes" the perception of the legal norm and correlates it with a real case. The legislator's constant return to familiar legal models is not a sign of system limitations, but rather reflects a deep psychological attitude towards stability and recognition that is necessary to maintain law and order. At the same time, it is interpretation that serves as a powerful channel for renewing the perception of law: society, recognizing the form, evaluates its content anew in the light of new contexts.

In addition, modern legal systems often encourage the free circulation of forms, erasing the boundaries between a legal norm and its interpretation. In such a system, legal argumentation often turns into a reference to symbolic

codes, with which both the legislator and the law enforcement officer work. Those in the legal field are guided not only by the text of the law, but also by familiar interpretative patterns, supported by precedent, tradition, or socio-cultural expectations of society. As a result, legal communication functions as a multi-layered text, which combines current legal norms, interpretative practices, and historical memory. Comparison of old and new versions of a legal norm, their combination and difference form a dynamic system of meanings. This enables the law not only to repeat, but also to develop.

The lawmaking activity of the legislator often relies on certain legal stereotypes - stable formulations, idioms, already accumulated within the relevant legal paradigm. A major part of the interpretative process in law therefore comprises not in creating something completely new, but rather in working with familiar material: in rethinking and structurally embedding the norm in a specific context. Thus, the richer the available "dictionary" of legal stereotypes, the more flexibility the interpreter and legislator acquire. Modern legal consciousness, saturated with information due to global access to various legal traditions, allows the interpreter to proceed from different legal styles.

Working with the legal paradigm is necessarily accompanied by similarities between acts of lawmaking. This occurs both due to historical dependence and also as a result of the normative limitations of the socio-cultural context itself. The stricter the canons of a certain legal era or system, the less scope for interpretation - and the more noticeable the similarity between individual acts of lawmaking. At the same time, even deliberate borrowings (e.g. references to foreign normative legal acts (Werner, 2024) or foreign legal traditions) - can serve as an instrument of legal expression. Both in traditional legal culture and in postmodernism, such references do not necessarily indicate dependence or imitation; on the contrary, they become means of legal communication. These intertextual inclusions activate the effect of presence in the addressee of the legal norm, turning the legal act into an event of interpretation. Consequently, legal interpretation is not so much an autonomous act of a law enforcement officer, as an action that correlates with a multitude of signs, codes, and stereotypes already stored in the memory of the legal culture. It follows that even in the most “individual” act of interpretation, the collective voice of tradition is hidden, and any interpretation of a norm is possible only in the presence of the legal norm itself as a point of reference.

The legal self-awareness of society in legal interpretation is a relative concept, which is a product of historical and cultural selection. That which is perceived as a correct and socially supported (Fjellborg, 2025) interpretation of legal norms in one era, may be interpreted as daring and outlandish in another. Changes in society’s legal self-awareness are easily traced using comparative legal history as an example. Thus, the differences between European and American judicial schools, styles of conducting trials, and styles of argumentation in public speeches indicate stable yet historically evolving models of interpretation.

In the course of lawmaking, a stable set of morphological stereotypes characterizing the legal paradigm is formed and gradually develops. These stereotypes become the basis of collective legal consciousness and create a recognizable legal environment. When references to such stereotypes become self-evident, and the vocabulary of reproduced clichés stabilizes, the phenomenon of formalism arises - a state typical of ‘academic law’. However, if these references are accompanied by interpretations, they contribute to the dynamic renewal of the paradigm. The gradual transformation of the system occurs precisely due to such work with legal material. It should be noted that the presence of standard solutions provided by the legal paradigm greatly simplifies the lawmaking process. The legislator is not obliged to create all legal material from scratch, since most of the structure is already defined by the system. The higher the degree of legal paradigm standardization , the more the legislator is inclined to rely on the mechanical reproduction of the morphological elements enshrined in the legal tradition. Interpretation in this context acts as a form of conscious intervention. By creating such a structure, the legislator consciously interacts with the expectations of public opinion (Zhang, 2024) - either confirming them, or postponing their implementation, or directly violating predictability.

This strategy of the legislator allows two main goals to be achieved: firstly, the economy of legal material - the legislator can build a long-term legal statement without resorting to the constant creation of something new, but effectively processes a limited set of structures; secondly, the unification of the legal statement - the legal material is more effectively fixed in the socio-cultural collective memory of society. On the other hand, achieving these goals has a reverse side - the need to provide law enforcement officers with the freedom to properly interpret legal norms. The courtroom becomes the place where abstract legal categories are translated into socially intelligible meanings, revealing the extent to which law depends on the linguistic forms and cultural imaginaries within which it is articulated. A deeper understanding of how language structures legal interpretation can be strengthened by examining concrete judicial practices across different legal cultures (Indonesia and Latvia).

2. Materials and methods

The study utilizes quantitative and qualitative content analysis, as well as comparative methods.

Material: reasoning from decisions of the Constitutional Courts of Latvia and Indonesia. The most socially significant cases, considered in different years, were selected: 10 decisions of the Constitutional Court of Latvia (e.g. including cases that relate to the Official Language Law, Maintenance Guarantee Fund Law, Amendments to the Education Law, Amendments to Immigration Law, issues of dual citizenship, etc.) and 10 decisions of the Constitutional Court of Indonesia (e.g. including cases that relate to issues of water resources use, holding regional head elections, electronic information and transactions, opportunities to run for election, etc.). A full list of analysed cases can be found in the "References" section.

A comparative analysis of constitutional interpretation requires identifying those structural elements of legal reasoning that are not only formally manifested in judicial decisions, but also reflect the underlying mechanisms of legal thinking in different cultural contexts. To achieve this goal, the study focuses on three key dimensions: 1) the emotional and symbolic foundations of legal reasoning; 2) the socio-historical context of legal interpretation; 3) the structure of legal idiom and types of legal thinking. The choice of these aspects is motivated by the wish to go beyond traditional formal-dogmatic analysis, and to demonstrate how law functions as a cultural, symbolic, and cognitive system. For each judicial decision, a structured content analysis of the reasoning sections was conducted: 1) lexical-semantic (what words are used), 2) argumentative (how the words are embedded in the logic of reasoning), 3) cultural-historical (what narratives are implied by the text).

To conduct a content analysis of the reasoning of decisions of the Constitutional Courts of Latvia and Indonesia, the following marker coding table was developed:

Code	**Search category (number of detected markers)**	**Subject of the marker search**	**Potential examples**	**Subject of qualitative analysis**
	LEXICAL-SEMANTIC LEVEL			
LS1	Emotionally charged concepts	Words with moral, value, or emotional connotations	Dignity, harmony, justice, memory, order, security, freedom	Quote, context
LS2	Symbolic identity markers	Words associated with national, religious, or cultural symbols	National language, cultural heritage, values	Word and symbol type
LS3	Historical terms	References to periods, events, traumas, colonization, or occupation	Independence, traditional law	Word and time period

LS4	Legal idioms	Recurring terms characteristic of national legal culture	Public order, human rights, proportionality, public morality	Recurrence and context
LS5	Universalist/local categories	Categories of global law or local custom	Rule of law, legal standard, national value	Category type
	ARGUMENTATIVE LEVEL			
AR1	Emphasis on the formal-logical structure of an argument	Normative, teleological, historical-value, moral	Interpretation of the purpose of a norm; balance of rights; reference to a moral foundation	Reasoning type
AR2	Emotional element	How emotion/symbol strengthens an argument	Legitimization, protection of traditions, restraint of society from conflict	Description of application
AR3	Historical element	The role of history in a court's conclusion	Justification of restrictions, reinforcement of rights, historical trauma	Function statement
AR4	Connection of cultural norms with legal position	How local culture structures a conclusion	Referential nature, central basis	Degree of dependency
AR5	Application of legal principles	What principles are used and how	Proportionality, rule of law, social harmony	Principle type
AR6	Idiomatic constructions	Stable formulas of national legal thinking	Foundations of moral order	Specific example
	CULTURAL-HISTORICAL LEVEL			
CH1	Historical Narrative	What "narrative of the past" is embedded in the argumentation?	Struggle for independence; colonial legacy	Brief reconstruction
CH2	Cultural Framework	The value system through which the court interprets the norm	Religious, national-state, legal	Frame type
CH3	Identity Narrative	Who constitutes the "people" or political community?	Multinational people, nation, postcolonial community	Image description
CH4	Normative Function of Culture	How is culture used to limit or expand rights?	Restriction of freedom for the sake of tradition, expansion of rights for the sake of modernization	Action type
CH5	Geopolitical Framework	Where does the court place the country in the global context?	Integration, national path; postcolonial reconstruction	Direction
CH6	Hidden Metanarratives	Indirect value or ideological assumptions	Collectivism, individualism, modernization, tradition	Brief description

Table 1. Marker coding table

3. Results

3.1. Quantitative results of the comparative analysis

The quantitative content analysis yielded the following results. The number of lexical-semantic markers reveals significant differences in the stylistic and conceptual focus of judicial discourse in the two countries. Emotionally charged concepts (LS1) are significantly more common in Indonesian Constitutional Court decisions (104 versus 16). Indonesian reasoning is characterized by greater expressiveness and a desire to emphasize the social significance of issues at hand. In Latvia, such vocabulary is minimized, reflecting a focus on a restrained legal style. Symbolic markers of identity (LS2) are also more prominent in Indonesian decisions

(63 versus 7). Historical terms (LS3) and legal idioms (LS4), in contrast, predominate in Latvia (84 and 113, respectively), while they are fewer in Indonesia (47 and 32). This demonstrates that Latvian judicial reasoning relies more heavily on historical legal tradition and established legal language. The category of universalistic and local concepts (LS5) is also more common in Latvian decisions (88 versus 36).

At the level of argumentation structure, the differences between the systems are even more pronounced. Emphasis on the formal-logical structure of argumentation (AR1) is noticeably dominant in Latvia (126 versus 40). Latvian decisions are built around strict logical frameworks and legal constructs. In contrast, Indonesia exhibits the opposite trend—a significant increase in the emotional element (AR2) (133 versus 11). The historical element (AR3) is present in both cases, but is more common in Indonesia (104 versus 73), which correlates with the overall cultural and historical richness of Indonesian legal discourse. The category of the connection between cultural norms and legal positions (AR4) is also significantly more pronounced in Indonesia (116 versus 56), indicating the close integration of legal reasoning with traditional and cultural contexts. Latvia significantly outperforms Indonesia in the frequency of application of legal principles (AR5) (38 versus 8). Idiomatic constructions (AR6) are more common in Indonesian decisions (96 versus 45).

The quantitative results of the "Cultural-Historical Level" markers reveal significant differences in the reasoning of the two countries' decisions. Historical narrative (CH1) and cultural framework (CH2) are present in the decisions of both countries, but are somewhat more common in Indonesia (81 versus 49 and 80 versus 66, respectively). Identity narrative (CH3) is widely used in both Latvia and Indonesia, but is even more prominent in the latter country (114 versus 102), which is consistent with the general trend of strengthening the symbolic and value-based layer. The category of the normative function of culture (CH4) is almost absent from Latvian decisions (3 cases versus 74 in Indonesia), demonstrating a significant difference in the understanding of the role of culture in shaping the court's legal position. The differences are particularly pronounced in the geopolitical frame indicator (CH5)—117 markers in Indonesia versus 58 in Latvia. Finally, hidden metanarratives (CH6) are significantly more common in Indonesian texts (48 versus 9), indicating deeply rooted cultural and historical interpretive frameworks influence judicial reasoning.

The quantitative results of the comparative content analysis are summarized in Table 2:

Code	Category	Latvia (10 cases)	Indonesia (10 cases)
		Total number of markers detected	Total number of markers detected
	LEXICAL-SEMANTIC LEVEL		
LS1	Emotionally charged concepts	16	104
LS2	Symbolic identity markers	7	63
LS3	Historical terms	84	47
LS4	Legal idioms	113	32
LS5	Universalist/local categories	88	36
	ARGUMENTATIVE LEVEL		
AR1	Emphasis on the formal-logical structure of an argument	126	40
AR2	Emotional element	11	133
AR3	Historical element	73	104
AR4	Connection of cultural norms with legal position	56	116
AR5	Application of legal principles	38	8
AR6	Idiomatic constructions	45	96
	CULTURAL-HISTORICAL LEVEL		
CH1	Historical Narrative	49	81
CH2	Cultural Framework	66	80

CH3	Identity Narrative	102	114
CH4	Normative Function of Culture	3	74
CH5	Geopolitical Framework	58	117
CH6	Hidden Metanarratives	9	48

Table 2. The quantitative results of the comparative content analysis

3.2. Qualitative results of the comparative analysis

In the analysed material, the judicial discourse of the Constitutional Court of Latvia is characterized by a predominance of bureaucratic-administrative and technocratic-legal language, emphasizing factual precision and strict legal formalization. Frequent references to case materials and detailed formal descriptions create a neutral, "aloof" tone, consistent with the established traditions of European legal writing. Emotional and symbolic language is virtually absent.

Moral and value-based language plays only a supporting role, and rarely influences the structure of argumentation. However, an important element is the historical-cultural register, which often reiterates the theme of the trauma of occupation. Here, history functions not as a cultural resource, but as a factor of legal vulnerability and an argument in favour of protecting identity and stability. Legal language is structured around concepts such as proportionality, balancing interests, and functional context, reflecting a high degree of procedural rationality. Indonesian court decisions display a different linguistic pattern. Moral, value-based, and ideological language dominates. Judges actively use categories such as "people," "justice," "moral order," and "harmony"—phrases repeatedly enshrined in political culture, particularly in the ideological principles of Pancasila. Emotional and symbolic language is expressed through soft expressiveness and the use of religious, cultural, and national formulas. Historical and cultural language emphasizes history not as a threat, but as the foundation of a unifying national identity. A legal-technocratic language is present, but it plays a secondary role to value-based and ideological constructs.

With regard to types of arguments, qualitative content analysis yielded the following results. The analysed Latvian court decisions are based on formal legal reasoning, built on an analysis of norms, their hierarchy, procedural requirements, and legal principles. Normative and value-based argumentation is rare and used primarily as an auxiliary element. The historical-doctrinal component, linked to the period of occupation, is a significant factor: it forms the context for arguments related to the protection of the state, language, and identity. Teleological argumentation is pragmatic in nature—based on the functional goals of regulation rather than on value-based ideals. The comparative legal approach is used sparingly: references to the practice of the EU and other countries are present, but not dominant. In the analysed Indonesian judicial decisions, the central mechanism is normative-value argumentation based on the values of Pancasila, social harmony, and moral principles. Formal legal argumentation plays a secondary role, often serving to formalize the decision, but does not determine its structure. Historical-doctrinal argumentation is expressed through appeals to Pancasila as the ideological basis of the legal order, making it not simply a historical factor but an active doctrine. Teleological argumentation is imbued with ideological implications: the goals of norms are considered in the context of strengthening national identity, harmony, and unity. The comparative legal method is rarely used—the national ideological context is perceived as self-sufficient.

The qualitative results of the comparative content analysis are summarized in Table 3:

Language		
Description	Latvia (10 cases)	Indonesia (10 cases)
Bureaucratic-administrative, neutral language	Massive use: statistics, references, case materials	Present, but secondary
Moral-value, ideological register	Auxiliary	Powerful layer: harmony, people, moral order, justice
Emotional-symbolic language	Virtually absent	Soft emotionality, religious and cultural formulas
Historical-cultural language	Occupation trauma	History as identity, not as danger
Technocratic-legal register	Proportionality, lenient measures, and functional context predominate	Present, but rarely structures the text
Argumentation		
Formal-legal argumentation	Basis for decisions	More of a supporting role
Normative-value argumentation	Rare	Key mechanism
Historical-doctrinal argumentation	Occupation as a legal factor	Pancasila as a doctrine
Teleological argumentation	Pragmatic	Ideologically rich
Comparative-legal argumentation	Moderately used	Rarely used
Cultural-historical foundations		
Socio-cultural situation as a factor in law	Language environment, ethnodemography	Diversity, intergroup relations
Institutional/political tradition	Party system, occupation experience	Role of the state as a mediator
Deep cultural narrative	Occupation trauma, identity threat)	Harmony, Pancasila, national spirit
Religious layer	Absent	Present - for example, quotes from Islam

Table 3. The qualitative results of the comparative content analysis

4. Analysis of results and discussion

4.1. General observations

A comparative analysis of the lexical-semantic, argumentative, and cultural-historical structures in the decisions of the Constitutional Courts of Latvia and Indonesia reveals two significantly different types of legal rationality, rooted in different historical memories, political-cultural traditions, and the symbolic foundations of legal discourse. Quantitative coding reveals that Latvian decisions are characterized by a high density of technocratic and formal-legal vocabulary, as well as frequent references to historical-political memory associated with the experience of occupation and statehood. This shapes a type of legal argumentation in which historical trauma and questions of protecting the democratic order serve as key justifying factors. Latvian discourse is characterized by a desire for normative predictability, legal precision, and institutional coherence, which is manifested both in the predominance of formal interpretation and in the use of comparative elements as a tool for confirming European legal identity.

Indonesian decisions, by contrast, feature a significantly higher frequency of moral, value-based, religious, and symbolic vocabulary, and are characterized by abundant references to Pancasila, religious norms, and concepts of community harmony. The dominant modes of argumentation are teleological, value-based, and institutional-

philosophical, demonstrating a legal culture that perceives the Constitution as a living ethical and political document oriented toward ensuring the collective good. Unlike Latvia, where legal decisions are largely based on the historical legitimization of state institutions, the Indonesian model emphasizes the need to balance individual rights with social harmony, which is a central element of the state narrative.

Both jurisdictions demonstrate the use of strong cultural and historical foundations, but these are structured differently: in Latvia through the memory of a threat to statehood, while in Indonesia through integrative and religious values. Thus, legal interpretation in both countries goes beyond positivist methodology, but follows different trajectories: Latvian—institutional-historical, Indonesian—moral-teleological. This demonstrates that legal systems function not as neutral mechanisms for applying norms, but as cultural systems that support different models of legal consciousness and legitimation.

4.2. Indonesia: Linguistic ambiguity, communal values, and the symbolic weight of "keadilan" (justice)

The Indonesian legal landscape provides a uniquely fertile environment for examining the linguistic and symbolic constitution of legal meaning. Following the collapse of the authoritarian regime in 1998, the post-Reformasi era ushered in a renewed commitment to constitutionalism (Diprose et al., 2019), decentralization, and the recognition of human rights (Hermanto et al., 2025). Yet this institutional transformation unfolded within a society whose legal consciousness remained deeply shaped by *adat* traditions, religious moralities, and the nation's ideological foundation in *Pancasila* (Iskandar, 2016). As a result, judicial interpretation in Indonesia frequently emerges at the intersection of formal statutory language and culturally embedded symbolic vocabularies. This layered environment illuminates how legal norms acquire meaning not merely through textual boundaries but also through collective memory, emotional resonance, and socio-historical identity (Wardhani et al., 2022).

Indonesian courts often confront linguistic ambiguity directly, particularly when statutory terms carry moral or cultural significance (Hermanto, 2021). A prime example is the judicial treatment of *keadilan* (justice). Unlike in Western jurisprudence, where "justice" often functions as an abstract normative principle, Indonesian judgments regularly infuse the term with communal meaning, articulated through expressions such as *rasa keadilan masyarakat*—the community's sense of justice (Lailam & Anggia, 2023). This phrase, though lacking doctrinal precision, wields profound symbolic weight. It is deeply connected to Indonesia's socio-cultural expectations of harmony, balance, and moral propriety (Bin-Armia et al., 2024).

This interpretive tendency is vividly seen in land disputes involving customary communities. Several Supreme Court decisions concerning *tanah ulayat* demonstrate how judges extend statutory definitions of ownership and control to accommodate the historical and emotional ties between indigenous groups and their ancestral lands. Rather than adopting a strictly positivistic approach, the Court evaluates the dispute through the symbolic lens of collective stewardship and social harmony (Butt & Murharjanti, 2022). The legal meaning of ownership is thus reconstructed through linguistic and cultural idioms specific to Indonesia's pluralistic society.

A similar pattern emerges in the Constitutional Court's landmark decision *Putusan MK No. 35/PUU-X/2012*, where the Court distinguished *hutan adat* from state forests. Here, the Court transformed statutory language by grounding its interpretation in the socio-historical identity of indigenous communities (Sari & Fu'adah, 2014). The term *masyarakat hukum adat*, typically treated as a legal category, was reinterpreted as a culturally living entity shaped by centuries of communal practice (Wiratraman, 2020). This reasoning confirms that, within Indonesian jurisprudence, legal language acquires authority through its alignment with cultural memory and emotional legitimacy.

The linguistic construction of legal meaning also appears in decisions concerning individual rights and morality. In *Putusan MK No. 46/PUU-VIII/2010*, regarding the civil status of children born outside marriage, the Court infused the concept of *martabat manusia* (human dignity) with socio-cultural narratives about child protection and communal ethics (Kusmayanti et al., 2023). This decision revealed that the Court understands legal interpretation as a process of negotiating linguistic symbols through the prism of cultural expectation and constitutional morality.

The symbolic dimension of legal language is not confined to constitutional adjudication. The Supreme Court often employs culturally embedded terms such as *kepatutan* (appropriateness) and *kewajaran* (reasonableness) in administrative disputes. In Peradilan Tata Usaha Negara, these terms become operative legal standards through which judges assess the legitimacy of administrative discretion. Their meaning is shaped not by rigid doctrinal construction, but by societal expectations concerning fairness, proportionality, and bureaucratic integrity. By invoking *kepatutan* and *kewajaran*, the judiciary activates an emotional-symbolic vocabulary that helps bridge statutory provisions with lived administrative realities.

Moreover, Indonesian jurisprudence on human rights adjudication—particularly in cases reviewed by the Human Rights Court—demonstrates the interdependence between legal language and historical trauma. Proceedings related to past human rights violations often rely on terms such as *hak asasi*, *kemanusiaan*, and *keadilan universal*, which carry heavy symbolic and emotional significance in a nation grappling with the legacy of state violence. The courts' engagement with these terms reflects a broader societal struggle to reconcile formal legality with moral accountability, memory, and collective healing.

Electoral and constitutional litigation further illustrate this pattern. Decisions such as *Putusan MK No. 22-24/PUU-VI/2008* on electoral thresholds draw on the symbolic resonance of *kedaulatan rakyat* - people's sovereignty (Hijrah, 2024). While the phrase is enshrined constitutionally, the Court interprets it in light of post-authoritarian democratic aspirations, imbuing the term with a historical narrative of resistance and political emancipation.

A particularly revealing example can be found in the Constitutional Court's landmark *Decision No. 85/PUU-XI/2013* on the Water Resources Law, where the Court asserted that water is a *cabang produksi yang penting bagi negara*—a constitutional phrase whose meaning is interpreted not merely through economic logic but through the cultural imagery of water as a communal life-source (Kartika et.al., 2025). The Court's interpretation expanded beyond textual formalism, invoking the symbolic role of natural resources in sustaining collective welfare and environmental stewardship. The legal meaning of "state control" was thus reframed as an ethical responsibility grounded in cultural understandings of balance (*keseimbangan*) and care (*pengayoman*).

Similarly, *MK Decision No. 005/PUU-I/2003* on the Broadcasting Law illustrates how the Court moved away from a literal reading of regulatory provisions toward a symbolic interpretation that treats information flows as part of the moral infrastructure of democracy. Here, the Court infused terms such as *kepentingan umum* (public interest) and *kehidupan demokratis* (democratic life) with emotional and historical significance rooted (Windrawan, 2014) in Indonesia's struggle against state-controlled media under the New Order. Through such framing, linguistic expressions became repositories of democratic memory as much as legal categories.
The Constitutional Court's reasoning in *MK Decision No. 100/PUU-XIII/2015* on the Election of Regional Heads further underscores the symbolic nature of constitutional language. While the statute offered procedural descriptions of regional elections, the Court reinterpreted them through the conceptual lens of *kedaulatan rakyat* (Nazriyah, 2016). Here, sovereignty was not treated as a technical principle, but as a cultural symbol of post-authoritarian political emancipation. The Court's linguistic reframing reveals how constitutional terms evoke collective emotional experiences, shaping interpretive outcomes beyond the textual structure of the statute.

The Supreme Court exhibits a similar approach. In *MA decisions concerning environmental disputes*, for instance, judges have relied heavily on the culturally charged vocabulary of *pembangunan berkelanjutan* (sustainable development) and *kelestarian lingkungan* (environmental preservation). These terms function as more than policy goals; they symbolize a moral expectation deeply rooted in community relationships with nature.

The symbolic–linguistic method is also visible in judicial treatment of morality and public order. In *Putusan MK No. 48/PUU-VIII/2010* concerning judicial review of the Pornography Law, the Court acknowledged the impossibility of assigning a singular meaning to terms such as *kesusilaan*, *nilai-nilai budaya*, and *ketertiban umum*. Instead, the Court positioned these terms within Indonesia's plural cultural context, arguing that their meaning must remain open to interpretation in light of communal sensibilities and local traditions (Faiz, 2018). Through this reasoning, the Court explicitly affirmed that legal concepts in the moral domain are inherently symbolic, shaped by regional identity and cultural negotiation.

In the domain of religious and family law, several Supreme Court decisions on inheritance and matrimonial disputes have relied on linguistic constructs such as *kedudukan perempuan*, *keadilan proporsional*, and *kemaslahatan keluarga*. These terms, drawn from Islamic jurisprudence but adapted into Indonesian socio-cultural contexts, reveal how legal meaning is co-produced by statutory language and religious-symbolic vocabularies (Wijayanti, 2025). Courts use these terms not merely as doctrinal tools, but also as interpretive devices that align legal norms with societal expectations of familial cohesion and moral integrity.

Taken together, this expanded jurisprudential landscape amplifies the argument that Indonesian courts interpret law by mobilizing linguistic forms whose meaning is inseparable from cultural identity, historical trajectory, and emotional resonance (Mietzner, 2010).

4.3. Latvia: Precision of legal language and historical sensitivity to rule-of-law principles

The State of Latvia proclaimed on 18 November 1918 to ensure the freedom and promote the welfare of the people of Latvia and each individual. The people of Latvia did not recognise the occupation regimes, resisted them, and regained their freedom by restoring national independence on 4 May 1990 on the basis of continuity of the State. Latvia as a democratic, socially responsible, and national state is based on the rule of law and on respect for human dignity and freedom; it recognises and protects fundamental human rights and respects ethnic minorities. The people of Latvia protect their sovereignty, national independence, territory, territorial integrity, and democratic system of government of the State of Latvia (The Constitution of the Republic of Latvia, 1922). This historical-political context significantly influences the interpretation of legal norms in the courts.

Latvia is an integral part of Europe and a European Union member state. The framework of European (Western) type democratic state systems outlines common general principles, but these principles are always specified by the national law of the respective country. Taking into account that these general principles allow for wide freedom of action within the framework of the basic norms of a democratic legal state, Latvia can specify them, modify them, or supplement them with other criteria and thus create its own specific model of the Latvian democratic state system. In a concentrated form, this is included in the comprehensive designation of the state system "democratic republic".

In the examples below, we will demonstrate how the Constitutional Court's interpretation of the concepts "democratic republic", "principle of democracy" etc., carries both technical and symbolic significance: it reflects a collective commitment to legal certainty that emerged as a societal response to past arbitrariness (historical experience of Soviet occupation), to subsequent restoration of independence, and the centrality of constitutionalism in contemporary Latvian identity. In several rulings, the Constitutional Court has interpreted

statutory norms through the lens of this principle, even when the legislative text does not explicitly prioritize it. The linguistic formulation of the concept “democratic republic” functions as a normative category that embodies the emotional memory of political transformation and the societal desire for stability. This demonstrates how Latvian courts utilize language not merely as a descriptive tool, but also as a mechanism for reconstructing legal meaning in accordance with historical identity and constitutional culture.

First of all, it should be noted that the preamble to the Constitution of Latvia (Satversme) has a special language that differs from the strictly normative formulations of the articles of the constitution. The preamble is used when interpreting the constitution and other legal norms. Secondly, in the period from the adoption of the Satversme in 1922 to the present day, the understanding of the constitution, its meaning, and essence, as well as the methods of interpretation, has developed and has become more precise and deeper. This is also taken into account by the Constitutional Court when interpreting legal norms.

Democracy, the rule of law, and human rights are common values that unite all of Europe. At the same time, the national constitutional identity of individual countries may also include different elements. In this sense, European identity is formed by the balanced and harmonious interaction of all national identities. For example, according to the case law of the European Court of Human Rights, both the right to vote in parliamentary elections and the right to stand as a candidate in such elections may be restricted. States have a wide margin of discretion to lay down rules in their constitutional systems regarding the status of a member of parliament, including the criteria that persons who do not meet them may not be elected. These criteria may differ from country to country, depending on the historical and political circumstances of each country.

The Constitutional Court of Latvia, in its judgment of 29.06.2018 in case No. 2017-25-01, has emphasized that the state has broad discretion in determining the criteria regarding a person's right to stand for election. Moreover, these criteria may differ in different countries, depending on the political and historical situation of each country. As Latvia's historical experience is unique, it is also therefore of great importance how past events have affected society in the long term. In another case (judgment of 05.02.2015 in case No. 2014-03-01), the Constitutional Court has already concluded that the electoral procedure is closely related to the historical development, structure, political situation, and a number of other factors of each country. Accordingly, if historical and socio-political aspects allow for the definition of specific legal restrictions, then even more so they allow for the interpretation of existing norms within the framework of such an understanding.

Similarly, when considering the case on citizenship issues (judgment of 13.05.2010 in case No. 2009-94-01) and interpreting the contested norms, the court took into account the fact that Latvian citizens had resided in other countries for a long time and under compulsion, while at the same time maintaining their affiliation with Latvian statehood. Therefore, the contested norms should be applied not only to those Latvian citizens who had arrived in other countries as refugees or were deported, but also to those who later left Latvia for other reasons during the occupation period.

This interpretation of the term "democracy", based on historical facts, is particularly vividly presented in judgments that affect the state language. The Constitutional Court (judgment of 13.11.2019 in case No. 2018-22-01) recognized that the regulation providing for the strengthening of the state language protects a democratic state system.

In considering the case on the use of the state language in private higher education institutions (judgment of 09.02.2023 in case No. 2020-33-01), the Constitutional Court clarified the opinion of the Court of Justice of the European Union on this issue. The Court of Justice of the European Union has answered questions posed by the Constitutional Court that Article 49 of the Treaty on the Functioning of the European Union must be interpreted in such a way that it does not contradict the legal regulation of a Member State which, in principle, obliges

higher education institutions to implement study programmes exclusively in the official language of that Member State, provided that this legal regulation is justified by considerations related to the protection of the national identity of that Member State, namely, that it is necessary for the protection of a legitimate aim and is proportionate to it. In examining this case, the Constitutional Court of Latvia has expressed clear reasoning. Taking into account that the Latvian language is an integral part of the constitutional identity and the language of common communication and democratic participation of society, as well as the fact that in the conditions of globalization Latvia is the only place in the world where the existence and development of the Latvian language (see: Judgment of the Constitutional Court of Latvia, case No. 2001-04-0103 of 21.12.2001) and, consequently, the core nation can be guaranteed, the restriction of the use of the Latvian language as the state language in the territory of the country should also be considered a threat to the democratic state system.
Moreover, the Constitutional Court stated (judgment of 05.06.2003 in case No. 2003-02-0106) that the interpretation of the state language issue is also related to the welfare of society. Namely, in addition to aspects of material welfare, the concept of "welfare of society" also includes non-material aspects that are necessary for the harmonious functioning of society. These could also include state measures to ensure the dominance of the Latvian language in society. Increasing the influence of the Latvian language would promote social integration and ensure the harmonious functioning of society, which is an essential prerequisite for the welfare of society.

The specified examples demonstrate that the constitutional court attaches special, historical, and political meanings to the interpretation of the term "democracy". The Administrative Cases Department of the Senate of the Supreme Court also acts similarly (judgment of 03.11.2006 in case No. SKA-5/2005) where the compliance of the conduct of the Saeima elections with the law and the Constitution was examined. Although the right of the applicants to apply to the court to examine the entire conduct of the elections, including the process of forming the will of the voters, was not clearly defined in the law, the court interpreted the law broadly in the light of the fundamental principle of democracy in order to reach the conclusion that the process of forming the will of the voters is also subject to judicial control.

These examples powerfully illustrate the central thesis of this article: that legal interpretation is inseparable from the linguistic, cultural, and emotive structures through which societies construct meaning. The post-Reformasi transformation of Indonesia—with its normative pluralism, constitutional renewal (Buana, 2020), and persistent engagement with indigenous and religious traditions—has produced a jurisprudence deeply attuned to the symbolic dimensions of law. It is through this interplay of language, memory, and cultural imagination that legal norms are animated, contested, and ultimately legitimized. Indonesian jurisprudence demonstrates that law becomes fully intelligible only when understood as a living symbolic system—one shaped by the language that frames it, the history that sustains it, and the communal values that give it purpose.

Although Latvia operates within a different legal tradition, the linguistic structure of its constitutional vocabulary likewise reflects a collective memory marked by foreign domination, institutional rupture, and the aspiration for stable democratic governance. Terms that appear formally neutral take on symbolic weight because they evoke historical trauma and the normative demand for order and predictability.

Conclusions

In the process of interpreting legal norms, the law must be considered as a symbolic system, deeply integrated with the language through which legal concepts are formed and structured. Language in law functions as a categorization mechanism that ensures not only cognitive but also emotional organization of legal consciousness. This calls into question classical ideas about law as an objective system, highlighting its constructivist and interpretive nature: legal meanings depend on cultural and historical contexts, which is manifested in the variability of legal idioms and paradigms. Thus, legal methodology must take into account the linguistic nature of law and its connection with the emotional and subjective aspects of human perception.

In both the jurisdictions analysed in the article (Indonesia and Latvia), legal interpretation extends far beyond the contours of positivistic methodology. No statutory text is self-explanatory; no legal provision can be applied without mediation through culturally meaningful symbols. The interpreter inevitably engages in a process of translation—converting textual language into normative meaning by drawing upon the emotional and historical registers embedded in collective memory. Although the symbolic repertoires differ, the interpretive mechanism is structurally similar.

Lawmaking and law enforcement inevitably rely on emotionally charged symbols that provide social legitimation for legal norms. Constitutional courts are a special forum where abstract legal categories (dignity, freedom, public order, harmony, national identity) receive normative interpretation through appeals to the collective feelings and symbolic resources of society. It is in constitutional justice that the fact that formal norms are ineffective without emotional and symbolic consent is most clearly demonstrated.
Law cannot be separated from historical experience and the cultural transformations of society. Constitutional courts, as institutions of "historical reflection," regularly draw on historical narratives and collective memory to justify particular interpretations. Indonesia is a postcolonial, culturally multilayered state with a strong influence from Pancasila and religious traditions. Latvia is a society overcoming the consequences of occupation, a society oriented toward European legal culture and the protection of national identity. Both countries use history as a tool of interpretation, but in different ways. The analysis shows that legal meanings are formed through a dialogue between past and present.

Legal idiom—as a set of concepts, images, logical frameworks, and communicative norms through which a judge thinks and formulates legal arguments—sets the boundaries of possible interpretations. Indonesia and Latvia have very different legal idioms: Indonesia combines religious, communal, postcolonial, and statist elements. Latvia draws on the European liberal constitutional tradition, which emphasizes rationality, individualism, human rights, and the rule of law. A comparison of legal idioms shows that legal thinking is not universal, and cultural differences shape different models of interpretation even with similar constitutional texts. Elements of variability of interpretation in law enforcement, if consciously applied and regulated, can serve as a means of maintaining public interest in law, as well as stimulating the development and renewal of legal norms. Cultural and historical conditions, which determine ways of perceiving and interpreting law in society, play an important role in this process. Law does not exist outside culture and history; it is instead a product of specific socio-historical conditions, educational practices, and communicative needs. This leads to the fact that legal paradigms and idioms differ depending on cultural context, forming different models of legal consciousness and legal rationality. This approach promotes a critical revision of universalistic theories of law, focusing on the pluralism and historical determinacy of legal systems. Methodologically, this requires taking into account cultural relativism and interdisciplinary methods in the study of law. The psychological readiness and ability of society to “correct” deviations in law enforcement are the key to maintaining a balance between stability and dynamics in the legal sphere.

Law should be viewed as a complex symbolic code that performs not only a regulatory but also a communicative function. Traditional utilitarian forms of law are characterized by compressed and collectively oriented codes that reflect social roles and stability, while legal postmodernism emphasizes more complex, individualized, and analytical structures that contribute to the development of legal culture and self-reflection. This distinction shows that law is not only an instrument of social power, but also a cultural phenomenon that develops in a dialogue between norms, symbols, and subjective perception, which opens up new perspectives for legal methodology and legal theory.

References:

Ajenifari, J.T., Omotunde, S.A., Oboko, U. (2025). A Pragma-Linguistic Interpretation of Legal Communication: A Study of Sections 133 and 134 of the Nigerian Constitutional Provisions for Presidential Election. *International Journal of Language and Law*, 14, 7-23. https://doi.org/10.14762/jll.2025.F7
Aritonang, D.M., Harijanti, S.D., Muttaqin, Z., Abdurahman, A. (2025). Extensive Jurisdiction of State Administrative Courts in Indonesia: Interpretation and Legal Coherence. *Issues Public Integrity*, 27 (3), 287-299. https://doi.org/10.1080/10999922.2023.2290750
Bárány, E. (2024). Theoretical context of legal regulation of interpretation of law [Teoretické súvislosti právnej regulácie výkladu práva]. *Pravny Obzor*, 107(2), 93-107. https://doi.org/10.31577/pravnyobzor.2024.2.01
Bin-Armia, M. S., Armia, M. S., Rifqy, F. F., Tengku-Armia, H., & Mustika, C. R. (2024). FROM CONSTITUTIONAL-COURT TO COURT OF CARTEL: A COMPARATIVE STUDY OF INDONESIA AND OTHER COUNTRIES. *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH*, *9*(2), 457-479.
Buana, M. S. (2020). Legal-Political Paradigm of Indonesian Constitutional Court: Defending a Principled Instrumentalist Court. *Constitutional Review*, *6*(1), 36-66.
Butt, S., & Murharjanti, P. (2022). What constitutes compliance? Legislative responses to Constitutional Court decisions in Indonesia. *International Journal of Constitutional Law*, *20*(1), 428-453.
Diprose, R., McRae, D., & Hadiz, V. R. (2019). Two decades of reformasi in Indonesia: its illiberal turn. *Journal of Contemporary Asia*, *49*(5), 691-712.
Durguti, E., Alidemaj, A., Krivins, A. (2024). Good Governance and Rule of Law effect on GDP growth: lessons for emerging economies. *Journal of Liberty and International Affairs*, 10(1), 37-60, https://doi.org/10.47305/JLIA24101041d
Faiz, P. M. (2018). Dari Concurring Hingga Dissenting Opinions: Menelusuri Jejak Pemikiran Hakim Konstitusi Maria Farida Indrati (From Concurring to Dissenting Opinions: Tracing the Thoughts of Constitutional Justice Maria Farida Indrati). *Serviam: Pengabdian dan Pemikiran Hakim Konstitusi Maria Farida Indrati, Pan Mohamad Faiz, ed., AURA Publishing*, 3-24.
Fjellborg, D. (2025). Banging on Closed Doors or Beating the Drum? Social Movements' Interpretations of Opportunities in Legal Appeal Processes. *Social Movement Studies*, 24 (1), 95-112. https://doi.org/10.1080/14742837.2023.2171386
Harigovind, P.C., Rakesh, P.S. (2025). Posthumous Justice: A Socio-Legal Interpretation of Rights of The Dead. *Journal of Law and Legal Reform*, 6(1), 41-70. https://doi.org/10.15294/jllr.v6i1.15929
Hermanto, B. (2021). Discover future prospect of Indonesia criminal law reform: Questioning adat criminal law existence, Material and Formal Legislation, and Constitutional Court Decision Frameworks. In *Paper was presented at International Seminar Udayana University and University of Melbourne* (Vol. 17, pp. 1-20).
Hermanto, B., Subawa, M., Nur, A. I., Aryani, N. M., Dalmau, R. M., & Astariyani, N. L. G. (2025). Legislative planning and quality of legislation: the case of Prolegnas in Indonesia lawmaking. *The Journal of Legislative Studies*, 1-29.
Hijrah, N. (2024). Judicial Competence and Consistency in the Constitutional Court's Decision about Open List Proportional Representation. *Al-Daulah: Jurnal Hukum dan Perundangan Islam*, *14*(1), 163-194.
Iskandar, P. (2016). The pancasila delusion. *Journal of Contemporary Asia*, *46*(4), 723-735.
Janicki, J. (2024). Hermeneutical Elements in the Derivational Model of Legal Interpretation [Elementy hermeneutyczne w derywacyjnym modelu wykładni prawa]. *Archiwum Filozofii Prawa i Filozofii Spolecznej*, 38(1), 48-59. https://doi.org/10.36280/AFPiFS.2024.1.48
Juan, C.A.A.S., Berríos, V.S., Tiznado, J.P.Z. (2024). An analytical reconstruction of Latin American legal doctrine on the principle interpretation in according to the Constitution. *Eunomia. Revista en Cultura de la Legalidad*, 26(1), 11-35. https://doi.org/10.20318/eunomia.2024.8500
Judgment of the Administrative Cases Department of the Senate of the Supreme Court, case No. SKA-5/2005 of 03.11.2006.
Judgment of the Constitutional Court of Indonesia, case No. 005/PUU-I/2003
Judgment of the Constitutional Court of Indonesia, case No. 100/PUU-XIII/2015
Judgment of the Constitutional Court of Indonesia, case No. 105/PUU-XXII/2024
Judgment of the Constitutional Court of Indonesia, case No. 22-24/PUU-VI/2008
Judgment of the Constitutional Court of Indonesia, case No. 35/PUU-X/2012
Judgment of the Constitutional Court of Indonesia, case No. 36/PUU-XVII/2019
Judgment of the Constitutional Court of Indonesia, case No. 46/PUU-VIII/2010
Judgment of the Constitutional Court of Indonesia, case No. 48/PUU-VIII/2010
Judgment of the Constitutional Court of Indonesia, case No. 85/PUU-XI/2013

Judgment of the Constitutional Court of Indonesia, case No. 87/PUU-XX/2022
Judgment of the Constitutional Court of Latvia, case No. 2001-04-0103 of 21.12.2001.
Judgment of the Constitutional Court of Latvia, case No. 2003-02-0106 of 05.06.2003.
Judgment of the Constitutional Court of Latvia, case No. 2009-94-01 of 13.05.2010.
Judgment of the Constitutional Court of Latvia, case No. 2014-03-01 of 05.02.2015.
Judgment of the Constitutional Court of Latvia, case No. 2015-18-01 of 16.06.2016.
Judgment of the Constitutional Court of Latvia, case No. 2017-25-01 of 29.06.2018.
Judgment of the Constitutional Court of Latvia, case No. 2018-22-01 of 13.11.2019.
Judgment of the Constitutional Court of Latvia, case No. 2020-33-01 of 09.02.2023.
Judgment of the Constitutional Court of Latvia, case No. 2022-05-01 of 17.02.2023.
Judgment of the Constitutional Court of Latvia, case No. 2023-04-0106 of 15.02.2024.
Kartika, I.G.A.P., Astarini, I.A., Yasa, P.G.A.S., Hermanto, B., Krivins, A. (2025). Quo Vadis Energy Legal Policy towards Equitable and Sustainable Development in Indonesia. *LAW REFORM*, *21*(2), 266-294.
Kusmayanti, H., Kania, D., Rajamanickam, R., & Masykur, M. H. (2023). The Justice for Illegitimate Children of Indonesian Women Workers Through Constitutional Court Decision No. 46/PUU-VIII/2010. *Jurnal IUS Kajian Hukum dan Keadilan*, *11*(2), 253-264.
Lailam, T., & Anggia, P. (2023). The Indonesian Constitutional Court approaches the proportionality principle to the cases involving competing rights. *Law Reform*, *19*(1), 110-127.
McNamara, S.W.T., Wilson, W.J., Woo, D. (2025). Legal Analysis of the Interpretation of Adapted Physical Education in US Law. *Exceptionality*, 33 (2), 106-117. https://doi.org/10.1080/09362835.2024.2396110
Mietzner, M. (2010). Political conflict resolution and democratic consolidation in Indonesia: The role of the constitutional court. *Journal of East Asian Studies*, *10*(3), 397-424.
Milian Gómez, J.F. (2024). Rethinking the Human Right to Food from a Single Perspective to a Four-Fold Legal Interpretation. *Journal of Human Rights Practice*, 16(2), 589-602. https://doi.org/10.1093/jhuman/huad047
Monateri, P.G. (2024). Form and Substance in Comparative Law and Legal Interpretation. *International Journal for the Semiotics of Law*, 37(5), 1533-1556. https://doi.org/10.1007/s11196-024-10124-4
Nazriyah, R. (2016). Calon Tunggal dalam Pilkada Serentak Tahun 2015 terhadap Putusan Mahkamah Konstitusi No 100/PUU-XIII/2015. *Jurnal Konstitusi*, *13*(2), 379-405.
Pérez Trujillano, R. (2024). The positivist mirage: Legal interpretation and ideology in republican Spain (1931-1936). *Historia y Politica*, 2024 (52), pp. 253-285. https://doi.org/10.18042/hp.2024.AL.07
Petrażycki, L. (1955). *Law and Morality*. Edited with an introduction by N.S. Timasheff. Cambridge. Massachusetts: Harvard University Press.
Pietrzyk, M. (2025). In Search of a "Happy Ending" in Legal Interpretation: Cognitive Dissonance in Judicial Decision-Making. *International Journal for the Semiotics of Law*, 38 (5), 1619-1638. https://doi.org/10.1007/s11196-025-10247-2
Potacs, M. (2024). Justice in Legal Interpretation [Spravedlnost ve výkladu práva]. *Pravnik*, 163(11), 1144-1152.
Römer-Barron, U., Cunningham, C.D. (2024). Applied corpus linguistics and legal interpretation: A rapidly developing field of interdisciplinary scholarship. *Applied Corpus Linguistics*, 4(1), 10-21. https://doi.org/10.1016/j.acorp.2023.100080
Sari, D. M., & Fu'adah, A. (2014). Peran pemerintah daerah terhadap perlindungan hutan adat pasca putusan mahkamah konstitusi nomor 35/puu-x/2012. *Jurnal Penelitian Hukum-Fakultas Hukum Universitas Gadjah Mada*, *1*(1), 53-61.
Spaić, B., Isibor, R. (2024). When legal interpretation is not about language The curious case of Lidia Poët. *Journal of Argumentation in Context*, 13(1), 131-162. https://doi.org/10.1075/jaic.00025.isi
The Constitution of the Republic of Latvia. Adopted by the Constitutional Assembly in a joint meeting on 15 February 1922.
Vilks, A., Kipane, A., Krivins, A. (2024). Preventing international threats in the context of improving the legal framework for national and regional security. *Social & Legal Studios*, 7(1), 97-105. https://doi.org/10.32518/sals1.2024.97
Vilks, A., Kipane, A., Krivins, A. (2025). The Role of Religious Norms in the Formation of Legal Systems: The Theological Foundations of Law in Different World Religions. *Pharos Journal of Theology. Themed Issue - June 2025*. 106(3), 1-12. https://doi.org/10.46222/pharosjot.106.3029
Wardhani, L. T. A. L., Noho, M. D. H., & Natalis, A. (2022). The adoption of various legal systems in Indonesia: an effort to initiate the prismatic Mixed Legal Systems. *Cogent Social Sciences*, *8*(1), 2104710.
Werner, W.G. (2024). Sisyphus in robes: International law, legal interpretation and the absurd. *Leiden Journal of International Law*, 37(1), pp. 6-21. https://doi.org/10.1017/S0922156523000389
Wijayanti, S. N., Lailam, T., & Iswandi, K. (2025). Progressive Legal Approaches of the Constitutional Justice Reasoning on Judicial Review Cases: Challenges or Opportunities? *LAW REFORM*, *21*(2), 219-240.

Windrawan, P. (2014). Putusan Mahkamah Konstitusi tentang Keberadaan Lembaga Negara. *Jurnal Yudisial*, *7*(1), 88-102.
Wiratraman, H. P. (2020). Law and politics of constitutional courts, Indonesia and the search for judicial heroes, by Stefanus Hendrianto. *Bijdragen tot de taal-, land-en volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia*, *176*(2-3), 410-413.
Wojtczak, S., Zeifert, M. (2025). Statutory Interpretation and Levels of Conceptual Categorisation: The Presumption of Legal Language Explained in Terms of Cognitive Linguistics. *International Journal for the Semiotics of Law*, 38 (3), 767-782. https://doi.org/10.1007/s11196-024-10118-2
Zaman, N. (2024). The Role of Dissenting Opinions in Constitutional Court Judgements: Perspectives of Judges and Legal Interpretation. *Jurnal Konstitusi*, 21(3), 482-500. https://doi.org/10.31078/jk2138
Zhang, W. (2024). A Programmatic Document for Strengthening Legal Education and Legal Theory Research in the New Era: Interpretation of the Opinions on Strengthening Legal Education and Legal Theory Research in the New Era. *Frontiers of Law in China*, 19(2), 117-128. https://doi.org/10.3868/s050-013-024-0007-6

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.002

ARTIFICIAL INTELLIGENCE IN INDONESIAN JUDICIAL DECISIONS: A PANCASILA-BASED NORMATIVE MODEL WITH A COMPARATIVE APPROACH

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Received: 9 July 2025; accepted: 8 December 2025
DOI: https://doi.org/10.13165/j.icj.2025.11.02.002

Abstract. This paper examines the urgency of integrating artificial intelligence (AI) into the process of judicial decision-making while remaining rooted in the moral values of Pancasila as the philosophical foundation of the Indonesian nation. On one hand, AI offers transformational potential in enhancing efficiency, consistency, and legal analysis capacity; however, on the other hand, AI also poses ethical and normative challenges related to the absence of moral awareness, ethical responsibility, and the risk of algorithmic bias. Through a juridical-normative research method with statutory, conceptual, and comparative legal approaches, this article explores how AI can function as a decision support system that enhances the objectivity of judges without replacing their deliberative and moral roles. A comparative study of practices in Brazil, the United States, and the European Union shows that the use of AI in the judiciary can be transformative if guided by legal principles and social values that are deeply rooted in society. By referring to the ethical thoughts of Kant, Bentham, Mill, and MacIntyre, and based on the five principles of Pancasila, this paper offers a conceptual model for the utilization of AI in the Indonesian judicial system that upholds human dignity, social justice, and the integrity of the national legal system.

Keywords: Artificial Intelligence, Judicial Decisions, Moral Values, Pancasila, Objectivity.

Introduction

Artificial intelligence (AI) is a technology based on computer science and data utilization designed to solve problems through algorithms that are capable of classifying, analyzing, and making predictions automatically and efficiently (Fine et al., 2023). Related to the field of justice, there is a finding that has long captured public attention, namely the phenomenon of "hungry judges," which describes the tendency of judges to impose harsher sentences as lunchtime approaches. A famous study in 2011 supported this suspicion, showing fluctuations in the severity of judges' rulings influenced by physiological and psychological conditions, particularly hunger (Chatziathanasiou, 2022). These findings reinforce the premise of legal realism theory, which emphasizes that legal decisions are not always purely the result of normative rationality, but are also influenced by non-legal factors, such as emotional conditions. In this case, AI is seen as promising as a law enforcement tool because it is free from human weaknesses such as hunger and fatigue.

However, a fundamental question arises: can AI, which lacks consciousness, intent, or free will, fully perform judicial functions? Because, in judicial practice, a judge's decision not only evaluates factual and normative aspects, but also must consider the dimension of morality, which is an inseparable part of justice (Wilson et al., 2022). In Indonesia, moral values are even emphasized as a constitutional mandate. Article 24, paragraph (1), of the 1945 Constitution of the Republic of Indonesia (Indonesian Constitution) states that "judicial power is an independent power to administer justice in order to uphold law and justice" (Firmantoro, 2021). Furthermore, Article 5 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power (Judicial Power Law) mandates judges to "explore, follow, and understand the legal values and sense of justice that are active in society" (Kuntadi,

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2023). Even in Article 53, paragraph (1) of the Republic of Indonesia Law Number 1 of 2023 concerning the Criminal Code, it is stated that judges must prioritize justice when there is a conflict between legal certainty and justice. This provision is in line with the national philosophy based on Pancasila, especially the second and fifth principles, which emphasize the principles of just and civilized humanity as well as social justice for all Indonesian people (Andriawan, 2022). Therefore, every decision must include the motto "For Justice Based on the One and Only God" as a marker that morality and spirituality are the foundation of judicial practice (Yamin et al., 2022).

Various previous studies have shown that although AI has advantages in terms of speed, efficiency, and an ability to manage large amounts of data, AI has not yet been able to fully replace the role of human judges. This is due to AI's limitations in understanding the complexity of the social contexts, emotional nuances, and ethical judgments required in judicial practice (Sharma, 2023). In Brazil, the use of AI in the resolution of simple cases has proven to reduce costs and speed up the judicial process. However, the final responsibility remains with the judge because AI does not yet have the capacity to adaptively correct itself to the complexities of law and the need for human correction (Limberger et al., 2022). On the other hand, judicial system reforms such as online courts and digital case management systems have demonstrated the role of AI as a structural support for judges' work, although they still pose new challenges related to legitimacy and integrity (Sourdin, 2021). Concerns over the legitimacy of algorithm-based decisions have become an important discourse in various countries. In Europe, the question of the possibility of AI replacing judges remains an ongoing debate, especially due to the lack of a uniform definition of courts within the framework of European Union law, while technological advancements demand responsive and adaptive regulations (Bodul, 2024). In Indonesia, studies on AI in resolving polygamy cases show that AI is capable of providing analysis based on legal parameters and gender justice, but the involvement of judges in assessing expressions, motives, and the relationships of the parties remains irreplaceable (Maliki et al., 2023). In relation to a fair trial, the most proportional approach is to make AI an assistant or tool in the drafting of decisions, rather than as a replacement for judges, because the judicial process is a social process that requires human interaction (Ulenaers, 2020). This is in line with practices in the United States, where AI is used for scheduling, case classification, and supporting online dispute resolution systems, but not for fully taking over judicial tasks (Lederer, 2020).

Normatively (Article 25, paragraphs (2) to (5) of the Judicial Power Law), judges have three main functions, namely "to examine, to adjudicate, and to decide cases." The examination is conducted to gather facts and assess evidence; the trial is carried out by weighing facts and law objectively and fairly; while the verdict is the culmination of the exercise of judicial power. In this context, this research focuses on how judges can compose decisions objectively with the help of AI, while still being able to filter the moral aspects inherent in justice. This research does not aim to replace judges in the trial process, but rather to explore how AI can serve as a behind-the-scenes decision support system while still respecting moral values.

This research aims to address two problem formulations: first, how relevant is the development of AI technology in supporting judges' roles in drafting decisions; and second, how to build a model for utilizing AI in decision-making that aligns with the moral values of Pancasila. Thus, this research is expected to formulate a new paradigm regarding the use of AI in the decision-making process by judges, which incorporates the deeply rooted moral aspects in Indonesian society.

The research method used in this paper is a juridical-normative study that employs three approaches: statutory, conceptual, and comparative (Ali, 2022). The statutory approach is used to examine positive legal provisions related to judicial power and the principle of morality in law enforcement in Indonesia, as stipulated in the Indonesian Constitution and Law Number 48 of 2009 on Judicial Power, as well as several other legislative regulations. The conceptual approach is used to analyse the legal and ethical thoughts of philosophers such as Immanuel Kant, Jeremy Bentham, John Stuart Mill, and Alasdair MacIntyre that are relevant to the application of AI in the formulation of decisions with moral content. Meanwhile, a comparative legal approach is undertaken by examining the use of AI in the judicial systems of several countries, particularly Brazil, the United States, and the European Union. Brazil was

chosen because it has effectively implemented AI in simple cases without eliminating the authority of judges; the United States serves as a reference for the use of AI in risk assessment systems, scheduling, and online dispute resolution; while the European Union demonstrates a precautionary approach through regulatory frameworks such as the EU AI Act and ethical discourse on the legal status of AI in the judiciary. Data in this research was obtained through a literature study of regulations, scientific journals, and international policy documents, and then qualitatively analysed to ascertain the connection between technological rationality and the moral values of Pancasila within the framework of the Indonesian legal system.

1. Measuring the Relevance of Artificial Intelligence in Supporting Judges' Role in Formulating Objective Decisions

Demands for a fast, accurate, and impartial judicial system continue to increase with the complexity of cases and the dynamic development of legal norms. In that reality, the objectivity of judges becomes an increasingly difficult challenge to maintain since they not only face complex legal facts, but also a high workload and societal expectations for decisions that are both legally and morally accountable. This is where AI offers a significant contribution. AI is not only present as a new technology, but also as an instrument of rationalization that can help judges formulate decisions more objectively and consistently. The analogy given by Henry Ford perfectly describes the presence of AI: innovation is not merely about speeding up the horse, but about creating a car that entirely changes the way humans work (Chen et al., 2020).

However, comprehending AI is not a straightforward task. This is because AI attempts to mimic human intelligence, while the concept of human intelligence itself is not yet fully understood by science. Therefore, AI should be understood as a system that can behave intelligently, analyse its environment, and act autonomously to achieve specific goals (Sheikh et al., 2023).

In the context of the judiciary, the role of AI becomes important insofar as it can support judges in achieving the primary goal of the judicial process: producing rational, accountable decisions that meet the public's sense of justice (Abbass, 2021). Stuart Russell's conceptualization of AI as a rational agent further strengthens its relevance for judicial tasks. He believes that intelligence should be judged by how well it can act on the best information and circumstances (Kühl et al., 2022). Thus, the focus of AI is no longer on mimicking how judges think, but on helping judges objectively achieve the best possible outcomes. The important question isn't whether AI can replace judges, but rather to what extent AI can be integrated as a rational partner for judges in maintaining objectivity in decision-making.

Brazil's experience shows that implementing AI in the judicial system can increase objectivity without eliminating the central role of judges. In various projects, such as simple case management and repetitive claims, AI is used to classify cases, detect connections to jurisprudence, and identify potential for faster and more efficient resolution (Limberger et al., 2022). However, the final decision-making authority remains with the judge, who is obligated to re-evaluate the AI's classification, test the proportionality of legal considerations, and correct any potential analytical errors. Such evidence indicates that, although AI provides rational support for legal analysis, the principles of judicial accountability and discretion are maintained as guardians of decision legitimacy.

Meanwhile, in the United States and the European Union, the development of AI technology is driving discourse on human rights protection and the principle of fair trial. AI is widely used in the US for case scheduling, online dispute resolution, and even risk-assessment tools in bail and sentencing decisions. However, it has come under fire for possible bias and the lack of transparency in algorithms (Lederer, 2020) (Ulenaers, 2020). In the European Union, the implementation of AI is currently accompanied by a cautious approach through regulatory frameworks such as the EU AI Act, which classifies AI in the field of justice as a high-risk system that requires strict human oversight and guarantees of protection for constitutional rights (Kim et al., 2025). Both jurisdictions demonstrate that AI integration cannot eliminate the moral and deliberative role of judges, and must always remain within the framework of

human values and constitutional principles—an approach that aligns with the Pancasila-based AI utilization model in the Indonesian judiciary.

1.1. AI as a Rational Instrument to Strengthen Judicial Objectivity

Objectivity is at the heart of judicial legitimacy. An objective decision indicates that the judge ruled based on legal principles and rational reasoning, and was free from personal preferences or external pressure (Aronson et al., 2023). Until now, objectivity has been maintained through the methods of legal generalization and legal abstraction. However, in modern practice, cognitive biases, the complexity of facts, and the high volume of data can still interfere with judicial neutrality (Kirillova et al., 2020).

AI is here to strengthen that neutrality. Through machine learning, AI can identify legal patterns, map relationships between facts and norms, and suggest relevance between previous jurisprudence and the case under review (Blasch et al., 2021) (Vasconcelos et al., 2023). Natural Language Processing (NLP) allows AI to extract norms from legal documents and detect inconsistencies in arguments within trial documents. This ability helps judges assess the consistency between the legal reasoning constructed and the applicable legal foundation. The development of neuro-symbolic AI, which combines symbolic logic and the power of statistical analysis, is bringing AI capabilities increasingly closer to human legal reasoning patterns (Hamilton et al., 2022). AI like this doesn't just read text, but also understands the normative relationships and underlying principles. Thus, AI contributes to strengthening the rational legitimacy of decisions.

Nevertheless, vigilance must still be maintained. The resolution of AI-related criminal acts in various countries currently still relies on conventional criminal law instruments. This expands the scope of interpretation that judges must still exercise independently (Al Qatawneh et al., 2023). Thus, AI should not be placed as a decision-maker but as a digital assistant that supports judges while maintaining their independence as holders of judicial power.

1.2. The Limits of AI and Judicial Moral Responsibility

AI support in the judicial process can improve effectiveness, accuracy, and consistency, but AI will never replace the moral responsibility of judges. A legitimate and valid legal decision is not only measured by the accuracy of legal logic, but also by moral sensitivity toward human dignity and the community's sense of justice. AI lacks the empathy, conscience, and moral wisdom that are the spirit of every judicial decision.

The principle of "justice delayed is justice denied" put forward by William E. Gladstone (Susilo et al., 2024) emphasizes the urgency of expediting case resolution. In this context, AI significantly contributes to accelerating the process without reducing the accuracy of legal analysis. This is in line with Article 2 (4) of the Judiciary Act, which says that justice should be simple, quick, and low-cost. However, acceleration should not come at the expense of accuracy, integrity, and diligence in upholding truth and justice.

Thus, the ideal relationship between AI and judges is built upon the following principles: AI enhances objectivity, while judges maintain humanity in justice. AI improves the rationality of decisions, but moral legitimacy remains in the hands of judges as the bearers of judicial power and the guardians of the legal conscience.

In Indonesia, the judiciary uses AI in accordance with Pancasila's philosophical foundation and values, which serve as the foundation for all legal sources. Instead of taking over morality, technology should focus on enhancing human values, promoting social justice, and upholding human dignity. Therefore, it is necessary to formulate a normative model for the utilization of AI that aligns with Pancasila morality, so that the use of technological innovation in the judiciary is not only rationally effective but also morally and constitutionally legitimate. This will be the focus of discussion in the next subsection.

2. Designing an AI Utilization Model in Judicial Decision-Making Aligned with Pancasila Morality

2.1. Pancasila as the Ethical Foundation of AI in the Judiciary

Pancasila is the philosophical and moral foundation of the Indonesian nation, whose status is affirmed in the Preamble of the Indonesian Constitution and serves as the source of all national laws (Susilo, 2024). In the context of the judiciary, Article 5 (1) of the Law on Judicial Power mandates judges to explore, follow, and understand the values of justice that exist within society (Fikriawan et al., 2021). Therefore, the Indonesian judiciary cannot separate any use of AI in decision-making from Pancasila, which serves as its ethical compass and moral legitimacy foundation. AI can help with the efficiency of legal analysis, but the moral judgment that determines the upholding of justice remains in the hands of judges as ethical conscious subjects.

Therefore, before adopting an ethical framework from Western moral thought, it is important to first affirm Pancasila's position as the primary normative framework governing how AI should be used in the Indonesian judicial environment. This aligns with global concerns that the presence of AI could potentially shift the role of judges, thus threatening democracy and freedom, which rely on the independence of the judiciary.

2.2. Western Ethical Frameworks as Supporting Parameters

The deontological ethics developed by Immanuel Kant emphasizes that moral actions must be based on reason and duty, not merely on the consequences of those actions. Kant's categorical imperative principle requires that every action be tested through the principle of universality: "Act only according to that maxim whereby you can at the same time will that it should become a universal law" (Kant et al., 2021). Regarding the drafting of judicial decisions with the help of AI, this principle reminds us that the resulting decisions must be morally acceptable to broader society and should not merely prioritize rational and objective preferences. Furthermore, through "Idea for a Universal History with a Cosmopolitan Aim," Kant emphasizes that the history of humanity is a journey towards freedom through collective reason (Kant, 2022). Therefore, the use of AI must not separate itself from the moral and historical framework of humanity.

Jeremy Bentham viewed morality as a system of behaviour regulation based on the principle of utility: the right action is the one that maximizes happiness for as many people as possible. Moral sanctions, including sympathetic and retributive sanctions, are instruments to instil internal awareness in individuals to act according to the principle of utility, not merely due to social pressure (Prokofyev, 2023). Bentham's approach is relevant in designing AI systems oriented towards social utility by considering the intensity, duration, and impact of happiness through felicific calculus (Akomolafe, 2019). John Stuart Mill continued the principles of utilitarianism by emphasizing the importance of the quality of happiness. Higher happiness is related to moral development, social empathy, and intellectuality (Komu, 2020) (Hansson, 2022). Regarding AI-based decisions, Mill's principle demands that the system not only measure the practical impact of the decisions, but also uphold human values and the moral progress of society.

The virtue ethics of Alasdair MacIntyre focus on character formation through social practices and life narratives. Virtue cannot be separated from the context of moral society and individual history (Darr, 2020). In the application of AI, the system must consider that decisions are not only about normative right or wrong, but also about how the decision reflects the virtues, social responsibility, and narrative integrity of a judge (Bretherton, 2021).

These Western ethical thoughts can serve as an additional parameter for testing the morality of AI-based decisions. However, in the Indonesian context, all these approaches cannot stand alone; rather, they must be synergized and subordinated under Pancasila as the constitutional ideology and morality that provides identity and legitimacy to Indonesian law.

2.3. Moral Responsibility and Ontological Challenges in AI-Assisted Judging

The use of AI in drafting judicial decisions faces ontological and normative challenges, particularly concerning the concept of personhood. The idea of an "electronic person" developed in the European Parliament resolution aims to grant limited legal status to AI entities in order to impose legal responsibility for the damages they cause (BERTOLINI, 2020) (Avila Negri, 2021). However, this approach poses anthropomorphic risks and moral responsibility confusion, as AI is not an autonomous moral agent (Stancati & Gallo, 2020) (Chesterman, 2020).

The presence of AI in the drafting of court decisions does not automatically guarantee the inclusion of moral dimensions in the resulting legal constructs. It is precisely at this point that the role of the judge becomes important in ensuring that their decision encompasses aspects of morality. Although AI systems can design decisions that are structured and logical, the moral dimension that forms the foundation of justice cannot be reduced to mere algorithmic output. Legal positivism, as formulated by Jeremy Bentham, John Austin, and Hans Kelsen, views law solely as a product of state authority that is autonomous from moral values (Kawałek, 2024) (Nurkic, 2021). While this view prioritizes formal legality, it also dismisses the substantial legitimacy derived from moral values.

Sharp criticism of this view comes from Hans J. Morgenthau, who emphasizes that law stripped of moral and political dimensions is at risk of losing essential social legitimacy in a rule of law state (Chas, 2023). In the use of AI, this reinforces the argument that legal positivism is insufficient as the sole frame of reference. An approach that can bridge law and morality is needed, as developed by Ronald Dworkin through his interpretive theory. According to Dworkin, law is not merely a set of rules but an interpretive practice that demands consistency with moral principles such as justice and human dignity (Hiebaum, 2023) (Queloz, 2024). Thus, the use of AI by judges must adhere to these normative principles to avoid becoming a technocratic tool devoid of value.

Furthermore, Cathy O'Neil has warned about the threat of discriminatory algorithms, which she calls Weapons of Math Destruction, namely predictive models that deepen social inequalities and institutionalize systemic biases if used without adequate ethical oversight (Berry, 2020). In this case, the ethical responsibility lies with the judges as the users and final controllers of the system. Judges are required to synchronize the application of AI with the moral values that exist in society, and to act as a filter against potential algorithmic deviations that are not in line with justice (Coeckelbergh, 2021). Moreover, AI is not a moral entity that can be held accountable. As emphasized by Coeckelbergh, the moral responsibility for a judge's decision cannot be transferred to a machine but remains an ethical burden on humans—namely, the judge as the subject of interpretation and bearer of the meaning of the law (Coeckelbergh, 2023). Therefore, AI models developed to support the drafting of decisions must be designed within the framework of legal hermeneutics, and uphold the principles of non-discrimination and the protection of human dignity. The design of systems that disregard these values risks perpetuating structural bias and undermining justice as the core value of the judiciary (Stettinger et al., 2024). In this case, judges are not merely users of AI but moral enforcers who encompass their decisions.

2.4. A Pancasila-Driven Normative Architecture for Judicial AI Systems

The first principle, the One and Only God, asserts that all policies, including those in the realm of technology, must adhere to spiritual values and an awareness of the human transcendental dimension. Thus, the use of AI cannot be separated from the religious ethics that embody the spirit of justice in the Indonesian legal system. Justice that is mechanistic in nature, devoid of divine moral touch, risks producing verdicts that are devoid of meaning and detached from true justice. Therefore, judges as users of AI are responsible for aligning its use with the noble values of the nation that are rich in spiritual ethics and profound moral awareness. According to Notonagoro, the principle of the Almighty God occupies the highest position in the hierarchical structure of Pancasila as the fundamental norm of the state and the legal idea that serves as the basis and direction for lawmaking (Sudirta et al., 2025). Therefore, the use of AI in judicial decision-making must be based on divine values that uphold human

dignity and ensure that justice does not lose its ethical and human meaning. Such an approach ensures that technology enhances rather than diminishes the human element of judicial decision-making.

The second principle, Just and Civilized Humanity, mandates that AI must be developed and used while always upholding human dignity and worth. In the context of decision-making, the technology used by judges must humanize people, not the other way around. AI-assisted decisions must reflect anti-discrimination principles, ensure procedural justice, and provide maximum protection for vulnerable groups. Thus, the judicial system not only becomes efficient but also upholds the values of fair and civilized humanity. In line with Teguh Prasetyo's theory of Dignified Justice (Keadilan Bermartabat) (Teguh Prasetyo, 2019), human dignity constitutes the core telos of Indonesian law, meaning that AI development must be oriented toward safeguarding the inherent worth of every individual and preventing the reproduction of structural biases or injustices that could harm marginalized communities.

The third principle, Unity in Diversity, encourages that AI in the legal field be developed with consideration for social integrity and the plurality of society. This technology must not contain algorithmic bias that could potentially lead to digital exclusion, social inequality, or even national disintegration. On the contrary, AI must be designed to strengthen social cohesion, promote the spirit of diversity, and maintain harmony within Indonesia's multicultural society. In this framework, judges are required to actively review and correct the content of AI-assisted decisions to ensure that they are fully in line with the spirit of national unity and integrity. As emphasized by Kaelan, unity in Pancasila does not imply homogenization but rather a harmonious integration of differences within a shared moral identity of the nation (Adrian et al., 2025); therefore, AI must be designed inclusively to embrace every segment of Indonesian society and prevent the marginalization of minority groups, ensuring that technological advancement reinforces—not erodes—the fabric of national solidarity.

The fourth principle, Democracy Guided by the Wisdom of Deliberation/Representation, emphasizes the importance of the deliberative principle in every legal decision-making process. AI, in this case, cannot and should not replace the role of humans in considering the social, ethical, and constitutional dimensions of a case. AI only functions as a supporting instrument—especially in compiling legal facts and structuring legal analysis frameworks—however, deliberation and final judgment remain in the hands of judges as the main actors in legal deliberation who are responsible for the decisions rendered. Drawing from Satjipto Rahardjo's concept of progressive law (Neta et al., 2021), judicial decision-making is fundamentally a humanistic endeavour requiring moral wisdom and empathy beyond the mechanical application of rules; thus, algorithmic systems may enhance rational analysis but can never replace the judge's contextual judgment and ethical discernment in realizing justice for the people.

The fifth principle, Social Justice for All Indonesian People, serves as the main normative direction in the design, data training, and AI algorithms used in the judicial system. AI must contribute to the realization of distributive, procedural, and substantive justice and have a high sensitivity to the diversity of social conditions in Indonesian society. Especially in protecting marginalized and vulnerable groups, AI must not be blindly neutral towards the imbalanced social structure. If the AI system is unable to accommodate this diversity of contexts, it becomes the moral and professional duty of judges to align and correct the rulings to remain in line with the principles of comprehensive social justice. According to Notonagoro, the principle of social justice represents the causa finalis—the ultimate purpose—of the entire Pancasila value system (Hastangka & Ediyono, 2023); therefore, AI assistance in the judiciary must not remain passively neutral toward structural inequalities but must actively function as a corrective force that strengthens substantive justice and ensures that every citizen, particularly those who are marginalized, receives fair and equitable treatment before the law.

This normative architecture is operationalized in this study as a conceptual model for judicial AI governance, serving as both an evaluative standard and a design principle for ensuring that AI remains constitutionally and morally accountable.

Thus, the implementation of artificial intelligence in the judiciary system based on Pancasila values is not only aimed at enhancing efficiency and accuracy in decision-making, but also at reinforcing ethical

foundations, ensuring respect for human dignity, and strengthening the social legitimacy of every decision rendered. The integration of the values of Godhead, Humanity, Unity, Democracy, and Social Justice in the design and use of AI ensures that technology remains a tool that supports justice, and is not devoid of moral dimensions. Rooted in Pancasila, AI in the Indonesian judiciary can serve as a catalyst for legal transformation that aligns with the nation's cultural identity and aspirations for universal justice.

Conclusions

In facing the complexity of cases, the abundance of data or evidence, and the continuously evolving norms, the utilization of AI in drafting judicial decisions becomes increasingly relevant, not merely as a symbol of technological advancement, but as a rational instrument that supports the emergence of objective, efficient, and logically testable rulings. With its ability to process large data sets, extract norms from jurisprudence, and construct legal argumentation patterns through machine learning, natural language processing, and neuro-symbolic systems, AI can alleviate the cognitive burden on judges, filter out biases, and enhance the consistency of rulings. However, AI is not an autonomous entity with conscience, empathy, or moral responsibility—which are fundamental elements in the function of the judiciary. Therefore, within the philosophical framework, law still demands enlightened subjectivity: the wisdom of judges as bearers of ethical responsibility and guardians of the value of justice. True objectivity does not arise solely from algorithms, but rather from the synergy between artificial intelligence and human integrity, which understands that a decision is both a product of normative logic and a reflection of public morality. In this case, AI is relevant as an auxiliary tool that simplifies processes, accelerates case resolution, and enhances the accuracy of considerations, in line with the principles of simple, swift, and low-cost justice as stipulated in Article 2 paragraph (4) of the Judicial Power Law. However, the effectiveness of AI entirely depends on the judges' ability to use it wisely within the framework of Indonesian national values. Designing an AI utilization model that aligns with the morality of Pancasila requires the integration of philosophical and ethical values in every aspect of the design and operationalization of the technology. The principles of divinity, humanity, unity, democracy, and social justice must be an uncompromisable normative foundation. AI should not replace human consideration, but rather function within the framework of the judge's moral responsibility as an interpreter and enforcer of justice. Although AI is capable of systematically composing legal analyses and deriving norms from precedents, it lacks the ethical capacity required in decision-making. Kant's deontological ethics teaches that every legal action must adhere to the principle of universality; Bentham and Mill's utilitarianism emphasises the importance of utility and the quality of happiness; while MacIntyre's virtue ethics highlights the integrity of character and social narrative as part of just public policy. These values must be internalized within the AI system to align with the spirit of justice, respect for human dignity, strengthening social cohesion, and protecting vulnerable groups. Thus, judges are not merely users of technology, but guardians of the nation's moral and cultural values in every decision they make. The utilization of AI rooted in Pancasila values can accelerate and simplify decision-making considerations, while also aligning with the moral values upheld by the Indonesian nation.

References:

Abbass, H. (2021). Editorial: What is Artificial Intelligence? In IEEE Transactions on Artificial Intelligence (Vol. 2, Issue 2). https://doi.org/10.1109/TAI.2021.3096243

Adrian, K., Sapriya, S., & Bestari, P. (2025). Embedding Pancasila Values: Towards Culture-Based Education. The Eurasia Proceedings of Educational and Social Sciences, 42, 38–54. http://www.isres.org/

Akomolafe, M. A. (2019). Jeremy Bentham on Equal Rights and Justice: An Overview. Philosophia, 24, 16–25. https://www.academia.edu/download/80313600/16-25_philosophia-24-2019_akomolafe.pdf

Al Qatawneh, I. S., Moussa, A. F., Haswa, M., Jaffal, Z., & Barafi, J. (2023). Artificial Intelligence Crimes. Academic Journal of Interdisciplinary Studies, 12(1). https://doi.org/10.36941/ajis-2023-0012

Ali, Z. (2022). Metode Penelitian Hukum, Jakarta. In Sinar Grafika (Issue August).

Andriawan, W. (2022). Pancasila Perspective on the Development of Legal Philosophy: Relation of Justice and Progressive Law. Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi, 5(1). https://doi.org/10.24090/VOLKSGEIST.V5I1.6361

Aronson, O., Elad-Strenger, J., Kessler, T., & Feldman, Y. (2023). Does personalization of officeholders undermine the legitimacy of the office? On perceptions of objectivity in legal decision making. Regulation and Governance, 17(3). https://doi.org/10.1111/rego.12495
Avila Negri, S. M. C. (2021). Robot as Legal Person: Electronic Personhood in Robotics and Artificial Intelligence. Frontiers in Robotics and AI, 8. https://doi.org/10.3389/frobt.2021.789327
Berry, P. (2020). Troubleshooting algorithms: A book review of Weapons of Math Destruction by Cathy O'Neil. The McMaster Journal of Communication, 12(2). https://doi.org/10.15173/mjc.v12i2.2450
BERTOLINI, A. (2020). Artificial Intelligence and Civil Liability: Legal Affairs. European Parliament's. http://www.europarl.europa.eu/supporting-analyses
Blasch, E., Pham, T., Chong, C. Y., Koch, W., Leung, H., Braines, D., & Abdelzaher, T. (2021). Machine Learning/Artificial Intelligence for Sensor Data Fusion-Opportunities and Challenges. IEEE Aerospace and Electronic Systems Magazine, 36(7). https://doi.org/10.1109/MAES.2020.3049030
Bodul, D. (2024). Can Artificial Intelligence (AI) replace the judge? Harmonius Journal of Legal and Social Studies in South East Europe, 12(1). https://doi.org/10.51204/harmonius_23101a
Bretherton, L. (2021). Political Theology, Radical Democracy, and Virtue Ethics; or Alasdair MacIntyre and the Paradoxes of a Revolutionary Consciousness. Political Theology, 22(7). https://doi.org/10.1080/1462317X.2020.1867406
Chas, C. (2023). Hans J. Morgenthau's Critique of Legal Positivism: Politics, Justice, and Ethics in International Law. Jus Cogens, 5(1). https://doi.org/10.1007/s42439-023-00076-x
Chatziathanasiou, K. (2022). Beware the Lure of Narratives: Hungry Judges Should Not Motivate the Use of Artificial Intelligence in Law. German Law Journal, 23(4). https://doi.org/10.1017/glj.2022.32
Chen, L., Chen, P., & Lin, Z. (2020). Artificial Intelligence in Education: A Review. IEEE Access, 8. https://doi.org/10.1109/ACCESS.2020.2988510
Chesterman, S. (2020). Artificial intelligence and the limits of legal personality. International and Comparative Law Quarterly, 69(4). https://doi.org/10.1017/S0020589320000366
Coeckelbergh, M. (2021). How to Use Virtue Ethics for Thinking About the Moral Standing of Social Robots: A Relational Interpretation in Terms of Practices, Habits, and Performance. International Journal of Social Robotics, 13(1). https://doi.org/10.1007/s12369-020-00707-z
Coeckelbergh, M. (2023). Narrative responsibility and artificial intelligence: How AI challenges human responsibility and sense-making. AI and Society, 38(6). https://doi.org/10.1007/s00146-021-01375-x
Darr, R. (2020). Virtues as Qualities of Character: Alasdair MacIntyre and the Situationist Critique of Virtue Ethics. Journal of Religious Ethics, 48(1). https://doi.org/10.1111/jore.12297
Fikriawan, S., Anwar, S., & Ardiansyah, M. (2021). The Paradigm of Progressive Judge's Decision and Its Contribution to Islamic Legal Reform in Indonesia. Al-Manahij: Jurnal Kajian Hukum Islam, 15(2). https://doi.org/10.24090/mnh.v15i2.4730
Fine, A., Le, S., & Miller, M. K. (2023). Content Analysis of Judges' Sentiments Toward Artificial Intelligence Risk Assessment Tools. Criminology, Criminal Justice, Law and Society, 24(2). https://doi.org/10.54555/CCJLS.8169.84869
Firmantoro, Z. A. (2021). Menimbang Kedudukan Majelis Kehormatan Mahkamah Konstitusi Setelah Terbitnya Undang-Undang Nomor 7 Tahun 2020. Jurnal Konstitusi, 17(4). https://doi.org/10.31078/jk1749
Hamilton, K., Nayak, A., Božić, B., & Longo, L. (2022). Is neuro-symbolic AI meeting its promises in natural language processing? A structured review. Semantic Web, 15(4). https://doi.org/10.3233/sw-223228
Hansson, S. O. (2022). John Stuart Mill and the Conflicts of Equality. Journal of Ethics, 26(3). https://doi.org/10.1007/s10892-022-09393-7
Hastangka, H., & Ediyono, S. (2023). Pancasila Education in Indonesia: The debate on Pancasila in the post reform era between legitimation, recognition, and institutionalization during 2000-2021. Jurnal Civics: Media Kajian Kewarganegaraan, 20(1). https://doi.org/10.21831/jc.v20i1.59673
Hiebaum, C. (2023). Law as Weak Integrity. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.4441791
Kant, I. (2022). Idea for a Universal History from a Cosmopolitan Perspective. In Toward Perpetual Peace and Other Writings on Politics, Peace, and History. https://doi.org/10.12987/9780300128109-007
Kant, I., Hegel, G. W. F., Green, T. H., Collingwood, R. G., Nishida, K., Tanabe, H., & Nishitani, K. (2021). Philosophical World Histories And Deontological Ethics. In Big and Little Histories: Sizing Up Ethics in Historiography. https://doi.org/10.4324/9780429399992-4
Kawałek, A. (2024). Strengthening the Theoretical Commitments Underpinning Therapeutic Jurisprudence Research: Ontology and Epistemology. Liverpool Law Review, 45(1). https://doi.org/10.1007/s10991-023-09329-7
Kim, B.-J., Jeong, S., Cho, B.-K., & Chung, J.-B. (2025). AI Governance in the Context of the EU AI Act. IEEE Access, 13, 144126–144142. https://doi.org/https://doi.org/10.1109/ACCESS.2025.3598023
Kirillova, E. A., Blinkov, O. E., Zulfugarzade, T., Bocharov, A. V., & Avdalyan, A. Y. (2020). The legal status of tokens and their inheritance. Juridicas CUC, 16(1). https://doi.org/10.17981/juridcuc.16.1.2020.12

Komu, S. S. C. (2020). Pleasure versus Virtue Ethics in The Light of Aristotelians and the Utilitarianism of John Stuart Mills and Jeremy Bentham. Al-Milal: Journal of Religion and Thought, 2(1). https://doi.org/10.46600/almilal.v2i1.57
Kühl, N., Schemmer, M., Goutier, M., & Satzger, G. (2022). Artificial intelligence and machine learning. Electronic Markets, 32(4). https://doi.org/10.1007/s12525-022-00598-0
Kuntadi. (2023). The Existence of Decisions of Customary Institutions in the Settlement of Criminal Cases in Indonesia. KnE Social Sciences. https://doi.org/10.18502/kss.v8i3.12838
Lederer, F. I. (2020). Here There Be Dragons: The Likely Interaction of Judges with the Artificial Intelligence Ecosystem. Judges' Journal, 59(1).
Limberger, T., Da Silva Giannakos, D. B., & Szinvelski, M. M. (2022). Can judges be replaced by machines? The Brazilian case. Mexican Law Review, 14(2). https://doi.org/10.22201/iij.24485306e.2022.2.16568
Maliki, I. A., Ali, Z. Z., & Khusaini, M. (2023). Artificial Intelligence and the Law: The Use of Artificial Intelligence as a Tool to Assist Judges in Deciding Polygamy Cases. Nurani, 23(2). https://doi.org/10.19109/nurani.v23i2.20152
Neta, Y., Budiyono, & Firmansyah, A. A. (2021). The Model of Local Regulation of the Human Rights Fulfillment Based on Progressive Law. Jambura Law Review, 3(Special issue). https://doi.org/10.33756/jlr.v3i0.7301
Nurkic, B. (2021). Legal positivism: An obstacle in the process of strengthening the rule of law in Bosnia and Herzegovina. In Journal of Liberty and International Affairs (Vol. 7, Issue 1). https://doi.org/10.47305/JLIA21170094N
Prokofyev, A. V. (2023). Jeremy Bentham's Theory of Moral Sanctions. RUDN Journal of Philosophy, 27(3). https://doi.org/10.22363/2313-2302-2023-27-3-757-773
Queloz, M. (2024). The Dworkin–Williams debate: Liberty, conceptual integrity, and tragic conflict in politics. Philosophy and Phenomenological Research, 109(1). https://doi.org/10.1111/phpr.13002
Sharma, M. (2023). India's Courts and Artificial Intelligence: A Future Outlook. LeXonomica, 15(1). https://doi.org/10.18690/lexonomica.15.1.99-120.2023
Sheikh, H., Prins, C., & Schrijvers, E. (2023). Artificial Intelligence: Definition and Background. https://doi.org/10.1007/978-3-031-21448-6_2
Sourdin, T. (2021). Judges, Technology and Artificial Intelligence: The Artificial Judge. In Judges, Technology and Artificial Intelligence: The Artificial Judge. https://doi.org/10.4337/9781788978262
Stancati, C., & Gallo, G. (2020). Could an Electronic Person Exist? Robots and Personal Responsibility. In Studies in Applied Philosophy, Epistemology and Rational Ethics (Vol. 52). https://doi.org/10.1007/978-3-030-37305-4_8
Stettinger, G., Weissensteiner, P., & Khastgir, S. (2024). Trustworthiness Assurance Assessment for High-Risk AI-Based Systems. IEEE Access, 12. https://doi.org/10.1109/ACCESS.2024.3364387
Sudirta, I. W., Pieris, J., Nugroho, W., & Ryantoni, H. (2025). Explore the Values of Pancasila as the Basic Philosophy of the Indonesian Nation. Arena Hukum, 18(1), 127–158. https://arenahukum.ub.ac.id/index.php/arena
Susilo, E. (2024). Integrating Spinoza's Philosophy of Civil Law into Indonesian Judicial Reasoning: Toward a Justice-Oriented Legal Framework. Supremasi Hukum: Jurnal Kajian Ilmu Hukum, 13(2), 173–190. https://doi.org/10.14421/c4016524
Susilo, E., Din, M., Suhaimi, & Mansur, T. M. (2024). Justice Delayed, Justice Denied: A Critical Examination of Repeated Suspect Status in Indonesia. Hasanuddin Law Review, 3(3), 342–357. https://doi.org/10.20956/halrev.v10i3.6088
Teguh Prasetyo. (2019). Keadilan Bermartabat Perspektif Teori hukum. Nusamedia.
Ulenaers, J. (2020). The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge? Asian Journal of Law and Economics, 11(2). https://doi.org/10.1515/ajle-2020-0008
Vasconcelos, H., Jörke, M., Grunde-Mclaughlin, M., Gerstenberg, T., Bernstein, M. S., & Krishna, R. (2023). Explanations Can Reduce Overreliance on AI Systems During Decision-Making. Proceedings of the ACM on Human-Computer Interaction, 7(CSCW1). https://doi.org/10.1145/3579605
Wilson, A., Stefanik, C., & Shank, D. B. (2022). How do people judge the immorality of artificial intelligence versus humans committing moral wrongs in real-world situations? Computers in Human Behavior Reports, 8. https://doi.org/10.1016/j.chbr.2022.100229
Yamin, B., Supryadi, A., & Fahrurrozi, F. (2022). "Mempertanyakan" Irah-Irah Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa Dalam Putusan Perkara Pidana. Unizar Law Review, 5(2). https://doi.org/10.36679/ulr.v5i2.8

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.003

HARMONIZATION OF CRIMINAL PROCEDURAL LEGISLATION OF INDIVIDUAL EU MEMBER STATES WITH THE PROCEDURAL PROVISIONS OF THE CONVENTION ON CYBERCRIME: A VIEW FROM UKRAINE

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Received: 30 January 2025; accepted:13 November 2025
DOI: https://doi.org/10.13165/j.icj.2025.11.02.003

Abstract. The procedural powers of pre-trial investigation bodies represent an important tool in dealing with cybercrimes. This academic paper analyses the procedural powers through the implementation of the relevant provisions of the Convention on Cybercrime. The aim of this academic research is to compare how some European countries implemented the provisions of the Budapest Convention procedural capabilities of pre-trial investigative bodies during the investigation of cybercrimes into national laws. The object of the research is the Budapest Convention and national procedural legislation of selected European countries, by the authors of this academic paper. The main tasks of this study to achieve the aim of this research are the following: 1) to gather systematic knowledge about the state of regulation of criminal procedural powers of pretrial investigation bodies dealing with cybercrimes by comparing the current procedural capabilities of pre-trial investigative bodies

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with the effective investigation of cybercrimes and the completeness of the implementation of the procedural provisions of the Budapest Convention in criminal procedure legislation of some European countries (which implemented the Budapest Convention and developed procedural mechanisms for national law enforcement agencies); 2) to analyse the criminal procedural laws of Ukraine relating to cybercrime investigation through the implementation of the provisions of the Budapest Convention into national law; 3) provide a recommendation on improving the laws of Ukraine to deal with cybercrimes. The result of this study shows that the full implementation of the procedural provisions of the Convention on Cybercrime by the signatory states is a mandatory condition for improving the effectiveness of cybercrime investigations in European countries, although the process of implementation of specified powers is too slow in some countries, especially through instruments of legal cooperation in criminal cases. The topic of legal cooperation in criminal matters related to cybercrimes shall not be a research theme in the given academic paper, it may be a separate topic for new academic research.

Keywords: The Convention on Cybercrime, Criminal Code, Criminal Procedure Code, procedural powers, investigative actions, measures to ensure criminal proceedings, computer data

Introduction

The International Convention on Cybercrime (hereinafter "Convention" or "the Budapest Convention") was opened for signing on 23 November 2001 in Budapest (ETS 185 – Cybercrime (Convention), and came into legal force on 1 July, 2004. The main purpose of the Budapest Convention is to pursue a common criminal policy aimed at protecting society from cybercrime, in particular, through the adoption of the relevant legislation and the promotion of international cooperation.

According to Article 14 of the Budapest Convention, each Party shall adopt such legislative and other measures as may be necessary for specific criminal investigations or proceedings, in particular, criminal offences established by the Convention, other criminal offences committed using computer systems, and the collection of evidence in electronic form of a criminal offence. The implementation and application of powers and procedures must be regulated by the conditions and preventive measures foreseen by the Party`s domestic law, which would provide an adequate protection of human rights and freedoms. Such conditions and preventive measures must include appropriate powers, judicial or other independent supervision, grounds that justify the application, limitation of the term of such authorities, and so on.

The problem of improving the efficiency of fighting cybercrime is a topical theme, not only for Ukrainian law enforcement agencies. For example, at the international conference "Cybercrime: Trends and Threats" held on 11-12 June 2018, in Nicosia (Republic of Cyprus), the Cyprus Chief of Police, Zacharias Chrysostomou, stated that the activities of cybercriminals cost the world economy USD 600 billion annually. According to statistics, two out of three Internet users also fall victim to cybercrime each year (Chrysostomou. Bulletin of Cyprus, 2018). According to Chat Le Nguyen and Wilfred Golman, typical cybercrime-related illegal actions committed in Pacific island countries include spam, hacking, viruses, pornography, identity theft, data theft, data manipulation, ransomware, distributed denial of service (DDoS) attacks, compromise of business email, email spoofing, bank fraud, social media abuse and intellectual property rights infringement, cyber financial crimes (credit card fraud and financial scams), cyberbullying, cyberstalking, revenge porn, fake news, etc. (Nguyen, Golman, 2021). Moreover, according to a report presented by Accenture Security, by 2030 total losses from cybercrime could amount to USD 90 trillion (Bissel, LaSalle, & Richards, 2017; Vitvitskiy, Kurakin, Pokataev, Skriabin, & Sanakoiev, 2021). The European Union Agency for Law Enforcement Cooperation (hereinafter "EUROPOL") states that "Cybercrime, in its various forms, represents an increasing threat to the EU. Cyber-attacks, online child sexual exploitation, and online frauds, are highly complex crimes and manifest in diverse typologies. Offenders continue to show high levels of adaptability to new technologies and societal developments, while constantly enhancing cooperation and specialisation. Cybercrimes have a broad reach and inflict severe harm on individuals, public and private organisations, and the EU's economy and security" (2023). Cybercrimes as a threat to national security are highlighted in many countries' reports, assessments, and strategies on national security. For example, the Annual Threat Assessment of the U.S. Intelligence Community (2023) stated that "The Ukraine war was the key factor in Russia's cyber operations prioritization in 2022. Although its cyber activity surrounding the war fell short of the pace and impact we had expected, Russia will remain a top cyber threat as it refines and employs its espionage, influence, and attack capabilities. Russia views cyber disruptions as a foreign policy lever to shape other countries' decisions. Russia is particularly focused on improving

its ability to target critical infrastructure, including underwater cables and industrial control systems, in the United States as well as in allied and partner countries, because compromising such infrastructure improves and demonstrates its ability to damage infrastructure during a crisis." This leads to the question: how can the threat of cybercrime be faced?

Para 16 of the Explanatory Report to the Budapest Convention (2021) aims principally to: (1) harmonise the domestic criminal substantive law elements of offences and connected provisions in cyber-crime; (2) provide for the domestic criminal procedural law powers necessary for the investigation and prosecution of such offences, as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form; (3) set up a fast and effective regime of international co-operation. This leads to the conclusion that the main aim was to establish criminal liability for the most dangerous acts committed online internationally. It leads to the next question: how will the provisions of the criminal law be practically implemented after criminal, illegal, dangerous acts have been committed by users online?

The authors of this academic paper will focus on how criminal procedure law, namely measures to ensure criminal proceedings and investigative steps designed to find and collect data, serve the objective of criminal procedure law as prescribed in the criminal procedure codes of many European countries. For example, para 1 of Article 2 of the Criminal Procedure Code of Ukraine (2012) states that the objectives of criminal procedure are the protection of individuals, society and the state from criminal offence, the protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensuring quick, comprehensive and impartial investigation and trial in order that anyone who committed a criminal offence is prosecuted in proportion to their guilt, no one innocent was accused or convicted, no one was subjected to ungrounded procedural compulsion, and an appropriate legal procedure applied to each party to criminal proceedings. This leads to the essence of this research: how a legal provision (a criminal offence committed in cyber space and described in corpus delicti of the article leads to criminalization of the most dangerous acts) leads to finding and collecting data by the methods prescribed in the criminal procedure code, and other laws for achieving the main objective of criminal procedure law as mentioned above. It leads to next questions for further analysis. What kind of legal instruments can law enforcement agencies use during the pre-trial investigation of cybercrimes? How fast can law enforcement agencies react to a cybercrime? How do law enforcement agencies mutually communicate nationally and internationally with Internet and telco providers?

The authors of this paper aim to examine the above-mentioned topics through considering the measures employed to ensure criminal proceedings and investigations prescribed in the criminal procedure code for finding and collecting data on cybercrimes. The importance of studying the implementation of the Convention on Cybercrime in the procedural legislation of different states is also related to the need to ensure an effective investigation of violations in taxation, in particular, tax on digital platforms (Kravtsova et al, 2020). The issue of effective interaction between the Cyber Police Department and investigative units of pre-trial investigation bodies also remains relevant (Darahan et al, 2021). The development of the necessity to strengthen law enforcement resources to successfully investigate computer crimes has become more important globally, as confirmed by the systematic online seminars and practical training in the joint project of the European Union and Council of Europe Cyber East, Cyber South, iPROCEEDS-2, etc..

The aim of this academic research is to conduct a comparative analysis of how the above-mentioned European countries implemented the provisions of the Budapest Convention procedural capabilities of pre-trial investigative bodies during the investigation of cybercrimes in national laws. The object of the research is the Budapest Convention and national procedural legislation of selected European countries by the authors of this academic paper in the field of cybercrime prevention and combating. The main tasks of this study for achieving the aim of this academic paper are the following: 1) to get systematic knowledge about the state of regulation of criminal procedural powers of the pretrial investigation bodies coping with cybercrimes through the comparative way the current procedural capabilities of pre-trial investigative bodies to the effective investigation of cybercrimes and the completeness of procedural

provisions of the Budapest Convention in criminal procedure legislation of some European countries (which implemented the Budapest Convention and developed procedural mechanisms for national law enforcement agencies); 2) to analyse the criminal procedural laws of Ukraine in the field of cybercrime investigation through the implementation of the provisions of the Budapest Convention into national law; 3) to provide a recommendation on improving Ukrainian cybercrime laws.

During the preparation of this article, an analysis of the regulatory framework (international treaties, EU acts, etc.) was carried out, taking into account 'soft law', i.e. regulatory acts that are only of a recommendatory nature for Ukraine, survey data, as well as field research by other governmental and non-governmental organizations (Osula, 2017; Krunoslav, 2022; Shurson, 2020; Drazen, 2013; Inmaculada, 2017).

This study is based on methodological paradigms, directions and a system of methods of scientific knowledge. The main methodology is hermeneutic, enabling an interpretation of the norms of current international and national legislation in cybercrime prevention and combating. Empirical data (statistical data provided by state authorities and court decisions) were processed using sociological methods. AI was not used.

1. Research on the status of introducing provisions of the Convention on Cybercrime

In analysing the importance of the fight against cybercrime in Ukraine, it's advisable to pay attention to the following statistics. In Ukraine, from January to December 2020, the dynamics of criminal offenses under Art. 361 of the Criminal Code of Ukraine keeps growing. 1146 cases of such criminal offenses were registered (139 criminal offenses more than 2018), 680 notices of suspicion were given (50 notices of suspicion more than 2018), 618 indictments were sent to court (141 indictments more than 2018) (Attorney General Office, 2020). Further chronological analysis of these statistics shows a further increase in the number of registered criminal offenses relating to the use of electronic computers in Ukraine. In 2024, according to the Unified Report on Criminal Offenses, 1953 such criminal offenses were registered, notices of suspicion of committing 1466 criminal offenses were served, and 1281 indictments were sent to court (Attorney General Office, 2024). The importance of optimizing cybercrime investigative powers of pre-trial investigation bodies to curb the growth of criminal offenses in these categories needs attention from national lawmakers. The effective fight against cybercrime involves active international cooperation in this area.

For the effective collection of evidence in electronic form, Art. 16 and 17 of the Budapest Convention foresee:
1) The possibility for the competent authority to issue an order for the urgent storage of computer data, including information on data movement stored by a computer system, in particular when there is reason to believe that such computer data is particularly vulnerable to loss or modification;
2) The obligation of the person who controls the relevant computer data to keep and maintain the integrity of such computer data for a certain period, which is necessary to get the approval of the competent authority to disclose such data;
3) The obligation of the person to store such computer data and maintain the confidentiality of the fact of it for a certain period on the order of the competent authority;
4) Ensuring the possibility of urgent retention of data movement, regardless of the number of service providers involved in the transfer of such information;
5) Ensuring the possibility of urgent disclosure to the competent authority of the amount of information of data movement, enough to identify service providers and the route to which the information was transmitted.

According to the Budapest Convention, it is possible to address the requirement for the retention and provision of relevant computer data both to people in whose possession or control such computer data is stored and to service providers – to provide information about the relevant user of services. Art.19 of the Budapest Convention states that in relation to the "search and seizure of stored computer data" each Party shall adopt such legislative and other measures as may be necessary to empower its competent

authorities to search or access: a computer system or part of it and computer data stored therein; and a computer-data storage medium in which computer data may be stored in its territory. Also, each Party shall adopt such legislative and other measures as may be necessary to ensure that where its authorities search or access a specific computer system or part of it, and have grounds to believe that the data sought is stored in another computer system or part of it in its territory, and such data is lawfully accessible from or available to the initial system, the authorities shall be able to expeditiously extend the search or similar access to the other system That is, on a computer system or its part, which is physically located outside the object where the search is carried out, but within the territory of the state, which is subject to the law enforcement powers of the pre-trial investigation body, the prosecutor who conducts the search.

Each Party shall also adopt such legislative and other measures as necessary to empower its competent authorities to seize or similarly secure accessed computer data. These measures shall include the following powers: to seize or similarly secure a computer system or part of it or a computer-data storage medium; make and retain a copy of those computer data; maintain the integrity of the relevant stored computer data; render inaccessible or remove those computer data in the accessed computer system. To carry out the mentioned actions, the competent authorities should have the power to order any person who knows the computer system`s functioning or measures applied to protect the computer data therein to provide, as is reasonable, the necessary information.

Let's turn to the comparative analysis of the criminal procedural legislation of particular European countries and the signatories of the Budapest Convention. The authors of the research paper analyse the regulation of procedural provisions in the national legislation of the above-mentioned states without linking them to investigative (search) actions or measures to ensure criminal proceedings (methods of collecting evidence, procedural actions, etc.), since the Budapest Convention uses the term "procedural provisions" (Article 14).

To achieve the aim of this academic paper, the criminal procedural laws of five European Union Members States were selected: the Republic of Bulgaria, the Republic of Hungary, the Republic of Romania, the Republic of Lithuania and the Republic of Latvia, as these countries have developed an appropriate procedural mechanism for investigating crimes in accordance with their obligations under the Budapest Convention. Additionally, three countries bordering Ukraine - Republic of Belarus, Russian Federation and the Republic of Moldova - were also selected for analysis.

1.1. The Republic of Latvia

According to Articles 136, 191, 192 of the Criminal Procedure Law of the Republic of Latvia (2005), the investigator may, by their decision, oblige the owner, possessor or administrator of an electronic information system (i.e. a natural or legal person processing, storing or transmitting data using electronic information systems, including a seller of electronic communications) to immediately ensure the preservation of the integrity of certain data at its disposal, necessary for the purposes of the investigation (the preservation of which is not provided for by law), in an unchanged state and their inaccessibility to other users of the information system. An investigator in pre-trial criminal proceedings, with the consent of the prosecutor, may apply to the seller of electronic communications with a request for the disclosure and provision of data subject to storage, in accordance with the procedures specified in the Law on Electronic Communications of the Republic of Latvia (2022).

1.2. The Republic of Lithuania

Even in signing the Convention and I and II Additional Protocols to the Convention, the Republic of Lithuania made reservations that criminal liability for the act described in Article 2 of the Convention occurs upon access to the whole or any part of a computer system without right by infringing security measures of a computer or a computer network. That, for reasons of efficiency, requests for mutual assistance made under Article 27, paragraph 9, are to be addressed to the central authorities. That criminal liability occurs if the acts described in Article 4 of the Convention result in serious harm. That

it reserves the right to refuse to execute the request for preservation of the data in cases where there is reason to believe that at the time of disclosure of the offence, on which the request for preservation of the data is based, is not considered as a crime by the laws of the Republic of Lithuania. That the Ministry of Justice and the General Prosecutor's Office of the Republic of Lithuania are designated as responsible authorities to perform the functions mentioned in Article 24, paragraph 7, sub-paragraph a., and in Article 27. The Police Department under the Ministry of the Interior of the Republic of Lithuania is designated as a competent authority to perform the functions mentioned in Article 35.

According to Article 154 of the Criminal Procedure Code (hereinafter "the CPC") of the Republic of Lithuania (2002), in a number of cases, an investigator may wiretap the conversations of persons transmitted via electronic communication networks, make recordings of them, monitor other information transmitted via electronic communication networks, and record and store it. This authority partially corresponds to the obligation "Expedited preservation of stored computer data" foreseen in Article 16 of the Budapest Convention. However, Article 154 of the CPC of the Republic of Lithuania does not cover the possibility of ordering another entity to promptly preserve certain computer data, including traffic data stored using a computer system, as defined in Article 16 of the Budapest Convention. In the context of the implementation of most other provisions of the Convention when working with electronic data, the authors of the given paper didn't find such procedural powers of the prosecution in the CPC of the Republic of Lithuania. The "Categories of Data to be Stored" of the Law on the Electronic Communications of the Republic of Lithuania (2004) are foreseen in Annex 1.

1.3. Republic of Hungary

In the interests of investigating crimes, the request temporarily restricts the right of disposal of computer data. It may be done at the court's order or the prosecution, in particular, to establish the location or identity of a suspect. Upon the request, the obligated party shall reserve the data stored in the information system designated in the order in an unchanged form and ensure its safe storage, if necessary, separately from other data files. The obliged party shall prevent the modification, deletion, or destruction of the computer data, as well as the transmission and unauthorized copying thereof and unauthorized access thereto. The party ordering the data reservation may affix its advanced safety electronic signature on the data to be reserved. If the reservation of the data at its original location considerably hinders the activity of the obliged party to process, manage, store, or transmit the data, the obliged party may, with the permission of the issuer of the order, ensure its reservation by copying the data into another data medium or information system. After the copy has been made, the order issuer may wholly or partially relieve the restrictions concerning the data medium and information system holding the original data. While the measure is in effect, the data to be reserved may solely be accessed by the court, prosecutor, or investigating authority that has issued the order and – with their respective permission – the person possessing or managing the data. Other entities may access this data only with the permission of the issuer of the order. The obliged party shall forthwith notify the issuer of the order if the data to be reserved has been modified, deleted, copied, transmitted, or viewed without authorization or an indication of an attempt of the above has been observed. After issuing the order for reservation, the issuer shall start to review the affected data without delay and, depending on its findings, either order the seizure of the data by copying them to the information system or other data medium, or terminate the order for their reservation. The duration of the obligation to reserve data shall be no longer than three months, and shall terminate if the criminal proceedings have been concluded, considering the conclusion of the criminal proceedings (Act XIX of 1998 on Criminal Proceedings of Hungary 1998). Art.158/B of Law XIX of Hungary on Criminal Proceedings to prevent or stop a crime provides for the possibility of rendering electronic data temporarily inaccessible by order of the court. This action can be done through the temporary removal of electronic data or due to the temporary prevention of access to electronic data entities subject to a court order shall notify users of the legal grounds for removing the relevant data or preventing access, regarding the appropriate court order. Orders to render electronic data temporarily inaccessible and to reserve data stored in an information system may be ordered simultaneously. Article 158/C of Law XIX of Hungary on Criminal Proceedings provides the court to oblige a web hosting provider to render electronic data temporarily inaccessible. In this case, the web hosting provider must comply with the court order within one working day.

The courts shall issue an order to render electronic data temporarily inaccessible if a foreign provider fails to comply with its request within thirty days, according to Art.158/D of the analysed law. Electronic communications providers must disable access to electronic data by the court's order. Court rulings may be sent by e-mail even if the person with the right to use the electronic data is unknown. The courts shall immediately send electronic notification to the National Media and Info-communications Authority (hereinafter "NMIA") about its orders to render electronic data temporarily inaccessible. The NMIA organizes and supervises the execution of orders, records the obligation in a central database of court rulings, and shall immediately notify electronic communications providers about court rulings. Electronic communications providers have one working day to comply with the relevant court rulings. The NMIA notifies the courts immediately about any failure by an electronic communications provider to comply with this obligation, and courts may take response measures in the form of fines. Thus, the procedural provisions of Art.16, 17, and 19 of the Budapest Convention are currently implemented in the procedural law of Hungary.

1.4. Republic of Romania

The CPC of Romania (2010) also pays considerable attention to the procedural regulation of the rules for working with electronic data, computer systems, and networks. Art.138 of the CPC of Romania provides that accessing a computer system is a special method of surveillance or investigation. This article provides for wiretapping, accessing, surveillance, tracking, or tracing using telephone, computer system, or other technical devices. According to Part 3 of Art.138 of the Code of Criminal Procedure of Romania, accessing a computer system designates access to a computer system or other data storage device, either directly or distant, through specialized programs or a network, to identify evidence (Criminal Procedural Code of Romania, 2010). According to Part 4 of Art.138 of the CPC of Romania, the features of a computer system include the functional connection of devices that provide automatic data processing using a computer program. Part 5 of Art.138 of the CPC of Romania defines the concept of computer data in the same way as in the Convention on Cybercrime: any representation of facts, information, or concepts in a form appropriate for processing in a computer system, including a program able to determine the performance of a function by a computer system. Art.141 of the CPC of Romania provides for the prosecutor's powers: making and preserving a copy of the computer data identified through accessing a computer system, prohibition of access to or removal of such computer data from the computer system. Copies shall be made using appropriate technical devices and procedures to ensure the integrity of the information contained. Art.143 of the CPC of Romania regulates the rules for electronic surveillance activities, making copies from computer data mediums, etc. Chapter V of the CPC of Romania regulates the rules of preservation of computer data. Art.154 of the CPC of Romania, in particularly, provides for the prosecutor's powers to order the immediate preservation of computer data for a maximum of 60 days. It also concerns data referring to information traffic of a computer system, held or controlled by providers of public electronic communication networks, or providers of electronic communication services intended for the public if there is a danger that such data may be lost or altered. The provider is also obliged to provide criminal investigation bodies forthwith with the information necessary for the identification of other providers to enable them to learn of all elements of the used communication chain. Art.156 of the CPC of Romania, in particularly, provides for the possibility to conduct a computer search. Art.168 of the CPC of Romania is devoted to regulating computer system searches. It designates the procedure for investigating, discovery, identification, and collection of evidence stored in a computer system or computer data, performed through adequate technical devices and procedures, to ensure the integrity of the information so contained. Part 8 of Art.168 of the CPC of Romania provides that if on the occasion of a search of a computer system or of a computer data storage medium, it is found that the sought computer data is stored in a different computer system or a computer data storage medium, and is accessible from the initial system or medium, the prosecutor shall immediately order the preservation and copying of the identified computer data and shall request the issuance of a warrant on an emergency basis. In addition, Art.170 of the CPC of Romania provides for the right of the pre-trial investigation body and the court to require any person or a provider of electronic communication services to provide them with specific computer data if this is necessary to prevent an offense, or when the data can be used as evidence in a case. Thus, we can

state the effectiveness of implementing the procedural provisions of the Budapest Convention to the CPC of Romania.

1.5. Republic of Bulgaria

Art.159 of the CPC of the Republic of Bulgaria provides, in particular, that on a request of the Court or from the bodies of pre-trial procedures, all establishments, legal persons, officials, and citizens shall be obliged to preserve and deliver the objects, papers, computer information data, the carriers of such data and data about the subscriber, which are in their possession and may be of importance for the case. “Data about the traffic” in the CPC of the Republic of Bulgaria is considered as all data about the transportation through a computer system of messages, signals, information about their origin, purpose, movement, duration, data size, and connection to the provider (CPC of the Republic of Bulgaria). Art.160 of the CPC of the Republic of Bulgaria states that if there are sufficient grounds to presume that computer information processing systems contain computer information that may be of importance to a case, a search shall be done to find and seize them. Part 7 of Art.163 of the CPC of the Republic of Bulgaria provides the seizure of computer information data. Part 3 of Art.172 of the CPC of the Republic of Bulgaria provides that the suppliers of computer-information services shall be obliged to assist the Court and the bodies of pre-trial procedures in gathering and recording computer information data through the application of special technical means. Thus, the procedural provisions of Art.16, 17, and 19 of the Convention are also implemented in the CPC of the Republic of Bulgaria. The judgment of the European Court of Human Rights (hereinafter “ECtHR”), "*Case of Iliya Stefanov versus Bulgaria*" of May 22, 2008, in particular, declared a violation of Art.8 of the European Convention on Human Rights in connection with the fact that during the search of the lawyer's office, police officers seized his computer, monitor, printer and other peripherals, thirty-three floppy disks, a piece of paper noting five motor vehicle registration numbers, and a certificate from a language school saying that the applicant had completed a course in English and German. (paragraph 16). This list of items seized during the search was due to the too-broad wording used in the search warrant. In particular, the applicant's (lawyer's) computer and all his floppy disks had been confiscated for two months, and therefore constituted excessive police interference in the applicant's professional secrecy. Only a week after searching and removing the computer and floppy disks, these items were handed over to an expert to select files using keywords. Ten days later, the expert informed the police that the special computer program had found no relevant files for those keywords on the searched media (Iliya Stefanov v. Bulgaria, §16). Thus, it can be assumed that if the investigators had carried out such procedural actions as the search of a computer and the collection of computer data during the search of the lawyer's office, the European Court of Human Rights would not have found excessive police interference in the applicant's professional secrecy and there would have been no claim to the ECtHR.

European Union Members States near Ukraine moved with different speeds on signing the Conventions and ratification thereof. The analysis of the criminal procedure law of the states bordering with Ukraine where the Budapest Convention has not been ratified yet has provided grounds for such conclusions: the legal construction of “computer data” is still not used at all in the current version of the CPC of the Russian Federation (2001) or the CPC of the Republic of Belarus (1999).

1.6. Judgment of the European Court of Human Rights

Perhaps the insufficiently detailed criminal procedural regulation of the investigator's actions contributed to the judgment of the ECtHR (*Yudytska and Others v. Russia*, 12 February 2015, § 40). In this decision, the ECtHR, in particular, noted: the court ruling on the search had not been formulated, which gave the investigators unlimited discretion in searching. According to the Court's case law, search warrants, where possible, should be drafted so that the consequences they have caused would be foreseeable. The excessive vagueness of the resolution's wording led to how the search was conducted. Investigators seized all the applicants' laptop computers and copied the contents of all hard drives. These computers were returned a week later. In particular, as regards the electronic data stored on the seized applicants' computers, it was clear that investigators hadn't selected information during the search. The search impinged on professional secrecy to an extent disproportionate to whatever legitimate aim was

pursued (*Yudytska and Others v. Russia*, § 50). In other words, the actions of the investigators went beyond "necessary actions in a democratic society."
At the same time, it should be noted that the CPC of the Russian Federation, which regulates the mentioned procedural actions in Chapter 25, Art.164.1, gives the investigation body discretion in the seizure of electronic data carriers and the copying of information from them during investigative actions, in particularly, in understanding the procedure of selecting electronic information (Criminal Procedural Code of the Russian Federation, 2001). Art.15 of the Budapest Convention incidentally states that procedural powers, provided for under its domestic law, shall adequately protect human rights and liberties and incorporate the principle of proportionality (Art.15 of the Convention). The circumstances mentioned above of the ECtHR judgment *Yudytska and Others v. Russia*, don't convey the necessity of computer confiscation in a democratic society. The investigators violated the principle of proportionality in limiting human rights.

Continuing to analyse the criminal procedure legislation of signatory states yet to ratify the Convention, it is expedient to pay attention to subsequent norms in a comparative aspect. Some rules for inspecting computer systems and devices for storing computer data are regulated in Art.118 of the CPC of the Republic of Moldova. However, any procedural provisions similar in content to those provided for in the Convention (CPC of the Republic of Moldova, 2003) haven't been revealed during an analysis of the current version of the CPC of the Republic of Moldova.

1.7 Results of comparative analysis

The following table presents a comparison between the procedural measures outlined in the Budapest Convention and the extent to which these measures have been implemented in the national legislation of the five considered countries:

Procedural powers under the Cybercrime Convention:	States:				
	Republic of Latvia	Republic of Lithuania	Republic of Hungary	Republic of Romania	Republic of Bulgaria
Issuing a warrant for urgent retention of certain e-data	+	-	+	+	+
The obligation of the person to maintain the integrity of stored e-data	+	+	+	+	+
The obligation of the person to store e-data without its disclosure	-	+	-	-	-
Urgent data storage on the movement of information, regardless of the number of involved service providers	+	-	-	-	+
Urgent disclosure of data on the movement of information sufficient to identify the service provider and the route of information transfer	+	-	-	+	+
Addressing the requirement of storing e-data about the service user to the service provider	-	+	-	-	-
Searching the computer system, a part thereof, and e-data	-	-	-	+	+

Searching computer media	-	-	-	+	+
Urgent extension of legal grounds for primary computer system search to another computer system or a part thereof	-	-	-	+	-
Arresting of data, computer system, a part thereof, or information carrier	-	-	+	+	+
Copying and saving a copy of such e-data	-	+	+	+	+
Preserving the integrity of stored e-data	-	-	+	+	+
Prohibition of computer system access	-	-	+	-	-
Extracting e-data from a computer system	-	-	+	+	+
Require a knowledgeable electronic specialist to provide necessary information about e-data protection	-	-	-	-	-
Urgent storage of e-data stored in a computer system outside the jurisdiction of the state	-	-	-	-	-
Urgent disclosure of a sufficient amount of preserved data movement to identify the service provider and the route of information transfer	-	-	-	+	-
Cross-border access to publicly available e-data, regardless of geographical location	-	-	-	-	-

Table 1: Powers of the pre-trial investigation bodies as a result of implementing the procedural provisions of the Convention on Cybercrime (Source: authors` research).

2. Republic of Ukraine

According to the Chart of signatures and ratifications of Treaty 185 (Budapest Convention) published at the Treaty office of the Council of Europe, the Budapest Convention was signed by Ukraine on 23 November 2001, ratified on 10 March 2006, and came into legal force on 1 July 2006. Ukraine has also ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) on 21 December 2006, entering into force for Ukraine on 1 April 2007). Ukraine signed the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (CETS No. 224) on 5 December 2022. Unfortunately, sufficient and specific provisions have not been included in the CPC of Ukraine yet that would empower investigators and prosecutors to satisfy the above-mentioned Ukrainian obligations to the Convention. The authors of the given paper agree with Orlov Yu and S. Chernyavsky's thoughts on the expediency of making appropriate changes to the CPC of Ukraine (Orlov, Chernyavsky, 2017).

Subjecting the current CPC of Ukraine (Art. 84) to critical analysis, it`s appropriate to disagree with the position expressed by S. Buyagi about the fact that the analysis of Art. 84 of the CPC of Ukraine (which has established the concept of evidence in criminal proceedings) "testified that the provision, which would expand the essence of this phenomenon with the help of evidence in electronic form" is therein absent (Buyagi, 2018). Art. 99 of the CPC of Ukraine states that other storage media, including electronic, may also belong to the documents. It seems that the legislator has caused confusion: a storage medium (e.g. flash memory card) would hardly be called a document. However, taking into account the above-mentioned Art. 99 of the CPC of Ukraine and Art. 8 of the Law of Ukraine "On Electronic Documents and Electronic Document Management" (Law of Ukraine, 2003, an electronic document is still a type of document and it should be assumed to be covered by the term "documents" in the above Art. 84 CPC of Ukraine. Indeed, according to Art. 8 of the Law of Ukraine "On Electronic Documents and Electronic Document Management" (2003), the admissibility of using an electronic document as evidence cannot be denied because it has an electronic form.

The analysis of some sources prompted that amendments to the criminal procedure laws of Ukraine should be conducted. Buyagi notes that following the law of the United States of America "On the Unification and Strengthening of the United States" every action that causes a malfunction or leads to illegal entry into a computer qualifies as terrorism. In turn, the provider is obliged to provide all known information about the user at the first request of the Federal Bureau of Investigation (Buyagi, 2018). It seems reasonable to amend the CPC of Ukraine and provide the pre-trial investigation body with the opportunity to receive information about the telecommunication services user upon request and without contacting the investigating judge. In Ukraine, such information can currently be obtained on the basis of temporary access to items and documents in accordance with Art. 160, 162, 165 of the CPC of Ukraine. In the CPC of Ukraine, it would be expedient for the pre-trial investigation body to regulate the possibility of conducting a remote verification and remote search of information resources in Ukraine and abroad. The CPC of Ukraine does not provide urgent and cross-border methods for collecting evidence electronically. Meanwhile, the Budapest Convention offers the following procedural measures in the regulation of international cooperation:
- The expeditious preservation of data stored using a computer system located within the territory of another state and in respect of which the initiator intends to submit a request for mutual assistance for the search or similar access (Art. 29 of the Convention),
- Expeditious disclosure of stored information of data movement in a sufficient amount of traffic data to identify that service provider and the path through which the communication was transmitted (Art. 30 of the Convention),
- Trans-border access to publicly available stored computer data, regardless of where the data is located geographically and data with the lawful and voluntary consent of a person who has lawful authority to disclose the data through that computer system (Art. 32 of the Convention).

According to the authors of this academic paper, procedural means of proof should be added, listed above in Art. 29, 30, and 32 of the Convention to the CPC of Ukraine. According to Part 2, Art. 1 of the CPC of Ukraine, international treaties - the binding concept of which has been given by the Verkhovna Rada of Ukraine - are part of the criminal procedure legislation of Ukraine. Moreover, according to Part 4, Art. 9 of the CPC of Ukraine, if by chance the norms of the CPC of Ukraine are contrary to international agreement the binding consent of which has been given by the Verkhovna Rada of Ukraine, the provisions of the corresponding international agreements of Ukraine are thus applied.

However, the declared obligations of Ukraine to create the opportunities mentioned above for the competent authorities cannot be equated with the specific powers of pre-trial investigation bodies and prosecutors. Therefore, at present, pre-trial investigation bodies cannot apply the provisions mentioned above of the Convention, as there are no relevant powers corresponding to them.

An analysis of the agenda of the tenth session of the Verkhovna Rada of Ukraine of the eighth convocation (Resolution of the Verkhovna Rada of Ukraine, 2019) showed that the issues of strengthening responsibility for offenses in information security and the fight against cybercrime in Ukraine are not ignored by the legislator. In the agenda, in particular, there is a draft Law on Amendments to Some Laws of Ukraine: № 2133a of 19 June 2015, and № 2133a-1 of 30 September 2016. Special attention should be paid to the draft Law on Amendments to Some Legislative Acts of Ukraine № 6688 of 12 July 2017. Other draft laws aim to strengthen the protection of information and information telecommunication systems in the agenda. We will nevertheless leave these draft laws unattended because they lack focus on the implementation of the procedural provisions of the Convention. Based on the analysis mentioned above of the current CPC of Ukraine, other laws and draft laws, which are currently on the agenda in the Verkhovna Rada of Ukraine, lead to the conclusion that proper conditions for the effective work of the Ukrainian competent authorities - in the context of most of the work with computer data and administrators of web resources, as provided for by the Budapest Convention - have not yet been created by the Parliament.

Conclusions

1) The republics of Bulgaria, Latvia, Lithuania, Hungary and Romania have empowered their pre-trial investigation bodies with the authority required to effectively investigate criminal offenses involving the use of electronic computers, systems, computer networks, and telecommunication networks. These powers are based on the provisions set out in their respective criminal and procedural legislation.
2) The procedural powers of the pre-trial investigation bodies as the result of implementing the procedural provisions of the Budapest Convention set up in the CPC vary amongst the analysed signatory states, even though the text of the Convention is the same.
3) Some procedural powers for pretrial investigation bodies to deal with cybercrimes are set up in other laws, not in the CPC, even though all countries selected for this research belong to the continental legal system.
4) The authors recommendation for the lawmakers of Ukraine is to follow Ukraine's national criminal procedural legislation; it is expedient to provide legal bases and procedural procedures to apply the system of procedural powers of pre-trial investigation bodies provided by the Convention on Cybercrime and listed above in the table of procedural controls.

References

Act XIX of 1998 on Criminal Proceedings of Hungary. (31 December 1998). *The official website of the UNODC*. https://sherloc.unodc.org/cld/document/hun/1998/hungarian_criminal_procedure_code.html
Additional Protocol to the Convention on Cybercrime concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems. (2024). *The official website of the Verkhovna Rada of Ukraine.* https://zakon.rada.gov.ua/laws/show/994_687#Text
Annual threat assessment of the U.S. intelligence community. https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf
Bissel, K., LaSalle, R. M., & Richards, K. (2017). *The Accenture Security Index. Redefining Security Performance and How to Achieve it.* https://www.accenture.com/t20170213T002042__w__/us- en/_acnmedia/PDF-43/Accenture- The-Acn-Security-Index.pdf
Buyagi, S. A. (2018). *Legal regulation of the fight against cybercrime: theoretical and legal aspect: dissertation.* Doctor of Law: 12.00.01. Classic private university named after King Danylo. Kyiv, Ukraine.
Chart of signatures and ratifications of the Treaty 185. *The official website of the Council of Europe.* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=185
Chart of signatures and ratifications of the Treaty 189. *The official website of the Council of Europe.* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=189
Criminal Division. *Official website of the U.S. Department of Justice*. https://www.justice.gov/criminal/cloud-act-resources
Criminal Procedure Code of the Republic of Romania. (2010). https://www.legislationline.org/download/id/5896/file/Romania_CPC_am2014_EN.pdf
Criminal Procedure Code of the Republic of Lithuania. (14 March 2002). https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr?positionInSearchResults=18&searchModelUUID=e04a3efe-6665-4c18-af6e-ab04cd2f0db9
Bulgaria Criminal Procedure Code. (28 October 2005). https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2019)034-e
Criminal Procedure Code of the Russian Federation. № 174-FL. (18 December 2001). http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=602039487&backlink=1&&nd=102073942
Criminal Procedure Code of the Republic of Belarus. № 295-L. (16 July 1999). https://etalonline.by/document/?regnum=HK9900295
Criminal Procedure Code of the Republic of Moldova. (14 March 2003). http://continent-online.com/Document/?doc_id=30397729#pos=6;-142
Darahan, V., Boiko, O., Rohalska, V., Soldatenko, O., & Lytvynov, V. (2021). *Structural-functional providing of the operative-investigative crime prevention in the field of public procurement in Ukraine*. *Amazonia Investiga*, 10 (42), 80-92. https://amazoniainvestiga.info/index.php/amazonia/article/view/1659/1755
Draft Law on Amendments to Certain Laws of Ukraine № 2133a. On Strengthening Liability for Committed Offenses in the Sphere of Information Security and Combating Cybercrime. (2015). *The Official website of the Verkhovna Rada of Ukraine.* http://search.ligazakon.ua/l_doc2.nsf/link1/JH1N968A.html

Draft Law on Amendments to Certain Laws of Ukraine № 2133a-1 On Strengthening Liability for Committed Offenses in the Sphere of Information Security and Combating Cybercrime. (2016). *The Official website of the Verkhovna Rada of Ukraine.* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=2133%D0%B0-1&skl=9
Draft Law on Amendments to Certain Legislative Acts of Ukraine № 6688 "On Counteracting Threats to National Security in the Information Sphere". (2017). *The Official website of the Verkhovna Rada of Ukraine.* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62236
Drazen, S. (2013). *Search and seizure data in cyber space – mechanisms to preserve and reproduce data in a non-volatile format. Criminal justice and security – contemporary criminal justice practice and research, conference proceedings*.
https://apps.webofknowledge.com/full_record.do?product=WOS&search_mode=GeneralSearch&qid=61&SID=D6A4txHKkBgNPFIH7Kp&page=6&doc=51&cacheurlFromRightClick=no
ECtHR. *Iliya Stefanov v. Bulgaria*. App. No. 65755/01 [22 May 2008], https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86449%22]}
ECtHR. *Yuditska and Others v. Russia*. App. No. 5678/06 [12 February 2015], https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-151037%22]}
Electronic Communications Law Republic of Latvia. (2022). https://likumi.lv/ta/id/334345-elektronisko-sakaru-likums
Explanatory report to the Convention on Cybercrime (2021). https://www.oas.org/juridico/english/cyb_pry_explanatory.pdf
Inmaculada, L.-B. P. (2017). *New technology applied to criminal investigation: searching computers.* Revista de los Estudios de Derecho y Ciencia Politica. Universit at Oberta de Catalunia. https://www.researchgate.net/publication/318119092_New_technology_applied_to_criminal_investigation_searching_computers
Internet Organized Crime Threat Assessment. https://www.europol.europa.eu/cms/sites/default/files/documents/IOCTA%202023%20-%20EN_0.pdf
Joint project of the European Union and the Council of Europe Cyber South, aimed at implementing the Budapest Convention on Cybercrime provisions. *The Official website of the Council of Europe*. https://www.coe.int/en/web/cybercrime/cybersouth
Kravtsova, T., Rohalska, V., Bukhanevych, O., Ilkov, V., & Chudnovskyi, O. (2020). Topical taxation issues in conditions of the digital market. *Journal of Legal, Ethical and Regulatory Issues*. Volume 23 (1), 1-6. https://www.abacademies.org/articles/topical-taxation-issues-in-conditions-of-digital-market-9014.html.
Kriminālprocesa likums, Stājas spēkā: 01.10.2005, 26.02.2025.-31.12.2025. Spēkā esošā https://likumi.lv/ta/id/107820-kriminalprocesa-likum
Krunoslav, A. (2022). The Challenges of Collecting Digital Evidence Across Borders. *Policija i sigurnost-police and security*. Volume 32. Issue 3. 271-289. https://hrcak.srce.hr/file/445780
Law of Ukraine № 4651-VI. (2012). Criminal Procedure Code of Ukraine. *The Official website of the Verkhovna Rada of Ukraine*. https://zakon.rada.gov.ua/laws/show/en/4651-17#Text
Law of Ukraine № 2824-IV On Ratification of the Convention on Cybercrime".(2005). *The Official website of the Verkhovna Rada of Ukraine.* https://zakon.rada.gov.ua/laws/show/2824-15#Text.
Law of Ukraine No. 851-IV About electronic documents and electronic document management. https://cis-legislation.com/document.fwx?rgn=11196
Law on the Electronic Communications of the Republic of Lithuania (2004). https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.232036/asr
Nguyen, Ch. L., & Golman, W. (2021). *Diffusion of the Budapest Convention on cybercrime and the development of cybercrime legislation in Pacific Island countries: 'Law on the books' vs 'law in action'*. The Computer Law and Security Review (CLSR), 40. https://www.sciencedirect.com/science/article/abs/pii/S0267364920301266
Reservations and Declarations for Treaty No.185 - Convention on Cybercrime (ETS No. 185). *The Official website of the Council of Europe.* https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=185&codeNature=0
Resolution of the Verkhovna Rada of Ukraine № 2679-VIII. (2019). "On the agenda of the tenth session of the Verkhovna Rada of Ukraine of the eighth convocation". *The Official website of the Verkhovna Rada of Ukraine.* https://zakon.rada.gov.ua/laws/show/2679-viii#Text
Orlov, Yu. & Cherniavskyi, S. (2017). *The use of electronic mappings as evidence in criminal proceedings.* Scientific Bulletin of the National Academy of Internal Affairs. No. 3 (104), pp. 13-24.
Osula, A. M. (2017). *Remote search and seizure of extraterritorial data. Dissertation for the commencement of Doctor of Philosophy (Ph.D.) in law*, University of Tartu. https://dspace.ut.ee/handle/10062/55683
Shurson, J. (2020). *Data protection and law enforcement access to digital evidence: resolving the reciprocal conflicts between EU and US law*. International Journal of Law and Information Technology. Volume 28, Issue 2, 167-184. https://academic.oup.com/ijlit/article/28/2/167/5866176

The Convention on Cybercrime of the Council of Europe (CETS No.185). *The Official website Council of Europe*. https://www.coe.int/ru/web/conventions/full-list/-/conventions/treaty/185
The single report on criminal offenses in the state was published in December 2018, 2020, 2023, 2024. *Statistics of the Attorney General`s office of Ukraine*. https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2
The single report on criminal offenses in the state published in December. (2018). Statistics of the Attorney General`s office of Ukraine. *The Official website of the Attorney General`s office of Ukraine*. https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2
The single report on criminal offenses in the state published in December. (2020). Statistics of the Attorney General`s office of Ukraine. *The Official website of the Attorney General`s office of Ukraine*. https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2
The single report on criminal offenses in the state published in December. (2024). Statistics of the Attorney General`s office of Ukraine. *The official website of the Attorney General`s office of Ukraine*. https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2
Treaty list for a specific State. *The official website of the Council of Europe.* https://www.coe.int/en/web/conventions/full-list?module=treaties-full-list-signature&CodePays=LIT
The Law on the Electronic Communications of the Republic of Lithuania, No. IX2135. (2004). *Official Gazette*, No. 69-2382.
Vitvitskiy, S. S., Kurakin, O. N., Pokataev, P. S., Skriabin, O. M., & Sanakoiev, D. B. (2021). *Peculiarities of cybercrime investigation in the banking sector of Ukraine: review and analysis*. Banks and Bank Systems, 16 (1), 69-80. http://dx.doi.org/10.21511/bbs.16(1).2021.07

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.004

Mykolas Romeris University

International Comparative Jurisprudence

GENDER DISCRIMINATION IN NATIONALITY LAW AS A COLONIAL LEGACY: A COMPARATIVE STUDY ON BOTSWANA AND SENEGAL

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Received: 15 October 2025; accepted: 4 December 2025.
DOI: https://doi.org/10.13165/j.icj.2025.11.02.004

Abstract. This comparative socio-legal study examines how gender-discriminatory nationality laws in Botswana and Senegal emerged from British and French colonial legal frameworks. The purpose of the study is to analyse how these colonial-era codes institutionalised patrilineal descent and restricted women's ability to transmit nationality to their children. Using a qualitative comparative methodology grounded in feminist legal theory and postcolonial legal theory, the study reviews constitutional cases, legislative reforms and international legal instruments. The findings show that both countries-maintained gender-biased nationality laws for decades after independence, treating women as secondary citizens and increasing the risk of statelessness for their children. The analysis demonstrates that reform occurred through different pathways: Botswana through the 1992 Unity Dow v. Attorney General constitutional case and Senegal through legislative amendment in 2013. The study finds that international human rights instruments, particularly CEDAW and the 1961 Statelessness Convention, along with domestic advocacy, played a critical role in catalysing these reforms. Overall, the research shows how postcolonial states can dismantle patriarchal colonial norms and achieve gender-equal citizenship through rights-based legal transformation.

Keywords: Gender discrimination; Nationality law; Colonial legacy; Botswana; Senegal.

Introduction

Gender-based discrimination in nationality laws has persisted in many countries well into the modern era, often rooted in legal frameworks established during colonial rule. This paper examines how colonial-era gender biases in legal codes have influenced discriminatory nationality laws, focusing on Botswana and Senegal as case studies. The analysis is socio-legal and theoretical, considering both the legal doctrines and the social context in which these laws evolved. The persistence of sex-discriminatory nationality laws has profound implications: such laws violate fundamental principles of equality and can lead to human rights issues like statelessness, limitations on women's rights and family hardships (Florczak-Wątor, 2024), While most countries worldwide reformed their nationality laws during the 20th century to recognise gender equality, a significant minority retained older patriarchal rules. These remaining discriminatory laws are concentrated in regions such as the Middle East, North Africa and parts of Sub-Saharan Africa. In all cases, discrimination reflects outdated notions of gender roles and parenthood that trace back to earlier legal models.

The central thesis of this paper is that many contemporary gender-discriminatory provisions in nationality laws are a direct colonial legacy. Colonial powers often imposed or influenced nationality codes that privileged patrilineal descent and the primacy of the husband's citizenship in determining a family's nationality. After independence, numerous new states inherited these biases in their own nationality legislation. In the following sections, the paper outlines the historical background of gender discrimination in nationality law, reviews international legal frameworks addressing this issue (such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the 1961 Convention on the Reduction of Statelessness) and then delves into detailed case studies of

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Botswana and Senegal. These case studies illustrate how British and French colonial legal legacies respectively shaped post-independence nationality laws and how each country eventually undertook reforms to align their laws with principles of gender equality. A comparative discussion and theoretical analysis will follow, drawing on feminist legal theory and postcolonial perspectives to explain why the colonial legacy has been so enduring and how legal change was achieved. The conclusion will summarise the findings and reflect on the broader significance of eliminating gender discrimination in nationality laws for achieving gender justice and preventing statelessness.

The purpose of this study is to examine how gender-discriminatory nationality laws in Botswana and Senegal, rooted in British and French colonial legal frameworks, persisted after independence and were eventually reformed. The objectives of the research are: (1) to analyse the historical and legal origins of gender bias in nationality laws; (2) to compare the socio-legal processes leading to reforms in both countries; (3) to assess the influence of international human rights instruments in promoting gender-equal citizenship. The study employs a qualitative comparative methodology, drawing on constitutional cases, legislative reforms and international legal instruments. It is guided by feminist legal theory and postcolonial legal theory in interpreting the findings.

AI-assisted technology was not used in the preparation of this article.

1. Colonial Legacies of Gender Bias in Nationality Law

Many of the gender-discriminatory nationality laws in post-colonial states can be traced directly to rules and principles established under colonial administrations. Historically, colonial powers such as Britain and France implemented nationality and citizenship policies that were deeply gender biased. These policies were informed by the patriarchal norms of the 19th and early 20th centuries, when women were often considered legally subordinate to men in matters of citizenship and civil status. One common doctrine was the principle of coverture under which a married woman's legal identity (including nationality) was subsumed under that of her husband. Under British nationality law, for example, until reforms in the mid-20th century, a female citizen who married a foreign man typically lost her British citizenship and a foreign woman who married a British man generally automatically acquired British status (Zaher, 2002).This was intended to ensure that a family had one nationality – that of the male head of household. Similarly, French colonial law historically treated the husband as the transmitter of nationality to the family; the French Code Civil and subsequent nationality laws of the early 20th century privileged paternal descent and often did not allow women to pass on nationality on equal terms (van Waas et al., 2019). These gendered rules were exported to or replicated in the colonies, creating a legacy where, by default, nationality was patrilineal and women's citizenship status was derivative of men's.
In many African and Asian colonies, there was initially no uniform "citizenship" for the native population; colonial subjects had a different status than citizens of the metropole (Melber et al., 2023). However, when independence approached and new states needed their own nationality laws, the laws were often drafted by referencing the former colonial power's legal concepts. Colonial officials or local elites educated in colonial law crafted new nationality codes that mirrored the gender biases of European laws (Manby, 2018). As a result, at the time of independence for numerous countries, nationality laws already contained discrimination: typically, children could acquire nationality through their father but not (or not equally) through their mother and women did not have the same rights as men to confer nationality to foreign spouses.

For instance, many newly independent Commonwealth countries in Africa initially based their citizenship provisions on the British model. In those models, jus sanguinis (citizenship by descent) was usually restricted to the paternal line. It was common that a legitimate child's nationality was determined by the father's citizenship, whereas the mother's citizenship mattered only for an unmarried mother's child (de Groot & Vonk, 2018). British colonial influence also meant that a married woman's nationality was linked to their husband's status. Upon gaining independence, some countries adopted constitutions or laws that automatically conferred citizenship on foreign wives of male citizens, but not foreign husbands of female citizens (Sainsbury, 2018). This asymmetry clearly echoed the colonial notion of women as appendages to their husbands in terms of legal identity.

French colonies, upon gaining independence, often adopted nationality codes based on the French Civil Code or the 1945 French Nationality Code as modified in the 1950s (Merle & Muckle, 2022). These codes had started to allow maternal transmission of nationality by the mid-20th century but still contained inequalities. Instead, nationality law enacted after independence in 1961 (Loi 61-10 du 7 mars 1961) provided that a child born to a Senegalese father and foreign mother automatically obtained Senegalese nationality (González-Ferrer et al., 2012), but a child born to a Senegalese mother and foreign father did not receive nationality at birth instead, that child could apply for nationality upon reaching adulthood. This was a direct carry-over of earlier French rules that privileged paternal descent. Additionally, under the 1961 Senegalese code, a foreign woman marrying a Senegalese man could acquire Senegalese nationality with relative ease, but a foreign man marrying a Senegalese woman faced much more difficulty or could not gain nationality at all by means of marriage (Vickstrom, 2019). These discriminatory provisions reflected the patriarchal assumptions of French law at the time of drafting, essentially treating men as the primary conduit of legal identity and national membership.

It is important to note that these colonial-era biases were often justified under notions of family unity and societal norms (Plange & Alam, 2023). Colonial laws sought to avoid dual nationality in the family and presumed that a family should follow the status of the husband/father. According to (Albarazi, 2014), the historic purpose of systems under which the father's nationality is decisive was claimed to be bringing unity and stability to families. Yet in practice, denying women equal nationality rights led to countless hardships, especially when families did not fit the patriarchal norm, for example if the father was absent, stateless, or foreign. Indeed, where a child could not obtain the mother's nationality due to a discriminatory law, the child risked being left with no nationality if the father's nationality was unavailable or if the father was not able to confer his citizenship for any reason (de Groot, 2014). The colonial assumption that only fathers confer family identity thus planted the seeds for intergenerational statelessness and gender injustice.

In summary, colonial legal frameworks entrenched a gender hierarchy in nationality rights, men were the default citizens and transmitters of citizenship, while women's nationality was secondary (Tchoukou, 2024). After independence, these inherited laws persisted as a colonial legacy, unless and until reforms were made. Notably, this colonial legacy is not linked to local culture or religion as much as it is to imported Western legal norms (Tarusarira, 2020). Studies have shown that gender discrimination in nationality laws is generally a legacy of colonial rule, not religion (Mumtaz et al., 2017). Even in countries where cultural or religious arguments are used today to justify discriminatory laws, those laws often originated in colonial statutes rather than in pre-colonial customs (Harrington, 2017). Recognising this historical origin is crucial, as it challenges assertions that such discrimination is an immutable tradition and instead reveals that these are outdated policies with foreign roots. Pre-colonial customary systems in both countries exhibited diverse gender patterns. Among some Tswana groups, matrilineal kinship influenced inheritance and social affiliation, while in parts of Senegal's Wolof and Serer traditions, lineage and belonging could pass through either parent depending on local norms (Kingwill, 2016). These indigenous practices were largely displaced by European legal models that rigidly imposed patrilineal nationality, indicating that gender bias in citizenship was more a colonial legal import than a reflection of authentic local culture.

The next section will examine the current international legal standards that call for an end to these colonial-era discriminatory practices, before turning to specific evolutions in Botswana and Senegal.

2. International Legal Frameworks on Gender and Nationality

The persistence of gender-discriminatory nationality laws has been increasingly challenged by international legal norms over the past few decades. A range of international conventions and human rights instruments have established the principle of equality between men and women with regard to nationality rights. These frameworks are in stark contrast to colonial-era laws and have often served as catalysts or justifications for domestic reforms (Bellizzi & Nivoli, 2023). Here, we outline the key global and regional instruments: notably CEDAW, the 1961 Convention on the Reduction of Statelessness, the

Convention on the Nationality of Married Women, the Convention on the Rights of the Child and relevant African regional agreements.

2.1. 1979 Convention on the Elimination of All Forms of Discrimination Against Women

Botswana ratified CEDAW in 1996 (without reservation to Article 9) and Senegal in 1985. Both are also parties to the 1961 Convention on the Reduction of Statelessness (acceded 2014) and the Convention on the Rights of the Child (ratified 1990 and 1995 respectively). CEDAW (Cole, 2023) is the cornerstone international treaty on women's rights and explicitly addresses nationality. Article 9 of CEDAW obliges States Parties to ensure equal rights for men and women with respect to nationality. Under Article 9(1), women must have the same right as men to acquire, change, or retain their nationality. This means, for example, marriage to a foreigner should not automatically strip a woman of her citizenship or force her to take her husband's nationality. Article 9(2) requires States to grant women equal rights with men regarding the nationality of their children. This provision directly targets the common discriminatory practice of only allowing fathers to pass citizenship to offspring. Since CEDAW's entry into force in 1981, it has been a powerful tool for reformers. Governments that have ratified CEDAW (which includes the vast majority of countries) are under a legal obligation to amend any gender-discriminatory nationality laws. However, some States entered reservations to Article 9, citing cultural or religious reasons, which has slowed uniform implementation. Nonetheless, the "international consensus on the equal status of men and women" in nationality law has been firmly established by CEDAW (Nanni, 2023). The CEDAW Committee, which monitors implementation, has repeatedly called out countries for non-compliant nationality laws and have urged their reform. For example, in its concluding observations and General Recommendations (such as General Recommendation No. 21 on equality in marriage and family relations, 1994), the Committee emphasises that denying women equal nationality rights violates women's autonomy and has severe consequences for children.

2.2. 1961 Convention on the Reduction of Statelessness

This treaty addresses specific scenarios that cause statelessness and includes provisions promoting gender-neutral nationality transmission (Nanni, 2023). Article 1 of the convention obliges States to grant nationality to people born in their territory who would otherwise be stateless, which indirectly pressures states to fill gaps left by gender-biased laws (since many stateless children result from a mother being unable to pass on citizenship) (UN General Assembly, 1961). Article 9 of the 1961 Convention explicitly prohibits discrimination in nationality laws that would cause loss of nationality on grounds such as marriage or change of marital status – this was aimed at eliminating the practice of women losing nationality because of marriage or divorce (Long, 1992). In essence, it requires that women's nationality should not be arbitrarily impacted by their relationship to a spouse and by extension, it underlines that sex-based discrimination leading to statelessness is unacceptable. While not all countries have ratified the 1961 Convention, it sets an important standard. Notably, Senegal pledged to address gender inequality in nationality laws in the context of the campaign to end statelessness, acknowledging obligations under the 1961 Convention (Foster & Lambert, 2016). Many African countries (including Botswana and Senegal) have now acceded to the 1961 Convention as part of a broader commitment to eradicate statelessness, thereby undertaking to revise any laws that could produce statelessness through gender discrimination.

2.3. 1957 Convention on the Nationality of Married Women

This earlier convention (sponsored by the United Nations) was specifically designed to combat the issue of women losing their nationality or being forced to change it upon marriage. It provides that neither marriage to an alien, dissolution of marriage, nor a change of nationality by the husband during marriage shall automatically affect the wife's nationality (United Nations, 1989). It essentially decouples a woman's legal nationality from her husband's status. Both Botswana and Senegal, in their post-colonial legislation, showed some awareness of this principle. For instance, Botswana's 1982 Citizenship Act (as noted in a historical review) did not require a woman to acquire her husband's nationality upon

marriage, aligning with this convention's norm, this indicates that even before comprehensive gender equality was achieved, there were partial adjustments made under international influence (Campbell, 2003). The Married Women's nationality convention is less cited today (having been subsumed by CEDAW's broader protections), but it was an important stepping stone in establishing that a woman's nationality should be independent of her husband's – a radical idea in mid-20th-century law, reflecting an early break from the strictures of coverture.

2.4. 1948 Universal Declaration of Human Rights

While not directly mentioning gender in its nationality clause, Universal Declaration of Human Rights (UDHR) Article 15 declares that everyone has the right to a nationality and that no one shall be arbitrarily deprived of nationality. When read in conjunction with Article 2 (the non-discrimination principle), it implies that discrimination by sex in conferring or revoking nationality is a violation of basic human rights (Hallo de Wolf & Moerland, 2023). The UDHR set the tone for later binding treaties. Additionally, UDHR Article 16 on marriage asserts that men and women have equal rights during marriage and at its dissolution; by interpretation, this equality extends to matters of nationality in marriage (Atchabahian, 2023). Though the UDHR is not binding law, it offers moral and customary influence that has guided states towards ensuring women are not treated as second-class citizens in nationality matters.

2.5. 1966 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) in Article 24(3) states that every child has the right to acquire a nationality. This is not explicitly about gender, but it creates an obligation for states to ensure that children are able to obtain a nationality. When a child is denied the mother's nationality due to sex discrimination, the State risks violating Article 24 if that child is left stateless. Also, Article 26 of the ICCPR guarantees equality before the law and equal protection without discrimination, including on the basis of sex. The Human Rights Committee (which oversees the ICCPR) has on occasion commented that nationality laws should comply with the principle of equality (e.g., in country reviews). Therefore, the ICCPR provides a general non-discrimination framework under which gender discrimination in nationality law can be challenged (Joseph & Castan, 2013).

2.6. 1989 Convention on the Rights of the Child

According to The Convention's on the Rights of the Child (CRC) Article 7 (Annex, 1989) it requires that children be registered immediately after birth and have the right from birth to a name, the right to acquire nationality and, as far as possible, the right to be cared for by their parents. Article 7 explicitly ties into the 1961 Convention by urging states to fulfil the child's right to a nationality where the child would otherwise be stateless. Article 2 of the CRC prohibits discrimination based on the parent's status, including the parent's sex. Read together, these provisions mean that a child should not be denied nationality because his or her mother is not allowed to pass it on – such denial is effectively discrimination against the child based on the mother's sex. Both Botswana and Senegal are parties to the CRC (Tobin & Cashmore, 2020). In Senegal, for example, the disparity before 2013 where children of Senegalese mothers had inferior rights was inconsistent with CRC commitments. UN committees, such as the Committee on the Rights of the Child, have specifically recommended that states including Senegal correct gender discriminatory provisions to ensure every child's right to a nationality (Mezmur, 2006). This international pressure adds to the legal impetus for reform.

2.7. 1981 African Charter on Human and Peoples' Rights and 2003 the Maputo Protocol

On a regional level, Africa has its own human rights instruments that address these issues. The African Charter (also known as the Banjul Charter) guarantees equality (Articles 2 and 3) and human dignity, and Article 18(3) specifically obliges states to eliminate discrimination against women. Although it does not explicitly mention nationality, the Charter has been invoked to argue for equal nationality rights (Viljoen, 2009). The Protocol to the African Charter on the Rights of Women in Africa (the Maputo

Protocol) explicitly mentions nationality. Article 6(h) of the Maputo Protocol states that a woman and a man shall have equal rights with respect to the nationality of their children, except where this is contrary to national security interests (Viljoen, 2009). This clause was a direct acknowledgement of the issue of gender discrimination in nationality and it commits African Union states that ratify the Protocol to reform their laws accordingly. South Africa, for instance, placed a reservation on Article 6(h) – revealing that some states anticipated conflicts with their nationality laws (Minow, 2021; Somé et al., 2016). Botswana has not ratified the Maputo Protocol as of the time of writing, but Senegal has. The Maputo Protocol came into force in 2005 and provides an important regional mandate for change.

2.8. 2015 African Commission Draft Protocol on the Right to Nationality

In 2015, the African Commission on Human and Peoples' Rights adopted a draft Protocol on the right to nationality in Africa (Killander, 2016). Although not yet in force, this draft protocol calls for gender-equal nationality laws among other provisions. It reflects a growing consensus in Africa that equal nationality rights are part of the fundamental right to nationality. Both case study countries have been involved in these continental discussions on nationality, with Senegal often cited as a positive example after its 2013 reform and Botswana being noted as one of the earlier reformers (1995) on gender equality in nationality (Manby, 2016).

3. Socio-Legal Perspectives and Theoretical Framework

Before turning to Botswana and Senegal specifically, it is useful to contextualise the issue in socio-legal and theoretical terms. This involves examining how legal rules about nationality both reflect and reinforce social norms about gender, and how postcolonial theory can explain the endurance of colonial legal structures. Two key perspectives inform this analysis: feminist legal theory (particularly as applied to citizenship) and postcolonial legal theory. Together, they help explain why gender-discriminatory nationality laws persisted for decades after independence and how change eventually came about.

3.1. Feminist Legal Theory on Nationality

Feminist scholars have long critiqued nationality laws as a site of gender subordination. Nationality (or citizenship) is not just a legal status; it is tied to membership in a political community, access to rights and one's identity. When women are denied the ability to transmit nationality or retain it independently of their husbands, it effectively signals that women are second-class citizens (Levit & Verchick, 2016). This falls under what some feminist theorists call the public/private divide in law: historically, men were seen as actors in the public sphere (politics, citizenship, the state) and women were confined to the private sphere (home, family) (Chinkin, 1999). This aligns with Carole Pateman's concept of the sexual contract (Pateman, 2016), where the state's social contract had an implicit male bias.

The consequences of these laws, as feminist analyses highlight, are deeply personal and social. Women in countries with discriminatory laws have faced practical harms: inability to secure identity documents for their children, fear of family separation (if children or spouses cannot reside in the mother's country) and disempowerment in marital relations (since husbands' status dictates the family's security). Catherine Harrington, a socio-legal advocate, notes that women's equal citizenship is undermined and their equal status in the family is implicitly rejected by states that uphold these discriminatory laws (Harrington, 2023; Yuval-Davis, 1991). In other words, these laws send a message that the state views mothers as less important than fathers in forming the national community. This notion perpetuates patriarchal family structures and can exacerbate gender-based power imbalances and even violence. Indeed, researchers have linked gender-discriminatory nationality laws to increased vulnerability for women – for instance, women who cannot pass citizenship to children may be less able to leave abusive relationships for fear their children will have no status or will lose access to the mother's country.

Feminist legal scholars also underscore that nationality laws often intersect with other forms of discrimination, such as race and ethnicity (Thames, Irwin, Breen, & Cole, 2019). A notable pattern is that some countries with gendered nationality laws apply them selectively to certain groups; for

example, in the past, some Middle Eastern states made exceptions for women of certain ethnic backgrounds. In Africa (Harrington, 2023), it observes that gender discrimination in nationality laws is often linked with other forms of discrimination — religious, ethnic, and/or racial — with xenophobia playing a role. For example, Madagascar (prior to reform) allowed single mothers to confer nationality, but officials sometimes denied documents if the mother's name "didn't sound native," effectively using the discretionary nature of maternal transmission to discriminate against ethnic minorities (Southall, 1971). This shows how gender discrimination can be a tool to enforce broader social hierarchies, something feminist and intersectional theory pays attention to. Women from minority or marginalised communities suffer twice over: they face the general discrimination of the nationality law and often stricter enforcement or less help due to prejudices.

3.2. Postcolonial Theory and Legal Change

Postcolonial legal theory examines how laws imposed or inherited from colonial regimes continue to shape independent states, sometimes to the detriment of those states' own citizens (Dann & Hanschmann, 2012). A postcolonial perspective on Botswana and Senegal's nationality laws reveals a tension between imported legal frameworks and indigenous values or post-independence identity formation. Many postcolonial scholars argue that newly independent elites often maintained colonial laws to ensure continuity and stability, even if those laws were ill-suited to the local context or inequitable (Ng'weno & Aloo, 2019). In the case of nationality, leaders may have been reluctant to immediately upend patrilineal rules, possibly due to their own patriarchal outlook or concerns about upsetting what they saw as social order. There is also the factor of legislative inertia: in the tumultuous period of gaining independence, issues like women's equal nationality rights were not prioritised by (mostly male) political leaders, who were more focused on nation-building, consolidation of power and sometimes, as in Botswana, managing ethnic and tribal citizenship issues. Thus, the colonial gender bias was not confronted early on (Zeleza, 2005).

However, postcolonial theory also sheds light on resistance and change, People in colonised societies did not uniformly accept all colonial impositions; rather, they negotiated and sometimes resisted aspects of it (Efferess, 2008). In Botswana's case, we see a domestic legal challenge in Unity Dow's case that can be viewed as a form of postcolonial resistance to a colonial-era norm. Unity Dow herself argued that the law's discrimination was not compatible with the modern values of Botswana's constitution, implicitly rejecting the colonial logic that had been carried into the law (Dow, 1995). Indeed, the Botswana High Court in 1991 used language about the bygone notion of women as chattels being long past, essentially asserting a new postcolonial identity where women are equal citizens. This reflects what postcolonial feminists advocate: reclaiming legal subjectivity for those (women, in this case) marginalised by colonial structures.

3.3. Decolonial Constitutionalism Perspective

Complementing the postcolonial approach, the theory of decolonial constitutionalism advanced by Richard Albert (2025) provides a contemporary framework for understanding how constitutional reform, interpretation and subconstitutional practices are deployed to dismantle colonial hierarchies embedded in law (Albert, 2025). Albert identifies modalities such as supraconstitutionalism and interpretive innovation through which postcolonial states expand rights protections beyond colonial limitations. This perspective reinforces the paper's argument that reforms in Botswana and Senegal represent not only legislative corrections but constitutional acts of decolonisation—transforming the inherited patriarchal order into one that affirms gender equality and inclusive citizenship.

Senegal's path to reform in 2013 can be partially attributed to postcolonial re-evaluation as well. After decades of independence, a new generation of lawmakers and activists (many influenced by global human rights discourse and local women's movements) pushed to update the nationality code (Kampman et al., 2017). Ibrahima Kane, a Senegalese legal expert, noted that Senegal's law evolved to recognise changes in social reality and civil status (Kane, 2024).

3.4. Statelessness and Social Impact

A socio-legal analysis must also consider the real-world impact of these laws on society (Belton, 2013. Gender-discriminatory nationality laws have produced stateless populations and social inequalities. For example, before reforms, children in Botswana and Senegal who could not inherit nationality from their mothers might become stateless if the fathers were foreign or stateless (Belton, 2013). The African Human Rights Commission case (Adekanmbi & Modise, 2000) is instructive – although not about gender, it involved a person effectively rendered stateless by citizenship rules and showed how personal suffering results from rigid nationality laws.

In theoretical terms, one can also apply human rights theory and the concept of universalism vs cultural relativism. Often, defenders of discriminatory laws invoke culture or sovereignty – implying that international norms of gender equality are Western impositions. This has been seen in many countries' rhetoric. However, as noted earlier, these specific nationality laws are themselves arguably Western impositions from the colonial period. Thus, the appeal to "our culture is patriarchal" to justify the laws is somewhat ironic (Donnelly, 1984). From a human rights universalism perspective, the right to equality is not bound by cultural exceptions, especially when the culture of law in question is actually a colonial artifact (Donnelly, 1984). The interplay between respecting local norms and enforcing universal rights has largely been resolved in favour of the latter when it comes to nationality laws, as evidenced by the near-universal acceptance of CEDAW's principles (with only a few holdouts).

Finally, the socio-legal movement for reform itself is a critical part of the theoretical landscape. The changes in Botswana and Senegal did not occur in a vacuum; they were the result of activism, litigation, public debate and international encouragement. We can view these movements through the lens of legal mobilisation theory (Handmaker, 2019) that how activists use legal tools and norms to effect change . In Botswana, an individual (Dow) used the courts. In Senegal, women's rights groups and international NGOs (like Equality Now) collaborated to lobby Parliament and Senegal's reform coincided with broader African and global campaigns (Manby, 2016). These strategies reflect an understanding that law is both an instrument of power and a site of contestation. Changing a nationality law is a political act that redefines national belonging and family structure; it requires building coalitions and sometimes overcoming significant conservative resistance.

In summary, the socio-legal and theoretical context reveals that colonial-era nationality laws were not only legal rules but also mechanisms that enforced a gender hierarchy aligned with colonial and patriarchal ideology. Over time, internal contradictions (with constitutional equality or lived reality), external pressures (international law) and human rights-based advocacy combined to push states towards reform. Recognising women as equal citizens and agents in conferring nationality is both a legal correction and a social transformation. With this context in mind, we now turn to the concrete case studies of Botswana and Senegal, which will illustrate these dynamics in detail.

4. Case Study: Botswana

Botswana (formerly the Bechuanaland Protectorate under British rule) gained independence in 1966. At independence, Botswana adopted a written constitution (the 1966 Constitution of Botswana) that included provisions on citizenship. Initially, Botswana's approach to citizenship was relatively progressive in one aspect – it followed a form of jus soli (citizenship by birth on the territory) as well as jus sanguinis (Scott, 1930). According to Botswana's Independence Constitution, any person born in Botswana would be a citizen if at least one parent was a citizen or if the person would otherwise be stateless. Also, transitional provisions granted citizenship to those with familial ties to the territory (Dow, 2001).

In 1966, citizenship questions were not at the political forefront in Botswana. The country was sparsely populated and issues of ethnic integration (Tswana tribes vs others) and economic development loomed larger (Nyamnjoh, 2002). The colonial legacy, though, was present in how the law treated men and women differently. Under the Independence Constitution's citizenship chapter and the Citizenship Act of 1966, a child born in wedlock could claim Botswana citizenship by descent only through a citizen father (if born abroad) or by birth if born in Botswana but not acquiring another citizenship from the

father. A child born out of wedlock to a citizen mother, however, could be a citizen (since the father was not legally acknowledged) (Mokobi, 2000). This meant legitimacy and the father's status were key. These provisions clearly mirrored British norms.

4.1. Legal Developments

The nationality law underwent changes post-independence. A major change came with the enactment of the Citizenship Act of 1982 (which replaced the 1966 Act). The 1982 Act removed Botswana's broad jus soli; it stated that a child born in Botswana would receive citizenship only if at the time of birth, the child did not automatically get another nationality from his father (Scott, 1930). This was essentially to prevent children of foreign fathers (who could pass their own nationality) from claiming Botswana citizenship simply by birth. It was a restrictive move, arguably to control immigration and align with practices in other African countries that were abandoning unconditional jus soli. Importantly, the 1982 Act also reaffirmed the gender discrimination: it explicitly allowed only illegitimate children to derive nationality from their mother and only if the mother was a citizen and born in Botswana (Izzard, 1985). If the child was born in wedlock, only the father's nationality counted. Thus, a Botswana woman married to a foreign man could not pass her Botswana citizenship to her child; the child's nationality would be that of the father (if any), or the child could be stateless if the father was stateless.

Additionally, the 1982 law initially still had a provision that a foreign wife of a Botswana man could apply for Botswana nationality with a relatively short residency 2.5 years. There was no equivalent provision for foreign husbands of Botswana women. This asymmetry meant, for example, that a British woman marrying a Botswana man could become Botswana citizen in a few years, but a British man marrying a Botswana woman had no such right and would have to go through normal naturalisation (which was much more onerous, typically 10 years of residence) (Stratton, 1992). The underlying assumption was, again, the man is the head of household whose status the woman follows.

In 1984, just two years later, an amendment further tightened the law: Botswana abolished the remaining jus soli provision entirely in 1984 amendments. The law now provided that a child born in Botswana would be a citizen at birth only if the father was a Botswana citizen (or if out of wedlock, the mother, but essentially it became full jus sanguinis), Birth in Botswana no longer conferred any citizenship rights unless the paternal link existed (Manby, 2018). This 1984 change entrenched the patrilineal approach completely. It also, as part of amendments, removed the preferential treatment for foreign wives – after 1984, women marrying Botswana citizens had to go through the same naturalisation process as others (Manby, 2016). That levelled down rather than levelling up – instead of giving foreign husbands the privilege, they revoked the foreign wives' privilege. The result by mid-1980s was a strictly gender-biased regime: a Botswana man could automatically pass citizenship to children born anywhere and his foreign wife had an expedited path earlier (though post-1984 that path was removed, presumably to ensure equality formally by treating both genders' spouses equally badly). A Botswana woman could not pass citizenship to a legitimate child born in or outside Botswana and her foreign husband had no right to citizenship (Dow, 1995).

Botswana was not unique in this setup; many African nations had similar rules at the time. But Botswana became a lightning rod for change due to one case, which is presented in the next section.

4.2. Attorney General v. Unity Dow (1992).

Unity Dow was a Botswana citizen married to an American man. They had three children; two were born after their marriage (hence "legitimate" under the law) and one before (considered "illegitimate" in legal terms). The two younger children, born in wedlock, were denied Botswana citizenship because their father was a foreigner; they held only the father's nationality (the United States). The eldest child, born before the marriage, was a citizen of Botswana through the mother (since at that time the child was deemed born out of wedlock). This peculiar situation – where within one family some children were citizens and others not – highlighted the arbitrary and unfair nature of the law (Dow, 1995). Dow

challenged the Citizenship Act as unconstitutional, arguing it discriminated based on sex and violated her and her children's rights under the Constitution's guarantees of fundamental rights.

The case went to the High Court in 1991 and then the Court of Appeal in 1992. Dow's legal team made a creative constitutional argument: even though Section 15 of the Constitution did not list sex as a forbidden ground of discrimination, the Preamble and Section 3 of the Constitution asserted principles of equality and the entitlement of all individuals to fundamental rights "whatever his race, place of origin, political opinions, colour, creed or sex (Manby, 2016). The government's lawyers argued that the omission of "sex" in the operative anti-discrimination clause meant that the law was allowed to discriminate on that basis and indeed they disturbingly argued that in a patrilineal society such discrimination was expected. The High Court, in a groundbreaking decision, found for Unity Dow in 1991. Justice Unity Doyle (the judge coincidentally shared a first name with the plaintiff) wrote: "The time that women were treated as chattels or were there to obey the whims and wishes of males is long past… it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was deliberately framed to permit discrimination on the ground of sex (Manby, 2016). This statement captured the socio-legal shift – acknowledging that the old order (treating women as second-class) is outdated. The Court of Appeal in 1992 upheld this decision, reading the Constitution's general principles to effectively prohibit sex discrimination despite the textual gap. The Court of Appeal emphasised that constitutional interpretation should be broad and in line with evolving values and that Botswana's ratification of international instruments like CEDAW (which was impending at that time; Botswana ratified CEDAW in 1996) could inform understanding of rights (Manby, 2016). This was a monumental victory for women's rights in Botswana and had a ripple effect across Africa.

Following the court's decision, Botswana's parliament acted. In 1995, it passed a new Citizenship Act (Act No. 8 of 1995) that removed gender discrimination. Under the 1995 Act, Botswana women were finally allowed to transmit citizenship to their children on the same basis as men (Cailleba & Kumar, 2010). A child born to either a Botswana mother or father (within marriage) would be a citizen by descent. Also, provisions were introduced to treat foreign husbands of Botswana women on equal terms with foreign wives of Botswana men regarding naturalisation opportunities (effectively, neither got special treatment, or later both could have equal residency requirements as per further amendments). The 1995 Act was a direct result of the Dow case – illustrating how litigation and constitutional principles translated into legislative reform (Fombad, 2011). Botswana thus became one of the early African countries to end formal gender discrimination in nationality law, setting an example that would later be followed elsewhere (Manby, 2016).

4.3. Impacts and Current Status in Botswana

The elimination of gender discrimination in 1995 meant that Botswana complied with CEDAW Article 9 when it ratified the treaty (with reservation to Article 2, but not to Article 9). It also meant fewer children were at risk of statelessness or family separation due to these laws. However, Botswana maintained other restrictive provisions, like a ban on dual citizenship (the 1998 Act still required citizens with dual nationality to renounce one at age 21). Interestingly, in recent years (2021) a case was brought by a Botswana woman challenging the dual nationality prohibition as discriminatory because it forced her children (with a foreign father) to choose nationalities (Dow, 1995). This shows that while the main gender issue was resolved, there are continuing discussions about how citizenship laws can disadvantage women in practice (since women are perhaps more likely to marry foreigners in certain contexts, given Botswana's small population and significant diaspora).

Botswana's step was also significant regionally. The Unity Dow case was cited across Africa in debates and even in court decisions in other countries. It sparked a wave of changes eliminating gender disparity in nationality laws across Africa. For example, judges and lawmakers in Kenya, Lesotho and Sierra Leone referred to Botswana's example when reforming their own laws in the 2000s and 2010s (Sierra Leone's 2006 citizenship amendment, Kenya's 2010 Constitution enshrining no discrimination in citizenship, etc.). Unity Dow herself became an international figure – she later served as a High Court judge in Botswana (the first woman to do so) and wrote and spoke extensively on human rights.

In Botswana, the social reception of the change was generally positive, though there were initial pockets of resistance. Some traditionalists argued that allowing dual citizenship or children of foreign fathers to be citizens might lead to an "influx" or dilution of national identity; similar arguments were heard in Nepal and other countries (Harrington, 2017). But Botswana's stable governance and respect for rule of law meant the court ruling was implemented without major backlash. Today, Botswana's nationality law (as of 2025) upholds gender equality for citizenship transmission to children. The country demonstrates how a colonial legacy can be successfully overcome through domestic legal processes buttressed by international human rights principles. Botswana's continuing compliance with CEDAW (ratified 1996) and the 1961 Statelessness Convention (acceded 2014) has been reaffirmed through periodic reports to the CEDAW Committee in 2019 and 2023, where the government detailed efforts to ensure equal nationality rights for children of mixed-nationality parents. In 2021, the Court of Appeal in Attorney-General v. Kowa upheld the restriction on dual nationality but acknowledged its disproportionate impact on women married to foreigners and urged a legislative review illustrating how judicial oversight continues to reinforce the equality framework established by Unity Dow v. Attorney-General (Dow, 1995).

5. Case Study: Senegal

Senegal became independent in 1960, after being a French colony and an integral part of French West Africa. At the time of becoming independent, Senegal initially federated with Mali (the Mali Federation) briefly, then became a separate republic. Senegal's legal system, including its nationality law, was heavily influenced by French law. Upon independence, Senegal adopted a nationality code – Loi No. 61-10 du 7 mars 1961 – which in large part mirrored the French Code de la Nationalité of that era. The 1961 code established criteria for being Senegalese at independence (essentially, those who were French citizens with connections to Senegal or who were indigenous to Senegal's territory became Senegalese nationals). It also sets forth rules for acquisition of nationality after independence by birth or descent (Hesseling & Kraemer, 2002).

From the outset, the Senegalese nationality law contained gender-discriminatory provisions. Specifically, under the 1961 law: - A child born in wedlock to a Senegalese father and a foreign mother was automatically Senegalese (nationalité d'origine). - A child born in wedlock to a Senegalese mother and a foreign father was not automatically Senegalese; however, the child could opt for Senegalese nationality upon reaching the age of majority (essentially an application process to be granted nationality, sometimes called "à la majorité) (Camara, 2007; Kane, 2021). This meant there was a clear inequality: paternal transmission was assured and immediate; maternal transmission was delayed and conditional. - For children born out of wedlock, if the mother was Senegalese and the father not established, the child could be Senegalese (similar to many civil law countries' approach). - Regarding spouses: a foreign woman married to a Senegalese man could acquire Senegalese nationality by declaration (simplified path) after a certain period of marriage, whereas a foreign man married to a Senegalese woman had no equivalent right (Kane, 2021). In fact, prior to 2013, Senegalese women could not pass on nationality to their husbands at all, reflecting a one-sided view of gender roles in marriage.

In addition, Senegal's law historically had some provisions that could cause loss of nationality, such as if a Senegalese woman married a foreigner and chose to take his nationality, she might lose Senegalese nationality (though Senegal, following French practice, may not have enforced that strictly). Dual nationality was technically prohibited in the code, although in practice it was often tolerated (C. R. i. A. Initiative, 2025). It's worth noting that Senegal's first post-independence president, Léopold Sédar Senghor, was himself married to a French woman who was reportedly given Senegalese nationality by a special act. The anecdote underscores the era's norm: women changed nationality upon marriage more readily than men.

5.1. Legal Developments

Senegal did not undergo major constitutional changes affecting nationality for a long time (Stepan, 2013). Its national citizenship code of 1961 remained largely the same for decades, with a few amendments (in 1967, 1970, 1979, 1984, 1989 as listed in the code's history. None of those amendments, until 2013, addressed gender discrimination in transmission to children or spouses (Crowder, 2023). They dealt with other issues: e.g., a 1979 amendment added provisions for exceptional naturalisation and service to the nation the 1984 amendment explicitly forbade dual nationality for naturalised citizens and clarified that an illegitimate child could gain nationality from the mother unless acknowledged by the father first. That 1984 change gave a slight route for maternal transmission: if a child was born out of wedlock, the mother could pass on nationality unless the father later acknowledged the child and the father was foreign – then the father's status could override (Camara, 2007). The 1989 amendment in Senegal allowed authorities to strip naturalised persons acting like foreigners of their nationality and clarified that just obtaining another nationality doesn't automatically lose Senegalese nationality unless the state takes action. Through all these technical changes, the core gender bias remained entrenched (Bandiaky-Badji, 2011).

Senegal ratified CEDAW in 1985 (with no reservation to Article 9) and the CRC in 1990. Thus, throughout the 1990s and 2000s, Senegal was actually bound by international law to change its nationality law, but it did not do so for some time (Crowder, 2023). One reason might be that the issue did not gain political urgency. Compared to some Middle Eastern countries, for instance, Senegal did not have as many high-profile cases of suffering due to this law (perhaps because cross-national marriages or women marrying non-citizens were somewhat less common, or extended family networks ameliorated some issues). Nonetheless, women's rights groups in Senegal, such as the Association of Senegalese Women Lawyers (AJS), were aware of the problem. They provided free legal advice and lobbied for legal reforms to combat discrimination (Suh, 2014). The AJS and others repeatedly pointed out the inconsistency of the nationality law with Senegal's 2001 Constitution – which in Article 7 guaranteed equality before the law for all citizens – and with Article 18, which obliges the state to eliminate discrimination against women (mirroring international commitments).

By the early 2010s, momentum for change was built. Regionally, other countries like Algeria in 2005, Morocco in 2007 and Cameroon in 2010 had revised their laws to allow maternal transmission of nationality. Internationally, UNHCR's Belong campaign (to end statelessness) and groups like Equality Now were focusing on West Africa. Senegal's government took notice and importantly, saw itself as a regional leader in human rights Senegal often prides on a stable democracy and adherence to the rule of law. In November 2011, at a ministerial meeting on statelessness, Senegal made a pledge to address gender inequality in nationality laws (UNHCR, 2018). This was followed by concrete legislative action. Although no constitutional challenge to the nationality code was filed before 2013, debates within Senegal's legal community increasingly referenced the 2001 Constitution, whose Article 7 guarantees equality before the law and whose Article 18 obliges the State to eliminate discrimination against women. These constitutional guarantees, combined with advocacy by the Association des Juristes Sénégalaises, provided the normative foundation for legislative reform even without judicial intervention.

The 2013 Reform: On 25 June 2013, the Parliament of Senegal unanimously passed Loi No. 2013-05 amending the nationality code, this landmark reform did two major things: 1. It granted Senegalese women the same rights as men to transmit nationality to their children. Children born to a Senegalese mother and foreign father are now Senegalese by operation of law, just as children born to a Senegalese father and foreign mother have always been, this eliminated the previous requirement for children of Senegalese mothers to apply at majority; henceforth, there is no distinction – maternal and paternal descent are equal. 2. It allowed Senegalese women to pass their nationality to their foreign spouse under the same conditions as Senegalese men. This meant a foreign husband can apply for Senegalese nationality after a certain period of marriage presumably the same five-year duration that had applied to wives (C.R.i.A. Initiative, 2025).

The law also addressed dual nationality: as part of the 2013 overhaul, Senegal relaxed its stance on dual nationality, effectively permitting dual citizenship (except for certain high office restrictions (Crowder, 2023). This was significant because one argument often made against gender equality was fear of dual nationality or loyalty issues (Albarazi, 2024). By accepting dual nationality generally in 2013, Senegal removed a perceived obstacle to allowing children to have dual identities (say Senegalese and their father's). It also aligns with global trends acknowledging that dual nationality is common in a globalised world.

Today, Senegal's nationality law stands as one of the more egalitarian in Africa. All discrimination in transmission of nationality to children and spouses has been removed (Manby, 2016). There remain some quirks – for example, the code still technically requires a person who acquires Senegalese nationality by marriage to renounce other nationalities, but as noted, dual citizenship is allowed in practice (and the Constitution only bars dual nationals from becoming President (Civil Rights in Africa Initiative, 2025). One could argue that the 2013 reform was comprehensive in terms of gender, fulfilling both CEDAW 9(2) (children) and 9(1) (spouse rights and retention of nationality). Senegal's example is frequently cited in international forums as a success story of legal reform improving gender equality and reducing risk of statelessness (UNHCR, 2018).

To sum up Senegal's case, a clear colonial legacy (French law-based discrimination) lasted from 1961 to 2013 – over fifty years of independence. The change came due to internal advocacy aligning with international human rights law and a political will to modernise. It is a prime illustration of how post-colonial states can reform outdated laws to uphold gender equality and how doing so fulfils international obligations such as those under CEDAW and the Statelessness Conventions. Senegal's subsequent periodic reports to the CEDAW Committee (2015 and 2022) praised the 2013 reform as exemplary and encouraged continued administrative harmonisation to remove residual barriers. The government has since collaborated with the UNHCR and the African Commission to promote gender-equal nationality laws across Francophone Africa, underscoring the enduring influence of international norms on national practice.

6. Comparative Discussion: Botswana and Senegal

Examining Botswana and Senegal side by side offers insights into both the common colonial roots of gender-discriminatory nationality laws and the different pathways through which reforms can occur. Despite different colonial masters (Britain and France, respectively) and different post-independence trajectories, both countries' nationality laws exhibited the hallmark of colonial gender bias: privileging paternal lineage and restricting women's capacity to transmit nationality.

6.1. Colonial Influence and Legal System

Botswana's initial citizenship law was influenced by British concepts, though interestingly Botswana first had jus soli which it then removed in favour of patrilineal jus sanguinis in 1982-84. This shift could be seen as Botswana moving closer to other Commonwealth countries' practices many of which had patrilineal citizenship at the time and possibly responding to concerns about migration. Senegal inherited a civil law code from France that already was patrilineal with limited maternal transmission opt-in at adulthood (C. R. i. A. Initiative. 2025). The immediate post-colonial laws in both countries thus bore the stamp of the colonizer's policies circa mid-20th century. It is notable, however, that by the 1970s and 1980s both Britain and France had amended their nationality codes to remove explicit gender discrimination, while many of their former colonies, including Botswana and Senegal, retained older formulations. This divergence reflected institutional inertia and differing post-independence priorities rather than continued endorsement of discriminatory norms. In both, women's nationality rights were curtailed: Botswana women couldn't pass citizenship to legitimate children from 1966 onward explicitly, worse by 1984 (Manby, 2016), Senegalese women couldn't pass citizenship to children or husbands from 1961 until 2013.

6.2. Impacts on Women and Families

In Botswana, the impact became a public issue when Unity Dow highlighted how her family could be forced to leave or break up because her children were not citizens in their mother's country. In Senegal, anecdotal evidence suggests many women simply endured the inconvenience or found workarounds (e.g., ensuring birth registration of their children with the father's consulate, etc.), but numerous others likely faced difficulties enrolling children in schools or fearing for their children's future. Both countries likely had some stateless children born to citizen mothers and stateless or foreign fathers – Botswana possibly fewer because Botswana has not historically hosted large stateless populations, whereas Senegal has hosted refugees (e.g., from Mauritania) where this could matter.

One difference is in the realm of marital nationality: Botswana from independence gave foreign wives immediate residence rights and eventually citizenship after a short period (which was removed in 1984), whereas Senegal allowed wives to naturalise but not husbands. After reforms, Botswana treats spouses equally (neither gets special treatment now, essentially) and Senegal treats them equally (both can get citizenship after 5 years).

6.3. Path to Reform

Botswana's reform came via the judiciary forcing legislative change; Senegal's came via legislative initiative (likely executive-driven) without a court case. Botswana's constitution, although not explicit on sex equality, provided an opening that a bold judiciary utilised (Manby, 2016). This was helped by the fact that Botswana is a common law country where courts can make such interpretations. In Senegal (civil law tradition), there was no court case challenging the nationality code – possibly because until recently, it may not have been justiciable or anyone who could challenge may not have tried. Instead, Senegal's change was propelled by advocacy and policy change from above. This underscores different strategies in different legal systems: strategic litigation was key in Botswana (a smaller country with a very independent judiciary at that time), whereas coalition lobbying and aligning with international commitments was key in Senegal (where the executive and legislature took the lead).

6.4. Timeline

Botswana addressed the issue earlier (1990s) at a time when many African nations still had discriminatory laws. It was one of the pioneers in Sub-Saharan Africa in eliminating gender discrimination in nationality, doing so in 1995. Senegal was part of a later wave in the 2010s when a concerted international effort was underway, changing the law in 2013. By 2013, the idea of gender-equal nationality law was more globally accepted and numerous countries had done it, which perhaps made it easier for Senegal. When Botswana did it, it was more exceptional; indeed, Unity Dow's case is often considered a trailblazer, cited alongside reforms in other early changers like Zimbabwe (1984) and Kenya (1985 – although Kenya had a partial reform then and a full reform in 2010). The differing dates reflect different socio-political contexts and pressures (Belton, 2013).

6.5. Public Reception and Cultural Factors

Neither Botswana nor Senegal experienced major public resistance to the reforms in terms of mass protests or backlash; the changes were ultimately seen as logical progressions. However, the arguments made against reform in general (like patriarchal reasoning, fear of foreigners obtaining nationality, etc.) were present. In Unity Dow's case, the government explicitly argued that Botswana was a patrilineal society and that justified the discrimination. The Court firmly rejected that stance as antiquated (Manby, 2016). In Senegal, during parliamentary debates in 2013, some questions may have been raised about dual nationality or whether this would allow many foreign men to claim Senegalese citizenship. The response was that it was required in the name of equality and that practical safeguards exist (like the five-year marriage duration and disallowance of fraudulent marriages) (Sarr, 2013, Parliamentary Debates, Senegal National Assembly). Essentially, both countries had to confront the "we are patriarchal" notion: Botswana did it via judicial enlightenment, Senegal via legislative consensus. As

Catherine Harrington noted from a global perspective, a common refrain in resisting reform is "we are a patriarchal society" (Belton, 2013), but both cases show that leadership can overcome that refrain with an appeal to constitutional and human rights principles.

6.6. Legal Technicalities Post-Reform

After Botswana's 1995 Act, any child born to a Botswana mother or father is a citizen by descent (if born in Botswana or if born abroad and one parent is citizen, with registration). That resolved most issues. After Senegal's 2013 law, any child with a Senegalese parent (mother or father) is Senegalese and any spouse (husband or wife) can naturalise. Both countries thus now comply with the letter of CEDAW Article 9. Each still has certain reservations or quirks: Botswana's constitution to date still does not list "sex" in the non-discrimination clause (though practically moot regarding nationality since the law changed; but generally, an outstanding constitutional issue) and Senegal's law still mentions that the President cannot hold dual nationality (2016 constitutional change) and minor administrative issues. But these do not reintroduce gender discrimination – they apply to all genders equally.

6.7. Statistical Outcomes

It is hard to quantify how many people were affected before and after. However, it is known that dozens of families in Botswana benefited from the precedent set by the Dow case even before the law changed (the government started processing citizenship for children of citizen mothers following the judgment). In Senegal, after 2013, reports indicate that hundreds of families took advantage of the new provisions in the first couple of years – women who had foreign husbands, or women who had lived abroad and had children there came forward to secure Senegalese nationality documents for their children (Kampman, Zongrone, Rawat, & Becquey, 2017). These are significant human impacts: children who may have felt alien in their mother's country were now fully recognised and husbands who might have hold temporary status now became citizens of their family's country.

6.8. Regional Influence

Botswana's early reform influenced Southern Africa – countries like Lesotho and Swaziland cited it when considering changes (Lesotho updated its constitution in 1993 but only fully fixed nationality equality in 2005; Swaziland is still pending as of 2025). Senegal's reform influenced West Africa with Niger following suit in 2014 in respect of spouses (Manby, 2016) and others progressing. Both serve as positive precedents in African Union discussions on nationality protocols, often being praised in meetings on statelessness.

In conclusion, both case studies confirm the paper's thesis: gender discrimination in nationality law was indeed a colonial legacy and dismantling it required conscious legal change aligned with modern human rights norms. The fact that Botswana and Senegal, despite different backgrounds, ended up with strikingly similar discriminatory rules shows how pervasive the colonial templates were. Their eventual convergence toward equality by the 2010s also shows the power of global norms and local agency. It is a testament to how post-colonial societies can rectify colonial-era injustices, enhancing citizenship for all and preventing the harm (like statelessness and family separation) that these old laws caused.

6.9. Post-2013 Developments and Continuing Progress (2013–2025)

Since the 2013 reform in Senegal and the earlier 1995 amendment in Botswana, both nations have continued to consolidate gender-equal nationality regimes through judicial interpretation, administrative practice and international engagement. In Botswana, subsequent constitutional litigation such as Mmusi and Others v. Ramantele (2013) on inheritance equality and the 2021 dual-citizenship case have reinforced the constitutional norm that discrimination on the basis of sex is inconsistent with the spirit of equality established in Unity Dow. The government has also reported to the CEDAW Committee (2019 and 2023 cycles) on maintaining parity in nationality transmission and preventing statelessness among children of mixed-nationality marriages. In Senegal, the Ministry of Justice and the Association

des Juristes Sénégalaises have implemented legal-aid and awareness programmes to ensure women can exercise their reformed rights. The CEDAW Committee's 2022 concluding observations welcomed Senegal's progress while urging further harmonisation between civil-status and nationality procedures to remove residual administrative barriers. Regionally, both countries have supported the African Union's Draft Protocol on the Right to Nationality (2015) and the Abidjan Declaration on the Eradication of Statelessness (2015), demonstrating leadership in continental norm-setting. These post-reform actions confirm that gender equality in nationality law has become an embedded constitutional and human-rights principle rather than a temporary legislative adjustment, marking a decisive break from colonial-era discrimination and affirming the enduring legacy of equality achieved through domestic reform and international accountability.

Conclusions

Colonial legacies in law have long shadows and the persistence of gender discrimination in nationality laws well after independence exemplifies this phenomenon. This paper has explored how two African nations – Botswana and Senegal – inherited and eventually overcame colonial-era gender biases in their nationality legislation. In both cases, the initial post-independence laws reflected the patriarchal frameworks of the former colonial powers, treating men as the primary conveyors of nationality and women as secondary citizens. The results were clear violations of gender equality, with significant human costs: women were denied an equal say in the legal identity of their children and spouses, families faced insecurity and even statelessness, and women's status as full citizens was symbolically and practically undermined. Through a socio-legal lens, we have seen that these laws were not products of indigenous customs or religious mandates, but rather imported norms that became locally entrenched. Feminist legal theory helped us understand the deep injustice and practical harm of such discrimination, while postcolonial theory illuminated why such laws lingered and how important it is for independent states to assert new values in place of colonial ones. The case studies demonstrated two pathways to change: one via constitutional litigation (Botswana) and one via legislative reform driven by international norms and advocacy (Senegal). Both paths converged on the same outcome: recognition that women and men must be equal in conferring nationality, as a matter of fundamental rights and social justice.

Crucially, international legal frameworks – especially CEDAW and the 1961 Statelessness Convention – provided both the impetus and the guidance for these reforms. Botswana's judiciary and Senegal's legislature each invoked the language of international human rights when moving away from the old law (Manby, 2016; Belton, 2013). This underscores the role of global governance in addressing colonial-era discrimination; international law has become a tool for local actors to challenge the status quo. Regional instruments like the Maputo Protocol further affirmed that gender equality in nationality is not a western imposition but an African commitment as well.

As of the time of writing, both Botswana and Senegal serve as success stories. Their current nationality laws uphold the principle that a citizen is a citizen, regardless of gender – a child can derive nationality from either mother or father and a marriage can confer potential citizenship to either spouse on equal terms. The positive impacts are evident: reduced risk of statelessness (particularly for children who otherwise had no claim to any nationality), enhanced rights and stability for families and the removal of a key barrier to women's full equality in society. It also means these countries are in full compliance with their obligations under international law on this matter, reflecting a decolonisation of the legal code that aligns with human rights. However, the broader fight against gender discrimination in nationality laws is ongoing. As noted, dozens of countries worldwide (albeit with a shrinking number) still maintain such discriminatory laws (Belton, 2013). The experiences of Botswana and Senegal yield some lessons for those contexts. Firstly, legal reform often requires both top-down and bottom-up pressures: enlightened leadership or judicial courage combined with grassroots activism and personal narratives that highlight injustice. Unity Dow's personal story and the coalition of Senegalese women's groups both played critical roles in shifting perceptions and convincing policymakers. Secondly, addressing technical legal issues like dual nationality concerns and framing solutions that assuage unfounded fears (for example, showing that granting mothers equal rights does not actually undermine national security

or identity), is important in the reform process. Botswana addressed potential dual-loyalty issues by continuing to restrict dual citizenship (though this is itself debated), whereas Senegal tackled it by actually embracing dual nationality formally, thus removing that as an argument against gender equality. Another insight is the importance of constitutional guarantees. Botswana lacked an explicit constitutional clause on sex equality in 1966, which delayed progress until judges interpreted other clauses broadly (Manby, 2016). Many countries since have updated constitutions to explicitly ban gender discrimination in citizenship (e.g., Kenya 2010). Senegal's constitution enshrined equality, which provided a strong moral basis for the 2013 change, even if not directly enforceable without legislation. Going forward, constitutional reforms in countries that still have discriminatory laws could pave the way for statutory changes.

In conclusion, gender discrimination in nationality laws is an outdated injustice rooted in colonial legacies, as seen in Botswana and Senegal, which can be addressed through legal reforms based on equality principles. Eliminating such discrimination ensures equal citizenship, prevents statelessness and upholds the fundamental truth that women's rights are human rights.

References:

Adekanmbi, G., & Modise, M. (2000). The state of adult and continuing education in Botswana. In *The state of adult continuing education in Africa* (pp. 65–93).
Albarazi, Z. (2014). No legal bond, no family life. *Tilburg Law Review, 19*, 11–19. https://doi.org/10.1163/22112596-01902002
Albarazi, Z. (2024). Towards the abolition of gender discrimination in nationality laws. *Forced Migration Review, 71*, 44–46. https://www.fmreview.org/afghanistan/albarazi-vanwaas/
Annex. (1989). *Convention on the rights of the child* (Vol. 1577, Treaty Series).
Atchabahian, A. C. R. C. (2023). Article 16 – The right to marry and to found a family. In *The Universal Declaration of Human Rights* (pp. 379–394). Brill Nijhoff.
Bandiaky-Badji, S. (2011). Gender equity in Senegal's forest governance history: Why policy and representation matter. *International Forestry Review, 13*(2), 177–194.
Bellizzi, S., & Nivoli, A. (2023). Gender discrimination in nationality laws: A systemic type of violence against women. *International Journal of Gynecology & Obstetrics, 163*(1), 323–324. https://doi.org/10.1002/ijgo.14986
Belton, K. A. (2013). Statelessness and economic and social rights. In L. Minkler (Ed.), *The state of economic and social human rights: A global overview* (pp. 221–247).
Camara, F. K. (2007). Women and the law: A critique of Senegalese family law. *Social Identities, 13*(6), 787–800.
Cailleba, P., & Kumar, R. A. (2010). When customary laws face civil society organisations: Gender issues in Botswana. *African Journal of Political Science and International Relations, 4*(9), 330.
Campbell, E. K. (2003). Attitudes of Botswana citizens toward immigrants: Signs of xenophobia? *International Migration, 41*(4), 71–111.
Chinkin, C. (1999). A critique of the public/private dimension. *European Journal of International Law, 10*(2), 387–395.
Cole, W. M. (2023). Convention on the elimination of all forms of discrimination against women (CEDAW). In *The Wiley Blackwell encyclopedia of gender and sexuality studies* (pp. 1–3). https://doi.org/10.1002/9781118663219.wbegss274
Crowder, M. (2023). *Senegal: A study of French assimilation policy*. Routledge.
Dann, P., & Hanschmann, F. (2012). Post-colonial theories and law. *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America, 45*(2), 123–127.
de Groot, G.-R. (2014). Children, their right to a nationality and child statelessness. In A. Edwards & L. van Waas (Eds.), *Nationality and statelessness under international law* (pp. 144–168). Cambridge University Press. https://doi.org/10.1017/CBO9781139506007.007
de Groot, G.-R., & Vonk, O. (2018). Acquisition of nationality by birth on a particular territory or establishment of parentage: Global trends regarding ius sanguinis and ius soli. *Netherlands International Law Review, 65*(3), 319–335. https://doi.org/10.1007/s40802-018-0118-5
Donnelly, J. (1984). Cultural relativism and universal human rights. *Human Rights Quarterly, 6*, 400.
Dow, U. (1995). *The citizenship case*. Lentswe la Lesedi.
Dow, J. U. (2001). How the global informs the local: The Botswana citizenship case. *Health Care for Women International, 22*(4), 319–331.
Efferess, D. (2008). *Postcolonial resistance: Culture, liberation and transformation*. University of Toronto Press.
E. R. i. A. Initiative. (2025). *Senegal – Citizenship rights in Africa*.

Florczak-Wątor, M. (2024). Equality rights. In W. Babeck & A. Weber (Eds.), *Writing constitutions: Volume 2 – Fundamental rights* (pp. 247–284). Springer International Publishing. https://doi.org/10.1007/978-3-031-39622-9_7
Foster, M., & Lambert, H. (2016). Statelessness as a human rights issue: A concept whose time has come. *International Journal of Refugee Law, 28*(4), 564–584.
Harrington, C. (2017). Campaigning for gender equality in nationality laws. https://children.worldsstateless.org/3/mobilising-against-childhood-statelessness/campaigning-for-gender-equality-in-nationality-laws.html#:~:text=to%20the%20father%E2%80%99s%20country%2C%20even,the%20children%20of%20Indian%20men
Harrington, M. (2023). Feminism against progress: 'Exhilarating'. Swift Press.
Hallo de Wolf, A., & Moerland, R. (2023). The UDHR as a living instrument at 75 and beyond. *Netherlands Quarterly of Human Rights, 41*(4), 182–189. https://doi.org/10.1177/09240519231214481
Handmaker, J. (2019). Researching legal mobilisation and lawfare.
Izzard, W. (1985). Migrants and mothers: Case-studies from Botswana. *Journal of Southern African Studies, 11*(2), 258–280.
Joseph, S., & Castan, M. (2013). *The international covenant on civil and political rights: Cases, materials, and commentary*. Oxford University Press.
Kane, I. (2021). *Rapport sur le droit de la nationalité: Senegal*.
Kane, I. (2024). The impact of the United Nations human rights treaties on the domestic level in Senegal. In *The impact of the United Nations human rights treaties on the domestic level: Twenty years on* (pp. 1003–1076). Brill Nijhoff.
Kampman, H., Zongrone, A., Rawat, R., & Becquey, E. (2017). How Senegal created an enabling environment for nutrition: A story of change. *Global Food Security, 13*, 57–65.
Kingwill, R. (2016). [En]gendering the norms of customary inheritance in Botswana and South Africa. *The Journal of Legal Pluralism and Unofficial Law, 48*, 208–237. https://doi.org/10.1080/07329113.2016.1185829
Levit, N., & Verchick, R. R. (2016). *Feminist legal theory: A primer* (Vol. 74). NYU Press.
Long, L. (1992). Changing residence: Comparative perspectives on its relationship to age, sex, and marital status. *Population Studies, 46*(1), 141–158.
Manby, B. (2016). *Citizenship law in Africa: A comparative study*. African Minds.
Manby, B. (2018). *Citizenship in Africa: The law of belonging*. Hart Publishing. https://doi.org/10.5040/9781509920808
Melber, H., Bjarnesen, J., Lanzano, C., & Mususa, P. (2023). Citizenship matters: Explorations into the citizen–state relationship in Africa. *Forum for Development Studies, 50*(1), 35–58. https://doi.org/10.1080/08039410.2022.2145992
Merle, I., & Muckle, A. (2022). Introduction. In I. Merle & A. Muckle (Eds.), *The indigénat and France's empire in New Caledonia: Origins, practices and legacies* (pp. 1–22). Springer International Publishing. https://doi.org/10.1007/978-3-030-99033-6_1
Mezmur, B. D. (2006). The African Committee of Experts on the Rights and Welfare of the Child: An update: Recent developments. *African Human Rights Law Journal, 6*(2), 549–571.
Minow, M. (2021). Equality vs. equity. *American Journal of Law and Equality, 1*, 167–193.
Mokobi, E. M. (2000). Lingering inequality in inheritance law: The child born out of wedlock in Botswana. *Perspective, 31*(2), 231–236.
Mumtaz, A., Hongdao, Q., Mukhtar, H., Saleem, H., & Saleem, R. (2017). Discrimination in nationality laws: A case study of Pakistan. *Journal of Law, Policy and Globalization, 66*.
Ng'weno, B., & Aloo, L. O. (2019). Irony of citizenship: Descent, national belonging, and constitutions in the postcolonial African state. *Law & Society Review, 53*(1), 141–172.
Nyamnjoh, F. B. (2002). Local attitudes towards citizenship and foreigners in Botswana: An appraisal of recent press stories. *Journal of Southern African Studies, 28*(4), 755–775.
Nanni, G. (2023). Gender equality, equity, and equal opportunities. In E. di Bella, S. Fachelli, P. López-Roldán, & C. Suter (Eds.), *Measuring gender equality: A multidisciplinary analysis of some EU countries* (pp. 1–30). Springer International Publishing. https://doi.org/10.1007/978-3-031-41486-2_1
Pateman, C. (2016). Sexual contract. In *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (pp. 1–3).
Plange, N.-K., & Alam, M. (2023). Re-thinking colonialism and social policy: With the logic of imperialism. *Social Sciences & Humanities Open, 8*(1), 100712. https://doi.org/10.1016/j.ssaho.2023.100712
Sainsbury, D. (2018). Gender differentiation and citizenship acquisition: Nationality reforms in comparative and historical perspective. *Women's Studies International Forum, 68*, 28–35. https://doi.org/10.1016/j.wsif.2018.01.005
Scott, J. B. (1930). Nationality: Jus soli or jus sanguinis. *American Journal of International Law, 24*(1), 58–64.

Somé, K. A., Forkum, P. N., Tanoh, A., Techane, M. G., Nabaneh, S., Nyarko, M. G., Griffith, S. T., Ogendi, P., Hlatshwayo, S., & Chisala-Tempelhoff, S. (2016). The impact of the African Charter and the Maputo Protocol in selected African states. PULP.
Stratton, L. C. (1992). The right to have rights: Gender discrimination in nationality laws. *Minnesota Law Review, 77*, 195.
Suh, J. S. (2014). *The paradox of post-abortion care: A global health intervention at the intersection of medicine, criminal justice and transnational population politics in Senegal* (Doctoral dissertation, Columbia University).
Tarusarira, J. (2020). Religion and coloniality in diplomacy. *The Review of Faith & International Affairs, 18*(3), 87–96. https://doi.org/10.1080/15570274.2020.1795442
Thames, A. D., Irwin, M. R., Breen, E. C., & Cole, S. W. (2019). Experienced discrimination and racial differences in leukocyte gene expression. *Psychoneuroendocrinology, 106*, 277–283.
Tobin, J., & Cashmore, J. (2020). Thirty years of the CRC: Child protection progress, challenges and opportunities. *Child Abuse & Neglect, 110*, 104436. https://doi.org/10.1016/j.chiabu.2020.104436
United Nations. (1989). *Convention on the nationality of married women*. *Annual Review of Population Law, 16*, 124.
van Waas, L., Albarazi, Z., & Brennan, D. (2019). Gender discrimination in nationality laws: Human rights pathways to gender neutrality. In N. Reilly (Ed.), *International human rights of women* (pp. 1–15). Springer Singapore. https://doi.org/10.1007/978-981-10-4550-9_13-1
Vickstrom, E. (2019). Legal status, gender, and economic incorporation of Senegalese migrants in France, Italy, and Spain. In *Migration, gender and social justice: Perspectives on human insecurity* (pp. 115–156). Springer International Publishing. https://doi.org/10.1007/978-3-030-12088-7_4
Viljoen, F. (2009). An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. *Washington and Lee Journal of Civil Rights and Social Justice, 16*, 11.
Yuval-Davis, N. (1991). The citizenship debate: Women, ethnic processes and the state. *Feminist Review, 39*(1), 58–68.
Zaher, C. (2002). When a woman's marital status determined her legal status: A research guide on the common law doctrine of coverture. *Law Library Journal, 94*, 459–486.
Zeleza, P. T. (2005). Gender biases in African historiography. In *African gender studies: A reader* (pp. 207–232). Springer.

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.005

A COMPARATIVE ANALYSIS OF JUDGEMENT IN ABSENTIA IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND IN EUROPEAN UNION LAW

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Received: 8 May 2025; accepted: 8 December 2025
DOI: https://doi.org/10.13165/j.icj.2025.11.02.005

Abstract. In principle, judgments in absentia are permitted in the signatory states of the European Convention on Human Rights and in the member states of the European Union. This paper critically analyses the conditions under which a person convicted in absentia is entitled to a retrial, with reference to the case law of the European Court of Human Rights and the Court of Justice of the European Union. The study aims to identify practical solutions to ensure compliance with the right to a fair trial, highlighting divergences and gaps in European practice, and proposing interpretative criteria that can guide courts in protecting defendants' rights across different jurisdictions. The analysis reveals some differences (at least according to the literal wording of the law) between the case law of the European Court of Human Rights and the provisions of European Union law on trial in absentia, particularly regarding when a retrial is imperative. Based on these findings, interpretative approaches are proposed to guide courts in assessing (i) the defendant's awareness of the consequences of absence, (ii) the conduct of the chosen defence counsel, and (iii) the good or bad faith of the defendant in missing stages of proceedings.

Keywords: Trial in Absentia, Right to a Fair Trial, Failure to Appear in Court, Personally Informed.

Introduction

An accused's ability to be present in a proceeding and the ability to understand what is being said about such accused is a right so elemental that it may be taken for granted (Clooney & Web, 2021).

The report issued by the Netherlands Institute of International Relations, T.M.C. Asser, concerning trials in absentia, states that the trial is the defendant's opportunity to challenge evidence against him and to present his account. It's his opportunity to tell his version of the story. To conduct a trial without the defendant is like trying to stage Hamlet without Hamlet. The story of Hamlet cannot be fully told without the Prince himself on stage. It would not be the same play. Without the defendant (even with the best supporting cast of judges, prosecutors and witnesses) the trial is not the same trial (Trials in Absentia n.d., p. 1-2).

However, it is often impossible to conduct criminal proceedings in the presence of the defendant, either because of his will or for reasons beyond his control. In such circumstances - particularly in the latter situation - the question arises as to whether it is possible, or indeed advisable, to proceed with a trial in absentia.

When the defendant is absent during a trial, the punitive dimension of the proceedings cannot be immediately fulfilled. Nevertheless, other important objectives must be considered: delivering justice to victims and ensuring compensation; fostering reconciliation; deterring future crimes; and ending a prevailing culture of impunity. In principle, all these aims may be achieved, or at least significantly advanced, through in absentia proceedings. A trial held in absentia can serve to ensure accountability and to combat impunity - objectives that are valuable in themselves. Failing to hold a trial for a fugitive

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may create the public impression that the defendant is being rewarded for his escape. Moreover, victims' interests may favour the continuation of proceedings in absentia, particularly in systems where civil parties are entitled to participate and to seek compensation. Finally, in absentia trials can also be viewed as reinforcing the truth-seeking function of criminal justice (Report on the Experts Roundtable on trials in absentia in international criminal justice, 2016, p. 2).

If the suspect or defendant absconds during trial or declines to attend at all, there is a risk that justice will never be done. Witnesses and victims have a legitimate expectation of having their day in court; that expectation cannot be undermined by a defendant who simply decides not to attend. Lengthy delays can cause real damage to the administration of justice. Not only does the rescheduling of hearings waste public time, resources and money, but victims and indeed any co-accused who have been waiting for their trial (often whilst in custody) will be adversely affected. Delay can also have a negative impact on the trial itself; the quality of evidence inevitably depreciates over time: witnesses die, memory fades, and physical exhibits are lost. Justice delayed can be justice denied (Trials in Absentia n.d., p. 4).

The present research aims to analyse the conditions under which judgments in absentia are conducted in the signatory states of the European Convention on Human Rights (1950) and in the member states of the European Union, focusing on the compatibility of such proceedings with the right to a fair trial.

The objectives of this study are threefold: 1) To examine the principles established by the case-law of the European Court of Human Rights regarding trials conducted in the defendant's absence, identifying the circumstances under which retrials are required; 2) To present the relevant case-law of the Court of Justice of the European Union and its interaction with the European Convention, highlighting similarities and divergences in the protection of the defendant's rights; 3) To develop a set of interpretative criteria that can guide courts in ensuring compliance with the right to a fair trial, taking into account concrete procedural scenarios and practical challenges encountered in different European jurisdictions (France, Italy, Romania).

The novelty of this paper lies in its comparative and analytical approach: it identifies differences and gaps in the application of fair trial guarantees, and develops practical, harmonized solutions that can be applied across different legal systems, By emphasizing analysis over description, this research seeks to generate actionable insights for legal practitioners, judges, and scholars, offering a framework for assessing whether a retrial is necessary and under what conditions the defendant's rights are fully protected.

A doctrinal research methodology is employed in this paper, focusing on a detailed analysis of primary legal sources (such as statutes, case law of the European Court of Human Rights, and decisions of the Court of Justice of the European Union), as well as secondary sources (including scholarly articles and legal commentaries). The method involves a comparative approach to highlight differences and similarities in legal frameworks, combined with interpretative analysis to extract relevant principles and criteria.

AI-assisted technology was used in the preparation of this article for checking grammar and spelling.

1. Historical and Comparative Foundations of Judgments in Absentia

Under old Anglo-Saxon law, an accused who unjustifiably absented himself was not tried in absentia or formally adjudged guilty by default. Instead, he was declared an "outlaw". The consequences of conviction upon an accused could hardly have been more severe than those of outlawry, which included forfeiture of all property and, at least until about 1329, being subject to summary execution by anyone who came upon him. Thus, it seems more accurate to say that the impact of outlawry was in effect, a conviction, and that judgments in absentia were not entered because the same purpose was accomplished by outlawry (Starkey, 1979, p. 723-724).

Traditionally, legal doctrine distinguishes between common law systems, in which judgment in absentia is not permitted, and Romano-Germanic systems, in which it is allowed through default proceedings. Yet the validity of this distinction may well be questioned. Several observations suggest that, while not entirely unfounded, it is largely artificial. First, in a great number of legal systems - whether belonging to the common law tradition or not—judgment in the absence of the defendant is possible under certain circumstances. Second, in Romano-Germanic systems where default proceedings exist, the resulting conviction carries limited weight. Third, in the common law world - where default judgment is in principle rejected - certain functional equivalents have been developed. A limited conviction is sometimes possible (Pradel, 2016, p. 530-531).

Since the purpose of this article is not to provide an exhaustive analysis of in absentia proceedings in comparative law, only three jurisdictions have been selected for discussion. With respect to common law systems, the paper briefly examines the situation in the United States of America. As mentioned above, in countries belonging to the Romano-Germanic legal tradition, the regulation of in absentia proceedings differs considerably. Accordingly, the study presents the German system, which in principle does not permit trials in absentia, and the Italian system, which generally allows them, subject to certain exceptions.

In the United States, according to rule no. 43 of the Federal Rules of Criminal Procedure, a defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behaviour, but the defendant persists in conduct that justifies removal from the courtroom.

In Crosby v. the United States, the Supreme Court held that Rule 43 prohibits the trial in absentia of a defendant who is not present at the beginning of trial. The Rule's express use of the limiting phrase "except as otherwise provided" clearly indicates that the list of situations in which the trial may proceed without the defendant is exclusive. Moreover, the Rule is a restatement of the law that existed at the time it was adopted in 1944. Its distinction between flight before and during trial is also rational, as it marks a point at which the costs of delaying a trial are likely to increase; helps to assure that any waiver is knowing and voluntary; and deprives the defendant of the option of terminating the trial if it seems that the verdict will go against him (Crosby v. United States, 1993).

In the United States, a defendant who has been personally summoned and fails to appear commits the separate offence of bail jumping, punishable by imprisonment, and will face this charge once apprehended (Pradel, 2016, p. 531).

German law does not permit trials in absentia. It should be noted that the German Code of Criminal Procedure distinguishes between an absent person and a person who fails to appear. According to Article 276 of the German Code of Criminal Procedure, an absent person is someone whose place of residence is unknown or who is known to be abroad.

In such cases, trials in absentia are excluded, and the court may only conduct judicial proceedings for the purpose of preserving evidence for the trial, which will be postponed until the defendant appears (art. 285).

In the second case, when the court knows the place where the defendant can be summoned, according to Art. 230 of the German Criminal Procedure Code, no trial will be held in the absence of the defendant, and when the defendant cannot provide sufficient reasons for his absence, a summons or a preventive arrest warrant will be issued. However, the defendant may be tried in absentia either if the court considers that his presence is not indispensable, or if the defendant intentionally causes a condition that affects his ability to take part in the trial, thus preventing the proper conduct of the trial (art. 231a), or if the defendant has been removed from the courtroom for inappropriate behaviour (art. 231b).

The main hearing may be held in the defendant's absence if he or she was properly summoned, and the summons referred to the fact that the hearing may take place in his or her absence and if only a fine of no more than 180 daily rates, a warning with sentence reserved, a driving ban, confiscation, destruction or rendering unusable of an object, or a combination thereof is to be expected. An increased penalty or a measure of reform and prevention may not be imposed in the defendant's absence. Disqualification from driving is admissible if the defendant was informed about this possibility in the summons. The main hearing does not take place without the defendant if the summons was affected by publication. (art. 232).

In all these cases, as well as when the offense for which the defendant has been brought to trial is punishable by less than six months' imprisonment, the trial may take place in absentia at the express request of the defendant. If the court grants the request, it shall inform the defendant of the legal consequences to which he or she is exposed (art. 233). Where permitted by law, the defendant may be absent from the trial and may be represented by up to three lawyers who may submit conclusions on the merits of the case (art. 234).

For the same purpose, to discourage defendants from failing to appear at trial, the appeal will be dismissed without a substantive review if the defendant-appellant fails to appear in court and does not provide sufficient reasons to justify his absence. For example, in one case the defendant and their lawyer were both absent during the main appeal hearing (Berufungshauptverhandlung). The appellate court continued the trial in their absence. The Federal Constitutional Court (Bundesverfassungsgericht) declared the proceeding in violation of the defendant's constitutional rights. Courts may allow in absentia hearings in appeals, but they must explicitly justify that the defendant's absence does not compromise the defence. Automatic continuation without such an assessment is unconstitutional (Bundesverfassungsgericht [BVerfG], 2025, 27 March, 2 BvR 829/24).

In another case, the defendant was absent for the appeal hearing. Their attorney held a general power of attorney covering representation even if the defendant was absent. The Federal Court of Justice (Bundesgerichtshof) clarified that, under § 329 StPO, an attorney may effectively represent the defendant in appeal proceedings, potentially substituting for physical presence. The power of attorney must explicitly authorize the attorney to act in the defendant's absence. So, the court held that the proceedings could continue legally in absentia because the attorney was properly authorized and effectively represented the defendant (Bundesgerichtshof [BGH], 2023, January 24, 3 StR 386/21).

In Italy, Law No. 67 of April 28, 2014 introduced a significant reform in criminal procedural law, abolishing the procedure for trials in absentia and appropriately amending the provisions relating to trials in absentia.

According to article 420 bis Criminal Procedure Code, if the defendant, free or detained, is not present at the hearing and, even if unable to appear, has expressly waived his right to be present, the Preliminary Hearing Judge shall proceed in his absence. The Preliminary Hearing Judge shall also proceed in the absence of the defendant if the latter has already declared or chosen an address for service during the proceedings, or has been arrested or placed under temporary detention, or has ordered a precautionary measure, or has appointed a retained lawyer. The Judge shall also proceed when the defendant is not present at the hearing but has been served the notice of the hearing personally, or it is in any case certain that the defendant is aware of the proceedings or has voluntarily avoided to be informed about either the proceedings or the documents thereof.

The defendant who, after appearing, leaves the hearing room or, having appeared at a hearing, does not attend subsequent hearings, is considered present and represented by their lawyer.

Except for this situation and in cases of nullity of the service, if the defendant is not present, the Preliminary Hearing Judge shall adjourn the hearing and order the notice to be served personally on the defendant by the police. When it is impossible to serve the notice, the Preliminary Hearing Judge shall direct by order suspension of the trial against the defendant who failed to appear. During suspension of

trial, the Preliminary Hearing Judge shall, upon request of a party, gather non-deferrable evidence following the procedure established for the trial (art. 420 quater).

Within one year from the date the order was issued, or earlier if needed, the Preliminary Hearing Judge shall order new searches for the defendant in order to serve the notice upon him. The Judge shall decide likewise at the end of each successive year, in case the proceedings do not resume. The Preliminary Hearing Judge shall revoke the order of suspension of trial: a) if the defendant is found after the searches; b) if in the meantime the defendant has appointed a retained lawyer; c) in any other case where it is certain that the defendant is aware of the proceedings against him. The Preliminary Hearing Judge shall set the date for the new hearing in the order of suspension of trial and the notice thereof shall be served, as ordered by the Judge, upon the defendant and his lawyer, the other private parties and the victim, and shall be forwarded to the Public Prosecutor (art. 420 quinquies).

It is mentioned that in Italy, if it is impossible to serve any document to the defendant, the judicial authority shall order a new search to find him, particularly at his place of birth, his latest habitual or temporary residence, the place where he usually works, and the central prison administration. If the defendant is not found, the judicial authority shall issue a decree stating that he cannot be found. After appointing a lawyer for the accused person who may not have one, the judicial authority shall order by the same decree that service be affected by delivering the copy of the document to the lawyer. Service effected in this way shall be valid to all intents and purposes. The person who cannot be found shall be represented by his lawyer (art. 159).

If it is found that the case was wrongly tried in the absence of the defendant because the provisions on the suspension of the trial were applicable, Article 604(5)(bis) states that the appeal court shall declare the judgment null, and order the case file be returned to the first-instance court. The appeal court shall also annul the judgment and order the case file be returned to the first-instance court if the defendant proves that his absence was due to his inculpable unawareness of the first-instance trial.

2. The European Court of Human Rights' Approach to Trials in Absentia

Article 6 of the European Convention on Human Rights guarantees the right to a fair trial. In the entire case law of the European Court of Human Rights (ECHR) it is shown that, although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present. Although proceedings that take place in the defendant's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself, or that he intended to escape trial (ECHR, Sejdovic v. Italy, 2006, para 81-82).

The defendant could not be considered to have waived his rights, as the authorities had designated him a "fugitive" based on a presumption lacking sufficient factual basis (in concrete terms, the presumption was founded on the fact that, prior to the commencement of proceedings, he moved from his registered address without notifying the authorities). In this context, account was taken of the fact that the defendant was unaware of any charges against him and that, in other criminal cases, the judicial authorities had been able to ascertain his new residence and interview him. The Government's argument that the defendant was to blame for his failure to appear in court, due to not informing the competent authorities of his change of residence, was also rejected. The Court observed that such conduct could amount to no more than a mere misdemeanour, and that the consequences imposed by the Italian authorities were clearly disproportionate in light of the fundamental role that the right to a fair trial plays in a democratic society (para. 32) (ECHR, Colozza v. Italy, 1985).

Although a defendant's flight may constitute evidence that he waived his right to be present at trial, the national authorities remain obliged to investigate the circumstances to determine whether the defendant has indeed fled, and such a conclusion must be supported by solid evidence rather than merely presumed from his absence (ECHR, Hermi v. Italy, 2004).

If the defendant was never notified of the proceedings against him, it is irrelevant that a public defender actively represented him, attending all hearings and requesting the testimony of numerous witnesses. It also bears no legal significance that the applicant was identified by several witnesses, as long as he was unable to attend the hearings to question them (ECHR, Sejdovic v. Italy, 2006).

In some cases concerning convictions in absentia, the Court has shown that informing a person of a prosecution brought against him is a legal act of such significance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague or informal notification cannot suffice. The Court cannot, however, exclude the possibility that certain established facts may provide an unequivocal indication that the defendant is aware of the existence of the criminal proceedings against him, of the nature and cause of the accusation, and that he does not intend to participate in the trial or seeks to evade prosecution. This may arise, for example, where the defendant publicly or in writing declares that he will not respond to summonses of which he has become aware through sources other than the authorities, succeeds in evading an attempted arrest, or when evidence brought to the attention of the authorities unequivocally demonstrates that he is aware of the pending proceedings and of the charges he faces (ECHR, Shkalla v. Albania, 2011, para 70).

The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved (ECHR, Sejdovic v. Italy, 2006, para 83).

When a defendant has been formally notified of the charges but cannot be located at the indicated address, prior involvement in other criminal proceedings is a relevant factor in assessing whether he was aware that his case could be brought before the courts, and thus in evaluating the fairness of a trial conducted in his absence. Authorities are obliged to take all reasonably necessary measures to secure the defendant presence at trial, including attempting to locate him at his known correspondence addresses. Where a defendant cannot be located despite reasonable efforts, the proceedings may lawfully continue in his absence. A defendant's prior acknowledgment of the charges and expressed willingness to participate in proceedings based on admission of guilt are significant in evaluating whether his absence affects the fairness of the trial (ECHR, Lena Atanasova v. Bulgaria, 2017, para. 45–52).

Imprisonment based on a final judgment rendered in default of appearance does not, in itself, constitute a violation of Article 5, as such deprivation of liberty falls within the scope of Article 5 para. 1(a). However, the refusal to reopen the trial - such as in the present case, where the application for retrial by a person convicted in absentia was dismissed because the case file had been destroyed - renders the deprivation of liberty unlawful from the moment the retrial request was rejected (ECHR, Stoichkov v. Bulgaria, 2005).

Similar to the other guarantees provided under Article 6 of the European Convention on Human Rights, the ECHR does not impose specific or rigid obligations, but is instead concerned with the overall fairness of the proceedings. Indeed, given the diversity of legal systems among the signatory states, such an approach would have been impossible in practice. Accordingly, the Court grants a wide margin of appreciation to national courts, while maintaining the requirement that the criminal proceedings, taken as a whole, must be fair. In this regard, in the view of the ECHR, the trial of a case in absentia is permissible. National courts must, however, ensure compliance with the other guarantees provided under Article 6 of the Convention, take all reasonable steps to inform the defendant of the charges brought against him, and safeguard the right to defence. As the right to be present at trial is a relative one, the defendant may choose to waive it.

However, in order to protect a person who has been tried without ever being aware of the criminal proceedings, it is necessary that, once such person has been found, they be granted the opportunity to request the reopening of the trial. In effect, that person must be fully reinstated in their previous procedural position, enjoying all the rights available to a defendant who has been aware of the proceedings (for example, the right to challenge the legality of evidence, the right to question witnesses, or the right to submit evidence). To prevent any element that could render the proceedings unfair, in cases involving individuals who have never been officially notified of the existence of the criminal process, the refusal to reopen the proceedings is acceptable only where it can be established with certainty that the defendant had actual knowledge of the charges against him.

3. Trials in Absentia under European Union Law: Legal Framework and CJEU Interpretation

In European Union law, references to trial in absencia and the guarantees to be provided in such situations are to be found in Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial and in Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

The Court of Justice of the European Union (CJEU) ruled in Melloni that Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is compatible with the requirements set out in Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union (CJEU, Melloni, 2013).

In Dworzecki, the summons was sent to the address indicated by Mr. Paweł Dworzecki and was received by an adult resident at that address, namely Mr. Dworzecki's grandfather - pursuant to Article 132 of the Code of Criminal Procedure, which provides that "in the event of the addressee's absence from home, the summons is to be served on an adult resident there." A copy of the judgment was also sent to the same address and received by an adult occupant.

The Court ruled that Article 4a(1)(a)(i) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that a summons, such as the one in the main proceedings, which was not served directly on the person concerned but handed over at that person's address to an adult member of the household who undertook to pass it on, does not in itself satisfy the conditions set out in that provision, particularly when it cannot be ascertained from the European arrest warrant whether, and if so when, that adult actually delivered the summons to the person concerned (CJEU, Dworzecki, 2016).

According to the Council Framework Decisions, a trial in absentia is compatible with the right to a fair trial if at least one of the following conditions is met:

- The person was summoned in person and thereby informed of the date and place of the trial that led to the decision;
- The person actually received, by other means, official information about the scheduled date and place of the trial, in such a way that it can be unequivocally established that the person was aware of the trial.

In both of these cases, the person must also have been informed that a decision may be handed down in the event of their failure to appear.

- The person, being aware of the scheduled trial, gave a mandate to a lawyer, either appointed by the person themselves or by the State, who effectively defended them at the trial.
- After being served with the decision and explicitly informed of the right to a retrial or appeal - which allows for the re-examination of the facts, including fresh evidence, and may result in the original

decision being quashed - the person expressly stated that they did not contest the decision or did not appeal it.

Although at first sight the criteria set out in the two Framework Decisions appear similar to those applied by the European Court of Human Rights, it will be shown below that a number of differences exist.

In fact, it can be observed that even at the level of European Union legislation there are slight nuances regarding these conditions. In this context, it is necessary to mention Article 8 para. 2-4 of Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, which stipulates that:

2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:

(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or

(b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.

3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.

4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons, but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that suspects or accused people are informed of the decision. In particular, when they are apprehended, they are also informed of the possibility of challenging the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.

Also, according to article 9, Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused people have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of defence.

Thus, although the directive reiterates the requirement to inform the defendant that a judgment may be rendered in their absence if they fail to appear, unlike the two Framework Decisions, it no longer requires that the defendant must have actually been defended in the proceedings by the lawyer appointed by them.

4. The Types of Cause Justifying the Reopening of Proceedings in Case of Trial in Absentia

First of all, it is necessary to consider the type of proceedings in which the absence of the person concerned requires a retrial. The case law of both courts appears to be consistent in this respect, as it concerns cases in which a "criminal charge" within the meaning of Article 6 of the European Convention on Human Rights is brought.

For example, in the Samet Ardic case, the Court of Justice of the European Union held that, where a party has appeared in person in criminal proceedings that resulted in a judicial decision definitively finding him guilty of an offence and, as a consequence, imposing a custodial sentence - execution of which is subsequently partially suspended subject to certain conditions - the concept of "trial resulting in the decision" does not include subsequent proceedings in which that suspension is revoked on grounds of breach of those conditions during the probationary period, provided that the revocation decision does not alter the nature or level of the sentence initially imposed.

The Court emphasized that the concept of "trial resulting in the decision" must be given an autonomous and uniform interpretation within the European Union, independently of national classifications and procedural rules in criminal matters, which naturally differ among Member States. It refers to the proceeding that led to the judicial decision finally sentencing the person whose surrender is sought under a European arrest warrant.

The Court also stated that the concept of "trial resulting in the decision" includes subsequent proceedings at the end of which a judicial decision finally amends the level of one or more previous sentences, insofar as the authority adopting that decision enjoys some discretion in that regard. In paragraph 75 of the Ardic decision, the Court emphasizes that this ensures Article 4a(1) of Framework Decision 2002/584 is interpreted and applied in accordance with the requirements of Article 6 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights (CJEU, Ardic, 2017).

In another case, the Court of Justice of the European Union reiterated the same principles, stating that proceedings leading to a decision - such as a judgment imposing a cumulative sentence by combining one or more previously imposed sentences- necessarily result in a more favourable outcome for the person concerned. For instance, a lighter penalty may be imposed following the enactment of new legislation penalizing the relevant offence less severely. Similarly, after multiple convictions, the sentences may be aggregated into a cumulative sentence that is lower than the sum of the individual sentences imposed in previous decisions. The guarantees incorporated in Article 6 of the European Convention on Human Rights apply not only to the finding of guilt but also to the determination of the sentence. Compliance with the right to a fair trial entail that the person concerned has the right to be present at the hearing due to the significant consequences the proceedings may have on the severity of the sentence. This is particularly relevant in proceedings determining an overall sentence, where the process is not purely formal or arithmetic but allows the competent authority a margin of discretion, for example, by considering the individual circumstances or personality of the defendant, or mitigating and aggravating factors. It follows that proceedings resulting in a judgment imposing a cumulative sentence - such as in the main proceedings, where a new determination of previously imposed custodial sentences is made - must be considered relevant for the application of Article 4a(1) of Framework Decision 2002/584, when they entail a discretionary assessment by the competent authority and result in a decision that finally determines the sentence (CJEU, Zdziaszek, 2017).

Regarding the types of cases that require the reopening of proceedings when the person concerned was not present, the case law of the two courts is similar.

In practice, in post-conviction proceedings the reopening of proceedings following a judgment by default will only apply to those cases where the courts have a margin of discretion regarding the nature and severity of the sentence imposed. If the sentence is modified following a factual analysis, a default judgment and the refusal to retry will result in a violation of the right to a fair trial. For example, in the case of a bad-faith failure to pay a criminal fine, the fine will be replaced by imprisonment. Under current Romanian legislation, the term of imprisonment to be served in the event of non-payment of the fine is determined at the moment the fine is imposed. Under the old rules, however, the court replacing the fine with imprisonment had the power to determine the length of the imprisonment. While in the first case, the court dealing with the subsequent proceedings does not have any discretion in determining the exact length of imprisonment (once bad faith has been established), in the second case, determining the duration requires a factual analysis. In these circumstances, only the second procedure falls within the scope of the right to a fair trial.

5. Possible Contradictions between the Case-law of the European Court of Human Rights and European Union Law

5.1. The condition of informing the defendant that a decision may be handed down if he or she fails to appear in court

A first potential area of conflict between the European Convention on Human Rights and the instruments adopted at European Union level concerns the requirement under the latter that the person concerned must have been informed that a decision may be rendered if he or she fails to appear at the trial.

In none of the cases identified in the case law of the European Court of Human Rights is there any explicit reference to such a formal requirement. The Court adopts a more pragmatic approach, examining in each case whether the person concerned was aware of the existence of criminal proceedings against them, and whether they could reasonably have foreseen the consequences of not appearing. As noted, a retrial may not be necessary even where the defendant was not formally informed of the proceedings, provided it can be unequivocally established that they were aware of their existence.

The case law of the European Court of Human Rights (as discussed in Chapter Two of this paper) establishes that a person must have been notified, in accordance with national law, of the existence of criminal proceedings against them. In principle, such notification is sufficient to make the person aware of the consequences of failing to appear before the judicial authorities. Therefore, if the person subsequently changes their residence after being notified of the charges and cannot be located despite reasonable efforts by the court, they can no longer claim a violation of the right to a fair trial. Furthermore, the right to a fair trial may still be considered respected even if the person was never personally notified, provided it can be clearly established that they were aware of the criminal proceedings against them.

By contrast, the two Council Framework Decisions appear to require a retrial in all cases where the defendant has not received formal notification of the proceedings, without taking into account whether the defendant may have learned of the proceedings through other means.

However, legislation subsequently adopted at European Union level allows for the possibility of rejecting a retrial request where, even though the defendant was never personally notified, it can be established beyond any doubt that they were aware of the trial.

In this regard, it should be recalled that recital 39 of Directive 2016/343 allows Member States to adopt and enforce a decision in absentia when a suspect or accused person cannot be located despite reasonable efforts, such as when the person has fled or absconded. Interpreting these provisions, the Court of Justice of the European Union appears to follow reasoning similar to that of the European Court of Human Rights, ruling that a retrial is not mandatory as long as it can be unequivocally established that the defendant absconded.

In one ruling, the Court held that under Articles 8 and 9 of Directive 2016/343, an accused person who cannot be located despite reasonable efforts may be tried and convicted in absentia. They must generally be allowed, once notified of the conviction, to request a reopening of the proceedings or an equivalent remedy to have the case re-examined in their presence. However, this right may be denied if precise and objective evidence shows that the person received sufficient information to know they were going to be brought to trial and, by deliberate acts with the intention of evading justice, prevented the authorities from officially informing them of that trial (CJEU, IR, 2022). According to paragraph 49, such precise and objective indicia may, for example, be found to exist where that person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated.

However, the judgment does not reveal the Court's reasoning in the event that the defendant was notified of the charge but not of the consequences of failing to appear. Regarding the importance of this issue

(including in the case of a defendant who changes their address during the trial), reference is made to paragraph 50, which states that " in considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive that information" and paragraph 54, according to which, "it is for the referring court – in order to determine whether IR should enjoy the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case – to examine whether he was informed, in due time, of the trial and, if he was not represented by a mandated lawyer, of the consequences of non-appearance, and whether he waived, tacitly, but unequivocally, his right to be present at that trial".

Therefore, there is a difference between the standard of the European Court of Human Rights (which requires that the person must have been aware that they could be prosecuted and that the judgment could be delivered in their absence) and the standard of the Court of Justice of the European Union (which requires that the person must have been informed of the consequences of their failure to appear).

It is emphasized, for example, that under Romanian law, no provision expressly requires that the defendant be informed of the possibility that a judgment may be rendered in their absence if they fail to appear at trial. According to Article 108 of the Code of Criminal Procedure, the defendant is indeed informed of the obligation to notify the court within three days of any change of address. However, they are warned that, if they fail to comply with this obligation, summonses and any other documents sent to their original address remain valid and are deemed to have been received by them.

From our perspective, a specific, case-by-case analysis is necessary to determine whether, given the particular circumstances of each defendant, they were aware of the consequences of not appearing. For instance, a lawyer cannot reasonably claim ignorance of the possibility of being tried in absentia, whereas a person with limited education may not be aware of this consequence.

The nature of the crime committed must also be taken into account. A person who has committed murder could hardly argue that they were unaware that the case would proceed to trial, whereas a person who stole an item of minimal value might reasonably be unaware of this. Although changing one's place of residence is generally considered evidence of evasion, at least under Romanian law, there are frequent situations in which individuals who commit minor offences - and for whom no custodial sentence would be imposed - change their address without notifying the authorities, often due to a lack of legal knowledge.

Consideration is given to situations in which a person is caught in the act, taken to the police, and questioned about their actions—thus having a criminal charge brought against them within the meaning of Article 6 of the European Convention—without, however, being formally charged. In such cases, under Romanian law, the person is not even informed of their obligation to notify the authorities of any change of address.

There are numerous situations in which criminal prosecution, even in relatively minor cases (such as traffic offenses or shoplifting), takes several years, often with long periods of inactivity by the prosecuting authorities. In this context, individuals who were caught in the act may change their place of residence without reporting it, not necessarily to evade justice, but because they are not truly aware of the risks they face. For such offences, no person present at trial in Romania is typically imprisoned unless they have a prior criminal record; therefore, there is no logical reason for the defendant to attempt to evade justice. However, under Romanian law, imprisonment becomes mandatory if the defendant fails to appear before the court to give consent to perform community service, as none of the non-custodial measures may then be applied.

With reference to paragraph 98 of the Sejdovic judgment ("In the particular circumstances of the present case, the question arises whether, if official notice was not served on him, Mr. Sejdovic may be regarded as having been sufficiently aware of his prosecution and the trial to be able to decide to waive his right

to appear in court, or to evade justice"), it appears that any reopening of proceedings must be considered on a case-by-case basis. Applying the standard of the Court of Justice of the European Union, reopening should not be refused to a person who cannot be clearly identified as having absconded (it must be reiterated that a change of address does not always signify evasion) and who has not been formally notified of the charges.

In such circumstances, Romanian case law reflects a degree of controversy regarding the possibility of requesting a reopening of criminal proceedings. In one case, the accused was caught red-handed by the police, made a statement, and took part in an on-site investigation before formal proceedings began, without being notified of the obligation to report any change of residence. Although an address had been provided, the defendant could not be located once formal proceedings had started. The court held that, as long as no formal charge had been brought in accordance with procedural rules, it could not reasonably be argued that the defendant was aware of ongoing criminal proceedings and their consequences. Consequently, his request for a retrial was granted (Curtea de Apel București, 16 December 2014, Decizia penală nr. 1566 [unpublished; Criminal Decision no. 1566].

On the contrary, another court rejected the defendant's claim that he could not have known criminal proceedings would be initiated against him. Although formal proceedings had not yet begun and he had not been informed of any legal obligations, the defendant signed a report and a handwritten statement acknowledging he was under investigation for aggravated theft (Curtea de Apel București, 9 October 2014, Decizia penală nr. 954 [unpublished; Criminal Decision no. 954].

Doctrine has emphasized that a person's awareness of the existence of criminal proceedings cannot be presumed solely on the basis of their participation in preliminary proceedings prior to the formal initiation of criminal proceedings. The mere presence or involvement in various evidentiary actions - such as on-site investigations or house searches - does not suffice to establish such awareness if these proceedings were not followed by an official notification of criminal charges (Udroiu, 2021, p. 749).

Another author notes that applying the conventional standard regarding notification of charges against a defendant, when national law does not permit notification prior to formal indictment, constitutes a violation of Article 20(2) of the Constitution, which prohibits the use of conventional standards in cases where national law affords a higher level of protection (Constantinescu, 2023, pp. 2875–2876).

A similar view can be observed in Italian case law. On 22 July 2014, four days after disembarking in Italy, the accused was identified by the State Police in Genoa and provided false personal details. He was informed that proceedings would be initiated against him for illegal entry, and a public defender was appointed. The accused elected to receive correspondence at the lawyer's office. This act was considered by the first-instance court - pursuant to Article 420-bis, paragraph 2, of the Code of Criminal Procedure - as proof of knowledge of the proceedings as well as an intention to evade awareness of the proceedings and their acts. However, the Court of Appeal held that this assessment was incorrect, noting that such an act, especially before the formal registration of his name in the in the register pursuant to Article 335 of the Code of Criminal Procedure, does not prove actual knowledge of the proceedings. The Supreme Court was asked whether the mere election of domicile at the lawyer's office could justify declaring the defendant absent and proceeding in his absence. The Court emphasized that the right to defence and the adversarial principle require the defendant's meaningful participation in the trial. Procedural safeguards must ensure real and effective knowledge of the proceedings, as mere formalities are insufficient and may undermine procedural fairness and human rights guarantees (Corte di Cassazione – Sezioni Unite Penali, Italy, 2020, Sentenza n. 23948 [Judgment No. 23948]).

5.2. Obligation to retry the case in relation to the conduct of the chosen lawyer

A second possible element of differentiation with regard to the mandatory retrial of the case concerns the conduct of the chosen defence counsel.

According to the two Framework Decisions set out above, a retrial is not required if the defendant, being aware of the trial, has mandated a lawyer who has been appointed either by the person concerned or by the State to defend him or her at the trial, and was indeed defended by that lawyer at the trial. Per a contrario, if the defendant (who has not been formally notified of the charge against him or her) appoints a chosen defence counsel, the judgment rendered in absentia will be quashed and the trial will be retried if the chosen defence counsel has not appeared.

Although the case law of the European Court of Human Rights does not expressly address this precise scenario, it must be considered, based on the principles outlined above, that the denial of a retrial in such circumstances would not constitute a violation of Article 6 of the European Convention on Human Rights.

Fairness in criminal proceedings requires that the defendand be adequately defended at all stages. Courts must ensure that counsel has the opportunity to defend the accused person, even in absentia. However, the State is not responsible for every deficiency of legal aid or privately appointed lawyers, as the conduct of the defence primarily remains a matter between the defendant and their counsel. Intervention by authorities under Article 6 §3(c) is required only when ineffective representation is manifest or clearly brought to their attention (ECHR, Sejdovic v. Italy, 2006, para 91-95).

To better understand this distinction, according to Article 466(2) of the Romanian Criminal Procedure Code, a convicted person who has appointed a defence counsel or representative is not considered to have been tried in absentia if that counsel or representative appeared at any point during the proceedings. The wording used, which resembles the two framework decisions, allows a retrial in cases where the defence counsel did not appear before the court.

This provision was designed to ensure comprehensive protection for the convicted person, not only against potential flaws in the summons procedure, but also with respect to the manner in which the lawyer exercises the right to defence (Crișu, 2020, p. 393). However, some scholars have criticized it, noting that the mere appearance of the lawyer or representative at a trial concerns only how the right to defence is exercised, which can lead to the arguably absurd situation where a retrial would be granted even if the chosen counsel had been hired solely to submit written conclusions (Constantinescu, 2023, p. 2878).

From our perspective, the absence of a chosen defence counsel is indeed equivalent to a lack of effective legal assistance, and such a flaw is evident. Nevertheless, the judge can appoint a public attorney to ensure effective defence and notify the defendant, assuming the defendant has communicated his or her contact details. Any bona fide person with average intellectual capacity would be expected to take an interest in the progress of their criminal proceedings. Therefore, if the proceedings continue for a certain period after the chosen counsel fails to appear, it is reasonable to expect the defendant to take steps to ascertain the situation. A person who does nothing in this regard and, moreover, fails to provide any telephone number or address for summons, cannot reasonably claim that their right to a fair trial has been violated if the trial proceeds in their absence. Accordingly, it must not be considered that international human rights regulations on the right to a fair trial require reopening proceedings solely because the chosen counsel did not appear, provided the defendant has demonstrated no subsequent interest in the case and the court has been unable to contact them due to a lack of information.

5.3. Situation where the defendant is only present at certain stages of the criminal proceedings

Another potential element of distinction regarding the possibility of trial in absentia concerns situations in which the defendant was not present at certain stages of the criminal proceedings. In our view, this does not reflect a substantive divergence between the two courts, but rather an apparent contradiction.
If the trial occurred at multiple levels of jurisdiction and the defendant, although absent at the first instance, was present before the appellate court, he cannot, in principle, claim that his right to a fair trial has been violated. For example, in the case-law of the Court of Justice of the European Union, in the Tupikas case, it was held that where proceedings take place at several instances resulting in successive

decisions, at least one of which was rendered in absentia, the term "trial resulting in the decision," within the meaning of Article 4a(1) of Framework Decision 2002/584, should be understood as referring to the instance that issued the final ruling. In these circumstances, even if the rights of the defence were not fully respected at the first instance, such a breach may be remedied during the second-instance proceedings, provided that these proceedings fully guarantee the requirements of a fair trial (CJEU, Tupikas, 2017, para 81 and 85-86).

It must be said, however, that respect for the right to a fair trial is not ensured by the mere participation of the defendant. The court examining the appeal must itself provide all the guarantees set out in Article 6 of the European Convention, such as hearing the defendant, ensuring that they have the opportunity to ask questions directly to the persons whose statements form the basis of the accusation, and ensuring that they have the opportunity to present evidence.

From the perspective of the European Court of Human Rights' case law, the relevant case is Coniac v. Romania. The Court reiterated that the proceedings as a whole may be considered fair if the defendant was allowed to challenge a conviction rendered in absentia and was entitled to attend the hearing before the appellate court, thereby opening the possibility of a full factual and legal examination of the criminal charge. However, the High Court in this instance relied solely on evidence submitted in the defendant's absence at the lower courts, without hearing him in person, despite the fact that the matters under review concerned factual issues, including the defendant's intent. This omission is particularly problematic given that the applicant had been previously acquitted in similar proceedings for lack of direct intent to commit fraud (ECHR, Coniac v. Romania, 2015).

What is relevant, therefore, is for the appellate court to ensure that, with regard to the criminal proceedings as a whole, the defendant has, at least at some stage, been afforded all the guarantees required by Article 6 of the European Convention. The European Court of Human Rights has also held, in Abdelali v. France, that offering an accused person - who has never been notified of the existence of criminal proceedings against them - the right to lodge an objection in order to be retried in their presence, but without being able to challenge the validity of the evidence against them, is insufficient, disproportionate, and deprives the concept of a fair trial of its substance (ECHR, Abdelali v. France, 2012). The same conclusion was reached in Abbou v. France (ECHR, Abbou v. France, 2017).

The situation becomes more problematic when the defendant's absence concerns the stage of the criminal proceedings at which the final decision is delivered. This includes cases in which, although the defendant participated in the criminal investigation, they no longer participated in the trial phase, or cases in which, although they participated at first instance, they no longer participated at the appeal stage.

In Tupikas, the CJEU held that in criminal proceedings involving several levels of jurisdiction, where at least one decision is delivered in absentia, the concept of a 'trial resulting in the decision' under Article 4a(1) of the Framework Decision 2002/584 refers only to the final instance that determines the defendant's guilt and imposes a penalty after a full re-examination of the merits. An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It remains, however, for the referring court to satisfy itself that it meets the characteristics set out above (CJEU, Tupikas, 2017).

A literal application of this principle would lead to the conclusion that whenever the defendant does not participate before the court delivering the judgment- whether at first instance, when they were present during the criminal investigation and no appeal was lodged, or at the appellate court, when they appeared before the first court - they would be entitled to request a retrial. It must not be considered that the Court of Justice of the European Union intended such reasoning, which would apply irrespective of the defendant's conduct during the criminal proceedings. In this regard, the decision explicitly states that the case law of the European Court of Human Rights must be taken into account. Paragraphs 78–80 of the Tupikas judgment clarify this point.

What the European Court requires is that the defendant be given the opportunity to participate in the proceedings and be informed thereof. Therefore, if the defendant was officially notified of the charges against them and was aware of the possibility of the case being tried in their absence, their failure to appear in court - provided the court took all the necessary steps to ensure their presence - cannot justify the reopening of the proceedings.

This is the prevailing view in Romanian case law. However, there are also court rulings that take a different approach. For example, in a court of appeals decision, applying the criteria from the Tupikas case - incorrectly, in our view - it was held that, although the defendant was aware of the existence of criminal proceedings during the criminal investigation phase, this did not necessarily amount to knowledge of the trial phase. The reasoning was that the formulation of a criminal charge does not automatically imply a decision to bring the case to trial (C. Apel Constanța, Romania, 2023, Decizia nr. 143 [Judgment No. 143]).

In another case, it was held that the defendant could not be considered unfamiliar with the criminal proceedings against him, since, having been arrested in a separate case, he had been brought before the criminal investigation authorities and questioned. On that occasion, he was also informed in writing, under signature, of the charges against him and of his obligation to notify the judicial authorities of any change of residence. Under these circumstances, the defendant was obliged, after his release from detention and prior to the issuance of the indictment in the present case, to contact the prosecutor's office or the police station to communicate his new address. After being released, he neglected to notify the criminal investigation authorities of his new residence. However, there is no evidence that the change of residence was intended to evade trial, which had not yet commenced at the time of his release. In these circumstances, it was decided that the case should be retried (C. Apel București, Romania, 2019, Decizia nr. 1580 [Judgment No. 1580]).

It is important to underline that this decision was handed down by the highest court of appeal in Romania. Romanian doctrine, however, considers that a defendant who was aware of the criminal proceedings against him and of all the essential elements of the accusation is not entitled to a retrial if he fails to appear before the court (Magdalena, 2017, p. 137; Micu, Slăvoiu & Zarafiu, 2022, p. 782; Constantinescu, 2023, p. 2874–2875).

From our point of view, in such a case, the defendant is responsible for the situation that has arisen, and invoking his own conduct to obtain a procedural advantage - namely, the retrial of the case - clearly violates the principle of nemo auditur propriam turpitudinem allegans. Similar reasoning was also adopted by the European Court of Human Rights in Lena Atanasova v. Bulgaria.

With regard to the defendant's absence from the appeal hearing, if the appeal was lodged by him and he was lawfully summoned, it must not be considered that his failure to appear can justify a retrial. If he does not appear after receiving the summons, fails to collect it, or does not communicate the address where he actually resides, reasoning otherwise would be to allow him to benefit from his own fault.
For example, in Ivanciuc v. Romania, the European Court of Human Rights held that the defendant could not claim that his right to a fair trial before the appeal court had been violated as long as he demonstrated total disinterest in the proceedings, missing all hearings before the domestic courts (ECHR, Ivanciuc v. Romania, 2005).

French case law is also similarly with this opinion. Thus, it has been stated that the procedure for default in criminal matters is not applicable before the Assize Court sitting in appeal when the defendant, absent without valid excuse, is the appellant (Cour de cassation – Chambre criminelle, France, 8 February 2023, n° 22-84.280 [Judgment No. 22-84.280]).

At the same time, if the appeal is lodged shortly after the judgment of the first court by the prosecutor or the injured party, it must not be considered that a retrial would be justified as long as the defendant has been lawfully summoned. For any person with an average level of education, it is obvious that the judgment of the first court could be appealed. It is therefore reasonable to require the defendant to be

diligent in checking his mail (so that he cannot later claim that he did not check his mailbox for a certain period) and, in the event of a change of domicile, to communicate this to the authorities.

There may, however, be situations in which an appeal is lodged a considerable time after the judgment of the first court. For example, in many jurisdictions the time limit for an appeal runs from the legal communication of the first court's judgment. In cases of unlawful communication, an appeal may be lodged even long after the judgment has been rendered. The aggrieved party could also request an extension of the appeal deadline if prevented from filing an appeal for good cause. Thus, if a long period has elapsed since the judgment was delivered, the defendant may reasonably consider the judgment to have become final. In such a situation, a person cannot be criticized for failing to check their mailbox over a certain period or for changing their domicile without notifying the authorities or completing the required legal formalities. It must be considered that the conclusion of the Court of Justice of the European Union in the Tupikas case could be taken into account in such scenarios.

Conclusions

The comparative analysis of the ECHR's case law and the EU rules on trials in absentia shows certain divergences - at least at the level of the literal wording - particularly concerning situations in which a retrial is mandatory. At the same time, CJEU jurisprudence consistently reflects the standards developed by the ECHR. Based on the three hypotheses presented in the previous chapter, the following interpretative proposals are advanced:

1. Awareness of the consequences of absence

In the absence of explicit information on the consequences of non-appearance, courts should apply an individualised assessment of whether the defendant could reasonably have foreseen the risk of being tried in absentia. Relevant indicators include the defendant's background, cognitive abilities, the seriousness of the offence, and the extent of participation in earlier stages of the proceedings.

This approach accommodates the nuanced distinctions identified in national practice, including the need to offer a retrial in cases where the defendant was apprehended in flagrante delicto, but did not subsequently participate in the criminal procedure.

2. Conduct of the chosen defence counsel

Where the defence counsel designated by the defendant fails to appear, the court's duties should be limited to appointing a public defender and notifying the person concerned. A defendant who demonstrates no diligence in maintaining contact with his lawyer should not be permitted to invoke the absence of counsel as a ground for requesting a retrial. Intervention by the court to remedy inadequate defence by chosen counsel should occur only in exceptional and manifest cases, in line with both ECHR and CJEU standards.

3. Establishing the relevance of good or bad faith when the defendant was present only at some stages of the trial

If the defendant was present during earlier procedural phases, but absent when the final judgment was rendered, the decisive criterion should be the defendant's good or bad faith, provided that the authorities undertook all reasonable steps to secure proper notification and attendance.

These proposals aim to harmonise the interpretative approaches of national courts with the converging standards of the ECHR and the CJEU. They seek to clarify when a retrial should be granted following a conviction in absentia, while safeguarding both the effectiveness of criminal proceedings and the fundamental right to a fair trial.

References:

Bundesgerichtshof [BGH] (Germany), (2023, January 24), 3 StR 386/21, retrieved from https://dejure.org/2023,4431
Bundesverfassungsgericht [BVerfG] (Germany), (2025, March 27), Beschluss 2 BvR 829/24. retrieved from https://www.bverfg.de/e/rk20250327_2bvr082924
Clooney, A., & Web, P. (2021), The right to fair trial in international law, Oxford University Press
Constantinescu V.H. în Udroiu M. (coordinator) (2023), Codul de Procedură Penală. Comentariu pe articole [Code of Criminal Procedure. Comment on articles], 4th edition, Bucharest, Romania, C.H. Beck, București Publishing House
Corte di Cassazione – Sezioni Unite Penali (Italy), (2020, 17 August), Sentenza n. 23948 [Judgment No. 23948], retrieved from https://www.sistemapenale.it/pdf_contenuti/1614625567_sezioni-unite-23948-2020-rescissione-giudicato.pdf
Cour de cassation – Chambre criminelle (France). (2023, 8 February), n° 22-84.280 [Judgment No. 22-84.280; published in the Bulletin], retrieved from https://www.courdecassation.fr/system/files/pdf_bulletins/validation_CCAS_BULL_CRIM~2023-2_1694617518.pdf
Court of Justice of the European Union (2013), Case C-399/11, Stefano Melloni v Ministerio Fiscal, Decision from 26 February 2013, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0399
Court of Justice of the European Union (2016), Case C-108/16 PPU, Paweł Dworzecki, Decision from 24 May 2016, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0108
Court of Justice of the European Union (2017), Case C 270/17 PPU, Tadas Tupikas, Decision from 10 August 2017, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62017CJ0270
Court of Justice of the European Union (2017), Case C-271/17 PPU, Sławomir Andrzej Zdziaszek, Decision from 10 August 2017, retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=193541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=519406
Court of Justice of the European Union (2017), Case C-571/17 PPU, Samet Ardic, Decision from 22 December 2017, retrieved from https://curia.europa.eu/juris/document/document.jsf;jsessionid=7065413363B4676362F856FD740A36FC?text=&docid=198161&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=513383
Crișu A. (2020), Drept Procesual Penal [Criminal Procedure Law], Bucharest, Romania, Hamangiu Publishing House
Curtea de Apel București (Romania), (2014, 16 December). Decizia penală nr. 1566 [Nepublicată; Criminal Decision no. 1566 (unpublished)].
Curtea de Apel București (Romania), (2014, 9 October). Decizia penală nr. 954 [Nepublicată; Criminal Decision no. 954 (unpublished)].
Curtea de Apel București (Romania), (2019, 27 November). Decizia penală nr. 1580 [Nepublicată; Criminal Decision no. 1580 (unpublished)].
C. Apel Constanța (Romania), (2023, 10 February). Decizia penală nr. 143 [Nepublicată; Criminal Decision no. 143 (unpublished)].
European Court of Human Rights (1985), Case of Colozza v. Italy, Decision from 12 February 1985, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-57462%22]}
European Court of Human Rights (2005), Case of Stoichkov v. Bulgaria, Decision from 24 June 2005, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-68625%22]}
European Court of Human Rights (2005), Case of Ivanciuc v. Romania, Decision from 8 September 2005, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-75862%22]}
European Court of Human Rights (2006), Case of Sejdovic v. Italy, Decision from 1 March 2006, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-72629%22]}
European Court of Human Rights (2001), Case of Shkalla v. Albania, Decision from 10 May 2011, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-104710%22]}
European Court of Human Rights (2012), Case of Abdelali v. France. Decision from 11 October 2012, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-113406%22]}
European Court of Human Rights (2015), Case of Coniac v. Romania, Decision from 6 October 2015, retrieved from https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-157518%22]}
European Court of Human Rights (2017), Case of Lena Atanasova v. Bulgaria, Decision from 26 January 2017, retrieved from https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Lena%20Atanasova%22],%22itemid%22:[%22001-170842%22]}

European Court of Human Rights (2017), Case of Abbou v. France, Decision from 2 February 2017, retrieved from https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Abbou%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-170657%22]}
International Bar Association, (2016), Report on the Experts Roundtable on trials in absentia in international criminal justice retrieved from https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia.
Magdalena C. (2017), Redeschiderea procesului penal în cazul judecării în lipsa persoanei condamnate [Reopening criminal proceedings in case of trial in absentia of the convicted person], in Revista Dreptul [Law Review], no.11/2017, 130-144.
Micu B., Slăvoiu R. & Zarafiu A. (2022), Procedură Penală [Criminal Procedure], Bucharest, Romania, Hamangiu Publishing House
Pradel J. (2016), Droit pénal comparé, 4 e édition, Dalloz
Starkey J. G. (1979), Trial in absentia in St. John's Law Review, no.4/1979, vol. 53, 721-745.
T.M.C. Asser Institute. n.d. Trials in Absentia. retrieved from https://www.asser.nl/media/795064/grc-trials-in-absentia-english.pdf
Udroiu M. (2021), Sinteze de Procedură Penală, vol. II [Criminal Procedure Summaries, vol. II], Bucharest, Romania, C.H. Beck, București Publishing House
United States Supreme Court, (1993) Crosby v. United States, 506 U.S. 255 (1993), retrieved from https://www.oyez.org/cases/1992/92-55.

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.006

INTERNATIONAL EXPERIENCE IN LEGAL SUPPORT OF COUNTERINTELLIGENCE ACTIVITIES AND ITS APPLICATION

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Received:14 December 2024; accepted: 11 November 2025.
DOI: https://doi.org/10.13165/j.icj.2025.11.02.006

Abstract. This article thoroughly analyses international experiences in the legal support of counterintelligence activities, focusing on the approaches of the UKUSA agreement member countries, European Union states and those in Asia. The main aspects of the legal regulation of special services are discussed, including their organisational structure, mechanisms of democratic control, human rights protection and integration into the international legal system. This article also addresses how counterintelligence agencies respond to modern challenges such as cyber threats and transnational crime. Specific recommendations are offered for adapting leading global practices to Ukrainian realities to enhance the effectiveness of counterintelligence activities, ensure national security and comply with international standards.

Keywords: counterintelligence activities, special services, national security, legal support, international experience.

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Introduction

Counterintelligence activities are crucial to ensuring national security, especially in the context of escalating threats in a globalised world. Drawing on international experience allows for the development of effective legal mechanisms to address contemporary challenges such as espionage, terrorism and cybercrime. However, since the legal frameworks governing counterintelligence activities vary significantly across countries due to historical, political and geographical factors, it is therefore essential to analyse international experience to craft optimal solutions.

Scholars have devoted considerable attention to studying the legal aspects of counterintelligence. Specifically, researchers have examined the legal frameworks governing the activities of special services in democratic societies and have analysed issues relating to transparency and public oversight. In the context of Ukraine (UA), certain studies focus on adapting the international experience to national needs. At the same time, a comprehensive analysis encompassing the legal frameworks for counterintelligence in leading European Union (EU) countries, the member states of the United Kingdom–United States of America Agreement (UKUSA), and Asia remains insufficient.

This study aims to examine the international experience in the legal regulation of counterintelligence activities and substantiate the possibilities of its adaptation to the reality of the situation in Ukraine. The primary question posed in this article is determining how international experience can contribute to enhancing the effectiveness of national counterintelligence while ensuring adherence to human rights, democratic standards and the rule of law.

The relevance of this study is driven by the need to improve Ukrainian legislation in the context of integration into the European security framework and counteracting internal and external threats. Specifically, the National Security Strategy of Ukraine (Melikhov et al., 2022) emphasises the importance of building a security system based on best international practices. Analysing the legal mechanisms of leading states will aid in formulating recommendations for enhancing the legislative framework of Ukraine (UA).

Thus, the study aims to explore the key approaches to the legal regulation of counterintelligence activities in various countries and to develop proposals for their practical application under conditions in Ukraine. This will strengthen Ukraine's (UA) national security in the face of contemporary challenges.

The theoretical and conceptual framework of the study on the legal regulation of counterintelligence activities is based on integrating several interdisciplinary approaches, including national security theory, legal theory, criminological concepts and doctrines of international law. Given the central research question—how the global experience in the legal regulation of counterintelligence activities can be adapted to Ukrainian conditions—it is crucial to formulate the foundational concepts that define the structure and direction of the analysis.

Counterintelligence activities are considered complex systems comprising search, counterintelligence, regulatory and administrative-legal measures (On et al., 2002). A systematic analysis enables the evaluation of how international standards and practices can be integrated into the national legal and administrative framework. This approach helps identify effective mechanisms for implementing foreign experiences and adapting them to national realities.

One of the key elements of the legal framework for counterintelligence lies in adhering to democratic standards and protecting human rights. The doctrine of the rule of law serves as the foundation for shaping a legal system where counterintelligence measures are conducted in compliance with international law and under the oversight of civilian authorities. This is crucial to adapting Western approaches to legal systems in states who seek to balance security and citizens' rights.

In the context of global threats, counterintelligence must ensure national security without violating citizens' fundamental rights and freedoms. This concept is developed in the works of domestic (Tyshchuk, 2023) and Western scholars, who analyse the optimal balance between the operational effectiveness of special services and adherence to democratic standards. The approach is based on legal oversight and the balance between security and human rights –core principles that can be considered when implementing international experience into Ukrainian practice.

To analyse international experience, it is essential to compare the legal systems of leading countries in counterintelligence. A comparative analysis helps to identify the strengths and weaknesses of different approaches and to determine ways to apply them. This promotes a deeper understanding of the functioning of counterintelligence agencies in various countries and the potential for applying best practices within the national security system.

Counterintelligence services in different countries have their own organisational structure and legal framework, corresponding to national conditions and challenges. However, there is a common understanding that special services form an integral part of the national security system and that their activities must be conducted on the basis of clearly defined legal norms and standards. For Ukraine (UA), it is essential to formulate a legal framework that ensures threats to national security can be effectively counteracted, while also preserving democratic principles and human rights.

The theoretical and conceptual framework of the study therefore allows for delineating the boundaries of the analysis, systematising international experience and identifying the key aspects of its adaptation to the contemporary conditions of Ukraine (UA). This is the foundation for further development of legal recommendations on integrating best international practices in counterintelligence activities.

The study's methodology is based on an interdisciplinary approach that combines several key methods: analysis and generalisation of scientific sources, the comparative-legal method, a systems-structural approach and the modelling method.

The analysis of scholarly works, international agreements and normative-legal acts allowed for key trends in the legal regulation of counterintelligence activities to be identified. The comparative-legal method was used to study the legal systems of leading countries, particularly the legal foundations of the work of counterintelligence agencies, mechanisms of democratic oversight and the protection of human rights.

The systems-structural approach provided a comprehensive understanding of international experience and its potential for integration into national legislation. In light of Ukraine's contemporary security challenges, the modelling method was applied to develop specific recommendations for adapting best practices.

Thus, the chosen methods allowed for a comprehensive examination of the subject, identification of effective approaches and formulation of practical proposals for improving the Ukrainian legal framework.

Artificial intelligence was used exclusively for grammar checking in the preparation of this article.

1. Legal support for counterintelligence activities in countries participating in the "UKUSA" agreement

The legal support for counterintelligence activities in countries participating in the "UKUSA" Agreement – United Kingdom (UK), United States (U.S.), Canada (CA), Australia (AU) and New Zealand (NZ) – has distinct features, based on the principles of cooperation in the fields of intelligence and counterintelligence as outlined by this agreement.

The UK and the U.S. have different types of organisations that protect national security from espionage and terrorist threats. In the UK, the Security Service (MI5, 2024) is relied upon, a purely counterintelligence agency without law enforcement powers, while in the U.S., the Federal Bureau of Investigation (FBI, 2024) serves as a law enforcement agency with counterintelligence functions (Kalkavage and Hulnick, 2014).

The historical development of MI5 has continuously refined counterintelligence work since its inception. Unlike MI5, the history of the FBI reveals an organisation that was initially created for law enforcement purposes and has never been a purely counterintelligence service under the pressure of the U.S. government. This pressure refers to the oversight by the U.S. Department of Justice, to which the FBI belongs, although this is a relatively formal subordination. Such pressure or control from lawyers, which primarily focuses on ensuring legal compliance in procedural actions, can result in breaches of secrecy. In contrast to the American organisation, MI5, which lacks the authority to conduct investigations, is focused on executing counterintelligence activities. This led to more significant efforts to protect the secrecy of its missions, causing MI5 to lose trust in cooperating law enforcement agencies and preventing the full exchange of operational data or joint counterintelligence operations. MI5 has never had law enforcement powers (except for a brief period in the 1990s), whereas the FBI has held such powers since the mid-1930s. Both organisations were similar in the sense that they were both tasked with combating international and domestic terrorism.

The counterintelligence organisations of MI5 and the FBI therefore have respective strengths and weaknesses, which contribute to understanding the key differences between the counterintelligence systems of the U.S. and the UK. A key advantage of MI5 is its focus on conducting counterintelligence activities. In contrast, the FBI's advantage lies in its broader powers, including the ability to investigate crimes against national security.

The modern system of legal regulations that forms the legal basis for the organisation and activities of U.S. counterintelligence can be presented as seen below.

The legal framework for organising and conducting counterintelligence activities in the U.S. is grounded in the U.S. Constitution, which sets out the fundamental principles and structural models of the legal order. It is further elaborated through federal statutes, subordinate regulatory acts, presidential instruments (including executive orders, directives and memoranda), orders and directives issued by agencies subordinate to the President and the strategies, executive documents and directives of the U.S. intelligence and counterintelligence community (Kravchenko, 2018).

It should be noted that in the U.S., the subjects of counterintelligence activities are members of the intelligence community, whose activities are regulated by corresponding normative-legal acts, with the key ones being the public laws "National Security Act" No. 235 (1947) and "The Intelligence Reform and Terrorism Prevention Act" No. 108-458 (2004).

The FBI is the leading agency for detecting, preventing and investigating espionage activities against the U.S. It is responsible for overseeing and integrating the efforts of law enforcement and U.S. intelligence agencies to ensure the utilisation of all available resources to accomplish assigned tasks.

The tasks of FBI counterintelligence work are the protection of the U.S. intelligence community's secrets; the safeguarding of the nation's critical assets-including advanced technologies and sensitive information across the defence, intelligence, economic, financial, healthcare, scientific and technological sectors; the countering of foreign espionage activities; and the prevention of the proliferation of weapons of mass destruction (Federal Bureau of Investigation, 2024).

The National Security Branch (NSB) of the FBI directly carries out counterintelligence activities (Federal Bureau of Investigation, 2024), protecting the U.S. from foreign intelligence and espionage operations through investigations and cooperation with local law enforcement agencies and other members of the U.S. intelligence community.

The NSB consists of units focused on combating terrorism, counterintelligence, intelligence management and weapons of mass destruction.
In addition to the FBI, 17 other well-known U.S. agencies have authority in the sphere of counterintelligence; some of them operate independently, while others form part of the relevant ministries and departments. For example, the U.S. Department of Defense includes at least nine specialised agencies.

Ukrainian scholar Roman Kravchenko (2018) emphasises the fact that according to Order No. 381-20, the U.S. Army has implemented a Counterintelligence Program (Headquarters, Department of the Army, 1993), which outlines that the Army conducts offensive, comprehensive and coordinated counterintelligence activities aimed at detecting, verifying, assessing, countering and preventing foreign intelligence operations, sabotage, subversion, terrorist activities and threats from foreign states, organisations, or individuals against the lives of Army personnel, military equipment and combat capabilities. According to this order, the Deputy Chief of Staff for Intelligence oversees counterintelligence within the Army and implements the Army's Counterintelligence Program. The U.S. Army Commander, along with the Commanders of European, Pacific, Southern and other commands, carries out counterintelligence operations and investigations within their areas of responsibility under the technical oversight of the relevant control departments. Reserve and National Guard commanders conduct relevant counterintelligence activities during mobilisation periods and are responsible for the annual counterintelligence training of Reserve personnel (Kravchenko, 2018). Therefore, counterintelligence is highly integrated into Army structures and subordinated to the military leadership of the U.S. Army.

Justin Harber (2009) argues that for U.S. counterintelligence, understanding the intelligence goals and capabilities of adversaries is crucial and the United States Intelligence Community (USIC) must be prepared to take offensive action, including infiltrating enemy networks and notable service organisations. This tactic of counterintelligence, known as offensive infiltration, serves almost the same function as the work of external intelligence: it uncovers the adversary's capabilities, priorities and operational effectiveness. Perhaps most importantly, it allows the opportunity to disrupt enemy actions through counterintelligence measures such as disinformation. The tactic of offensive counterintelligence involving disinformation measures, as discussed by Harber, is somewhat analogous to the «active measures» employed by the special services of an aggressor state (Tyshchuk, 2024).

Continuing the topic of offensive counterintelligence, it is essential to highlight the words of Frederick Wettering, who points out that the most effective sources for detecting spies in the U.S. are defectors and the spies themselves. Additionally, effective results are achieved through agent-based counterintelligence measures aimed at recruiting personnel from hostile intelligence agencies to identify spies within the U.S. intelligence community (Wettering, 2000).

Although offensive counterintelligence remains one of the best opportunities for the U.S. intelligence community to detect threats to national security, according to Justin Harber, intelligence officials face numerous challenges when infiltrating networks and organisations of hostile intelligence services. For example, U.S. national intelligence agencies are relatively inert targets for adversaries. Their officers often follow similar (standard) tactics resulting from uniform training (Harber, 2009). This points to the need to expand the range of counterintelligence measures and continually alter the algorithms used in their implementation.

All entities involved in intelligence and counterintelligence activities in the U.S. interact within the intelligence community, which is overseen by the Office of the Director of National Intelligence (ODNI), directly reporting to the U.S. president Office of the Director of National Intelligence (n.d.). The structural body of the ODNI is the National Counterintelligence and Security Center (NCSC), which manages national counterintelligence for the U.S. government within the intelligence community.

In light of the above, we can conclude that the FBI is the leading agency for detecting, preventing and investigating intelligence-subversive activities against the U.S. At the same time, the NCSC oversees

national counterintelligence within the U.S. intelligence community for the government (National Counterintelligence and Security Center, 2024).

In addition, it is worth mentioning the counterintelligence powers of one of the U.S. border agencies, the Coast Guard (CG), which is part of the Department of Homeland Security (DHS). The CG has its counterintelligence unit, the Coast Guard Counterintelligence Service (CGCIS). The CGCIS provides counterintelligence support for the Coast Guard's border special operations, protecting personnel, information systems and assets from external enemy intelligence, as well as from the intelligence efforts of terrorist organisations, drug trafficking structures and other organised criminal groups, enemies and spies, as well as from real threats. Furthermore, the CGCIS is responsible for detecting, documenting and investigating non-governmental organisations involved in intelligence-subversive activities and attempting to acquire crucial information about the CG's operations, capabilities, plans and personnel (Coast Guard Counterintelligence Service, 2024).

The UK government has intelligence services with counterintelligence powers within several government departments. These agencies are responsible for gathering and analysing external and internal intelligence information, conducting military intelligence, counteracting espionage and counterintelligence activities. Their intelligence assessments contribute to the conduct of the UK's foreign relations, maintaining national security, military planning and law enforcement activities within the UK. The primary organisations include the Secret Intelligence Service (MI6, 2024), MI5, Government Communications Headquarters (GCHQ, 2024) and Defence Intelligence (DI, 2024).
The Security Service MI5 is the UK's internal intelligence and security agency, part of its intelligence system. MI5 is overseen by the Joint Intelligence Committee (JIC, 2024), supported by the Joint Intelligence Organisation (JIO, 2024), within the Cabinet Office. MI5 is focused on protecting the UK's parliamentary democracy and economic interests and combating terrorism and espionage within the UK (National Intelligence Machinery, 2010).

The legal basis for counterintelligence activities in the UK consists of: The Security Service Act 1989, which entered into force on December 18, 1989 and the Intelligence Services Act 1994, effective from November 2, 1994, together form the foundation of the United Kingdom's counterintelligence legislation. The first section of the Security Service Act 1989 defines the principal function of the leading counterintelligence agency, MI5, as ensuring national security through the prevention and suppression of threats such as espionage, terrorism and sabotage, as well as activities conducted by agents of foreign states or efforts aimed at undermining or overthrowing parliamentary democracy by political, military, or violent means.

The following paragraph of this Act adds the function of "protecting the economic well-being of the UK from threats arising from the actions or intentions of individuals outside the British Isles."

The Security Service Act 1996 amended the previous law, supporting the police and other law enforcement agencies in preventing and investigating serious crimes (Security Service Act, 1996).

Another UK intelligence agency, Defence Intelligence (DI), is also worth mentioning. This organisation is part of the UK's intelligence community and focuses on collecting and analysing military intelligence. Unlike other British intelligence agencies (MI6, GCHQ and MI5), DI is an integral part of the Ministry of Defence rather than a separate entity. The agency employs civilian and military personnel and is funded through the UK's defence budget. Within the Ministry of Defence's Intelligence structure is a counterintelligence directorate whose staff have the appropriate authority to conduct counterintelligence activities (Defence Intelligence, 2024).

Counterintelligence in the UK assesses the country's vulnerability to foreign espionage, monitors sabotage activities and identifies individuals who intend to undermine the established government system. Security measures may be taken based on counterintelligence data. Still, the primary function of counterintelligence is to obtain information on the plans, operations and capabilities of organisations intending to carry out subversive activities. Counterintelligence is conducted in three overlapping

phases: detection, or the recognition of specific factual or obvious evidence of subversive activities; investigation or gathering more evidence; and analysis, which arranges the information in such a way that it can be used. Detection methods include surveillance, publicity (informing the public about the threat of subversive activities) and communication, which allows counterintelligence agencies to cooperate with other public and private security services to maximise the scope of surveillance in detecting subversive activities or legitimate subversive operations (King, 1993).

Matthew Kalkavage and his thesis advisor, Professor Arthur Hulnick, believe that the counterintelligence of the UK is characterised by a focus on recruiting enemy spies and intelligence officers, which, in turn, requires a high level of professionalism from special services personnel in handling double agents. American scholars discuss this element of offensive counterintelligence ("active measures") in the works we mentioned earlier. However, British counterintelligence, due to historical traditions and differences in the powers of the leading national counterintelligence organisations MI5 in the UK and the FBI in the U.S., views the counterintelligence measures of recruitment and working with double agents as a distinct area of counterintelligence activity and strives to excel in this regard (Kalkavage and Hulnick, 2014).

The complexity and ambiguity of working with double agents are highlighted by the words of James Angleton, the former head of counterintelligence at the U.S. Central Intelligence Agency (CIA), who described counterintelligence as a "desert of mirrors." This phrase, borrowed from Thomas Eliot, aptly depicts the endless complexity of possibilities in this mirrored world of distortions. It attempts to understand and outwit the enemy, where it is unbearably difficult to implement the necessary counterintelligence measures. Counterintelligence is a world of truth, lies and deception intertwined in sophisticated ways. As a result of this reality, the leadership of counterintelligence agencies is obliged to strictly adhere to secrecy measures and take additional counterintelligence steps to ensure that double agents provide reliable information. Should they betray them, the damage would therefore be limited to local consequences (Robarge, 2009).

Daniel Lomas and Stephen Ward point out that secrecy has become a core principle for the UK intelligence services due to the focus on working with double agents. Only recently have these intelligence agencies operated in the shadows, not officially recognised by the UK government and lacking the legal foundation at the legislative level. Now, more information about British intelligence is available than ever before and its activities are supported by relevant legislative acts (Lomas & Ward, 2022). This situation is quite similar to our state's, considering the lack of legal and regulatory framework for counterintelligence activities during the Soviet and post-Soviet periods (Table. 1).

Parameters	FBI	MI5
Date of Establishment	July 26, 1908	October 1, 1909
Jurisdiction	National, with limited overseas activity for international investigations	Exclusively national, coordinates international activities through MI6 and GCHQ
Main Functions	Counterintelligence, counterterrorism, organised crime, cyber threats, corruption, intellectual property protection	Counterintelligence, counterterrorism, monitoring extremism, protecting critical infrastructure
Organisational Structure	Over 35,000 employees, including special agents, analysts, technical staff	Approximately 4,500 employees: analysts, operatives, technical specialists
Subordination	U.S. Department of Justice, directly under the control of the FBI Director	The Director reports directly to the UK Prime Minister.
International Cooperation	Joint operations with INTERPOL, EUROPOL, UKUSA partners, bilateral agreements with allies	Close coordination with MI6, GCHQ and other UKUSA partners

Powers	Authorised to make arrests, conduct searches, participate in legal proceedings, initiate criminal cases	Collects intelligence, no authority for arrests or initiating criminal cases
Operational Approach	Operational activities, including covert operations, use of technical means, cooperation with witnesses	Focus on analytical activities, threat prevention and involving individuals.
Funding	Over $10 billion annually (2023)	Approximately £0.6 billion annually (2023)
Management Features	Distributed system with 56 field offices over 350 regional branches, including headquarters in Washington	Centralised management, headquarters in London
Key Tools	Analytical systems, databases, biometric technologies, specialised surveillance programs	Integrated intelligence systems, technical means for communication monitoring
Legislative Basis	Foreign Intelligence Surveillance Act (FISA), sections 18 and 28 of the U.S. Code	Intelligence Services Act 1989, Human Rights Act 1998
Priorities	Counterterrorism, preventing cybercrime, investigating financial fraud	Countering domestic terrorism, protecting national security, analysing extremism threats

Table 1. Comparison of FBI and MI5.

The Canadian Security Intelligence Service (CSIS, 2024) is responsible for counterintelligence functions in Canada. The legislation regulating the activities of CSIS includes the Canadian Security Intelligence Service Act (1984). This act grants the agency the authority to collect and analyse information about national security threats, including terrorism and espionage. Additionally, the Access to Information Act is essential as it provides a certain level of transparency in the operations of intelligence services.

In AU, counterintelligence tasks are carried out by the Australian Security Intelligence Organisation (ASIO, 2024), which operates under the Australian Security Intelligence Organisation Act (1979). According to this law, ASIO can conduct surveillance, wiretapping and other operational measures to combat terrorism, espionage and other national security threats. However, these actions require court approval or the authorisation of specific government agencies to protect citizens' rights.

In New Zealand, counterintelligence activities are carried out by the New Zealand Security Intelligence Service (NZSIC, 2024). Legislative acts, such as the Intelligence and Security Act (2017), define the functions and powers of NZSIC, allowing it to conduct operational measures to identify national security threats, including terrorism and espionage. These measures can only be carried out with the approval of relevant government bodies, ensuring oversight of the intelligence agencies' activities.

All countries signatories to the UKUSA Agreement have legislative provisions ensuring cooperation in intelligence and counterintelligence, as well as restrictions on the use of specific methods such as surveillance and wiretapping. At the same time, each of these countries maintains a balance between national security and citizens' rights, notably through judicial oversight or the need to obtain special authorisations for conducting such operations. An essential role in this process is played by international cooperation within the framework of the UKUSA Agreement, which allows for exchanging information on national security threats and coordinating counterintelligence measures between the countries.

2. The legal framework for counterintelligence activities in European Union countries

Studying the international experience of conducting counterintelligence activities opens up new opportunities for improving the counterintelligence system in the context of its adaptation to the overall European security space requirements. The progressive achievements of countries demonstrating high

professional training for special services personnel and operational units aligned with global standards are exciting to see. These countries have rich historical traditions of special services, which contributes to their leading role in counterintelligence and intelligence activities at both regional and global levels, as well as accumulating significant experience in the professional training of operational personnel to counter new threats to national and state security.

Modern counterintelligence activities in EU countries face enhanced foreign espionage threats, particularly from the aggressor state and the People's Republic of China (PRC). Following the aggressor's invasion of Ukraine, counterintelligence has gained priority status, highlighting the need to improve the legal framework for protecting state interests and EU security. A significant portion of espionage activity is concentrated in Northern Europe, leading to various legal approaches to combat foreign intelligence operations within the EU framework.

Empirical data on espionage in Europe highlights the limited scope of comparative studies in this field, whereas in-depth case studies dominate those that are available. While individual studies help understand the complexity of spies' motivations and the peculiarities of their recruitment, they need to allow for the assessment of the representativeness of specific cases or for forming a comprehensive picture. Available statistical analyses focused on European countries show a predominance of men among convicted spies, with material gain being the dominant motivation and an increasing influence of particular states as initiators of espionage. Most spies are middle-aged individuals, often with experience in military or intelligence fields, although there are also a small number of women. Material incentives are generally accompanied by pressure or threats, although only a few spies receive financial rewards. About 75% of spies are civilians, indicating the growing significance of illicit activities in espionage. The issue of limited access to data complicates comprehensive analysis and existing studies only scratch the surface of the problem, leaving room for hidden cases of espionage (Jonsson, 2023).

Differences between European and American spies manifest in the activity of intelligence-gathering countries. Between 1990 and 2015, the PRC emerged as the primary driver of espionage against the U.S., while the aggressor country remained the leading initiator in Europe, accounting for 37 out of 42 espionage cases. In 2022, despite the rise in Chinese activity, espionage by the aggressor country significantly escalated against the backdrop of the war in UA, with a particular focus on the Baltic states. The situation is further complicated by the uneven geographical distribution of espionage cases and contemporary legislation and political decisions regarding counterintelligence, which influence the number of convictions. In this context, the EU Counterintelligence Course (EUCIC) is a critical tool that provides integrated training for counterintelligence professionals. The course targets professionals with experience in intelligence, investigations and management of agents, aiming to improve skills in line with international and regional standards. Key components of the course include modern counterintelligence methods, security and information analysis, emphasising ethical norms and legal frameworks essential for improving the effectiveness of combating espionage.

A distinctive feature of the course is its inclusion of e-learning modules alongside practical sessions, available as on-site training in Vienna and online. The program covers foundational and advanced aspects of counterintelligence operations, such as mobile and progressive surveillance, working with informants, countering cyber threats, deception and special operations. Candidates also receive comprehensive training in international law and the ethical principles of counterintelligence activities. EUCIC is accredited according to European standards, serving as a benchmark of professional competence in counterintelligence. Thanks to special discounts for distance learning, group bookings and membership, the program remains accessible to various organisational groups, ranging from representatives of government institutions to non-profit organisations and the private sector.

The program's developers believe that the EU Counterintelligence Course provides participants with comprehensive and benchmark training that meets the demands of the modern threat environment and enhances their ability to address the European security community's diverse challenges (Intelligence Academy, 2024).

Counterintelligence functions in the French Republic (FR) are carried out by the General Directorate for Internal Security (GDIS, 2024), established as part of intelligence community reforms through modernisation efforts (Zakharov et al., p. 11-23).

The powers of the GDIS FR exemplify classical approaches to building a counterintelligence system in a democratic country (Ministère de l'Intérieur, 2014), combating foreign interference, including the activities of foreign intelligence services; preventing and stopping acts of terrorism or actions that undermine state security, territorial integrity, or the functioning of French state institutions; preventing and countering actions that expose national classified information or information related to the country's economic, industrial, or scientific potential; monitoring individuals, social movements, groups and organisations engaged in subversive activities or posing a threat; counteracting the unauthorised proliferation of weapons of mass destruction; overseeing the activities of international criminal organisations that may threaten national security; preventing and addressing crimes related to information technologies and communication systems.

At the same time, contrary to international standards, the GDIS is vested with pre-trial investigation functions and can carry out the full range of operational measures typically conducted by structures under the Ministry of Internal Affairs, including the National Police, as stipulated by legislation. The GDIS includes an operational search unit tasked with carrying out arrests, searches and other active operational measures (Zakharov et al., p. 11–23). Thus, the affiliation of this unique service in the FR with the Ministry of Internal Affairs has resulted in law enforcement functions and powers similar to those of the FBI in the U.S.

The reform of France's internal exceptional service attempts to adapt structures established in the 20th century to modern requirements and threats. High-profile terrorist attacks on French soil have become the primary indicator of the success or failure of the GDIS's activities. In most cases, the exceptional service had information about potential terrorists who later became the organisers or perpetrators of terrorist acts in France, yet failed to take practical steps to prevent their plans. As a result, the GDIS is under constant strict control by political forces, particularly the opposition in parliament. This leads to ongoing transformations of the service in its search for the optimal operation model in current conditions (Zakharov et al., p. 11-23).

The exceptional service of the Federal Republic of Germany (FRG) – the Federal Office for the Protection of the Constitution (FOPC, 2024) is part of the Federal Ministry of the Interior. The FOPC is an example of an internal exceptional service with counterintelligence powers. Its primary mission is to protect the state and society from threats that aim to undermine the free democratic order; endanger the existence of the FOPC, the FRG, or any of the federal states; impede the operation of state authorities; act against the FRG's national interests abroad – including through the use of violence; and weaken the foundations of international understanding, particularly the peaceful coexistence of nations.

In addition, the competencies of the FOPC FRG include countering the intelligence and subversive activities of foreign intelligence services, protecting against sabotage and preventing access to confidential information.

The FOPC FRG places particular emphasis on countering far-right, including neo-Nazi parties, far-left, Islamist and other extremist organisations, primarily involving foreign nationals. At the same time, the FOPC FRG is not authorised to conduct pre-trial investigations.

The exceptional service of the Republic of Poland (RP) – the Internal Security Agency (ISA), established in 2002, is responsible not only for counterintelligence tasks, counterterrorism and the protection of state secrets but also for combating the illegal drug trade, organised crime, corruption and economic crimes. Among other duties, the ISA oversees the use of EU funds by Polish state authorities. It monitors the financial activities of government structures, including, for example, the General Directorate for National Roads and Motorways. In contrast to recommended international standards, the ISA is

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terrorism and transnational organised crime, rather than duplicating law enforcement or anti-corruption agencies (Table. 2).

Category	Details	Examples and Sources
General Characteristics	High level of professional training for intelligence agency personnel, adaptation to the European security space	Focus on combating foreign espionage threats, particularly from the PRC and the aggressor country.
Main Challenges	Rise in foreign espionage, increased activity of the aggressor country and the PRC	Central activity regions: Baltic states, Northern Europe
	Uneven geographic distribution of espionage cases	The aggressor responsible for 37 out of 42 espionage cases in Europe (1990–2015)
Counterintelligence Models	EU countries integrate counterintelligence into state structures, considering historical and current demands.	Practical examples: GDIS (FR), FOPC (FRG), ISA (PL)
	Differences in pre-trial investigation approach: GDIS has investigation functions, but FOPC needs such powers.	GDIS performs law enforcement functions similar to the FBI
Counterintelligence Training	EU Counterintelligence Course (EUCIC) – a program for improving the qualifications of counterintelligence specialists according to international standards	Practical sessions in Vienna, online modules, accreditation according to European standards
	Main components: counterintelligence methods, working with informants, countering cyber threats, international law and ethics	The course is available for state authorities and the private sector.
Counterintelligence Services (FR)	General Directorate for Internal Security (GDIS): combating foreign espionage, terrorism, protecting national secrets, countering the spread of WMD	Conducting operational measures, arrests and searches; monitoring terrorist threats
	Under strict parliamentary control, reforms were triggered by terrorist attacks.	Drawbacks: In most cases, the service knew about terrorists but failed to prevent attacks
Counterintelligence Services (Germany)	Federal Office for the Protection of the Constitution (FOPC): protecting democracy, countering sabotage, extremism and subversive intelligence activities	Primary focus: far-right, Islamist organisations, protection from foreign influence
	Lacks pre-trial investigation functions, focuses on prevention and information monitoring	Special attention to neo-Nazi parties and transnational extremist groups
Counterintelligence Services (Poland)	Internal Security Agency (ISA): countering espionage, terrorism, corruption and economic crimes; controlling the use of EU funds	Similar to post-Soviet services, it has pre-trial investigation functions.
	Military Counterintelligence Service (MCS): protecting combat readiness, countering military crimes and cryptographic information control	Interaction with military police, intelligence in the defence sector

Issues and Recommendations	Powers of some services (GDIS, ISA) regarding pre-trial investigations may not meet international standards and pose a risk to human rights.	Recommendations: improving effectiveness through adherence to human rights and international standards
	There is a need for modernisation of services to adapt to modern threats and transnational crime.	Priority: transitioning to modern operational formats with democratic civilian oversight

Table 2. Counterintelligence Activities in EU Countries.

3. Specific legal aspects of counterintelligence activities in Asian countries

In Asian countries, the legal regulation of counterintelligence activities depends on the specifics of state policies and the influence of geopolitical factors. In the People's Republic of China (PRC), the leading agency responsible for counterintelligence operations is the Ministry of State Security (MSS), which has extensive powers to combat threats to national security. The legislation grants it broad authority to carry out various counterintelligence measures, including controlling information flows and monitoring suspicious individuals without a judicial warrant. Under the guise of national security, deep penetration into citizens' data takes place, allowing the MSS to conduct comprehensive analytical operations to identify potential risks (Welch, 2011).

The PRC Anti-Spionage Law (Table 3), which came into effect on July 1, 2023, is a crucial component of the country's legal framework for counterintelligence activities. It significantly expands the powers of relevant agencies, particularly the Ministry of State Security (MSS), providing them with even greater capabilities for controlling information flows and identifying threats to national security. The updated law also strengthens the data collection and protection requirements, significantly affecting foreign companies and individuals working in the PRC.

Category	Details	Examples and Sources
Purpose of the Law	Expanding the scope of protection ("criminalisation") of national security	Strengthening "judicial sovereignty"
Key Changes in the Law	New categories of espionage activity were added, including a collection of commercially significant data.	Article 4(3) covers information previously not considered state secrets (e.g., market data)
	Cyberattacks targeting state organs, infrastructure, or classified information are also considered espionage.	New provisions regarding attacks on critical information infrastructure
Recent Law Enforcement Actions	Raids on consulting firms' offices (Mintz Group, Bain & Co, Capvision) are suspected of gathering information that could threaten national security from the PRC.	The raid at Capvision's office was broadcast live on state media.
	Police seized data, arrested employees and shut down company operations	In the case of Mintz Group, raids led to the closure of the office in Beijing
Scope of the Law	This applies to companies operating in the PRC or processing data related to strategic sectors (e.g., healthcare, technology)	Applies to data with potential value for national security
	Controls the transfer of data abroad, especially in the context of research, mergers and acquisitions (M&A)	The law restricts the transfer of personal data to foreign judicial or law enforcement bodies without permission.

Risks for Foreign Companies	Potential classification of regular commercial activity as espionage (e.g., market research or technology sharing)	Bain & Co. and Capvision were investigated on suspicion of facilitating illegal data collection.
	Increased costs for ensuring compliance with data security legislation	Need for constant monitoring of data sources and compliance with local requirements
Impact on National Security	The law supports the protection of critical information and infrastructure, but it increases tensions in international relations.	Conflicts over restrictions on data transfer between the PRC and international partners
Recommendations for Companies	Strengthen internal protocols: implement data protection policies and avoid unauthorised use of third parties.	Create internal guidelines to prevent data leaks.
	Risk assessment: review supply chains, especially when cooperating with state or suspicious organisations	Bain & Company recommends thorough vetting of third-party agents.
	Investigation protocols: ensure confidentiality of data during international transfer, including anonymity and encryption	Use of anonymised data when working with foreign judicial bodies
Judicial Sovereignty	Prohibition of providing evidence or data stored in the PRC to foreign judicial bodies without government approval	Examples of restrictions in DSL laws (Art. 36), PIPL (Art. 41), ICJAL
Laws Related to CEL	Cybersecurity Law (2017), Data Security Law (2021), Personal Information Protection Law (2021)	Establish standards for data processing and restrict the transfer of confidential information.

Table 3. Changes in China's Anti-Espionage Law and Their Impact (Lamp et al., 2023).

In the Japanese State (JS), counterintelligence activities are carried out by several unique services, with a significant role played by the National Police Agency Security Bureau (NPASB, 2024). The special services in JS operate within stricter legal frameworks, which require judicial oversight of their operations, particularly when intercepting secret communications or conducting searches. To carry out such actions, the agency must obtain a court order to protect citizens' rights and minimise the risk of violations. Additional oversight by the prosecutor's office contributes to more effective compliance with the balance between state interests and individual rights.

In the Republic of India (RI), counterintelligence tasks are carried out by the National Intelligence Bureau (NIB, 2024), one of the oldest intelligence agencies in the world. The primary function of the NIB is to detect threats from foreign intelligence services and counterterrorism. Indian legislation grants NIB broad powers to implement counterintelligence measures, such as phone tapping and surveillance of suspected individuals, making it an effective tool for ensuring national security. However, there is an ongoing public debate regarding the scope of these powers, particularly regarding measures that may infringe on citizens' rights. Despite the existing legal constraints, NIB enjoys government support, allowing it to respond swiftly to national security threats, especially in the face of growing regional risks.

In the Republic of Korea (RK), counterintelligence activities are carried out by the National Intelligence Service (NIS, 2024), which, in addition to protecting against external threats, conducts domestic oversight to prevent espionage activities. Legal regulations limit its actions regarding citizens' personal information, requiring the NIS to obtain court approval for certain types of intelligence activities, such as phone tapping and searches. The legislation of the Republic of Korea regulates the responsibility of special services for abuse of power, which promotes greater transparency and prevents interference in citizens' private lives without proper justification.

In the Republic of Singapore (RS), the role of the counterintelligence agency is performed by the Internal Security Department (ISD, 2024), which has significant powers to combat terrorism and espionage. The ISD has the authority to indefinitely detain suspects without a court warrant if it is deemed necessary in the interests of national security. This legislative provision ensures operational efficiency, but at the same time, raises concerns among international human rights organisations regarding potential violations of human rights.

Thus, the legal aspects of counterintelligence activities in Asian countries demonstrate significant differences in the approaches to regulating intelligence agencies, ranging from democratic constraints in JS and RK to more authoritarian methods in PRC and RS. A common feature across most countries is the attempt to ensure effective counterintelligence in the face of growing international threats. Still, protecting citizens' rights, transparency and oversight of intelligence agencies vary considerably.

4. Proposals for the application of international experience in the legal provision of counterintelligence activities

Integrating the national counterintelligence system into the European and global security space has necessitated the search for and implementation of new approaches to the legal provision of counterintelligence activities based on preserving national achievements and utilising the best practices of global experience. This is emphasised in modern strategic documents of Ukraine, including the National Security Strategy of Ukraine (Melikhov et al., 2021) and Strategies for ensuring state security (2022).

The issue of defining international experience related to implementing counterintelligence measures lies in Ukraine's understanding of national security services, which significantly differs from Western approaches. Specifically, in Western practice, the concept of "intelligence" services generally includes structures that deal with both intelligence (foreign intelligence) and counterintelligence (domestic intelligence) to gather information related to national security threats. Accordingly, the requirements and standards for the activities of intelligence and counterintelligence agencies are based on the same principles of human rights protection and adherence to the rule of law. In other words, in Western practice, there is typically no distinction between "more important" or "more universal" special services. Special services are not categorised by departmental affiliation or functional areas. Each unique service has specific tasks within strict legislative frameworks and under constant democratic civilian oversight. Significantly, this approach not only does not diminish their effectiveness and does not hinder continuous development and improvement, but on the contrary, it leads to continuous updating, modernisation and prevention of abuse (Zakharov et al., p. 11-23).

Alongside this, studying foreign experience in carrying out counterintelligence activities has allowed us to conclude that the aspects set out below could be informative and valuable for domestic legislators.

The experience of the U.S., where the counterintelligence system operates quite successfully, integrated into most key state agencies, primarily those with military and law enforcement orientations, is particularly valuable. The FBI is leading the organisation and coordination of counterintelligence activities in the U.S. At the same time, overall leadership is provided by the interagency body – the NCSC, which is part of the ODNI structure.

The experience of the UK, where counterintelligence is conducted in three overlapping phases, is noteworthy: detection, or the recognition of specific factual or apparent evidence of subversive activities; investigation, or the clarification of additional evidence; analysis, which organises the information in such a way that it can be used within a mechanism for protection of witnesses and victims.

It should be noted that intelligence agencies occupy a special place in the security and defence sector of a democratic state. Despite the varying interpretations and structural peculiarities of special services in each country, there is a common understanding that intelligence agencies are government departments responsible for collecting, processing, analysing and delivering specialised information to relevant state structures that ensure national security. The information provided by intelligence agencies is crucial in

formulating strategic decisions by the country's top leadership and directly influences the functioning of the state, both in domestic and foreign policy (Zakharov et al., p. 11-23).

Conclusions

The comparative assessment of counterintelligence regimes in UKUSA member states, major European jurisdictions and selected Asian systems reveals a set of institutional and legal elements essential for reforming Ukraine's counterintelligence framework. Despite their differing political traditions, effective models consistently combine a clear division of competences, judicial authorisation for intrusive measures and structured oversight mechanisms ensuring transparency and legal restraint.

The contrast between the People's Republic of China and the Republic of India illustrates the boundaries of institutional design. The Chinese model, centred on the Ministry of State Security and not restrained by judicial review, demonstrates the systemic risks of concentrated power and unchecked surveillance. Conversely, India maintains extensive intelligence powers under parliamentary scrutiny, demonstrating that operational effectiveness can coexist with democratic control. For Ukraine, these cases delineate both the practices to be avoided and the benchmarks to be pursued.

Establishing an independent counterintelligence body modelled on the British MI5 – devoid of investigative powers yet operating under strict secrecy – would prevent duplication of functions and strengthen institutional neutrality. Judicial warrants, as required in Japan and the Republic of Korea, should become a prerequisite for any interference with private life, while continuous parliamentary and ombudsman oversight, following the Canadian and Australian examples, would reinforce accountability and public trust.

Further reform should prioritise professional education grounded in legal ethics, cyber counterintelligence and human-rights compliance, alongside the alignment of legislation with GDPR (General Data Protection Regulation) standards on personal data protection. The creation of an independent Human Rights Ombudsman for the security sector would institutionalise preventive monitoring and redress mechanisms.

Collectively, these measures would enable Ukraine to establish a modern, rights-based and resilient counterintelligence architecture consistent with democratic governance and capable of responding effectively to hybrid and technological threats.

References:

Australian Security Intelligence Organisation. (2024). *Australian Security Intelligence Organisation*. https://www.asio.gov.au/
Australian Security Intelligence Organisation Act. (1979). https://www.legislation.gov.au/C2004A02123/latest/versions
Bryja, T. (2024). Winning the Race: The Case for Counterintelligence against Chinese Espionage. *Georgetown Security Studies Review*. https://gssr.georgetown.edu/the-forum/topics/intel-natsec/winning-the-race-the-case-for-counterintelligence-against-chinese-espionage/
Canadian Security Intelligence Service. (2024). *Canadian Security Intelligence Service*. https://www.canada.ca/en/security-intelligence-service.html
Central Anti-Corruption Bureau. (2024). *Central Anti-Corruption Bureau*. https://cba.gov.pl/en
Coast Guard Counterintelligence Service. (2024). *Coast Guard Counterintelligence Service*. https://www.dco.uscg.mil/Our-Organisation/Intelligence-CG-2/
Defence Intelligence. (2024). *Defence Intelligence*. https://www.gov.uk/government/groups/defence-intelligence
Federal Bureau of Investigation. (2024a). *Federal Bureau of Investigation*. https://www.fbi.gov/
Federal Bureau of Investigation. (2024b). *Federal Bureau of Investigation*. https://www.fbi.gov/?came_from=https%3A//www.fbi.gov/about/leadership-and-structure/national-security-branch

Federal Office for the Protection of the Constitution. (2024). *Federal Ministry of the Interior and Community*. https://www.verfassungsschutz.de/EN/home/home_node.html
General Directorate for Internal Security. (2024). *Direction générale de la sécurité intérieure*. https://www.dgsi.interieur.gouv.fr/
Government Communications Headquarters. (2024). *GCHQ*. https://www.gchq.gov.uk/
Harber, J. R. (2009). Unconventional spies: The counterintelligence threat from non-state actors. *International Journal of Intelligence and Counterintelligence, 22*(2), 221–236. https://doi.org/10.1080/08850600802698200
Headquarters, Department of the Army. (1993). *Army regulation 381–20: The Army counterintelligence program*. Washington, DC. https://irp.fas.org/doddir/army/ar381-20.pdf
Intelligence Academy. (2024). *EU Counterintelligence Course (EUCIC)*. https://ieis.eu/covert-operations-training/eu-counterintelligence-course-eucic/
Intelligence and Security Act. (2017). https://www.legislation.govt.nz/act/public/2017/0010/latest/DLM6921247.html
Internal Security Department of Singapore. (2024). *Internal Security Department*. https://www.isd.gov.sg/
Joint Intelligence Committee. (2024). *Joint Intelligence Committee*. https://www.gov.uk/government/groups/joint-intelligence-committee
Joint Intelligence Organisation. (2024). *Joint Intelligence Organisation*. https://www.gov.uk/government/groups/joint-intelligence-organisation
Jonsson, M. (2023). Espionage by Europeans: Treason and counterintelligence in post–Cold War Europe. *Intelligence and National Security, 39*(1), 77–92. https://doi.org/10.1080/02684527.2023.2254020
Kalkavage, M., & Hulnick, A. (2014). *Counterintelligence in the Kingdom and the States: A historical comparison of the FBI and MI5* (pp. 1–87). https://www.bu.edu/pardeeschool/files/2014/08/Sample-Research-Paper-2.pdf
King, D. P. (1993). Counter-intelligence and security. *Police Journal, 66*(3), 306–309. https://doi.org/10.1177/0032258X9306600311
Kravchenko, R. M. (2018). Activities of military counterintelligence in the U.S. Army: Organisational and legal aspects. *Journal Information and Law, 4*(27), 112–120. https://doi.org/10.37750/2616-6798.2018.4(27).273371
Lamp, R., Jun, Y., Wu, W., Zhou, T., & Wang, Z. (2023). China's new counter-espionage law and recent enforcement raise the data security compliance bar. *De Brauw Blackstone Westbroek*. https://www.debrauw.com/articles/chinas-new-counter-espionage-law-and-recent-enforcement-raise-data-security-compliance-bar
Lomas, D. W. B., & Ward, S. (2022). Public perceptions of UK intelligence: Still in the dark? *The RUSI Journal, 167*(2), 10–22. https://doi.org/10.1080/03071847.2022.2090426
Melikhov, O., Yatsyno, O., Shostak, V., Buniak, O., Zatolokin, S., Maslovskyi, S., Sobkovych, S., & Myshalov, D. (2022). *White Book 2021: Defence policy of Ukraine* (pp. 1–122). Ministry of Defence of Ukraine. https://mod.gov.ua/news
Military Counterintelligence Service. (2024a). *Military Counterintelligence Service*. https://www.skw.gov.pl/en/index.html
Military Counterintelligence Service. (2024b). *Military Counterintelligence Service*. https://www.skw.gov.pl/informacje-ogolne.html
Ministère de l'Intérieur. (2014). Décret n° 2014-445 du 30 avril 2014 relatif aux missions et à l'organisation de la direction générale de la sécurité intérieure. *Journal officiel électronique authentifié—Décrets, arrêtés, circulaires. Textes généraux*, 0102. https://www.legifrance.gouv.fr/download/pdf?id=E_GVwww232XgTyjxIRx_pLV83fFq1dGGtfc0nz-u5MM=
Minister of National Defence. (2024). *Minister of National Defence*. https://www.gov.pl/web/national-defence/ministry1
National Counterintelligence and Security Center. (2025). *Office of the Director of National Intelligence*. https://www.dni.gov/index.php/ncsc-home
National Intelligence Bureau. (2024). *National Intelligence Bureau*. https://www.mha.gov.in/en/centralpoliceorganisation/intelligence-bureau
National Intelligence Machinery. (2010). *National intelligence machinery* (pp. 1–38). https://www.gov.uk/government/publications/national-intelligence-machinery
National Intelligence Service. (2024). *National Intelligence Service*. https://eng.nis.go.kr/
National Security Act. (1947). https://www.dni.gov/index.php/ic-legal-reference-book/national-security-act-of-1947
National Police Agency Security Bureau. (2024). *National Police Agency Security Bureau*. https://www.npa.go.jp/bureau/security/index.html
New Zealand Security Intelligence Service. (2024). *New Zealand Security Intelligence Service*. https://www.nzsis.govt.nz/
Office of the Director of National Intelligence. (n.d.). *Members of the intelligence community.* https://www.dni.gov/index.php/what-we-do/members-of-the-ic

Verkhovna Rada of Ukraine. (2002). *On counterintelligence activities – Article 1: The concept of counterintelligence activity*. https://zakon.rada.gov.ua/laws/show/374-15?lang=en#Text
Robarge, D. (2009). The James Angleton phenomenon: "Cunning passages, contrived corridors": Wandering in the Angletonian wilderness. *Studies in Intelligence, 53*(4), 1–21. https://www.cia.gov/resources/csi/static/Cunning-Passages-Contrived-Corridors.pdf
Secret Intelligence Service. (2024). *Secret Intelligence Service*. https://www.gov.uk/government/organisations/secret-intelligence-service
Security Service Act. (1989). https://www.legislation.gov.uk/ukpga/1989/5/contents
Security Service Act. (1996). https://www.legislation.gov.uk/ukpga/1996/35
Security Service. (2024). *Security Service (MI5)*. https://www.mi5.gov.uk/
Strategies for ensuring state security. (2022). https://zakon.rada.gov.ua/laws/main/56/2022.?lang=en#Text
The CSIS Act. (1984). https://www.canada.ca/en/security-intelligence-service/corporate/legislation.html
The Intelligence Reform and Terrorism Prevention Act. (2004). *Office of the Director of National Intelligence*. https://www.dni.gov/index.php/ic-legal-reference-book/intelligence-reform-and-terrorism-prevention-act-of-2004
Tyshchuk, V. V. (2023). Features of legal differentiation of the border sphere in Ukraine: Peer-reviewed article. *Italian Review of Legal History, (9)*, 295–329. https://doi.org/10.54103/2464-8914/21918
Tyshchuk, V. V. (2024). Main Criteria for the Classification of Disinformation and Attempts to Criminalisation of Its Spread in Ukraine. *Bratislava Law Review, 8(1)*, 203-224. https://doi.org/10.46282/blr.2024.8.1.372
Welch, J. P. (2011). Chinese counterintelligence: History, tactics and case study. *American Military University*, 1–14. https://www.researchgate.net/publication/257266444_Chinese_Counterintelligence_History_Tactics_and_Case_study
Wettering, F. L. (2000). Counterintelligence: The broken triad. *International Journal of Intelligence and Counterintelligence, 13*(3), 265–300. https://doi.org/10.1080/08850600050140607
Zakharov, Y. Y., Tokariev, H. V., Stupak, I. I., Popov, I. V., Samus, M. M., Semorkina, O. M. (2021). *SBU reform: Challenges and prospects* (pp. 1–172). Ukrainian Institute for the Future. https://archive.khpg.org/en/1608809343

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.007

MILITARISED SERVICES, ARMED FORCES AND PRO-DEFENCE ORGANISATIONS OF POLAND AND LITHUANIA. SELECTED LEGAL ASPECTS

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Received: 16 April 2025; accepted: 19 November 2025
DOI: https://doi.org/10.13165/j.icj.2025.11.02.007

Abstract. The article aims to explore Polish and Lithuanian legal systems, and to analyse the legal solutions concerning militarised services, armed forces and the pro-defence organisations of Poland and Lithuania. The objective is to answer how far these solutions meet current challenges. Comparative considerations play an important role, due to their inspiring research impact. They refer to two neighbouring countries that are in a similar geopolitical situation. The scope of this article does not allow for reference to all aspects of the issue. The following section therefore deals with selected issues concerning militarised services and armed forces: the legal framework for their activities in the international context, legal conditions in national context, and their place in the security and public order system. An outline of the employment characteristics of officers and professional soldiers is also presented. The methods used in the article include a comparative legal analysis of the relevant legal frameworks and policies in Poland, Lithuania, the European Union and the North Atlantic Treaty Organization. Included reflections show that there is a considerable complexity of issues connected with the legal aspects of activities of armed forces, militarised services and pro-defence organisations in Poland and Lithuania.

Keywords: armed forces, uniformed formations, special services, pro-defence organisations, professional soldiers, officers.

Introduction

Poland and Lithuania share a long history, both recent and long ago. Not only are they neighbours, but for more than 200 years (1569-1795) they formed one of the largest states in Europe as the Polish-Lithuanian Commonwealth. Three decades ago, Poland and Lithuania concluded the Treaty on Friendly Relations and Good-Neighbourly Cooperation (1994). Since then, the two countries' relations have been characterised by their shared aspirations for integration into the North Atlantic Alliance (NATO) and the European Union (EU). These measures were implemented as part of the fundamental responsibility of every state to ensure external security by protecting the independence and inviolability of its territory, as well as internal security. The second safety role mentioned consists of many issues, such as the health and lives of citizens, protection against natural disasters, protection against terrorist threats, social security, and the predictability of the legal system. Various government institutions, companies performing public functions, and health care providers are responsible for the safety of citizens. However, armed forces, uniformed formations, and special services are the most important of these institutions. Uniformed or militarised services are commonly used to describe the latter two. In Lithuania, they are also often called statutory services (Šilinytė & Vaičiūnė, p. 163) or paramilitary services (Saudargaitė, p. 124). This concept is also appropriate in the context of Polish legal realities. Activities aimed at strengthening state security and national defence capabilities are also carried out by pro-defence organisations.

When considering current threats to state security, such as direct aggression or attacks of a hybrid nature, it is worth taking a look at the legal solutions to see how far they meet current challenges. The

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objective of this article is to examine the legal status in this regard. The article aims to explore both the Polish and Lithuanian legal systems. Comparative considerations play an important role, due to their inspiring research impact. They refer to two neighbouring countries that are in a similar geopolitical situation. The scope of this article does not allow for reference to all aspects of the issue. The following section therefore deals with selected issues.

The methods used in this article include a comparative legal analysis of the relevant legal frameworks and policies in Poland, Lithuania, the EU and NATO. The analysis involves the examination of legislative texts, legal principles, and recent amendments mainly by applying linguistic, systematic and comparative methods. AI-assisted technology was used in the preparation of this article to check grammar and spelling.

1. Legal framework for activities of armed forces and militarised services - international context

Both Poland and Lithuania successfully completed their aim to join NATO: Poland - 12.03.1995, Lithuania - 26.04.2005. NATO's fundamental and enduring objective is to guarantee the freedom and security of all its members by political and military means. NATO signatories agree that an armed attack on one or more of the member states in Europe or North America would be considered an attack against all NATO members (North Atlantic Treaty, 1949). The scale of threats influenced the creation of the NATO Response Force in 2002. Half-yearly, members prepare their units for joint operations. On 1 January 2024, the Polish Special Forces were deployed for the third time, and for the first time they led a full-scale defence operation.

The Community context resulting from Poland's and Lithuania's EU membership should also be taken into account. An integral part of the common foreign and security policy is the common security and defence policy (Treaty on the European Union, 2016). In the event of a terrorist attack or natural or man-made disaster affecting any Member State, the EU and its Member States shall act together in a spirit of solidarity (Treaty on the European Union, 2016, Treaty on the Functioning of the European Union, 2012). The operational capacity of the EU is dependent on the operational capacity of its Member States, on whose efforts the strengthening of the EU's security and defence policy depends. This is primarily implemented by armed forces and militarised services. Poland and Lithuania are also making joint efforts to ensure the security of their citizens, for example in cyber defence (Polish-Lithuanian Co-operation Agreement, 2022), the elimination of chemical and environmental accidents (Interreg VI-A Lithuania-Poland Cross-border Co-operation Programme 2021-2027, 2021), and the protection of Lithuania's border with Belarus.

2. Legal conditions of the armed forces - national context

In Poland, the fundamental objectives that should guide state bodies are enumerated in Article 5 of the Polish Constitution (Constitution of the Republic of Poland, 1997). One such objective is to ensure the safety and security of citizens. These objectives have an overarching function in the guidance and activity of public authorities (Padzik, 2018, pp. 117-118)., As fundamental constitutional values they underpin the existing legal system. The legislator has not specified in the Polish Constitution the measures necessary to achieve such objectives. However, the Council of Ministers has been specified as being responsible for ensuring internal and external security, as well as public order (Constitution of the Republic of Poland, 1997). The Polish Armed Forces are responsible for fulfilling their duty to guarantee the independence and inviolability of the country (Constitution of the Republic of Poland, 1997). They are subordinate to the President and the Ministry of National Defence (Constitution of the Republic of Poland, 1997). On the basis of Polish legislation, Act of 11 March 2022 on Homeland Defence plays a key role. This act replaced 14 laws that had previously directly addressed the Polish Armed Forces.

The Lithuanian Constitution has a provision that can be interpreted as an indication of the state's obligation to ensure the security of citizens: 'State institutions serve the people' (Constitution of the Republic of Lithuania, 1992). A provision also establishes powers for the Government of the Republic

of Lithuania to protect the territorial inviolability of the country and guarantee state security and public order. The right to security, understood as the absence of threats to personal safety and freedom from fear of violence, is recognised as a fundamental human right. In Lithuania, a law has been devoted exclusively to national security matters. In accordance with the Lithuanian Constitution, defence of the State of Lithuania against foreign armed attack is recognised as the right and duty of every citizen of the Republic of Lithuania. The organisation of the country's defence is determined by law. The Law on the Basics of National Security (1996) defines the concept contained in its title, and establishes the basis for ensuring such security, including military defence. This Act stipulates that the Commander of the Armed Forces reports to the Minister of National Defence. Issues concerning activities of the Lithuanian Armed Forces are regulated by the Law on the Organisation of the National Defence System and Military Service of the Republic of Lithuania (1998).

Both Poland and Lithuania have Military Police as a subdivision of the Armed Forces. Polish and Lithuanian Armed Forces participate in a variety of tasks that serve state security, such as rescue, counter-terrorism, and crisis management. The primary importance, however, is to protect the territory of the state, while for other structures of the state this task is ancillary. In the event of a declaration of mobilisation and in a time of war, individual units of uniformed formations may be militarised in Poland (the Police, the Border Guard, the State Protection Service) and military special services (the Military Counterintelligence Service, the Military Intelligence Service) become part of the Armed Forces by virtue of the law. In the first case, this issue was regulated in the Acts establishing the service (Act on the Police, 1990; Act on the Border Guard, 1990; Act on the State Protection Service, 2017), and in the second case, in the Act on Homeland Defence (2022). A similar solution was adopted in Lithuania (Law on the Organisation of the National Defence System and Military Service of the Republic of Lithuania, 1998). This means that in the event of martial law or armed defence against aggression (war), some institutions form part of the national defence system (the State Border Guard Service, the Public Security Service, combat units of the Lithuanian Riflemen's Union).

3. Militarised services and pro-defence organisations in the security and public order system in Poland and Lithuania

As the militarised services in both countries are organised along military lines, their structure is therefore highly hierarchical. Each service is headed by a single person - the Head of Service, with the status of central government administrative bodies in their area of competence. As such, they have a high position in the structure of state administration, reporting to the relevant Minister or Prime Minister.

Uniformed formations are usually armed and have a formalised hierarchy. They have been established by the state to exercise its authority in a specific area related to state security, e.g. financial, border control, prevention of the consequences of natural and catastrophic events and protection against violations of the law (prevention). In Poland, these include formations under the Ministry of the Interior and Administration (the Police, the Border Guard, the State Fire Service, the State Protection Service), the Prison Service under the Ministry of Justice, the Customs and Tax Service under the Ministry of Finance, and the Marshal's Guard supervised by the Seym Marshal. In the Republic of Lithuania, institutions responsible for maintaining law and order include those under the Ministry of the Interior (the Police, the State Border Guard Service, the Fire and Rescue Service, the Financial Crimes Investigation Service, the Public Security Service) and the Prison Service under the Ministry of Justice, the Customs Service under the Ministry of the Finance, and the Dignitary Protection Service (independent state institution).

Special services carry out covert operational and reconnaissance activities in the country and abroad. They are involved in intelligence and counter-intelligence activities, acquiring and protecting information vital to the internal security of the state. The nature of secret services means that their tasks determine the secrecy of their activities that cannot and should not be widely known. The importance of protecting state security and the specific functions they perform make the special services subject to increased supervision and control by state authorities. Special services have four

functions: information, process, prevention, control and protection. Traditionally, special services perform intelligence and counter-intelligence tasks (information and intelligence services), primarily obtaining information necessary in terms of state security, and disinforming enemy states or organisations (Szustakiewicz, 2021, p. 42). The two types of special services are civil and military. These include the Internal Security Agency (ABW) and the Intelligence Agency in Poland (AW), which both are subordinate to the Prime Minister, and the State Security Department (VSD) accountable to the seimas and the President in Lithuania. The Military Counterintelligence Service (SKW) and the Military Intelligence Service (SWW) are responsible for the functions of military special services in Poland. They are subordinate to the Ministry of National Defence. In Lithuania, the Second Department of State Security (AOTD), which is also subordinate to the Minister of National Defence, fulfils these responsibilities. The above-mentioned special services are mainly involved in intelligence and counter-intelligence activities, with supplementary police activities. Counterintelligence is the opposite of intelligence, which seeks to obtain valuable information from the perspective of another entity, usually hostile to the state in question, including measures to detect and counter espionage to prevent foreign intelligence services from accessing state secrets.

Over time, special services began to perform tasks other than those previously assigned to the classic (traditional) special services because they are concerned with detecting crime and prosecuting perpetrators (prevention and police services). Defined by the Polish legislator as a special service and supervised by the Prime Minister, the Central Anti-Corruption Bureau (CBA) has a police function in addition to its control and analytical-informative functions. The Special Investigation Service in Lithuania, accountable to the President and the Seimas, detects and investigates corruption crimes and criminal offences, and prepares and implements corruption prevention measures. This type of special service does not engage in conventional intelligence or counterintelligence activities, but works to ensure national security in the broadest sense. They act in all situations where threats to state security arise, not only in connection with suspected crimes, with a primary function to detect, prosecute, and prevent crimes against vital state interests. Preventive police tasks are also handled by the classic special services, namely the ABW and the SKW in Poland, and the VSD and the AODT in Lithuania.

Due to their clandestine work, special services have been granted special operational powers to protect the most important interests of the state. They aim to establish facts about events that disrupt the normal functioning of the state and society due to their socially harmful nature (Bożek, 2015, pp. 21-22). It is therefore important to emphasise the supervision and control of these services. In Poland, although they are supervised and controlled by the executive, parliament, and the courts, it is widely recognised that current arrangements are inadequate (Szwedowicz-Bronś & Małecki, 2024; NIK, 2024; Oklejak, 2022). The Lithuanian system of external oversight aims to guarantee the independence, legality, and compliance of intelligence institutions with the requirements of protecting human rights and freedoms (Law on Intelligence Controllers of the Republic of Lithuania., 2021). A key role in this system is played by the Intelligence Controller, who also works with parliamentary committees to assess the legality of the actions of officers and their measures, and investigates complaints regarding the secret services. Information on potentially unlawful activities of an intelligence service or its potentially unlawful decisions with regard to persons against whom intelligence activities are conducted may also be reported to the controller by an officer of the Intelligence and Counter-Intelligence Service. The controller is appointed by Parliament for five years, and is granted extensive powers to carry out duties that include access to the offices of intelligence and counter-intelligence institutions, and access to information that constitutes state secrets.

In addition to the armed forces, pro-defence organisations play a significant role in national defence. They educate the public in defence skills and strengthen their sense of responsibility for defending the country. In Poland, the Minister of National Defence may conclude a pro-defence partnership agreement with such organisation. The agreements involve organising training courses for members or volunteers of pro-defence organisations. The Minister of National Defence may also consent to the free use of the resources and infrastructure of the Armed Forces, and provide material and financial support to pro-defence organisations. In return, members and volunteers may be called up for basic military training, after which they become reserve soldiers. The benefits of the agreement are therefore

mutual for the pro-defence organisation and for the state. At present, nine pro-defence partnership agreements are in force at the Ministry of National Defence. Lithuania has also recognised the need for defence education for the public and the role of citizens in national defence. As part of the modernisation of its defence system, Lithuania has increased its spending on non-governmental organisations and individual initiatives that support the population's defence preparedness (Staśkiewicz, 2020, p. 47). The main pro-defence organisation is the Lithuanian Riflemen's Union under the Ministry of National Defence which provides defence training, including in irregular operations, as well as patriotic and civic education, for adults and young people aged 12 and over. In 1997, the Lithuanian parliament passed a law on the Lithuanian Riflemen's Union. The association cooperates with state institutions responsible for security, including the army, the Police, and the State Border Guard.

Organisation and powers of the statutory services, the legal status of their heads, and the working conditions of officials in both countries have been laid down by law. In Poland, from the inter-war period through to the present day (with one exception), all the matters in question are contained in the legislation establishing the service. This results in the official relationship of officers being defined in ten statutory acts, with a different solution applied only to special military services. Issues related to the tasks and structure of these formations were included in the Act of 9 June 2006 on the Military Counter-Intelligence Service and the Military Intelligence Service, and issues related to the service status of officers were included in the Act of 9 June 2006 on the Service Status of Officers of the Military Counter-Intelligence Service and the Military Intelligence Service. In Lithuania, the provisions on employment conditions for officers of almost all uniformed formations are mostly contained in a single legal act: the Statute on Internal Affairs (2003). However, some differences have been introduced in the laws defining their organisation and powers due to the different tasks of the various formations. The Customs Service and the Financial Intelligence Service officers are covered by the Civil Service Act (1999). The Law on the Intelligence Service (2000) and the Law on the Special Investigation Service (2000) regulate both aspects of the three Lithuanian special services: organisation and personnel. The solution adopted by the Lithuanian legislator, whereby most of the elements relating to the service relations of almost all uniformed services were incorporated into a single legal act, deserves to be applauded. In Poland, increasing attention is being paid to the legitimacy of limiting the number of statutory acts relating to militarised services and even to the need to enact a common law for all officers containing general provisions regulating the service relationship (Gacek, 2018, p. 82; Liwo, 2017 p. 267; 2017; Szustakiewicz, 2019, pp. 91-92; Wieczorek, 2017, p. 16, p. 75, pp. 366 - 367). The dissemination of rules governing official relations in militarised formations is contrary to the principles of the economy of legislation, and also leads to unjustified differentiation between officers of different services.

4. Outline of employment characteristics of officers and professional soldiers

In Poland and Lithuania, a significant and varied group of individuals employed in the armed forces and militarised services perform their duties on the basis of an employment or administrative-legal relationship. Both countries distinguish between professional soldiers and military personnel in the armed forces. The staff of the militarised services comprises managers, officers, and employees who head them. The armed forces and formations are primarily composed of professional soldiers and officers. Therefore, it will be useful to focus on an analysis of this category of actors, with the exception of the officers of two Lithuanian uniformed formations - the Customs Service and the Financial Investigation Service - whose status is defined in the Civil Service Law and therefore falls within the scope of this Law.

The legal nature of officers' and soldiers' employment in Poland and Lithuania is similar. In fact, we are dealing with a legal relationship between specific entities, the content of which includes rights and obligations of the parties, and the subject of which is behaviour required of the obligated party. This is regulated primarily by administrative law, and alternatively by labour law. Due to its interdisciplinary legal nature, this relationship can be the subject of research by both labour and administrative law representatives. In the Polish legal system, the legislator uses the term "service relationship" on the

basis of legal acts regulating the status of professional soldiers and officers in militarised services. However, it can be applied to professional soldiers and officers in Lithuania, since they, like their Polish counterparts, perform a special kind of paid work, involving the ability and willingness to sacrifice one's health and even life to protect values (goods) specified in legal regulations. In both countries officers, and in Poland professional soldiers, are employed on the basis of an appointment of a different legal nature than an appointment provided for in the Polish Labour Code (1974). In Lithuania, soldiers enter professional military service after signing a written military service contract with the Ministry of Defence. As the conditions of service are defined by administrative law, there is no possibility of negotiating, for example, the level of pay or working hours. In order to cope with the tasks of the services, strict selection criteria are applied for recruitment in terms of mental and physical ability, moral attitude, and education. According to Lithuanian law, this includes the age for applicants to join the armed forces or a particular service. In Poland, this approach has been abandoned in order not to limit the number of applicants, especially at a time when the number of personnel in the army and services is on the increase. Whether a candidate meets the legal requirements is checked during the qualification process, which also aims to ensure that the selection process is objective and optimised to identify the most knowledgeable, skilled, and capable candidates. Officers and professional soldiers take an oath, which constitutes a commitment to fulfil official duties appropriately, guaranteeing the fulfilment of statutory tasks. Taking the oath is the first act of an officer's official activity, and only after taking the oath can the officer begin to perform their official duties. Officers and professional soldiers are obliged to fulfil official duties, even at the risk of their own lives in the case of armed forces and parts of militarised formations. As they swear to be ready for sacrifice, they must perform their duties even when their health and lives are threatened, which is the most important feature of the service.

By acting on behalf of the state and fulfilling its tasks, the responsibilities of officers and professional soldiers are extensive compared to a standard employment relationship. In addition to obligations arising from the employer-employee relationship (e.g. working hours, health and safety), there are other organisational-legal obligations, e.g. respect for law, state secrets, restrictions on political and social rights. The rank of duties means that the duties of officers and professional soldiers are defined by the legislator as obligations to the state or the service, not to the organisational unit employing them. The duties and rights of professional soldiers and officers are defined by the legislator on a unilateral basis, and are based on legislation to include the protection of persons performing functions of state authority, protection of state borders and border traffic control, assessment and collection of customs duties and taxes, fight against fires and natural disasters, and the fight against corruption in public and economic life. They also take the form of prohibitions on certain activities and thus restrictions on certain civil rights, e.g. prohibitions on membership of political parties, exercise of the mandate of a member of parliament or senator, restrictions on membership of international associations, and the prohibition of participation in a strike. Employees in an official relationship also have limited personal rights through the imposition of various obligations, including the requirement to submit asset declarations, to reside at their place of work or in a nearby locality, and to report or obtain permission to travel abroad. The last group of special obligations takes the form of restrictions on economic rights: prohibitions or restrictions on the possibility of taking up additional employment or activities outside the service. In the second case, the authorisation of a superior is required, provided that the legal criteria are met (no conflict with the performance of official duties, no damage to the honour, dignity, good name or prestige of the service). Professional soldiers and officers are also subject to a regular appraisal process to evaluate the performance of duties, to motivate the efficient performance of duties and activities, to identify candidates for appointment or appointment to a higher official position or rank, and to determine the professional development and training needs of the appraisee. Employment in militarised formations and the armed forces also entails subordination to the service, including official subordination, i.e. carrying out current orders, and availability. An officer or soldier must be prepared for significant changes, such as being transferred to another location. The official relationship is also characterised by being subject to disciplinary responsibility for breaching official discipline, which may take the form of breaching professional ethics, and committing a crime or misdemeanour, including a fiscal offence or misdemeanour.

The State guarantees a number of special rights to compensate for the special demands of the service, increased responsibility, and to ensure the supply and stability of personnel for a service which is often carried out under difficult and arduous conditions, frequently involving personal risk. This relationship is even formulated in Lithuanian law as one of the main principles of internal administration (Law approving the Statute of the Internal Service, 2003). Such a move would make sense in Poland, too. It would be the legislator's response to the opinion - unfair because it ignores the nature and conditions of service - that professional soldiers and officers enjoy undue privileges. The right of officials and professional soldiers to be encouraged to perform their duties effectively and professionally should be established not only formally, but also legally protected (Gabriūnaitė & Adamonienė, p. 203). Entitlements include the right to housing or additional social benefits. Lithuanian officers also received legal guarantees for their activities, e.g. only the Prosecutor General could initiate criminal proceedings against them. An important element of the legal status of officers and professional soldiers is employment stability. Due to the nature of their duties, protecting the stability of their employment serves not only the officers and soldiers themselves, but also the public interest. Stability is ensured by the appointment and service relationship established by the appointment act and, in the case of Lithuanian professional soldiers, by the military service contract. In each of these employment bases a closed catalogue of reasons justifies compulsory or optional dismissal. According to Lithuanian law, one such grounds is reaching a certain age. The Polish legislator has moved away from this solution. Only in the case of officers of the Marshal Guard may reaching the age of 60 lead to dismissal (Act on the Marshal's Guard, 2018). Measures will also be taken to encourage professional soldiers and officers to serve for as long as possible after 2020. To achieve this aim, regulations were issued in 2023 to introduce an incentive payment to retain experienced officers and professional soldiers with at least 25 years of service for as long as possible. One year later it has even been decided to allow retired police officers and border guards to return to work, and continue to receive a pension in addition to their contractual salary.

Conclusions

These reflections show that there is a considerable complexity of issues connected with legal aspects of the activities of armed forces, militarised services, and pro-defence organisations in Poland and Lithuania that comprise multiple problems related to rules set out in laws from different countries. Poland's and Lithuania's membership in international alliances and organisations, especially NATO and the EU, is crucial for the legal conditions of armed forces' and militarised formations' activities. The army and these formations must be ready for action and have the capacity for international action, since constitutional obligations and alliance commitments dictate the need for these capabilities. Poland and Lithuania also educate their populations in defence matters, as reflected by closer cooperation with pro-defence organisations. Duty in the armed forces and militarised services requires discipline, loyalty, and sacrifice. It is the state’s responsibility to provide professional soldiers and officers with decent living conditions, which enable them to concentrate on official duties and compensate for their statutory duties’ hardships, constraints, and sacrifices. Their employment relationship is based on an appointment, possibly a military service contract (Lithuania), which creates a strong bond between the parties. Tasks of the armed forces and militarised services are sometimes carried out throughout the country and abroad, which requires unilateral changes by superiors within the framework of service subordination, e.g. in the scope of duties or place of performance. This is facilitated by the administrative-legal nature of the service relationship, which enables the far-reaching disposition of the soldier and officer. A comparative view is the most effective way to make recommendations that will bring about the necessary changes in standards. It would be advisable for the Polish legislator to establish an effective system of supervision of the special services and to enact a law containing general provisions that regulate the service relationship. In contrast, the Lithuanian legislator should consider abolishing age restrictions on the commencement and termination of service in order to try to avoid the staff shortages currently being experienced by Poland. Efficient armed forces and militarised services are very important for the state. In fact, they are proof of national strength and one of the most important guarantees of security, especially in the current turbulent times.

References:

Act of 26 June 1974 Labour Code. Dz.U. 2025 poz. 277. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf
Act of 6 April 1990 on the Police. Dz.U. 2025 poz. 636. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900300179/U/D19900179Lj.pdf
Act of 12 October 1990 on the Border Guard. Dz.U. 2025 poz. 914. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900780462/U/D19900462Lj.pdf
Law of 17 July 2000 on Intelligence. Collection of Laws of 2000, Valstybės žinios, Nr. 64-1931. https://www.e-tar.lt/portal/en/legalAct/TAR.1881C195D0E2/YuFGpyHuMp
Act of 24 May 2002 on the Internal Security Agency and the Intelligence Service. Dz.U. 2024 poz. 812. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20020740676/U/D20020676Lj.pdf
Act of 9 June 2006 on the Military Counter-Intelligence Service and the Military Intelligence Service. Dz.U. 2024 poz. 1405. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20061040709/U/D20060709Lj.pdf
Act of 9 June 2006 on the service of officers of the Military Counter-Intelligence Service and the Military Intelligence Service. Dz.U. 2025 poz. 694. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20061040710/U/D20060710Lj.pdf
Act of 8 December 2017 on the State Protection Service, Dz.U. 2025 poz. 34. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000138/U/D20180138Lj.pdf
Act of 11 March 2022 on Homeland Defense. Dz. U. 2025 poz. 825. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20250000825/O/D20250825.pdf
Bożek, M. (2015). Charakterystyka ustawowych uprawnień operacyjnych służb specjalnych. *Rocznik Administracji Publicznej*, 1, 18-47.
Constitution of the Republic of Lithuania (1992). https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.313314/
Constitution of the Republic of Poland (1997). https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf
Gabriūnaitė U. & Adamonienė R. (2025). Problems of the motivation and incentive system for officers of law enforcement institutitons. *Public Security and Public Order*, 37(2), p.198-213.
Gacek, P. (2018). Stwierdzenie nieważności rozkazu personalnego o nawiązaniu, zmianie albo rozwiązania stosunku służbowego. *Państwo i Prawo*, 8, 69-83.
Law of 19 December 1996 on the Basics of National Security. No VIII-49. State Gazette, 1997, No 2-16. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.34169/asr
Law of 2 July 1997 on the Lithuanian Riflemen's Union. Valstybės žinios, Nr. 69-1736. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.41841/asr
Law of 5 May 1998 on the organisation of the national defence system and military service of the Republic of Lithuania. Valstybės žinios, Nr. 49-1325. https://www.e-tar.lt/portal/lt/legalAct/TAR.15C705E93776/asr
Law of 8 July 1999 on the Civil Service. Document Nr.: VIII-1316. https://www.e-tar.lt/portal/it/legalAct/TAR.D3ED3792F52B/asr
Law of 2.05.2000 on the Special Investigation Service (consolidated version, 2021). TAR, 2017, Nr. 21647. https://www.e-tar.lt/portal/legalAct.html?documentId=52d2a460ec7311e78a1adea6fe72f3c5
Law of 29 April 2003 approving the Statute of the Internal Service. Document Nr.: IX-1538. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.210318/asr
Law of 19 September 2006 on the Public Security Service. Document Nr.: X-813. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.283038/asr
Act of 26 January 2018 on the Marshal's Guard. Dz. U. 2025 poz. 607. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000729/U/D20180729Lj.pdf
Law of 23 December 2021 on Intelligence Controllers of the Republic of Lithuania. TAR, Nr. 26905. https://www.e-tar.lt/portal/lt/legalAct/fa177910658911eca9ac839120d251c4/asr
Liwo, M. (2017). Nabór do służb mundurowych. In S. Płażek (ed.), *Nabory i konkursy w służbie publicznej* (107-128). Warsaw: Wolters Kluwer.
Oklejak T., *Potrzebna skuteczna cywilna kontrola nad służbami specjalnymi*. Downloaded from: https://www.prawo.pl/prawnicy-sady/sluzby-specjalne-potrzebna-skuteczna-kontrola,512817.html
North Atlantic Treaty signed in Washington (1949). https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20000870970/O/D20000970.pdf
Padzik, J. (2018). Rola i znaczenie normy art. 5 Konstytucji Rzeczypospolitej Polskiej dla obszaru prawa kształtującego system obronny państwa. *Studia Bezpieczeństwa Narodowego*, 14(2), 117-129.
Šilinytė I. & Vaičiūnė K. (2022). Lithuania. In K. Burczaniuk (ed.), *Legal aspects of the European Intelligence Services' Activities* (163-176). Warsaw: Publishing House of the Internal Security Agency.
Staśkiewicz, U. (2020). Wybrane aspekty obrony narodowej Litwy. *Historia i Polityka*, 33(40), 33-49.

Supreme Chamber of Control, performance of tasks related to coordination, supervision and control of the functioning of special services carrying out operational and investigative activities on the territory of the Republic of Poland. Results of the audit. Download: https://www.nik.gov.pl/aktualnosci/sluzby-specjalne-nadzor-kontrola.html
Saudargaitė, I. (2023). Public security in constitutional dimension in Lithuania. *Public Security and Public Order*, 33, 115-129.
Szustakiewicz, P. (2021). *Definicja i zakres prawa służb specjalnych*. Warsaw: Difin.
Szustakiewicz, P. (2019). Zagadnienie unifikacji przepisów regulujących stosunek służbowy funkcjonariuszy służb mundurowych. *Przegląd Bezpieczeństwa Narodowego*, 21, 82-95.
Szwedowicz-Broń K. & Małecki M., *Zbudujmy przejrzysty nadzór nad służbami specjalnymi*. Downloaded from: https://www.rp.pl/opinie-prawne/art40303771-szewdowicz-brons-malecki-zbudujmy-przejrzysty-nadzor-nad-sluzbami-specjalnymi
Treaty on the Functioning of the European Union (consolidated version, 2012). C 202/47. https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj
Treaty on European Union (consolidated version, 2016). C 202/1. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF
Wieczorek, M. (2017). *Charakter prawny stosunków służbowych funkcjonariuszy służb mundurowych*. Toruń: Adam Marszałek Publishing House.

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.008

ROTATION AS A LEGAL INSTRUMENT OF INSTITUTIONAL REFORM: THE CASE OF UKRAINE'S CUSTOMS SERVICE

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Received: 24 April 2025; accepted: 12 December 2025.
DOI: https://doi.org/10.13165/j.icj.2025.11.02.008

Abstract: This article analyses the legal, psychological and institutional dimensions of staff rotation in Ukraine's customs administration, introduced amid public service reform under martial law. It argues that while rotation is promoted as an anti-corruption and managerial renewal tool, it operates in practice within an ambiguous legal framework that exposes deeper governance and trust deficits. Drawing on comparative administrative law, empirical data and socio-legal scholarship, the study examines how fragmented regulation, weak procedural safeguards and limited ethical leadership shape institutional resilience and staff confidence. The findings show how the effectiveness of rotation depends less on its formal design than on its legal clarity, fairness and ethical implementation. When these elements are lacking, rotation risks eroding rather than strengthening institutional trust. Situating Ukraine's experience within broader European and global practice, the article concludes that legally codified and ethically grounded mobility frameworks are essential for sustainable public sector reform and institutional integrity in times of crisis.

Keywords: rotation, institutional trust, customs reform, Ukraine, wartime governance.

Introduction

The idea of rotating customs officers across customs territorial bodies appeared in Ukraine after 2014, when the question of how to curb informal networks inside the service became politically urgent. What at first seemed like a technical personnel measure quickly turned into one of the most debated elements of administrative reform. In practice, rotation means that officers must periodically relocate to other regional units. Its stated purpose is simple: prevent the "localisation" of power, reduce the risk of corruption schemes tied to specific territories and keep the service more mobile and responsive. Many countries have used similar approaches for decades, but for Ukraine this is a new experiment – and one taking place in very unstable legal and political conditions.

Unlike many wartime decisions, this reform was conceived earlier and was supposed to be part of a broader restructuring of personnel policy, but its actual implementation began when the country was already living under martial law. This coincidence has changed the entire tone of the reform: a standard HR tool has turned into a matter of governance, legal certainty and institutional trust. How this mechanism works in such a context is precisely what makes it worth examining.

The present article looks at rotation not as a bureaucratic procedure but as a legal and administrative instrument that operates under exceptional pressure. The central question is whether this tool can realistically strengthen trust and institutional legitimacy within the customs service – or whether, in its current form, it does the opposite.

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The purpose of this research is to determine whether and how the rotation of customs officers, as a legal and administrative mechanism introduced under martial law, can enhance institutional trust and resilience within Ukraine's customs service. In doing so, the study seeks to connect its legal, organisational, psychological and comparative dimensions into a single analytical framework that explains how law, ethics and governance interact under conditions of crisis.

To answer this, the research focuses on four interrelated aspects:
(a) the legal basis and regulatory design of the rotation system;
(b) the way it functions within today's administrative setting;
(c) its practical impact on internal motivation, trust and stability;
(d) the comparative experience of other states that have relied on similar practices – including Poland, Hungary, Indonesia, Lithuania and Vietnam – to identify transferable elements, good practices and normative insights that could inform improvements to Ukraine's rotation framework.

Methodologically, the study combines a legal analysis of the Customs Code of Ukraine (Verkhovna Rada of Ukraine, 2012) and subordinate legislation with a socio-legal perspective that examines how officers themselves experience rotation. Comparative examples help to highlight both the strengths and the weak spots of the Ukrainian model. This approach avoids treating rotation as a purely formal rule and instead shows how it functions within institutions.

In addition to normative and comparative sources, the analysis draws on empirical data obtained through formal information requests submitted to the State Customs Service of Ukraine in 2024–2025 under the Law of Ukraine On Access to Public Information. These requests yielded official responses on the number of active rotation orders, personnel distribution and policy implementation timelines. This qualitative factual basis was used to validate the legal and administrative findings and to ensure methodological transparency.

AI-assisted technology was not used in the preparation of this article. All arguments, interpretations and conclusions were developed independently by the author.

Although the instrument itself is far from new, its operation in a legally unstable environment is rarely analysed in depth. Ukraine offers a unique opportunity to see how a standard anti-corruption and integrity tool behaves when legal and political systems are stretched by war. This makes the topic relevant not only domestically but also for other states that face overlapping security and administrative crises.

Previous scholarship – including works by Kuybida and Shpektorenko (2023), Mavlonov (2023), Sardiko (2024), Veenstra and Heijmann (2023), as well as analytical reports of the World Bank (2023) – has mostly addressed rotation in relatively stable systems. This article takes a different angle: it places the Ukrainian experience within a broader discussion about legality, trust and administrative accountability under strain. By linking doctrinal law to everyday practice, the analysis seeks to understand whether the rotation mechanism can genuinely contribute to building a more resilient public service.

This discussion naturally leads to a broader question that extends beyond the technical design of the rotation mechanism. In fragile governance environments, legal instruments alone are rarely sufficient to secure institutional resilience. What often determines whether reforms succeed or fail is the way they interact with deeper, less tangible factors – such as trust, organisational culture and the emotional security of public officials.

1. Theoretical Framework: Trust and Institutional Reform

Reforming public institutions in fragile or transitional settings is usually framed through legal procedures, structural redesign and regulatory convergence. Yet research increasingly shows that such reforms succeed only when legal mechanisms are supported by institutional culture, ethical leadership and psychological stability. These dimensions become crucial in times of crisis, when officials must operate under uncertainty and pressure. In Ukraine's customs service, where reforms such as leadership rotation and performance certification unfold under martial law, these insights acquire particular legal and administrative relevance.

In this setting, it is not enough to adjust formal procedures alone – the human side of institutional work also matters. This point aligns with Valamalua et al. (2022), who emphasise that mental well-being should form part of resilience frameworks because systemic stress undermines the legitimacy of institutions. However, these authors also note that psychological support must complement, not replace, robust administrative and legal instruments.

Rotation, which is frequently promoted as an anti-corruption tool, depends on the legal environment in which it operates. As Mungiu-Pippidi (2015) observes, in settings where the rule-of-law is weak, it may instead serve political control, undermining rather than building institutional trust. Fang et al. (2023) similarly stress that reform succeeds only when leadership is perceived as legitimate and rule-bound. In Ukraine, the prevalence of acting officials weakens the symbolic and normative force of rotation, revealing deficiencies in the legal foundations of the reform. This problem has deepened since the introduction of martial law in 2022 when competitive recruitment for civil service positions was suspended under the Law "On the Legal Regime of Martial Law". All appointments are now temporary for the duration of wartime. According to the National Agency of Ukraine on Civil Service, as of 30 June 2025, customs authorities had appointed 4,810 employees outside the competitive procedure, while 6,824 customs officers had been dismissed on 24 February 2022.

A key legal challenge lies in the absence of a coherent statutory basis. The Law on Civil Service of Ukraine (2016) does not mention "rotation." Instead, Article 570-3 of the Customs Code of Ukraine (2012) narrowly defines it as a temporary, three-month relocation of an officer to another position to balance workload or address urgent needs. In practice, consent to rotation is mandatory at the time of appointment or transfer, effectively limiting individual discretion and granting the employer procedural dominance. This contractual asymmetry challenges the principle of voluntariness inherent in civil service relations.

The regulatory base, though supplemented by ministerial orders and procedural algorithms, remains fragmented. The principal act – Ministry of Finance Order No. 229 of 5 May 2025 – defines a limited set of guarantees for officers, complemented by the State Customs Service Algorithm on Rotation, which introduces randomised software allocation. The software, however, remains under development, reducing transparency and consistency. Moreover, while the Procedure formally recognises three rotation types (between positions, towards temporary and towards permanent vacancies), the Algorithm currently operationalises only the first, narrowing its practical application and leaving legal ambiguities unresolved.

Importantly, the rotation mechanism in Ukraine is still emerging and lacks a stable statutory foundation. Ukrainian labour legislation does not define "rotation" as a separate legal category and for many years, the practice was treated as a temporary assignment comparable to business travel, without changes in rank or function. A statutory basis appeared only with Law No. 3977-IX of 17 September 2024, which amended the Customs Code to introduce rotation by consent as a contractual condition (Article 570-3). This shifted the institution into the domain of public-service contract regulation, while leaving essential implementation details to subordinate acts.

Compared with the diplomatic service of Ukraine – where rotation is mandatory, planned and embedded in a long-term career model under the Law "On Diplomatic Service" (2018) and the Order No. 427 of the Ministry of Foreign Affairs of Ukraine (2018) – customs rotation remains short-term, discretionary and primarily operational. Diplomats typically serve three- to four-year foreign postings, while customs officers may be reassigned for no more than three months at a time, with a cumulative limit of six months per service year. Thus, diplomatic rotation functions as an integrity and career-development tool, whereas customs rotation currently serves mainly as a managerial instrument to address immediate staffing needs.

Under the Procedure for the Rotation of Customs Officers (Ministry of Finance of Ukraine, 2025), rotation aims to balance workload and ensure temporary operational capacity. It takes three forms: (1) assignment to a vacant position, (2) replacement of a temporarily absent employee and (3) mutual exchange between officers. The temporary nature of such assignments – capped at three months per instance and six months cumulatively – underscores the provisional and managerial character of the mechanism.

Decisions are made by the Head of the State Customs Service, who may delegate this authority to heads of regional customs offices. The Procedure contains clearly defined exemptions for specific categories of staff, such as pregnant women, parents of children under fourteen and persons with disabilities. Each rotation must be formalised by an official order specifying its duration and purpose; the conditions of remuneration remain unchanged and after the rotation period ends, the officer must return to the previous position. The effectiveness of each rotation is evaluated by the head of the customs office, who reports the results to the Head of the State Customs Service.

The IMF, in its explanatory note to the draft rotation policy, commends this framework as a foundational step but recommends further alignment with international standards (OECD, WCO, EU) (International Monetary Fund, 2025). In particular, it calls for clearer categorisation of posts by sensitivity level and for defining the maximum permissible tenure in each category. The IMF also stresses the importance of transparent planning, consultation and communication procedures. However, the current framework still lacks a planning mechanism. Order No. 229 (Ministry of Finance of Ukraine, 2025) does not provide any tool for advance rotation planning or workforce forecasting, meaning that rotations are initiated reactively rather than based on institutional needs or long-term integrity goals.

A key innovation of the 2025 Procedure (Ministry of Finance of Ukraine, 2025) is the requirement for mandatory handover of tasks and institutional knowledge during reassignment, along with support measures such as training, relocation assistance and mentorship. Customs offices now conduct staff surveys and regular monitoring, ensuring genuine rather than formal evaluation of rotation outcomes. While international standards remain essential, experts emphasise that their implementation must be adapted to Ukraine's resource capacity and social guarantees for personnel. Yet despite these procedural improvements, the absence of codification within primary legislation continues to generate legal uncertainty and limit institutional trust.

According to anonymised survey data collected from 3,871 customs officials through a formal information request to the State Customs Service, perceptions of the rotation system remain mixed. When asked to evaluate its introduction, 16.4% responded positively, 56.7% viewed it as partially positive and 26.9% assessed it negatively or as harmful. (Official reply to the information request from the State Customs Service of Ukraine, Letter No. 5/12-02/10/3480 of June 03, 2025) These results suggest that, despite procedural improvements, the mechanism has not yet secured broad internal support and continues to be perceived as transitional rather than fully institutionalised.

This fragmented regulation produces a system that is overly centralised and discretionary, with insufficient procedural guarantees. It risks undermining both legal certainty and personnel trust, thereby turning rotation from a tool of integrity into an instrument of administrative control. The World Bank

(2023) has noted similar patterns in fragile states, where informal networks often neutralise formal integrity measures. In such contexts, reforms become political rather than administrative exercises.

The suspension of USAID financing in 2025 revealed institutional dependence and weak domestic ownership of reform. This asymmetry reflects a broader structural issue within Ukraine's EU integration process, where legal harmonisation advances faster than institutional capacity-building.

Świerczyńska (2017, 2019) observes that the resilience of the EU Customs Union resilience rests on decentralised and legally coherent frameworks that ensure adaptability while also preserving accountability. For Ukraine, this implies that flexibility must be legally codified rather than improvised. Similarly, Jabłońska-Wołoszyn (2015) highlights that reforms in Poland succeeded only when competency models were anchored in both law and institutional values, ensuring behavioural alignment. Ukraine's approach has largely overlooked this link, creating a gap between legal form and institutional practice.

Horodynskyi (2024) identifies value misalignment and motivational barriers as central obstacles to implementing rotation in Ukraine's public service. Legal reform alone rarely ensures performance improvement. Nguyen et al. (2020) show that motivation and managerial support are stronger performance drivers than formal rule changes, while Pérez Azcárraga et al. (2022) argue for flexible, law-based staffing systems in fragile contexts. Comparative experience from the Western Balkans confirms this tendency: Bilalli (2020) found that harmonisation without institutional ownership failed to enhance integrity.

As Drozdek (2017) notes, EU customs resilience derives from institutional coherence based on clear mandates and competent leadership. For Ukraine, this means embedding rotation within a coherent legal framework, ensuring procedural fairness and fostering ethical professionalism.

Ukraine's legal framework for customs public service combines elements of continuity and adaptation under martial law, although fragmented regulation, limited safeguards and excessive centralisation undermine institutional resilience. Enduring reform thus requires embedding rotation principles in the Civil Service Law, clarifying officer protections and aligning practice with EU standards on rule-of-law. Overall, the rotation system remains a transitional construct—procedurally improved but normatively incomplete—where trust depends on enforceable guarantees rather than managerial design.

2. Institutional Trust and Rotation: Lessons from Comparative Practice

Modern customs administrations balance fiscal control and public security. In Poland, as Świerczyńska (2019, 2020) notes, officers serve simultaneously as fiscal and security agents, following a dual mandate that elevates the institutional and legal value of integrity.

Since 2022, Ukraine's western border with the EU has assumed renewed strategic importance as trade flows have shifted westwards. Nevertheless, despite this redistribution, systemic risks such as undervaluation and the falsification of documents continue to persist. These challenges underscore that institutional stability depends not only on border infrastructure or funding, but on legal predictability and professional trust within the customs service.

Rotation, in this regard, can serve as both a reform and resilience mechanism, provided it is grounded in a coherent legal framework that ensures equality, procedural fairness and professional continuity. The Ministry of Finance Order No. 229 (2025) defines "protected categories" of officers who are exempt from rotation, including parents of children under fourteen and persons with childhood disabilities. However, officers who acquire disabilities later in life are not exempt. This selective approach creates a normative imbalance and raises questions under the constitutional principle of equality. By offering protection based on narrow criteria, the regulation risks institutionalising unequal treatment and eroding trust in the rotation system's fairness. In doctrinal terms, the absence of compensation contradicts the

principle of legal proportionality, which requires that administrative measures affecting civil servants be balanced and justified (Kuybida & Shpektorenko, 2023).

As of 30 October 2025, rotation powers were delegated to three customs offices (Lviv, South-Eastern and Ternopil) under a provisional algorithm approved by the acting Head of the State Customs Service (State Customs Service of Ukraine, 2025). This cautious, phased rollout reflects an experimental approach to legal testing. While it mitigates risks, it also highlights the dependence of reform success on consistent evaluation and leadership commitment. The key challenge is therefore not legal definition alone but embedding the mechanism within a stable rule-of-law and human capital framework. Such disparity may contradict Article 24 of the Constitution of Ukraine (1996) and the general principles of non-discrimination enshrined in the Law on Civil Service (Arts. 5, 19) (2016).
Applying the equality and proportionality tests, exemptions and burdens attached to rotation must pursue a legitimate aim and remain necessary and balanced. If they do not, they violate legal certainty and non-discrimination.

Comparative practice offers instructive contrasts. In Vietnam's "Smart Customs" programme, legal and technological reforms advance in tandem, combining reassignments with structured training to ensure continuity and accountability (Le, 2023). In Greece, Karyotakis and Barda (2020) show that perceptions of fairness and autonomy, rather than pay incentives, determine trust in HR practices. In both contexts, rotation strengthened legitimacy when it was legally codified and transparently linked to career progression. These examples collectively indicate that legal predictability and structured oversight, rather than discretionary management, are decisive for institutional trust.

A particularly relevant comparative example is Lithuania, where the Statute of the Internal Service (2023) regulates the rotation of officers in statutory institutions under the Ministry of the Interior, Justice and Finance. Under the Statute, heads and deputy heads of statutory bodies are appointed for a five-year term, with the possibility of this being renewed once only. At that stage, they must then be transferred to an equivalent position within the same or another statutory institution. This rotation framework combines stability and renewal, preventing the monopolisation of leadership positions. Rotation can also be applied for up to six months without consent in cases where the service urgently requires it, ensuring operational flexibility while maintaining legal safeguards.

Although Lithuania's Law on Customs (2004) does not regulate rotation directly, customs officers fall under the broader framework of the Internal Service Statute (2023), which provides procedural guarantees, written orders and compensation for relocation. Officers transferred between territorial customs offices are entitled to reimbursement of travel costs, temporary accommodation, or rental allowances as defined by Ministry of the Interior of the Republic of Lithuania Order No. 1V-216 of 4 March 2019. This model illustrates how legal codification, combined with clear procedural guarantees and compensatory rights, turns rotation into a rule-of-law instrument rather than a discretionary management tool.

Ukraine's model diverges sharply: rotational assignments do not adjust base pay or compensate for relocation, leaving officers financially disadvantaged despite expanded duties. This legal omission undermines both the fairness and attractiveness of rotation. Anis (2023) demonstrates that in Indonesia, measurable gains occurred only where internal oversight was structured and rule-based; where discretion prevailed, rotation instead bred uncertainty and resistance.

The Polish model, analysed by Grottel (2014) and Drozdek (2017), illustrates how clear statutory mandates fostered administrative stability under stress. Rotation, they argue, must be legally framed to promote professional renewal without undermining employment security. Similarly, Kuybida and Shpektorenko (2023) conceptualise rotation as a multi-stage legal mechanism for competence transfer and professional suitability assessment, not merely a managerial instrument. Without such guarantees, reform risks weakening solidarity instead of strengthening it.

Ukraine's current framework remains fragmented, socially selective and economically imbalanced. Strengthening its legal basis through codified rights, compensation standards and constitutional alignment would transform rotation from a discretionary administrative tool into a rule-of-law instrument of institutional trust and resilience.

Recent Ukrainian scholarship reinforces the need for a systematic, legally grounded approach to mobility in public administration. Horodynskyi (2025) emphasises that while rotation is widely recognised internationally as a mechanism to prevent corruption, promote leadership development and maintain institutional adaptability, Ukraine still lacks a coherent national concept that would unify disparate sectoral practices across customs, diplomatic, tax and law-enforcement services. Drawing on comparative experience from the United States, Germany, France, Japan, China and Ireland, he argues that rotation can operate effectively only where transparent criteria, professional support and motivational systems accompany its implementation. In wartime conditions, such a framework gains strategic importance: it enables rapid adaptation of public institutions, ensures managerial continuity and mitigates abuse of power in high-risk or strategically sensitive regions. This view aligns with the present analysis, suggesting that without a national policy of personnel mobility, Ukraine's rotation system risks remaining fragmented, reactive and normatively incomplete. Developing a unified legal and institutional concept–anchored in the Law "On Civil Service" (Verkhovna Rada of Ukraine, 2016) and consistent with EU governance standards–thus represents not only an administrative necessity but a precondition for institutional resilience under crisis and recovery alike (Horodynskyi, 2025).

In summary, comparative practice confirms that rotation achieves stability and legitimacy only when underpinned by codified guarantees of equality, proportionality and due process, thereby transforming mobility from discretionary management into a predictable rule-of-law mechanism of institutional trust.

3. Legal and Psychological Aspects of Wartime Customs Reform

Periods of institutional turbulence, such as martial law, compel customs administrations to pursue a dual imperative: sustaining operational capacity while safeguarding legality and public legitimacy. Under Article 64 of the Constitution of Ukraine (1996) and Article 20 of the Law "On the Legal Regime of Martial Law" (2015*)* restrictions on rights and duties of civil servants must remain proportionate and legally reviewable. For customs officers, this creates a specific challenge: ensuring operational flexibility while maintaining constitutional legality and equality of treatment. This section analyses how wartime conditions redefine the legal nature of rotation within Ukraine's customs service and tests its compliance with constitutional and administrative standards of legality. This duality of purpose makes the Ukrainian case particularly relevant for comparative analysis. While rotation was introduced to enhance flexibility, its legitimacy depends on a coherent legal framework grounded in equality, transparency and procedural guarantees.

Indonesia provides a relevant example of how legally embedded personnel policies can mitigate corruption risks during institutional transition. The establishment of Integrity Zones, as analysed by Wibiastika and Darma (2024), demonstrates how procedural transparency and ethical mandates can be codified to create administrative regulations. These Integrity Zones were embedded in ministerial decrees, linking staff rotation directly to anti-corruption legislation. A similar legal integration could strengthen Ukraine's rotation procedures by aligning them with Article 4 of the Law "On Civil Service" (2016) (principles of political neutrality and non-discrimination). Ukraine could adopt a similar model to ensure that personnel rotation remains rule-based and able to be reviewed from a legal standpoint. This contrast shows how legal formalisation, not ad hoc measures, determines institutional integrity.

By contrast, Poland's experience shows the legal risks of poorly designed reforms. Ura (2021) criticises the restructuring of the National Revenue Administration, where civil servants were removed or downgraded without justification under the pretext of reorganisation. These actions, later contested before the Constitutional Tribunal, highlight the need for wartime HR reforms in Ukraine to be firmly grounded in constitutional and procedural principles to prevent retroactive legal vulnerabilities. These

divergent trajectories underline that Ukraine's success will depend on whether it embeds wartime flexibility within constitutional legality.

Legal ambiguity surrounding Ukraine's current rotation procedures reinforces these risks. The system defines rotation as a temporary transfer lasting no more than three months, but it remains detached from broader career planning or merit-based advancement. However, current regulations—specifically Paragraph 17 of the Procedure for Rotation approved by the Ministry of Finance (2025) —do not specify compensation, appeals, or evaluation mechanisms. Such gaps contradict Articles 5 and 11 of the Law "On Civil Service," (2016) which guarantee transparency, equality and accountability in career progression. Without such integration, rotation risks undermining institutional coherence. This indicates that Ukraine's rotation system currently lacks the doctrinal clarity necessary for constitutional consistency.

Comparative studies (Szabó 2017; Grottel 2014; Jabłońska-Wołoszyn 2016) demonstrate that transparent merit-based promotion and professional training are not managerial choices but legal safeguards ensuring fairness and accountability.

From a comparative legal standpoint, the decentralised enforcement model of EU customs offers a cautionary precedent. Czermińska and Świerczyńska (2017) argue that fragmented enforcement erodes mutual trust and complicates transnational HR mechanisms such as rotation or evaluation. For Ukraine, this suggests that transposing EU models without addressing internal fragmentation would yield only superficial convergence. Grottel (2014) similarly emphasises that institutional legitimacy grows from formalised career paths, not ad hoc reassignment, while Ura (2021) warns that politically driven restructuring undermines merit-based governance.

Flexibility must remain bounded by proportionality, due process and ethical oversight, all of which are principles expressly derived from constitutional and administrative law. Mechanisms such as internal audits, ombudsperson reviews and civil society monitoring preserve legality even under emergency governance. In this context, rotation functions as a constitutional safeguard rather than an exception to legality.

Ultimately, wartime public service is not an exception to good governance but the most rigorous test thereof. The way a state regulates the rights and guarantees of its officials under crisis determines both institutional survival and post-war legitimacy. For Ukraine, the challenge is to transform the extraordinary pressures of wartime administration into the foundations of a resilient, trustworthy and law-governed public service.

In conclusion, the wartime transformation of Ukraine's customs administration reveals the dual nature of institutional reform under pressure: it is both a response to immediate survival needs and a test of long-term governance capacity. Current Ukrainian norms lack clear procedural and compensation guarantees, leaving room for arbitrariness. Embedding rotation in statutory law through amendments to the Law on Civil Service and the Customs Code would transform it from a discretionary tool into a constitutional mechanism of resilience. Amend Article 41 of the Law on Civil Service to include a defined rotation clause with procedural safeguards, compensation and appeal rights. Supplement the Customs Code with Article 575-1 establishing duration, transparency and oversight mechanisms for personnel rotation. Introduce a Cabinet Resolution on the public register of rotation decisions audited by the Civil Service Commission. These findings collectively demonstrate how wartime personnel policies test the balance between constitutional legality and administrative adaptability – the paper's central research question.

4. Ethical Leadership and Internal Legitimacy

The effectiveness of rotation schemes within customs administrations depends not only on their formal design but also on their internal legitimacy and ethical foundations. As Ukraine adapts its customs

institutions to the realities of war and the expectations of post-war reconstruction, the perceptions of public servants become a decisive factor in determining long-term resilience. This section explores how ethical leadership, organisational coherence and psychological trust intersect with performance evaluation, operational reform and risk management. In legal terms, internal legitimacy functions as a derivative of the rule-of-law principle, requiring that managerial discretion be exercised within codified limits and subject to judicial or administrative review.

Modern customs systems operate in risk-laden environments shaped by geopolitical volatility, digital transformation and shifting trade dynamics. Karklina-Admine et al. (2024) argue that resilience in such contexts relies on proactive, data-driven Customs Risk Management (CRM) frameworks. These systems enhance procedural efficiency while shaping human resource policy, determining where officers are deployed, how they are trained and how integrity is institutionalised. Following this logic, rotation is not merely a personnel instrument but a lever for reinforcing adaptability and public trust across the entire system. Such risk-based deployment must, however, comply with Article 4 of the Law on Civil Service and relevant Cabinet resolutions to prevent discriminatory or arbitrary assignments.

A robust CRM architecture ensures alignment between strategic priorities and staff deployment. For Ukraine, embedding CRM principles into personnel policy could mitigate arbitrary reassignments and strengthen coherence, especially at high-risk or overburdened border crossings. Within this perspective, risk governance becomes the operational bridge between institutional strategy and personnel decision-making–an issue explored further in the subsequent analysis.

Beyond institutional design, personnel reform must also engage with the subjective dimensions of legitimacy. A survey by Choi, Park and Lee (2015) of 148 Korean customs officers in ports found that perceptions of distributive fairness and professional recognition were the strongest predictors of job satisfaction. These findings indicate that perceived fairness directly affects compliance with institutional reforms, a factor that Ukrainian law must address through codified guarantees of procedural equity.
Świerczyńska's (2016) study of Poland's transition to selective risk-based control demonstrates how procedural reforms, when properly calibrated, can simultaneously raise efficiency and staff confidence. Between 2005 and 2014, control efficiency improved seventeen-fold despite rising trade volumes. Thus, procedural rationalisation in Ukraine should be legally formalised through internal by-laws ensuring predictable deployment and objective evaluation criteria.

Similarly, Truel, Maganaris and Grigorescu (2015) document how the Union Customs Code (UCC) shifted the operational paradigm from physical inspections to audit-based and electronic controls, requiring both traders and customs officers to adapt their professional practices. In times of disruption, such as war or institutional reconstruction, aligning procedural reforms with training and professional development becomes essential. Yet procedural efficiency alone cannot ensure resilience. Institutions must also preserve and transmit ethical standards and institutional memory across personnel cycles. This leads directly to the question of knowledge continuity and moral integrity. This interplay between ethical perception and procedural law demonstrates that institutional legitimacy depends on enforceable, not merely declarative, standards.

In conclusion, ethical leadership and perceived fairness are not peripheral values but core pillars of institutional resilience. In Ukraine's wartime customs system, the legitimacy of reform depends not only on what is implemented but on how it is perceived–from frontline officers to senior administrators. Embedding trust, fairness and competence within personnel systems is essential to building sustainable governance under conditions of crisis and recovery alike.

The rationale behind rotation is well established: it is designed to prevent stagnation, dismantle patronage networks and introduce new perspectives into hierarchical systems. In theory, it functions as both an anti-corruption instrument and a mechanism of institutional renewal. Yet, as institutional theory repeatedly shows, trust depends not only on rule clarity or performance outcomes but on predictability, participation and procedural fairness. When rotation is introduced without a transparent framework–or

perceived as arbitrary or politically motivated–it undermines the legitimacy it was meant to reinforce. Officers may interpret rotation as a punitive measure rather than a developmental one. Morale declines, loyalty erodes and informal resistance emerges. Paradoxically, a reform aimed at dismantling informal networks may generate new ones, driven by uncertainty and survival instincts. Therefore, ethical leadership is not only a managerial quality but also a constitutional obligation, as derived from the principles of good governance enshrined in Article 19 of the Constitution of Ukraine.

In essence, the ethical dimension of customs reform represents both its most fragile and most decisive element. Institutional design, no matter how sophisticated, cannot substitute for integrity-based leadership or for the perception of fairness among staff. Ukraine's wartime customs service thus stands at a crucial juncture: the success of rotation and reform will depend not solely on the legal texts that define them, but on the moral credibility of those who apply them. Building such credibility requires transparent communication, ethical exemplarity and continuity of institutional values even under duress. To institutionalise ethical accountability, amendments could be introduced to Article 13 of the Law on Civil Service, expanding it with provisions on managerial responsibility for fairness in rotation and evaluation. The next section expands this discussion toward post-war administrative reconstruction and long-term governance capacity.

5. Policy Recommendations: Building Institutional Resilience through Law and Leadership

Ukraine's experience of customs governance under martial law shows that institutional resilience is a legal and ethical construct as much as a managerial one. It rests on the rule of law, procedural fairness and administrative predictability. The rotation mechanism, although codified in ministerial orders, remains constrained by fragmented competencies and ambiguous legal status, underscoring the need for statutory consolidation.

Comparative evidence from Poland, Lithuania and Indonesia demonstrates that resilience grows where reforms are grounded in enforceable legal standards and transparent digital oversight. For Ukraine, this implies codifying reforms in a legally coherent, context-sensitive and EU-aligned manner.

5.1. Policy and Research Priorities

(a) Competency Validation System. Develop a national competency validation framework to maintain performance standards across rotated positions.
(b) Motivational Profiling. Integrate voluntary motivational assessments into recruitment and rotation processes, regulated by ministerial order under the Law on Civil Service.
(c) Digital Integrity Platforms. Extend digital personnel-management systems to include integrity analytics and rotation tracking, reducing discretion and improving transparency.
(d) Dual-Track Governance. Distinguish between emergency and long-term frameworks to preserve legal continuity during crises.
Once codified, these instruments would uphold Article 19 of the Constitution and ensure lawful, predictable mobility practices, thereby transforming rotation from a reactive device into a structured element of institutional resilience.

5.2. Legal Anchoring and Institutional Coherence

Resilience requires precision and legislative clarity. To align with the constitutional principle of legality, the rotation mechanism should be embedded in primary legislation through amendments to the Law on Civil Service or a dedicated Customs Personnel Mobility Act.

Such a statute should:
(a) define legal grounds and objectives of rotation;
(b) establish transparent criteria and procedural safeguards;
(c) guarantee appeal rights under Article 55 of the Constitution.

Amending Article 570-3 of the Customs Code to extend rotation up to twelve months (with employee consent) and adding Article 43[1] to the Law on Civil Service would ensure fairness and transparency. Lithuania's example confirms that statutory codification, tenure limits and relocation guarantee prevent politicisation and legal uncertainty.

5.3. Integrity and Oversight Innovations

Integrity systems should evolve beyond static asset declarations toward behavioural oversight. Optional polygraph screening for sensitive posts, introduced under Article 570-4 of the Customs Code, could enhance accountability while respecting voluntariness and due process. Reform models must avoid *normative mimicry*, the notion of mechanically importing Western frameworks without domestic adaptation. Sustainable integrity reform depends on legal contextualisation, not imitation.

Conclusions

The analysis confirms that the resilience of Ukraine's customs public service under martial law depends less on managerial improvisation and more on the internal coherence of its legal and ethical framework. The constitutional and statutory bases have proven flexible enough to maintain operational continuity, demonstrating that legality can serve both as a stabilising and transformative force.

However, overreliance on executive decrees and ad hoc orders risks weakening the rule of law and staff confidence. True convergence with EU standards will require leadership accountability, transparent procedures and a culture of ethical professionalism.

Comparative experience from Lithuania, Poland and Indonesia reinforces that resilience arises where mobility and integrity mechanisms are codified in primary law and supported by procedural safeguards. In Ukraine's context, codified rights and predictable processes are not technical details but foundations of legitimacy and public trust.

Ultimately, sustainable reform emerges where law, ethics and institutional trust act as mutually reinforcing pillars of state continuity.

References:

Anis, M. (2023). Pengaruh pengawasan terhadap kinerja Direktorat Penindakan dan Penyidikan pada DJBC Kementerian Keuangan RI [The effect of supervision on the performance of the Directorate of Enforcement and Investigation at the Directorate General of Customs and Excise, Ministry of Finance of Indonesia]. *Asdaf Kabupaten Banjar*. Available: http://eprints.ipdn.ac.id/9372

Bilalli, M. (2020). Customs union for the Western Balkan countries. *Justicia – International Journal of Legal Sciences, 13–14*, 139–145. https://www.ceeol.com/search/article-detail?id=940330

Constitution of Ukraine. (1996). *Vidomosti Verkhovnoi Rady Ukrainy (VVR), No. 30, Article 141.* https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text

Choi, D.-H., Park, J.-H., & Lee, M.-G. (2015). Study on the job satisfaction of customs officials at port customs – Focus on ocean fisheries officials. *Journal of Navigation and Port Research, 39(3)*, 223–231. Available: https://www.researchgate.net/publication/282519619_Study_on_the_Job_Satisfaction_of_Customs_Officials_at_Port_Customs_-_Focus_on_Ocean_Fisheries_Officials_at_Port_Customs_-

Czermińska, M., & Świerczyńska, J. (2017). Customs Administration in the European Union – Common one or 28 different?, *Krakowskie Studia Międzynarodowe*, 4, 111–129. https://www.ceeol.com/search/article-detail?id=643577

Drozdek, A. (2017). The autonomy of the European Union customs law (selected issues). *Acta Universitatis Carolinae Iuridica, 1*, 91–102. https://www.ceeol.com/search/article-detail?id=518077

Fang, Z., Hua, M., Bao, Y., & Sun, Q. (2023). Interactive effect of leader ethicality and competency on Chinese customs officers' organizational citizenship behaviors. *Frontiers in Psychology, 14*, 1152608. https://doi.org/10.3389/fpsyg.2023.1152608

Grottel, M. (2014). Polish Customs Authority in the implementation of innovative system of services for entrepreneurs, *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, 369 (1), 219–229. https://www.ceeol.com/search/article-detail?id=284554
Grottel, M. (2014). Polish customs authority in the process of improvement the quality of business services. *International Business and Global Economy*, 33, 712–722. https://doi.org/10.4467/23539496IB.13.053.2438
Horodynskyi, A. (2024). Factors limiting the use of rotation in the mechanism of professional mobility of public servants. *Theoretical and Applied Issues of State-Building*, 32, 116–130. https://doi.org/10.35432/tisb322024319683
Horodynskyi, A. (2025). Foreign experience of staff rotation in public service. *Theoretical and applied issues of state-building*, *33*, 212–225. https://doi.org/10.35432/tisb332025331324
International Monetary Fund. (2022). Pérez Azcárraga, Augusto Azael, Tadatsugu Matsudaira, Gilles Montagnat-Rentier, János Nagy, and R. James Clark. *Customs Matters: Strengthening Customs Administration in a Changing World*. Washington, DC: International Monetary Fund.
International Monetary Fund. (2025). *Ukraine: Technical assistance report—National revenue strategy implementation in customs administration* (IMF Country Report No. 2025/079). Washington, DC: Author. https://doi.org/10.5089/9798229020121.019
Jabłońska-Wołoszyn, M. (2015). Organizational culture based on competences in public service – Example of the competency model in the customs service. *Journal of Intercultural Management*, 7, 113–123. https://www.ceeol.com/search/article-detail?id=727802
Jabłońska-Wołoszyn, M. (2016). The assessment of managerial competencies in a public organisation – The example of customs service. *International Journal of Contemporary Management*, 15, 63–78. https://www.ceeol.com/search/article-detail?id=522683
Karklina-Admine, S., Cevers, A., Kovalenko, A., & Auzins, A. (2024). Challenges for customs risk management today: A literature review. *Journal of Risk and Financial Management*, 17(8), 321. https://doi.org/10.3390/jrfm17080321
Karyotakis, K. M., & Barda, E. I. (2020). Job satisfaction measurement tool for public sector executives: Case study – Customs officers in Greece. *Journal of Contemporary Research in Social Sciences*, 2(5), 89–118. https://doi.org/10.33094/26410249.2020.25.89.118
Kuybida, V., & Shpektorenko, I. (2023). Staff rotation: Resources of the institutional channel of personnel professionalization and the instrument (procedure) of public service personnel management. *Public Administration and Regional Development*, 21, 850–867. https://doi.org/10.34132/pard2023.21.11
Le, H. V. (2023). Human resource management for developing the Smart Customs model in Vietnam*, Journal of Finance & Accounting Research, No.02 (21)-2023, pp.84 - 93.*
Mavlonov, A. (2023). The effect on anti-corruption of the customs information systems of the Republic of Uzbekistan. *World Customs Journal*, 17(2), 5–12. https://doi.org/10.55596/001c.88098
Ministry of Foreign Affairs of Ukraine. (2018, October 18). *Order No. 427 on approval of the Procedure for rotation of diplomatic service officers in diplomatic service bodies*. Registered with the Ministry of Justice of Ukraine on November 8, 2018, No. 1274/32726. https://zakon.rada.gov.ua/laws/show/z1274-18#Text
Ministry of the Interior of the Republic of Lithuania. (2019). Order No. 1V-216 of 4 March 2019 on the Reimbursement of Travel and Commuting Expenses for Officers of the Internal Service System. *Teisės aktų registras (TAR)*, No. 2019-03725. https://www.e-tar.lt/portal/lt/legalAct/f3622160401b11e9aeacc8204ccfc06d/asr
Ministry of Finance of Ukraine. (2025). *Order No. 229 of 5 May 2025 on the Approval of the Procedure for the Rotation of Customs Officers* (registered with the Ministry of Justice of Ukraine on 18 June 2025, No. 938/44344).
Mungiu-Pippidi, A. (2015). *The quest for good governance: How societies develop control of corruption.* Cambridge University Press. https://doi.org/10.1017/CBO9781316286937
Republic of Lithuania. *Statute of the Internal Service*. Law No. XIV-2404 of 19 December 2023. Republic of Lithuania. *Law on Customs*. No. IX-2183, 27 April 2004.
Smilianskyi, I. (2025, April 18). Customs reform was to be 90% funded by USAID. *Forbes Ukraine*. https://forbes.ua/money/reforma-mitnitsi-mala-finansuvatisya-na-90-koshtami-usaid-smilyanskiy-18042025-29003
State Customs Service of Ukraine. (2025). *Algorithm for the Implementation of the Rotation Procedure of Customs Officers*.
Nguyen, V. D., Aquino, P. G., & Le, D. H. (2020). Motivational factors impact the labor productivity of customs' officials in Vietnam. *Revista Espacios*, 41(22), 44–58. https://www.revistaespacios.com/a20v41n22/a20v41n22p04.pdf
Sardiko, V. (2024). Attitudes of Latvian external border custom officers towards work. *Proceedings of the 15th International Scientific and Practical Conference Environment. Technology. Resources*, 4, 232–236. https://doi.org/10.17770/etr2024vol4.8200

Wibiastika, I. B. K., & Darma, P. G. S. (2024). Implementation of the Integrity Zone Program to Improve Indonesian Customs' Anti-Corruption Culture: A Case Study of Denpasar Customs. *World Customs Journal*, *18*(2), 77–95. https://doi.org/10.55596/001c.123944
Szabó, A. (2017). Objectives of the Bologna Process and their realization in the education of Hungarian customs officers. *Customs Scientific Journal*, Vol. 7 No. 2, 54–60. Available: http://csj.umsf.in.ua/archive/2017/2/7.pdf
Świerczyńska, J. (2016). The Polish customs service as a guardian of security and safety of the cross-border freight traffic. *Krakowskie Studia Międzynarodowe*, 3, 39–52. https://www.ceeol.com/search/article-detail?id=584459
Świerczyńska, J. (2016). The reduction of barriers in customs as one of the measures taken by the customs service in the process of ensuring security and safety of trade. *Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach*, 266, 212–222. Available: https://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.cejsh-6c221efb-5988-47aa-81e1-60f3f6d5d266/c/18.pdf
Świerczyńska, J. (2017). The contemporary face of the customs system in the European Union. *Przedsiębiorczość i Zarządzanie*, 9.2, 321–332. https://www.ceeol.com/search/article-detail?id=718576
Świerczyńska, J. (2019). Towards modern organization – the institutional reform of the customs administration in Poland. *Krakowskie Studia Międzynarodowe*, 2, 249–269. https://www.ceeol.com/search/article-detail?id=854294
Świerczyńska, J. (2019). W obliczu wyzwań – pół wieku funkcjonowania unii celnej w Unii Europejskiej. *Zeszyty Naukowe Polskiego Towarzystwa Ekonomicznego w Zielonej Górze*, 11, 119–136. https://doi.org/10.26366/PTE.ZG.2019.165
Świerczyńska, J. (2020). Customs security in the context of the activities taken by the National Revenue Administration in Poland. *Bezpieczeństwo. Teoria i Praktyka*, 4, 157–173. https://doi.org/10.48269/2451-0718-btip-2020-4-009
Truel, C., Maganaris, E., & Grigorescu, D. R. (2015). The development of EU customs law: From the Community Customs Code to the Union Customs Code. *Journal of Legal Studies "Vasile Goldiş"*, 30, 83–106. https://www.ceeol.com/search/article-detail?id=468957
Ura, E. (2021). Zatrudnienie funkcjonariuszy w administracji celno-skarbowej po reformie. *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, 28, 243–267. https://doi.org/10.4467/25444654SPP.21.021.14263
Valamalua, A., Mohanakumar, S., Ranathunga, I., & Medonza, S. (2022). Bolstering resilience in customs: The wellbeing of our people. *World Customs Journal, 16*(1), 151–156. https://doi.org/10.55596/001c.116469
Veenstra, A., & Heijmann, F. (2023). The future role of customs. *World Customs Journal*, 17(2), 13–30. https://doi.org/10.55596/001c.88415
Verkhovna Rada of Ukraine. (2012). *Customs Code of Ukraine: Law of Ukraine No. 4495-VI of 13 March 2012*. https://zakon.rada.gov.ua/laws/show/4495-17/ed20120313#n4128
Verkhovna Rada of Ukraine. (2015*). On the Legal Regime of Martial Law*: *Law of Ukraine No. 389-VIII of 12 May 2015*. https://zakon.rada.gov.ua/laws/show/389-19#Text
Verkhovna Rada of Ukraine. (2016). *Law of Ukraine on Civil Service: Law of Ukraine No. 889-VIII of 10 December 2015*. *Vidomosti Verkhovnoi Rady of Ukraine (VVR)*, 2016, No. 4, Article 43. https://zakon.rada.gov.ua/laws/show/889-19#Text
Verkhovna Rada of Ukraine. (2018). *Law of Ukraine on Diplomatic Service: Law of Ukraine No. 2449-VIII of 7 June 2018*. *Vidomosti Verkhovnoi Rady of Ukraine (VVR)*, 2018, No. 26, Article 219. https://zakon.rada.gov.ua/laws/show/2449-19#Text
World Bank. 2023. "Customs Reform in Developing Countries – Time for a Rethink?" Equitable Growth, Finance & Institutions Notes. Washington, DC: World Bank. Available: https://documents1.worldbank.org/curated/en/099058205082321364/pdf/IDU0fc1367f6055f0044e209adb06163ad425687.pdf)

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.009

CORRUPTION AT THE CROSSROADS OF SECURITY: EXPOSING THREATS, BUILDING DEFENCE/RESILIENCE

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Received: 1 October; accepted:21 November 2025.
DOI: https://doi.org/10.13165/j.icj.2025.11.02.009

Abstract. The paper discusses the importance of a systems approach in managing corruption threats to national security and highlights the potential of innovative approaches and technologies in mitigating these risks. The aim of this article is to show how corruption affects public and private sector actions, strategies and policies by examining the complex relationship between corruption and its impact on national security. To achieve this aim, the study focuses on identification corruption-related threats to national security, reviewing states' obligations to strengthen national security measures and assessing the experience of Lithuanian companies in identifying corruption risks in the field. The research combines a theoretical analysis of scientific literature with a quantitative method—a questionnaire survey conducted among Lithuanian state-owned and private companies. Based on the insights of scientists, it is estimated that certain national security interests may be violated by such illegal actions as weakening the institution, causing a dangerous increase in crime, unbalancing defence spending or damaging important infrastructure, increasing social and economic instability, etc. The results indicate that corruption risks related to national security must be managed systemically, through coordinated criminal, political, organisational and preventive measures, including personnel vetting, cybersecurity and procurement control. Innovative technologies such as artificial intelligence and blockchains can effectively reduce risks. The results obtained may serve as a starting point for Ukraine to strengthen the link between prevention of corruption and national security.

Keywords: National Security, Corruption, Threats, Corruption Resilience.

Introduction

Recent events such as the Russian war in Ukraine, tensions in other regions such as Israel, increased migratory flows and attempts to cross the US border, attempts by migrants from the Belarusian side to cross the borders of Lithuania, Latvia and Poland, and other unrest in the world all point to the need to revise the entire scale of the concept of security, from the perception of a sense of security and the notion of national security, to the development of reasonable and systematic responses to manage threats to national security. At the same time, these developments are also triggering research and evaluation in

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this field, with the legitimate question of whether and how the nature of national security threats has changed and, if so, how they relate to other sectoral areas.

The Heritage Foundation in the Americas identifies several main groups of non-military national security: political security (protection of the government and the public from internal and external threats); economic security (control of the economy and people's freedom to control their own financial decisions); energy security (access to energy resources); homeland security (control of airports, borders, transport and migration); cyber security (Holmes, 2015).

Each sector's approach to security is determined by unique factors, which emphasises the importance of focusing national security strategies on vital areas and allocating resources efficiently (Holmes, 2015).

The multidimensional, ambiguous concept of security is a matter of debate in the scientific community (Pūraitė & Šilinskė, 2017). K.R. Holmes, in discussing what national security is and is not, stresses the need to clearly differentiate between national issues, emphasising the importance of focusing strategic planning on the vital aspects of national security, with a clear distinction between these and social and other domestic issues. He argues that this will help to avoid confusion and to allocate resources more efficiently, while ensuring real national defence (Holmes, 2015).

The fight against corruption is considered a national security priority. In regarding corruption as a threat to national security, Lithuania has included targeted provisions in the National Corruption Prevention Agenda, noting that "progress in combating corruption not only affects the maturity of society, the economy, state governance and the justice system, but also helps to ensure national security interests". The impact of corruption on national security is primarily visible through its effects on the functioning of state institutions. Corruption poses a threat to national security because it creates conditions for non-transparent activities of state institutions, undermines economic and social stability, fuels crime and erodes public trust in the state and its institutions (Seimas of the Republic of Lithuania, 2022, Section 1).

The various world events and unrest that destabilise the foundations of security in the scientific field make it possible to rethink the concept of national security, to assess the relationship between national security and civil society (Kazlauskaitė Markelienė & Petrauskaitė, 2011), and to evaluate what preventive measures are effective in ensuring national security.

Analysis by the U.S. Agency for International Development (USAID) has shown that in order to effectively address anti-corruption as a national security priority, there are three key areas that need to be the focus. Firstly, the development of flexible public procurement systems, e.g. The Office of Transition Initiatives (OTI) has developed procurement mechanisms that can be quickly adapted to different situations, making efficient use of people and resources. Secondly, the deployment of staff, e.g. in the field, in the form of "a pool" of staff. In addition, the Office of Humanitarian Aid deploys Disaster Assistance Response Teams (DARTs) that are ready to act quickly after a disaster. In addition, these teams could accordingly operate in anti-corruption situations, implementing the "corruption declaration" under clear conditions for rapid response. Thirdly, confidence building, e.g. USAID's violence and conflict prevention teams use confidence building techniques that can be adapted to anti-corruption initiatives to gain support from local communities and promote cooperation (Cordell, 2021).

Mr Cordell also stresses the importance of aligning political objectives with operational imperatives, of working with United Nations agencies on joint anti-corruption efforts and of participating in initiatives such as the G7 Build Back Better World (B3W) initiative, the aim of which is to fight corruption in infrastructure in a coherent manner. It also stresses the need to focus efforts on high-risk sectors such as green energy and digital technologies, to join and support initiatives such as the Extractive Industries Transparency Initiative (EITI), and to apply digital development principles to increase transparency and accountability (Cordell, 2021).

In examining security challenges, security aspirations and the avoidance of crises, conflicts, threats and hazards, scholars point to the need to address threat management in a systemic manner, i.e. "every crisis, conflict, threat or hazard must be understood and assessed in a systemic manner" (Melnikas et al., 2020, p. 401). Therefore, it is fully accepted that a systemic assessment is necessary since it is not focused on the analysis of individual phenomena and threats but on the correlation and impact of phenomena and processes on each other. It is thus agreed that the perception and assessment of threats and hazards as a system should be based both on the desire to clearly and unambiguously define the relevant boundaries of the system, and on the need to respond in a targeted, timely and effective manner to various crises, conflicts, threats, hazards and security problems (Melnikas et al., 2020, p. 403).

The analysis of scholarly sources shows that the impact of corruption threats on national security is defined more broadly, not only in terms of the impact on security or on individual security-related links, but also on human rights and the territorial integrity of the state. Scientists mentioned that "in Ukrainian society, corruption is a priority in the context of financial and military support" (Kravtsov et al., 2024, p. 28). Other authors, for example, O. Makarenkov, in his analysis of the impact of corruption threats on Ukraine's national security, notes that "the strategy of eliminating corruption threats to national security is a system of knowledge about legal and organisational measures aimed at ensuring the dominance of human virtues in public relations at a level that excludes both potential and real threats to human rights, territorial integrity, safe living conditions of citizens and other constitutional values" (Makarenkov, 2024, p. 173). It is important to note that a systemic approach to analysing national security challenges allows for a broader assessment of the scope of threats, i.e. to assess the parallels – what are the actions of other actors and how do they affect national security. Furthermore, at the same time, by looking at the scale of national security challenges in a systematic manner it is possible to identify not only national security risks in the narrow sense, but also the risks of other affected areas that impact national security. It should be noted that the timely and systematic identification of important risks allows for timely and adequate preparation for risk management (preparation of risk maps, identification of interrelated risks, development of risk management models, etc.). Researchers examining corruption risks have noted that "the main factors for the emergence of corruption in Ukraine are war, low standard of living, unfavourable crime situation, social stratification, distrust of the judicial system, isolation of power from society, weak anti-corruption legislation, migration" (Sobko et al., 2023, p. 223).

This article focuses on the main challenges of corruption in the field of national security, i.e. it will analyse how corruption can manifest itself in actions related to national security. This article seeks to show how the fight against corruption is inextricably linked to national security, and how the threat factors are strongly intertwined, requiring an integrated strategy and synergies and coherence between all actors.

The subject of this study is corruption risks in national security and their management.

The aim of this article is to show how corruption affects public and private sector actions, strategies and policies by examining the complex relationship between corruption and its impact on national security.

In order to achieve this objective, two objectives are set:
1) Identify corruption-related threats in the field of national security.
2) To review the obligations of states to strengthen national security measures and to assess the experience of Lithuanian companies in identifying corruption risks in the field of national security and in applying countermeasures.

The research used the method of analysis of scientific literature to analyse the theoretical provisions: definitions of corruption threats and national security; the impact of corruption threats on national security; the main insights of scholars regarding the relationship between national security and corruption. A quantitative research method—a questionnaire survey—was also used to analyse the experience of Lithuanian state-owned and private companies in identifying corruption threats and their impact on national security, as well as in applying countermeasures to manage such threats and ensure

national security. For this purpose, a questionnaire consisting of nine questions was administered to employees responsible for corruption prevention and/or national security (compliance officers) in these companies. The survey was conducted between August and September 2024, and the empirical findings are used in the article selectively, insofar as they directly relate to the issue under examination (Law on the Protection of Objects Important for National Security, 2002, Annex 1).

AI-assisted technology was not used in the preparation of this article.

1. Corruption threats in the context of national security

Different threats to national security caused by corruption can be identified, such as the weakening of democracy and trust in government, the strengthening of authoritarian regimes, the violation of state sovereignty, the fuelling of conflicts, the weakening of the state and its institutions and the growth of social discontent (Kukutschka, 2023). Corruption can also contribute to terrorism (Auer & Meierrieks, 2024) and migration threats, breaches of information and cyber security (Department of State Security of the Republic of Lithuania & Second Department of Operational Services, 2023, p. 54), economic instability and the vulnerability of strategic assets, thereby threatening public security. In addition, by weakening law enforcement and judicial institutions, corruption creates favourable conditions for organised crime to expand and operate with impunity and can be deliberately used by foreign states or non-state actors to buy influence through political and business networks, thereby deepening external interference in domestic decision-making (Khrystynchenko et al., 2023; Lang et al., 2025). Corruption may also distort defence spending (Ofori-Mensah & Zhelyazkova, 2024), diverting resources from the most urgent capability needs to less effective but more profitable projects for corrupt officials, and undermine the quality and resilience of critical infrastructure (such as roads, bridges and energy systems), creating additional vulnerabilities that can be exploited in crises or armed conflict. (Chen, Liu & Lee, 2022; OECD, 2022; Hawkins, 2013). In addition, links between corruption and national security are also important for future training. In the context of the long-term training of law enforcement officers for 2026–2029, it should be emphasised that due to changing phenomena and emerging prohibitions, such as the application of sanctions, it is necessary to share international good practices in investigating corruption-related crimes that are related to hybrid threats and sanctions circumvention; only in this way, will it be possible to build common security (Caciuloiu, 2025).

Scientists, in analysing corruption impact to social relations in Ukraine, stressed the necessity to continue applying a complex of anticorruption measures: “preventing and combatting corruption have been central to Ukraine’s reform agenda since the Revolution of Dignity in 2013-2014, and the increased transparency and preventive measures have led to tangible reductions in corruption across various sectors. However, corruption remains a major problem, causing significant costs to the state budget, businesses and the population, discouraging investment and undermining the rule of law by the Commission Opinion on Ukraine’s application for membership of the European Union, 2022” (Novikovas & Fedchyshyn, 2025, p. 91).

Recognising the seriousness of these threats and highlighting their interconnectedness requires a strong set of comprehensive measures, both nationally and internationally, to prevent corruption and to counter other threats. It must also be understood that anti-corruption strategies need to be flexible and dynamic, taking into account the ever-changing geopolitical situation and integrating with other national security strategies.

At the organisational level, a risk-based approach to tackling corruption, including clear anti-corruption policies, independent project evaluation, transparent decision-making criteria and the implementation of strong internal control systems, is crucial (Pattanayak & Verdugo Yepes, 2020). This is not only to reinforce the existing controls, but to also develop flexibility and the ability to act in uncertain situations, where innovation and experimentation are becoming essential. Mr. Lindstedt points out that 'antifragile' organisations are all about fostering a culture of experimentation within the organisation, empowering innovative teams and having leaders/managers who adapt their leadership style to lead appropriately in critical situations (Lindstedt, 2022).

Lithuania's national security assets, such as strategic companies and infrastructure, may expose it to the risk of corrupt practices, which could be reflected in the activities of these companies and put society at risk. If corruption becomes entrenched in strategic facilities, it can lead not only to economic losses but also to a direct threat to the security of the population and the stability of the state.

In order to identify corruption risks, the results of internal investigations and preventive analyses of Lithuanian companies and interviews with compliance officers of Lithuanian companies were used to identify actions that threaten national security and to assess their correlation with corruption resilience, cybersecurity and information security (see Figure 1).

Looking at the correlation in the context of national security, there are interlinkages between the individual areas of corruption resilience, cybersecurity and information security, and specific actions, where actions such as lack of cooperation, lack of regulation or fraudulent actions are linked to all areas in which national security can be affected.

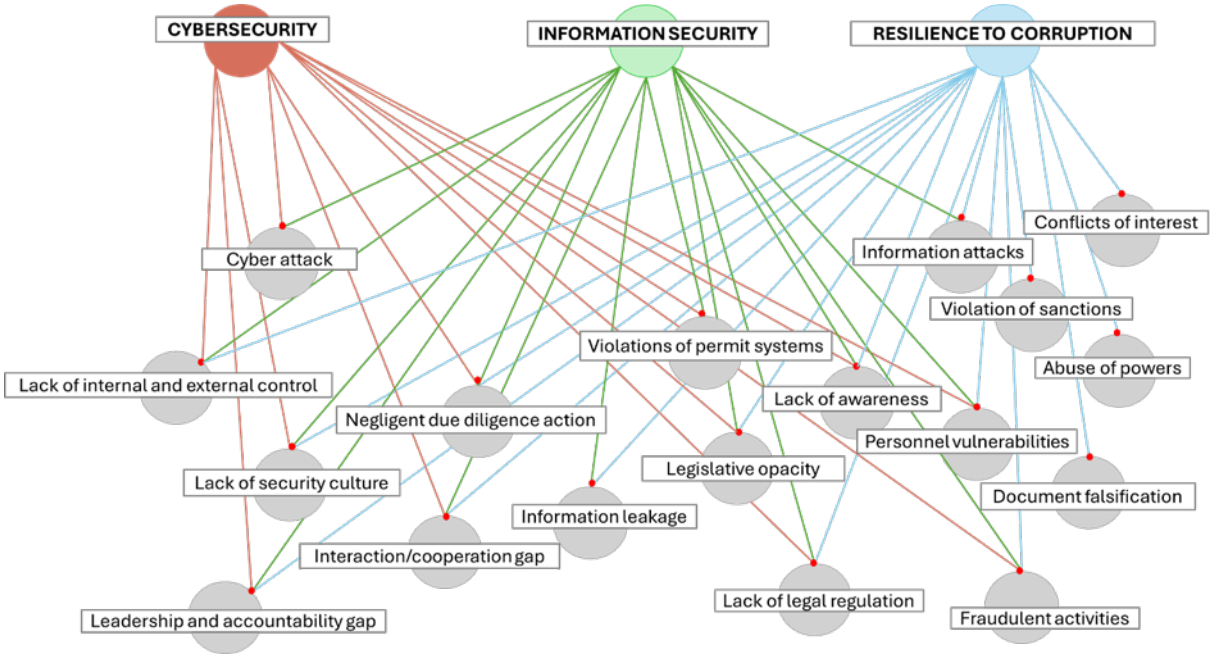

Figure 1. Correlation between threat-related actions and individual safety areas (prepared by the authors)

These actions can not only directly affect the operation of strategic facilities but also jeopardise the security of the country as a whole. However, they can be managed and mitigated through appropriate prevention and control measures and by integrating such measures into other national security strategies to ensure their effectiveness and coherence.

2. National security measures to enhance resilience to corruption: the Lithuanian experience

Each state needs to rethink its security model and adapt to changes both globally and regionally, which is also reflected in national legislation: the ability to operate in a less predictable environment, to cooperate more effectively with allies and partners, and to increase the resilience of the state and the public to emerging threats (Seimas of the Republic of Lithuania, 2021). Such actions are linked to measures of a complex nature in both internal and external contexts: deterrence, defence, building resilience to national security threats, and prevention of corruption. For example, the links between national security and the prevention of corruption are inseparable and are enshrined in key strategic documents, which stress that the anti-corruption system in Lithuania "cannot be static, but must be improved and developed in the light of changes, taking into account the link between corruption and national security: corruption should be seen as a threat to national security, and the fight against corruption is a prerequisite for and a key component of national security" (Seimas of the Republic of

Lithuania, 2022). Security requires states to take steps to identify security risks and to provide countermeasures to manage them.

More recently, legislation adopted by the European Parliament and the Council of the EU on a high common level of cybersecurity across the EU has entered into force. The aim is to further improve the resilience of the public and private sectors and the EU as a whole, as well as the resilience and incident response capabilities of the EU. This is in order to harmonise the cybersecurity measures taken by the Member States, to lay down the key rules for the operation of a coordinated regulatory framework and to establish mechanisms for effective cooperation amongst the authorities responsible in each Member State (European Parliament & Council, 2022). Compliance with these provisions would not only ensure the management of risks related to information security, e.g. by defining the responsibilities of the responsible actors in the field of information security, but also manage potential corruption risks, e.g. to prevent the possible leakage of confidential information.

The General Data Protection Regulation and other legislation on personal data protection require you to take steps to ensure the protection of personal data in order to prevent personal data breaches. In this context, it is important to assess the appropriateness of the transfer of data to third parties in order to foresee that the data will be used for a specific purpose (drafting of data transfer agreements). At the same time, however, it is important to identify and justify the nature and content of the anti-corruption measures to be implemented, the content of the targeted data, and the need for publicity in the public interest (General Data Protection Regulation, 2016).

The unauthorised loss, destruction, disclosure or unauthorised access to, or disruption of, an information system, technology or computer equipment of companies and organisations is an act that can affect the performance of companies and organisations and cause them material or non-material damage. Therefore, States are obliged to develop and implement cyber security incident and vulnerability (security gap) management plans to establish procedures for companies and organisations to properly manage cyber and information security incidents and cyber vulnerabilities identified in companies and organisations information systems, technologies, computer equipment and electronic communications networks (General Data Protection Regulation, 2016).

In addition, each country takes other steps to ensure national security and other security links. Lithuania, for example, has clarified the link between national security and anti-corruption activities (Seimas of the Republic of Lithuania, 2022). The National Anti-Corruption Agenda 2022-2033 states that "the objective of preventing corruption is to strengthen national security, create social welfare, improve the quality of administrative, public and other public services, protect freedom of fair competition, and minimise the impediment of corruption to the development of democracy and the economy" (Seimas of the Republic of Lithuania, 2022). Corrupt acts are understood more broadly to include acts aimed at concealing corruption offences, while the implementation of corruption-proof measures requires an assessment of the relationship between corruption prevention and national security, etc.

Secondly, Lithuania obliges companies of national security importance to prepare Security Plans (Seimas of the Republic of Lithuania, (2024b), Art. 15), which provide for the application of information security, cyber security, personnel security and physical security measures to manage potential risks in the companies' areas of activity. Recently, new challenges have been raised in relation to these plans, such as the activation of the plans when needed and the evaluation of the effectiveness of their provisions by means of exercises to determine whether the provisions of the security plans are effective in ensuring the security of the companies' operations. Other undertakings and organisations that do not qualify as undertakings of national security importance should, among other things, prepare security plans in accordance with the nature and specificity of their activities and apply basic regulatory measures, such as confidentiality undertakings, to their operations.

Thirdly, in Lithuania, companies of national security importance, in accordance with targeted legislation (Seimas of the Republic of Lithuania, (2024b)), must assess their compliance with national security requirements by applying to a special commission before entering into transactions. In addition, investor

due diligence is compulsory in the cases set out in the aforementioned law. In all cases, it is necessary to identify the risks arising in the field of national security and to provide measures to manage them.
Fourthly, Lithuania needs to fulfil the eligibility requirements for persons applying for or holding positions in companies important for national security. Ensuring compliance is linked to the management of potential risks in the field of national security through the selection and recruitment of reliable and transparent personnel. The correlation of compliance is seen in the area of personnel reliability: not only under Article 17 of the Law on the Protection of Objects of National Security Importance, but also under Article 17 of the Law on the Prevention of Corruption. In a complex assessment of the relationship between national security and corruption prevention, an analysis of the legal basis and application of these security checks reveals not only the close parallelism between the procedure of the checks, but also between the objectives themselves, (Navickienė & Kinkevičius, 2023).

It should be noted that additional cross-cutting actions have recently been taken to ensure national security. The changing geopolitical situation has led to a review and tightening of national security procurement requirements (Seimas of the Republic of Lithuania, (2024a, 2024c)). The relevant legislation has been substantially supplemented with national security provisions, which include the need to ensure that the entity has no interests that could jeopardise national security, the origin of the goods to be procured etc.

The authors' research has shown that depending on the nature of their activities, companies and organisations are implementing and enforcing other effective national security, information security, cybersecurity and anti-corruption measures that comprehensively address national security interests, but companies are not doing it to a great enough extent.

The survey covered one public institution, one state-owned enterprise, ten state-owned joint-stock companies (closed joint-stock companies), one municipally owned joint-stock company and one foreign-owned private company (Figure 2). The low participation of private companies is explained by the fact that only a few state-owned and private companies were selected from the list of companies of national security importance on (Law on the Protection of Objects Important for National Security, 2002, Annexes 1–3) in order to get an overall picture of the representation of these sectors and their importance for national security.

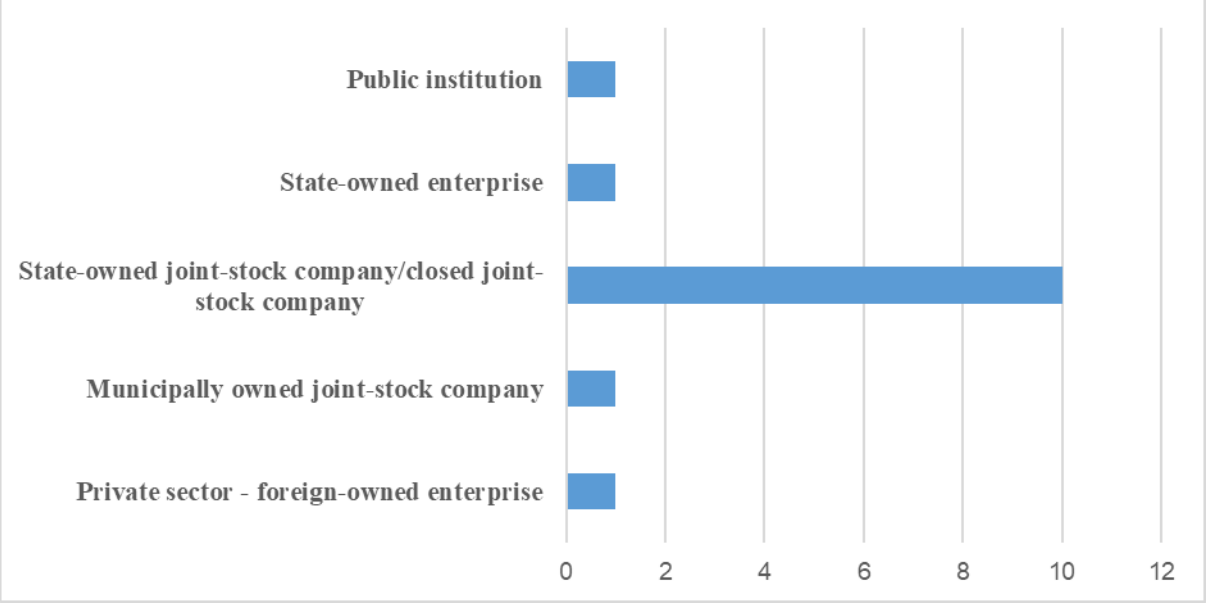

Figure 2. Company forms

Thus, the survey data suggest that state-owned joint-stock companies/ closed joint-stock companies are the most exposed to various risks, in particular information leakage, cyber-attacks, disclosure of commercial or official secrets, evasion of sanctions and other violations of sanctions, and non-performance of official duties.

State-owned enterprises and municipally owned joint-stock companies are also exposed to certain risks, with a lower risk distribution than state-owned companies, but are still exposed to cyber-attacks and other criminal activities.

The private sector has a lower diversity of risks compared to public enterprises and companies, but is exposed to risks of theft, fraud and bribery and kickbacks.

In summary, cyber-attacks and information leaks are the most common risks in all categories analysed, especially in state-owned joint-stock companies/ closed joint-stock companies. These risks in state-owned joint-stock companies/ closed joint-stock companies are particularly frequent. This may reflect their greater importance, sensitivity or attraction to malicious actors seeking to obtain sensitive information or disrupt operations (Figure 3).

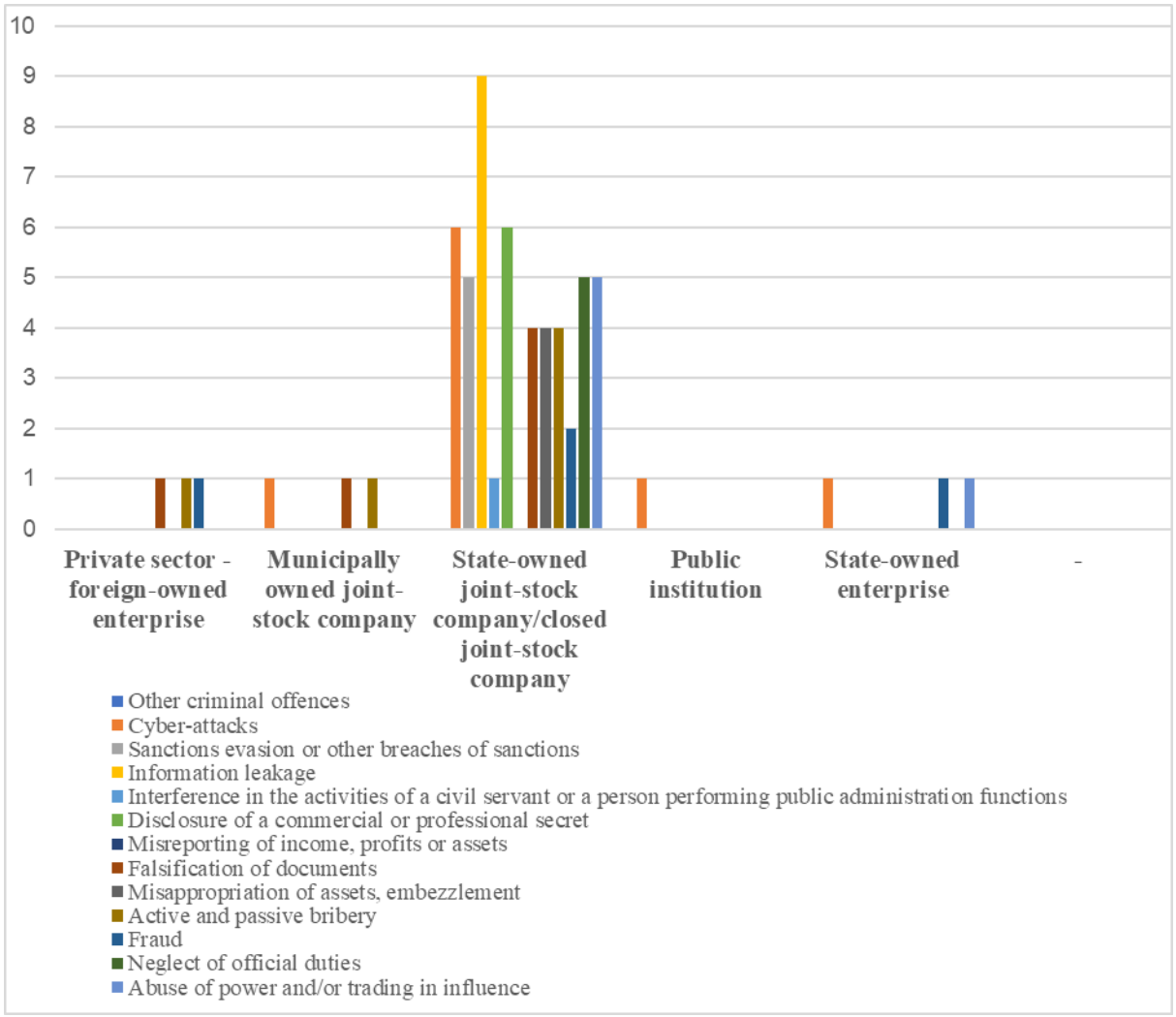

Figure 3. Which types of corruption and other criminal offences pose the greatest threat to your company's national security interests?

The initial findings of the survey suggest that organisations value most the implementation of comprehensive internal policies and procedures (12 responses), as well as the establishment of dedicated anti-corruption units (9 responses) and internal and external audits (9 responses) (Figure 4).

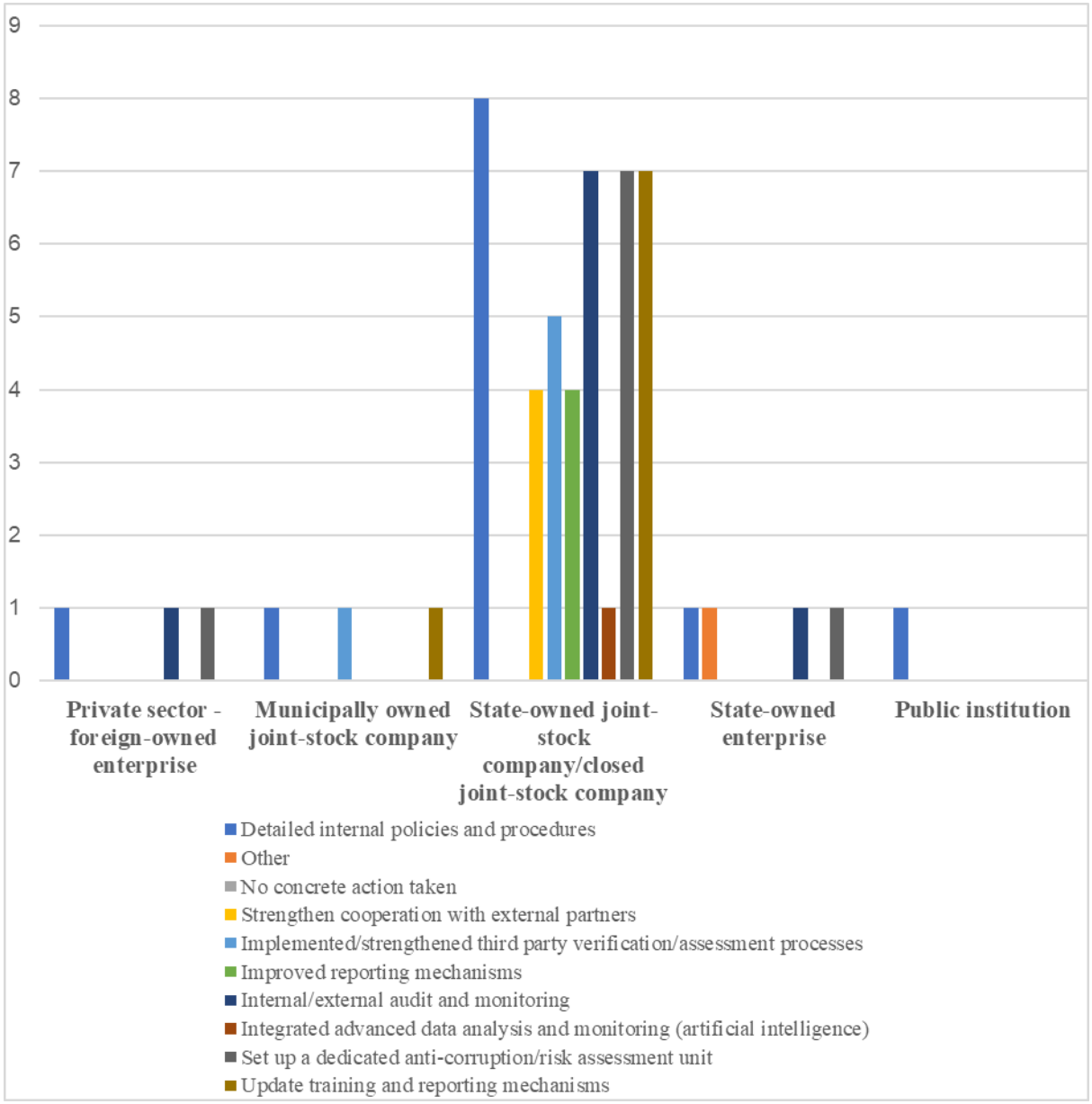

Figure 4. What steps has your company taken to identify and respond to these new threats?

In addition, state-owned joint-stock companies/ closed joint-stock companies are active in implementing other measures to identify and respond to new threats. They often strengthen cooperation with external partners, introduce third party verification processes and improve reporting mechanisms. In contrast, some private and municipally owned companies are less active in these areas, which may reflect different priorities and principles. These differences may be due to different legal frameworks for risk management and compliance and the availability of resources. Private companies may manage risks differently as they often face fewer bureaucratic hurdles and have greater flexibility. The private sector can focus on targeted risk management and need only act when necessary, thus avoiding excessive costs and making more efficient use of resources.

Therefore, while state-owned joint-stock companies/ closed joint-stock companies use a variety of measures, this does not necessarily show the superiority of their methods. Private companies may operate in a different way, concentrating on key areas and making the best use of available resources.

In assessing the effectiveness of measures, it is necessary to consider the specific context and characteristics of the companies' activities and to carry out appropriate further research.

The tools in place help to identify threats, ensure legal compliance and transparency in organisations. However, when discussing other measures that can improve the effectiveness of the fight against corruption in national security companies, the survey data shows that state-owned joint-stock companies/ closed joint-stock companies highlighted the need to invest more in training and awareness-raising of employees, clear regulation of processes and technology-based monitoring.

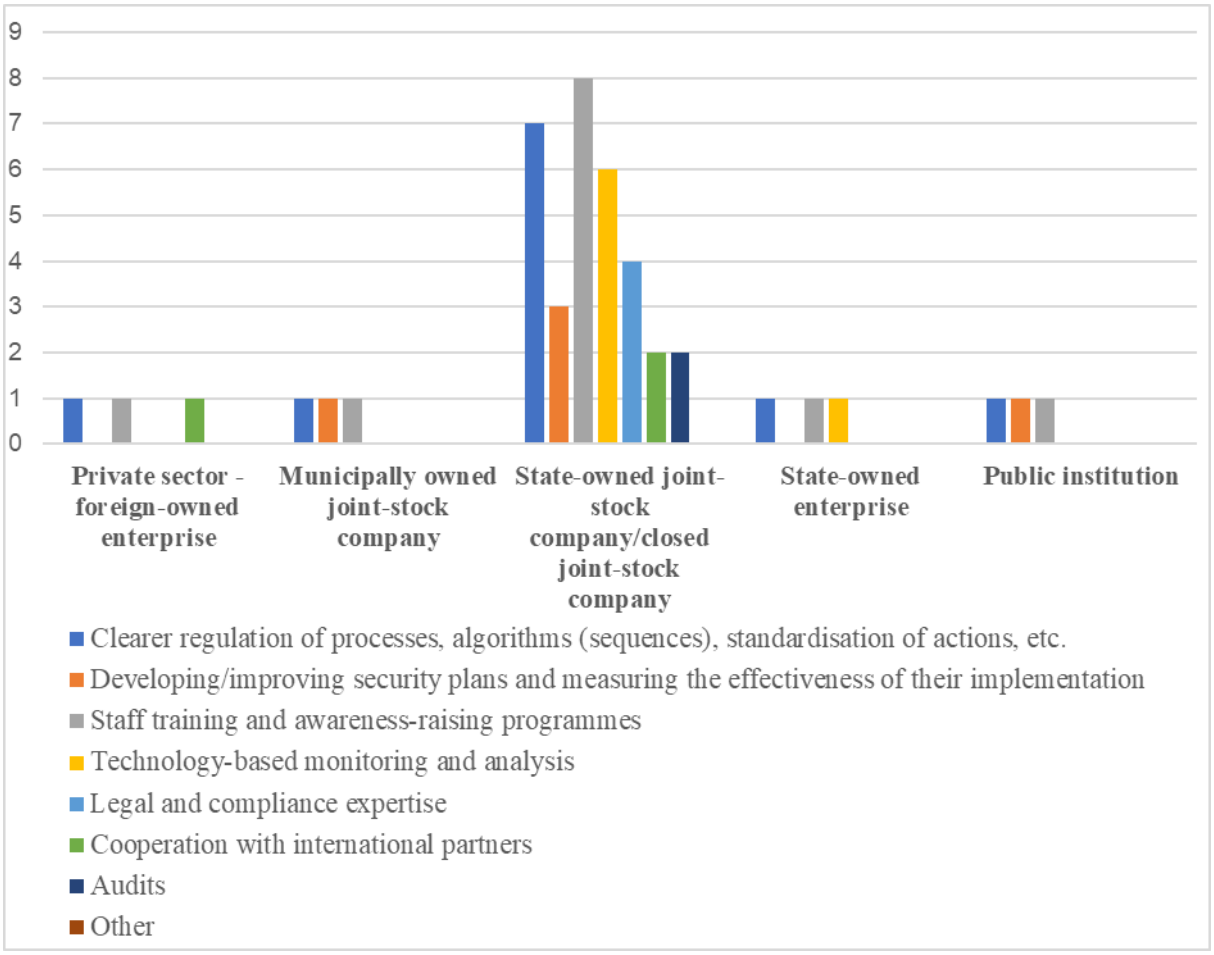

Figure 5. Are there any specific areas where national security companies should invest more to improve their anti-corruption efforts?

When analysing which innovative approaches or technologies can effectively reduce corruption and other related risks (Figure 6), several trends can be observed. state-owned joint-stock companies/ closed joint-stock companies consider that being more proactive in using different technologies and methods is an effective way to fight corruption. Compared to other forms of organisations, they particularly value artificial intelligence technologies for data analysis and anomaly detection, and blockchain technology for transparent supply chains. This approach may be linked to a greater need for transparency and strict compliance requirements, at least from a regulatory perspective. The use of risk maps is also seen as important in both state-owned joint-stock companies/ closed joint-stock companies and the private sector. Furthermore, private companies consider the introduction of advanced technologies such as digital whistleblower platforms as an effective way to reduce corruption. Different technologies are valued in different organisations, depending on their specific needs and field of activity, but there is a trend where advanced technologies are becoming an increasingly important tool in the fight against corruption and in the strengthening of organisations' security systems.

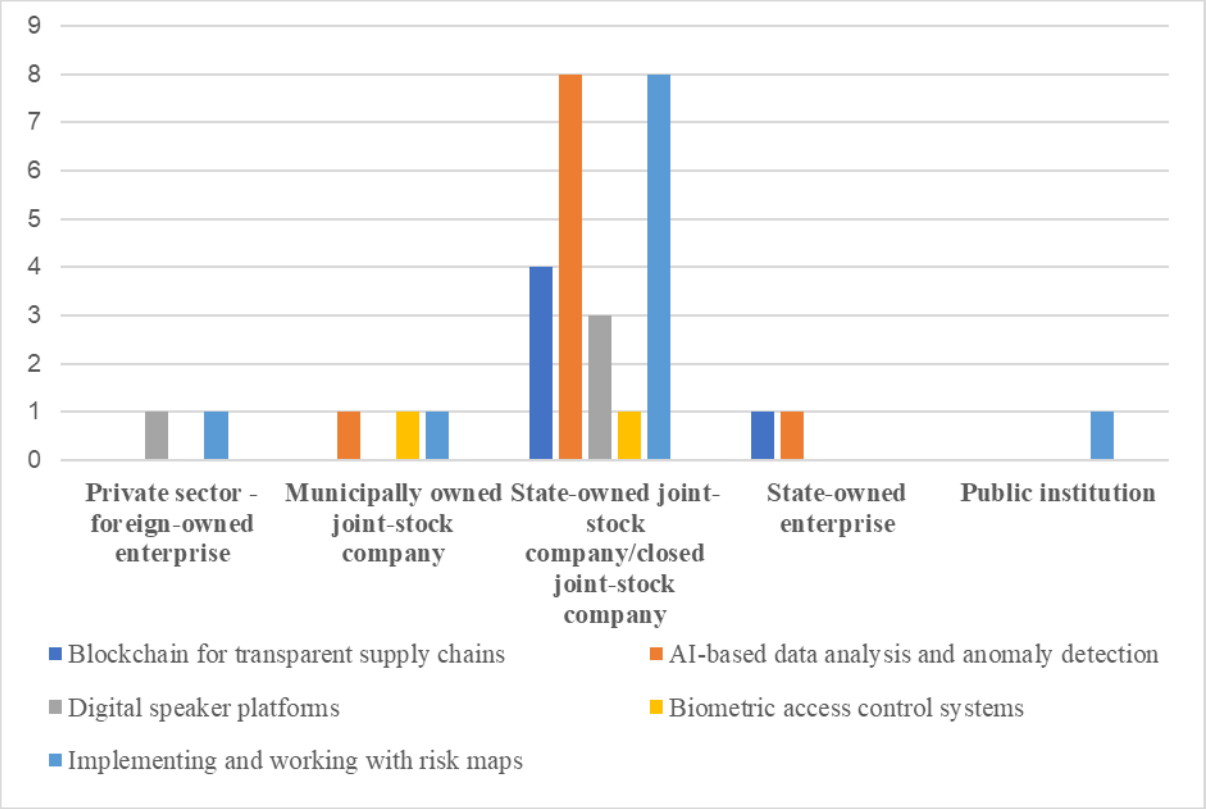

Figure 6. Which innovative methods or technologies do you think can effectively reduce corruption and other related risks?

In summary, Lithuanian companies are confronted with corruption in national security. They recognise such threats and apply different countermeasures; in particular, state-owned joint-stock companies/ closed joint-stock companies have paid a lot of attention to strengthening the targeted provisions of their internal legislation, to strengthening third-party verification, and to audits and monitoring. However, at the same time, they are concerned about the need for more active awareness-raising, clearer regulation of the processes, better integration of technologies for monitoring, and innovative ways and actions to reduce corruption.

After evaluating the experience of Lithuanian companies, comparing and transforming (modelling) the results obtained, the following experience would be significant for Ukraine in the field of strengthening national security. Criminal policy in the field of national security has several vectors: 1) countering war challenges; 2) countering corruption challenges; 3) preserving the Euro-integration and Euro-Atlantic directions of Ukraine's development. At the same time, national security itself in the modern world consists of many components: cybersecurity, information security, environmental security, etc. That is why Lithuania's experience in the fight against corruption is important, especially taking into account the creation of a reliable legislative framework, effective anti-corruption law enforcement and judicial bodies, and the creation of mechanisms for their interaction at the EU level. In addition, Lithuania, as an EU member state, has gone through the procedure of adapting its legislation to EU legislation (in accordance with agreements, regulations, directives, etc.), which provides an opportunity to form a criminal policy in the field of national security of Ukraine considering the experience of Lithuania. The empirical data obtained allow for Ukraine to identify corruption risks during the future transition from EU candidate state to the full EU member state.

Conclusions

Corruption is one of the biggest threats to national security, with a wide-ranging impact on both the state and society. In the context of national security, corruption takes many forms, including leaks of confidential information, sanctions violations, lack of awareness, cyber-attacks, etc. The fight against corruption requires comprehensive, flexible and dynamic strategies integrated into national security plans. They must promote transparency, strengthen control and ensure long-term stability. The systemic approach includes not only criminal prosecution but also political, organisational and preventive actions (personnel vetting, cyber-security, procurement control). Innovative technologies such as artificial intelligence and blockchains can effectively reduce risks.

The study shows that state-owned joint-stock companies/ closed joint-stock companies are more exposed to corruption risks than private companies. They are quite active in implementing measures to identify and respond to new threats, but there is still a greater need to strengthen legal compliance management systems, deploy advanced technologies, model potential threat scenarios and strengthen corporate preparedness for practical action.

Based on the results obtained, Ukraine could beneficially adopt Lithuania's best practices in anti-corruption policy and the development of national security-oriented criminal policy.

References:

Auer, D., & Meierrieks, D. (2024). Bestechung und Bomben: Korruptionsbekämpfung dient auch der nationalen Sicherheit. *WZB-Mitteilungen: Quartalsheft für Sozialforschung*, (186), 48–50. https://bibliothek.wzb.eu/artikel/2024/f-26651.pdf

Caciuloiu, A. (2025, November 14). Challenges and opportunities for officer training in creating a common EU law enforcement culture. Presentation at the international conference *Police in a changing world*, Seimas of the Republic of Lithuania, Vilnius.

Chen, C., Liu, C., & Lee, J. (2022). Corruption and the quality of transportation infrastructure: Evidence from the US states. *International Review of Administrative Sciences*, 88(2), 552–569. https://doi.org/10.1177/0020852320953184

Cordell, K. (2021). Anti-corruption as a national security priority: Planning the development response. Center for Strategic and International Studies. https://www.csis.org/analysis/anti-corruption-national-security-priority-planning-development-response

Department of State Security of the Republic of Lithuania, & Second Department of Operational Services under the Ministry of National Defence. (2023). *Assessment of threats to national security 2023*.

European Parliament & Council of the European Union. (2016). Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. *Official Journal of the European Union*, L 119, 4.5.2016. https://eur-lex.europa.eu/eli/reg/2016/679/oj

European Parliament & Council of the European Union. (2022). Directive (EU) 2022/2555 of 14 December 2022 on measures for a high common level of cybersecurity across the Union (NIS2). *Official Journal of the European Union*, L 333, 27.12.2022. https://eur-lex.europa.eu/eli/dir/2022/2555/oj

Hawkins, J. (2013). How to note: Reducing corruption in infrastructure sectors. *Evidence on Demand*. https://doi.org/10.12774/eod_cr.may2013.hawkins

Holmes, K. R. (2015). What is national security? In *2015 Index of U.S. Military Strength*. The Heritage Foundation, Washington, DC.

Kazlauskaitė-Markelienė, R., & Petrauskaitė, A. (2011). Civil society and national security: A theoretical review of the problem. *Annual Strategic Review of Lithuania*, 9(1), 235–253.

Khrystynchenko, N., Tataryn, N., Hrokholskyi, V., Tomliak, T., & Starostin, O. (2023). Corruption in the civil service as a threat to national security. *Lex Humana*, 15(4), 414–426. https://seer.ucp.br/seer/index.php/LexHumana/article/view/2808

Kravtsov, S., Orobets, K., Shyshpanova, N., Vovchenko, O., & Berezovska-Chmil, O. (2024). Progress and challenges in combating corruption in Ukraine: Pathways forward. *Journal of Strategic Security*, 17(2), 28–43.

Kukutschka, R. M. B. (2023, January 31). CPI 2022: Corruption as a fundamental threat to peace and security. Transparency International. CPI 2022: Corruption as a fundamental threat to… - Transparency.org

Lang, B., Pozsgai Alvarez, J., & Hogic, N. (2025). Strategic corruption: Conceptualizing the geostrategic dimensions of transnational corruption. *Public Integrity*, 1–9. Advance online publication. https://doi.org/10.1080/10999922.2025.2520704

Lindstedt, D. (2022). *Building resilient organizations through change, chance, and complexity*. Taylor & Francis.

Makarenkov, O. (2024). Strategy for eliminating corruption threats to Ukraine's national security. *Baltic Journal of Economic Studies*, 10(1), 163–174.

Melnikas, B., Tumalavičius, V., Šakočius, A., Bileišis, M., Ungurytė-Ragauskienė, S., Giedraitytė, V., Prakapienė, D., Guščinskienė, J., Čiburienė, J., Dubauskas, G., Dudzevičiūtė, G. (2020). *Security challenges: Improving management.* Collective monograph. Vilnius: Ministry of National Defence of the Republic of Lithuania.

Navickienė, Ž., & Kinkevičius, A. (2023). Improving personnel security clearance – the way of harmonization of national and European Union legal acts. *Jurisprudence*, 30(1), 100–120.

Novikovas, A., & Fedchyshyn, S. (2025). Peculiarities of the legal regulation of accepting gifts in the civil service in Ukraine and Lithuania. *International Comparative Jurisprudence*, 11(1), 91–103.

OECD. (2022). *Catalysing collective action to combat corruption in infrastructure: Accountable and effective non-judicial grievance mechanisms*. OECD Publishing. https://doi.org/10.1787/ce6d1b84-en

Ofori-Mensah, M., & Zhelyazkova, D. (2024). *Trojan horse tactics: Unmasking the imperative for transparency in military spending*. Transparency International Defence & Security.

Pattanayak, S., & Verdugo-Yepes, C. (2020). Protecting public infrastructure from vulnerabilities to corruption: A risk-based approach. In *Well Spent: How Strong Infrastructure Governance Can End Waste in Public Investment*. International Monetary Fund.

Pūraitė, A., & Šilinskė, N. (2017). Understanding the concept of security: Theoretical approach. *Public Security and Public Order*, 19, 135–145.

Seimas of the Republic of Lithuania. (2021). *National Security Strategy* (Resolution No. IX-907 of 28 May 2002; current version as of 22 December 2021). Vilnius.

Seimas of the Republic of Lithuania. (2022). *National Agenda for the Prevention of Corruption 2022–2033* (Resolution No. XIV-1178 of 28 June 2022; TAR, 2022-07-07, No. 14816). Vilnius.

Seimas of the Republic of Lithuania. (2024a). *Law No. I-1491 on Public Procurement* (adopted 13 August 1996; Vilnius.

Seimas of the Republic of Lithuania. (2024b). *Law No. IX-1132 on the Protection of Objects Important for National Security* (adopted 10 October 2002; *Valstybės žinios*, 2002-10-30, No. 103-4604; current consolidated version as of 1 January 2024). Vilnius.

Seimas of the Republic of Lithuania. (2024c). *Law No. XIII-328 on Procurement by Contracting Entities in the Fields of Water Management, Energy, Transport and Postal Services* (adopted 2 May 2017; current consolidated version as of 1 May 2024). Vilnius.

Sobko, G., Shchyrska, V., Volodina, O., Kurman, O., & Semenohov, V. (2023). International anti-corruption concepts and their implementation in Ukraine. *Novum Jus*, 17(2), 219–249.

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.010

CONFLICT OF INTEREST IN PUBLIC SERVICE AND RESTRICTIONS FOR POST-PUBLIC SERVANTS IN UKRAINE AND LITHUANIA

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Received: 1 September 2025; accepted: 2 December 2025.
DOI: https://doi.org/10.13165/j.icj.2025.11.02.010

Abstract. Resolving conflict of interest in public service is one of the key mechanisms for combating corruption. Its principles are defined in international legal documents. The United Nations (UN) Convention Against Corruption states that each State Party should strive, in accordance with the fundamental principles of its domestic law, to establish, maintain and strengthen systems that promote transparency and prevent the appearance of conflict of interest. All State Parties shall endeavour to establish, maintain and strengthen measures that promote transparency and prevent conflicts of interest, in accordance with the fundamental principles of their domestic law. The article raises the problem that the confusing legal regulation and the variety of situations that arise in public service result in public servants not always correctly identifying conflicts of interest, not avoiding conflicts of public and private interests, and persons who have ceased to work in the public service not complying with restrictions on work, restrictions on concluding contracts or using individual benefits, and restrictions on representation. The aim of this article is to reveal the peculiarities of the legal regulation of conflict of interest, to analyse means of resolving conflicts of interest in the public service and restrictions for post-public servants in Ukraine and Lithuania. The authors set out a number of tasks in the article: (i) to define the concept of conflict of interest in the public service; (ii) to identify means of resolving conflicts of interest in the public service in Ukraine and Lithuania; (iii) to compare the restrictions (limitations) for post-public servants in each country. The research methods employed included: (i) comparative method, comparing the regulations on conflict of interest in each country; (ii) generalisation method, to formulate conclusions; (iii) document analysis method, focusing on the legal acts and documents of Ukraine and Lithuania; (iv) statistical method, to reveal the number of investigation identifying conflicts of interest in public officials' activities.

Keywords: Conflict of Interest, Public Service, Post-public Servants, Withdrawal from Decision-making, Restrictions, Limitations, Liability.

Introduction

Resolving conflicts of interest in public service is one of the key mechanisms for combating corruption. Its principles are defined in international legal documents. For instance, the United Nations (UN) Convention Against Corruption (2003) states that each State Party should strive, in accordance with the fundamental principles of its domestic law, to establish, maintain and strengthen systems that promote

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transparency and prevent the appearance of conflict of interest. All State Parties shall endeavour to establish, maintain and strengthen measures that promote transparency and prevent conflict of interest, in accordance with the fundamental principles of their domestic law. The United Nations Anti-Corruption Toolkit (2004) states that most forms of corruption involve creating or exploiting a conflict between a corrupt person's professional duties and private interests.

The Organization of Economic Cooperation and Development Toolkit on Managing Conflict of Interest in the Public Sector (OECD, 2005) provides the following definition: "A conflict of interest is a conflict between an official's public duty and private interests, where the official's private interests may improperly influence the performance of their official duties and responsibilities". Recommendation № R(2000)10 of the Committee of Ministers to Member States on Codes of Conduct for Civil Servants states that a conflict of interest arises when an official has a personal interest that may influence, or appear to influence, their objectivity and impartiality in performing their official duties.

The legal term "conflict of interest" is a much younger term than the concept it represents, which plays a significant role in addressing the broader issue of corruption (Pastukh, 2021). A conflict of interest is a component of most corruption offences and is always based on a contradiction between an official's personal and official interests, where his or her personal interests may affect the improper performance of official duties. In his work 'Defining Political Corruption', Philp comprehensively explores the phenomenon of corruption and notes that people who hold office inevitably have several interests. These interests relate to various aspects of their private lives as well as to their official duties, which they must fulfil in the public interest (Philp, 1997).

This article addresses the instruments that Ukrainian policymakers could adopt to align Ukraine's legal framework with EU standards on solving conflict of interests in the public service, improving capabilities of public officials (public servants) to avoid of conflicts of interests, to comply with restrictions after service in the public sector. The article raises the problem that the confusing legal regulation and the variety of situations that arise within the framework of public service result in public servants not always correctly identifying conflicts of interest, not avoiding conflicts of public and private interests, and persons who have ceased to work in the public service not complying with restrictions on work, restrictions on concluding contracts or using individual benefits and restrictions on representation. The aim of this article is to reveal the peculiarities of the legal regulation of conflict of interest, to analyse means of resolving conflicts of interest in the public service and restrictions for post-public servants in Ukraine and Lithuania. The authors set out a number of tasks in the article: (i) to define the concept of conflict of interest in the public service; (ii) to identify means of resolving conflict of interest in the public service in Ukraine and Lithuania; (iii) to compare the restrictions (limitations) for post-public servants in each country. The research methods employed included: (i) comparative method, comparing the regulations on conflict of interest in each country; (ii) generalisation method, to formulate conclusions; (iii) document analysis method, focusing on the legal acts and documents of Ukraine and Lithuania and (iv) statistical method, to reveal the number of investigation identifying conflict of interest in public officials' activities.

The essence of the conflict of interest, the measures applied to avoid the conflict of interest and the restrictions applied for post-public servants were analysed from different perspectives and in different contexts Pastukh (2021), Philp (1997), Reed (2008), Oleshko (2018; 2023), Soloveičik and Šimanskis (2019), Havronyuk (2018), Rivchanenko (2017), Zheng (2015), Brezis (2023), Reyes (2018), Wilks-Heeg (2015), Cortese (2011), Novikovas (2022) and others.

AI-assisted technology was not used in the preparation of this article.

1. Conflict of interest in the public service: concept, signs, types

In fact, a conflict of interest exists whenever a person has a private interest that could affect the objectivity or impartiality of a decision, even if the decision is objective, impartial and legal. A particular

danger of a conflict of interest is that it leads to a loss of public trust in the official and the authority in which he or she works (Havronyuk, 2018).
Reed believes that a conflict of interest is "a situation where a public official (civil servant) has a personal or other interest that may affect his impartiality and objective performance of official duties <…>. conflicts of interest are naturally occurring phenomena, not pathology – they are an inevitable consequence of a situation where a person occupies more than one social role" (Reed, 2008).

Nikolov provides a summary of the legislation of most European countries and highlights the following features of conflicts of interest:

- A conflict of interest is a situation that arises in the performance of professional duties.
- A person with authority and power has a personal interest in situations that may be beneficial to him.
- Such exercise of power is based on the authority he has, the source of which is usually public law.
- The interest of such a person may affect the performance of his authority or duties (Nikolov, 2013).

Different scientific sources have different approaches to defining a conflict of interest. According to Oleshko, a conflict of interest is a situation with its own preconditions, course and consequences. It is important to understand how this situation emerges, its characteristics and the possible outcomes, as well as the potential consequences (Oleshko, 2018). Understanding conflict of interest requires a set of components: situational, behavioural and consequential. Pastukh's definition of a conflict of interest as "the presence of a private interest of a public official that may affect or influence the objectivity or impartiality of decision-making or the performance or omission of actions in the exercise of discretionary official, representative, or other powers as a public official" is also noteworthy (Pastukh, 2021). According to the scientist, the components of a conflict of interest are: (i) discretionary official, representative and other public powers (including non-governmental powers); (ii) private interests of those exercising such powers; (iii) potential influence of private interests on the objectivity or impartiality of discretionary official or other public powers. It should be noted that private interest is important for establishing a conflict of interest and it could be defined as the declarant's (or that of a person close to them) interest in personal property, non-property benefits, moral obligations, duties, or similar interests in the performance of their official duties.

The case law of the European Union has also been revealed the concept of conflict of interest. One of the first cases in which a conflict-of-interest situation was discussed episodically is Ismeri Europa v Court of Auditors (Case No. T-277/97). The General Court of the European Union ruled that a conflict of interest is a situation where a person who has influence over the decision-making process uses that influence to obtain personal benefit. The Court did not separately examine the concept of conflict of interest and did not specify any criteria or characteristics of such a concept, but attempted to define such a situation, emphasising the influence of the person as a decisive factor (Judgment in Case No. T-277/97).

In the case of Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy the General Court of the European Union summarised the previous case-law of the General Court and the Court of Justice of the European Union and made some progressive findings on conflict of interest. Firstly, the Court stated that the concept of conflict of interest is objective in nature and that, in order to define it, it is necessary to disregard the intentions of the persons concerned, even if they acted in good faith. Secondly, contracting authorities are not obliged to exclude tenderers who find themselves in a situation of conflict of interest; such exclusion would not be justified in cases where it can be demonstrated that the situation did not influence their actions or that it did not distort fair competition between suppliers. Thirdly, the exclusion of a tenderer who is in a situation of conflict of interest regarding public procurement procedures is necessary only if there are no other appropriate measures to avoid infringement of the principles of equal treatment and transparency (Judgment in Case No. T-415/10)

In Cases Deloitte Business Advisory NV v Commission of the European Communities (Case No. T-195/05) and Intrasoft International SA v European Commission (Case No. T-403/12), the General Court,

interpreting the provisions of EU Regulation No 1605/2002, repealed and replaced by EU Regulation No 966/201225, stated that a conflict of interest is an appropriate legal basis for excluding a tenderer from a public procurement procedure. However, this should only be considered when the conflict of interest becomes real. This risk must be determined by assessing the tenderer and its tender since the mere theoretical possibility of a conflict of interest is not sufficient. The Court states that a conflict of interest is (i) a situation which (ii) is objective in nature and (iii) must be real and not theoretical. Furthermore, exclusion from the competition is (iv) a measure of last resort, which means that it is the exception rather than the rule.

The administrative courts of the Republic of Lithuania have also expressed their views on the assessment of conflict of interest in practice. This practice is still followed when considering cases in administrative courts. The Supreme Administrative Court of Lithuania emphasises that a conflict of interest cannot be hypothetical, but must be direct and obvious. Recognising that a person's activities are influenced by a conflict of interest, it is necessary to clearly and unambiguously indicate in each case what factual circumstances confirm the existence of a specific property or non-property interest of the person. The assessment of these circumstances cannot be based on assumptions, unrealistic or unlikely hypothetical conclusions and speculations about the possible past or future interests of a person working in the civil service (administrative case No A442-1009/2014). The law cannot be interpreted too broadly – private interest and personal interest in the decisions made must be clear and direct, and linked to the declarable data established in this law that may give rise to a conflict of interest (administrative case No A756-1601/2013). The legislator has clearly and unambiguously established the relevant legal measures that must be followed by persons working in the civil service so that the public does not have any doubts about the impartiality and transparency of decisions made in the civil service i.e. the legislator. Prohibiting persons working in the civil service from participating in the preparation, consideration or adoption of decisions, which give rise to a conflict of interest, has clearly defined what measures a person working in the civil service must take to avoid a conflict of interest situation and in what order they must be taken (administrative case No A602-230/2013.).

Under Ukrainian legislation, the specifics of preventing and resolving conflict of interest are defined in The Law of Ukraine On Prevention of Corruption (2014) in Section V. Additionally, the National Agency for the Prevention of Corruption has developed the Guidelines for the Application of Certain Provisions of the Law of Ukraine On Prevention of Corruption Regarding the Prevention and Settlement of Conflict of Interest and Compliance with Restrictions on the Prevention of Corruption (Methodological Recommendations, 2024), which are updated systematically. The latest version of the guidelines was issued on January 12, 2024 and was updated on February 3, 2025. Although these guidelines do not contain legal provisions and are purely advisory, they are intended to ensure the uniform application of the Law of Ukraine On Prevention of Corruption and to establish a consistent approach to complying with the rules for preventing and resolving conflict of interest and preventing corruption. In essence, the guidelines serve as a corruption prevention handbook for public servants, offering clear algorithms for addressing various situations and providing practical examples.

It is important to pay attention to that The Law of Ukraine On Prevention of Corruption (2014) does not contain a definition of the term “conflict of interest”. It can be defined by analysing such concepts as “potential conflict of interest”, “real conflict of interest” and “private interest”, which are enshrined in Article 1 of the aforementioned Law:

- a potential conflict of interest is the presence of a private interest in the area in which a person exercises his/her official or representative powers, which may affect the objectivity or impartiality of his/her decision-making, or the performance or non-performance of actions in the exercise of these powers;
- a real conflict of interest is a conflict between a person's private interest and his/her official or representative powers, which affects the objectivity or impartiality of decision-making, or the performance or non-performance of actions in the exercise of these powers;
- private interest means any property or non-property interest of a person, including those arising from personal, family, friendly or other non-service relations with individuals or legal entities, including those

arising from membership or activity in public, political, religious or other organisations (The Law of Ukraine On Prevention of Corruption, 2014).

Thus, it can be concluded that a conflict of interest may exist when the following three components are present simultaneously: - the person has a private interest; - the person has official powers, which he or she may exercise at his or her discretion to take actions or make decisions on the issue in which he or she has a private interest; - such official powers are discretionary, meaning the person may choose from several legally permissible actions or decisions at his or her discretion. Only when these factors are present can it be asserted that a person's private interest may affect their objectivity and impartiality when performing an action or making a decision; the person therefore has a conflict of interest (Methodological Recommendations, 2024).

It is important to remember that a conflict of interest exists whenever a person has a private interest that may affect the objectivity or impartiality of a decision, even if the decision (action) is objective and impartial and complies with the law. While a conflict of interest does not necessarily lead to an illegal decision or act, it can create such a situation and cause a crime related to official or professional activity involving the provision of public services if the conflict is not identified, assessed and resolved in a timely and proper manner (Methodological Recommendations, 2024).

Currently, the Ukrainian legal definition of "conflict of interest" consisting of a triptych of concepts – private interest, potential conflict of interest and actual conflict of interest – does not meet the requirements of legal certainty, clarity and unambiguity. There is either a conflict of interest or there is not. There cannot be “a little bit of a conflict of interest”. It would be appropriate to refer to the Law on Coordination of Public and Private Interests of the Republic of Lithuania, (1997), where Article 2(2) contains a clear definition of the concept of “conflict of interest”. It defines it as a situation in which the declarant, in the performance of his or her official duties or in the performance of his or her official assignment, is required to take or participate in a decision or to carry out an assignment that also concerns his or her private interests.

According to Soloveičik and Šimanskis, conflict of interest are not illegal in themselves. They can be the beginning of all kinds of illegal actions (civil or administrative offences, criminal acts, etc.). However, negative actions and their consequences can be avoided due to (i) appropriate legal regulation and (ii) correct behaviour of the person who finds himself in such a situation. Traditionally, a conflict-of-interest situation is not a violation of the law per se (in itself, by itself), it is rather a necessary condition for its occurrence if the responsible person or the legal ecosystem in which this person operates does not interfere. (Soloveičik & Šimanskis, 2019).

From a practical standpoint, it is important to note that a conflict of interest is not a violation in and of itself. Violations may occur when the situation is concealed or not detected in time, or when it is not properly resolved. According to the Code of Ukraine on Administrative Offenses (1984) (Article 172(7)), liability is incurred for violations of the requirements for preventing and settling conflict of interest, including: - failure to notify a person in the cases and in the manner prescribed by law of a real conflict of interest; or - taking actions or making decisions in the context of a real conflict of interest. However, parts 1 and 2 of Article 172(7) the Code of Ukraine on Administrative Offenses (1984) are broad and only describe the essence of these administrative offences. For a full definition of their features, refer to other legal and regulatory acts or bylaws that define the legal and organisational framework for Ukraine's anti-corruption system, the content and procedure for applying preventive anti-corruption mechanisms and the rules for addressing the consequences of corruption offences. This provision has general and specific content. The general content of a blanket disposition is conveyed in the verbal and documentary form of the relevant article of the Code of Ukraine on Administrative Offenses (1984) and necessarily includes provisions of other regulatory legal acts. The general content of the blanket disposition relates to defining an act as a certain type of offence and establishing administrative liability for it. The specific content of this disposition details the relevant provisions of other regulatory legal acts, filling the administrative legal provision with more specific content (Resolution of the Shevchenkivskyi District Court of Kyiv in case № 761/3217/24).

As can be seen from the explanations provided by the High Specialised Court of Ukraine for Civil and Criminal Cases in the information letter "On Bringing to Administrative Liability for Certain Corruption-Related Offenses"(2017), the analysis of the terms "potential interest" and "real interest", as defined in Article 1(1) of the Law of Ukraine On Prevention of Corruption, reveals that a potential conflict of interest differs from a real one. In a potential conflict, only the existence of a person's private interest is established. This private interest may affect the objectivity or impartiality of decision-making. In contrast, a real conflict of interest is defined as a contradiction between a person's private interests and their official or representative powers. This contradiction directly affects the objectivity or impartiality of decision-making or the performance of actions. Additionally, it also determines the degree of influence of this contradiction on decision-making or performance of an action, which should have an objective expression, as well as the temporal relationship between decision-making and the presence of certain signs that occur in this case. In other words, the difference between these concepts is that in order to establish the facts of a real conflict of interest, it is not enough to state the existence of a private interest that may potentially affect the objectivity or impartiality of decision-making, but it should be directly established that firstly, a private interest exists, secondly, it contradicts official or representative powers and thirdly, such a contradiction actually affects the objectivity or impartiality of decision-making or actions in practice.

Thus, under Ukrainian law, there is no liability for potential conflict of interest. A person may only be held administratively liable for failing to report, perform actions, or make decisions in the context of a real conflict of interest. According, Article 23(3) of the Law on Coordination of Public and Private Interests of the Republic of Lithuania, Declaring persons who have been recognised as having violated the requirements of this Law in accordance with the procedure established by legal acts may not be promoted, accepted, transferred, appointed or elected to an equivalent or higher position in an institution or in the system of institutions in which they work for one year from the date of adoption of such a decision.

Some researchers point to another type of conflict of interest: the perceived conflict of interest. According to Oleshko, a perceived conflict of interest is a situation that creates the perception, based on a sufficient set of objective features, that a conflict of interest exists or may exist when, in fact, this perception is false (Oleshko, 2023).

The conclusions and recommendations "Conflict of Interest Management in Ukraine and the National Agency for the Prevention of Corruption" prepared by Kalninsch and Hoppe (2018) also suggest introducing the term "apparent conflict of interest" into Ukraine's current anti-corruption legislation. This would align with paragraph 12 of Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service (2004). It says that "By contrast, an apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties, but this is not in fact the case. A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future".

From time to time, civil servants and other persons authorised to perform the functions of the state or local self-government may have doubts about whether they have a conflict of interest or not. To distinguish a perceived conflict of interest from a potential or real one, the National Agency for the Prevention of Corruption developed a conflict-of-interest test. Public officials can use the test to determine if they have a conflict of interest and take the necessary steps to resolve it. The test helps identify potential conflict that may arise in different situations and prevent their negative consequences. It is an important tool for ensuring transparency and integrity in the work of those authorised to perform public functions. This test is interactive and is designed to help officials quickly understand many typical problematic situations and identify conflict of interest in a timely manner. While the test does not provide answers to every question, it serves as a guide to help officials determine if they have a conflict of interest. If the test indicates that a conflict of interest exists, the official must follow the approved National Agency for the Prevention of Corruption algorithm of actions to prevent a corruption offence.

It is worth noting that the existence of such a self-testing tool in the Ukrainian anti-corruption system is consistent with Managing Conflict of Interest in the Public Sector: A Toolkit (2005), which provides a self-test for identifying conflict of interest in Section 6. This is a Short questionnaire/memory-jogger for senior managers. As explained in A Toolkit (2005) "As a diagnostic measure, senior managers and heads of public organisations can use the following short questionnaire to remind themselves of the need for personal efforts, specifically targeted, to discourage the growth of conflict of interest, corruption and misconduct in the organisations for which they are responsible".

2. Means of resolving conflict of interest in the public service

The Law of Ukraine on Prevention of Corruption (2014) provides a clear set of guidelines for individuals authorised to perform the functions of the state or local self-government to avoid or further resolve conflict of interest. Thus, they are obliged to: (i) take measures to prevent the emergence of a real or potential conflict of interest; (ii) notify no later than the next business day from the moment when the person learned or should have learned about the existence of a real or potential conflict of interest to his/her direct supervisor and in case of holding a position that does not require a direct supervisor, or in a collegial body - to the National Agency for the Prevention of Corruption or other body or collegial body determined by law, while performing the duties in which the conflict of interest arose, respectively; (iii) not to take actions or make decisions in the context of a real conflict of interest; (iv) take measures to resolve a real or potential conflict of interest.

There is a gap in the law because it does not specify what form the conflict of interest should take. The National Agency for the Prevention of Corruption has issued recommendations (Methodological Recommendations, 2024) for reporting and registering real and potential conflict of interest in writing, in accordance with the existing record-keeping system.

The Law of Ukraine on Prevention of Corruption (2014) regulates the actions of the immediate supervisor of the person / head of the body authorised to dismiss / initiate dismissal from office / the National Agency for the Prevention of Corruption. The respective entity is obliged to: (i) upon receipt of the notification of a conflict of interest, decide on the settlement of the conflict of interest of the subordinate within two business days. The manager must also notify the relevant subordinate of the decision; (ii) if he/she becomes aware of a conflict of interest (from other persons, corruption reports, The National Agency letters, etc.), take measures provided by the Law to prevent and resolve the conflict of interest of the subordinate.

If a person (who holds a position that does not involve a direct supervisor) reports a conflict of interest to the National Agency for the Prevention of Corruption, he or she must be advised of the procedure for resolving such a conflict of interest. At the same time, the National Agency for the Prevention of Corruption, unlike the direct supervisor of the person with a conflict of interest, is not empowered to make decisions on the settlement of the conflict of interest.

Any person with doubts about a potential conflict of interest may apply to the National Agency for the Prevention of Corruption for clarification. The Law of Ukraine on Prevention of Corruption (2014) states that if a person has not received confirmation of the absence of a conflict of interest, he or she must act in accordance with the requirements of this law. The Law provides certain immunity to a person who has received confirmation from the National Agency for the Prevention of Corruption that he or she has no conflict of interest. In this case, the person is exempt from liability, even if their actions are later found to constitute a conflict of interest.

The legal acts of the Republic of Lithuania regulate the obligation to declare a conflict of interest and to recuse oneself from decision-making in a very similar way. In article 11(1) of Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997) a declarant shall be prohibited from participating in the preparation, deliberation or adoption of decisions, or from otherwise influencing or attempting to influence them, or from performing other official duties (hereinafter referred to as "the performance of official duties") if the official duties performed are related to his private interests. Before

performing or commencing the performance of official duties, the civil servant must inform the head of the institution or establishment or the person authorised by him or another entity accepting or appointing to office, or a collegial state or municipal institution (where the declarant is a member of a collegial state or municipal institution) and persons who perform official duties together, of the cases referred to in Article 11(1) and to declare dismissal and not to participate in any form in the further performance of official duties (Article 11(2)).

Accordingly, administrative courts specify the provisions of the law, indicating that the following rules of conduct are established for a person working in the civil service:

1) prohibition to participate in the preparation, consideration or adoption of decisions or otherwise influence decisions that cause a conflict of interest;
2) obligation to inform the head of his institution and persons who are also participating in the preparation, consideration or adoption of a decision about the existing conflict of interest and to declare his withdrawal from the adoption of such a decision;
3) the head of the institution or his authorised representative may not accept the declared withdrawal and oblige the person to participate in the subsequent procedure. The Supreme Administrative Court of Lithuania indicates that it follows from these legal norms that the rules of conduct established therein for a person working in the civil service become mandatory and must be implemented in cases where a situation arises that meets the criteria of a conflict of interest arising between private and public interests (administrative case No. eA-1446-520/2021).

Novikovas indicates that the declaring person is prohibited from performing official duties if the official duties performed are related to his private interests. Accordingly, the declaring person must, before performing official duties or after starting to perform them, firstly, inform the head of the institution about the indicated cases, secondly, declare his resignation and thirdly, not participate in any form in the further performance of official duties. Public administration entities must prepare written preliminary recommendations, which would clearly indicate from which official duties the civil servant must resign. The head may not accept the resignation of the declaring person only in exceptional cases (Novikovas, 2022).

The Supreme Administrative Court of Lithuania has stated that there are no exceptions when a person working in the public service may not inform his/her direct superior or an authorised representative of the head of the institution and persons who are also participating in the procedure for preparing, considering or adopting a decision about the existing conflict of interest and not withdraw from participating in the procedure for preparing, considering or adopting a decision that causes a conflict of interest. The Supreme Administrative Court of Lithuania has also stated that a circumstance regarding whether a person working in the public service, having violated the prohibition on participating in the preparation, consideration or adoption of decisions or otherwise influencing decisions that cause a conflict of interest, achieved the desired result is not legally significant (administrative case No. A146-2624/2012).

A specific procedure for resolving conflict of interest is provided for members of collegial bodies. This includes local self-government bodies, such as city, regional and district council deputies; members of the Antimonopoly Committee of Ukraine; and so on. If a member has a real or potential conflict of interest, he or she is not entitled to participate in this body's decision-making process. Any other member of the relevant collegial body or meeting participant directly concerned with the issue under consideration may declare the conflict of interest of such a person. Any conflict of interest statement made by a member of a collegial body must be recorded in the minutes of the collegial body's meeting. However, there may be situations in which the relevant person's failure to participate in this body's decision-making process could result in the entire body losing its competence. According to the law, this person's participation in decision-making is subject to external control, as determined by the relevant collegial body.

In addition, the following entities are subject to the rules of special legislation governing the status of the respective persons and the principles of organisation: the President of Ukraine; members of the Parliament of Ukraine; members of the Cabinet of Ministers of Ukraine; heads of central executive bodies that are not members of the Cabinet of Ministers of Ukraine; judges; judges of the Constitutional Court of Ukraine; heads and deputy heads of regional and district councils; city, village and settlement heads; secretaries of city, village and settlement councils; and deputies of local councils.

For example, the procedure for resolving conflict of interest among judges of the Constitutional Court of Ukraine is quite complex and different from others, since according to the Law of Ukraine on the Constitutional Court of Ukraine (2017), it is a collegial body of constitutional jurisdiction. If a judge of this body has a conflict of interest, he or she cannot participate in preparing, considering, or adopting decisions, nor can he or she exercise other powers in matters in which he or she has a conflict of interest. A judge must inform the Constitutional Court of Ukraine in writing of a conflict of interest within one working day and recuse himself or herself. For the same reason, participants in constitutional proceedings may also recuse themselves from the Constitutional Court (Law on the Constitutional Court, 2017), Article 60). Recusal (self-recusal) is applied, in particular, if: - the judge is directly or indirectly interested in the outcome of the case; - the judge is a family member or close relative of the persons involved in the case; there are other circumstances that cast doubt on the objectivity and impartiality of the judge. Failure of the Constitutional Court judge to notify the Constitutional Court of a real conflict of interest, or to take actions or make decisions in the context of a real conflict of interest will also entail administrative liability under the Article 172(7) of Code of Ukraine on Administrative Offences (1984).

However, the question remains whether there will be a conflict of interest for the Constitutional Court judge who has recused himself or herself from a case (where he or she may have a potential/real conflict of interest), but such recusal was not satisfied by this collegial body. Thus, in the Resolution of the Holosiivskyi District Court of Kyiv in (case № 752/5194/21), the court pointed out that it was impossible to bring the Constitutional Court judge in respect of administrative responsibility, since the judge's application for recusal was submitted to the Grand Chamber of the Constitutional Court of Ukraine, but the Grand Chamber refused to satisfy it. Additionally, the resolution emphasises that the Constitutional Court of Ukraine is a collegial body and that all of its decisions are made by majority vote. It also stresses that there is no direct or immediate causal link between voting and the decision-making of particular judges.

It is worth noting that Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997) contains a similar provision for the recusal of members of collegial bodies. Thus, a person is obliged to comply with the preliminary written recommendations of the first supervisor, head of an institution or establishment, or an authorised representative in connection with the performance of official duties from which he or she is obliged to refrain. These recommendations are based on declarations and data from the Conflict of Interest Risk Management Information System, or at the person's request. The collegial body shall suspend the person in question from performing official duties by a reasoned written decision if there are sufficient grounds to believe that his or her participation is related to private interests and may lead to a conflict of interest (Article 11).

As we can see, neither Ukrainian nor Lithuanian legislation provides a clear answer to the above question. We believe that the situation in which a member of a collegial body participates in adopting a joint decision, after submitting a self-recusal that the collegial body did not address, requires clear provisions in Ukraine's current anti-corruption law.

Ukrainian legislation provides for a number of measures to resolve conflict of interest: - self-settlement; - external settlement. The choice of a particular measure depends on a number of factors: the type of conflict; its duration; the status of the entity that has arisen and the entities authorised to resolve it; the presence (absence) of a person's consent to the application of a particular measure; the form of settlement (oral or written), etc. (Pastukh, 2021).

Self-settlement. Persons authorised to perform the functions of state or local self-government who have a real or potential conflict of interest may independently resolve it by divesting themselves of the relevant private interest. They must also provide supporting documents to their immediate supervisor or the head of the body authorised to initiate dismissal. It is important that divesting oneself of the private interest exclude any possibility of concealing it.
In fact, the relevant person must constantly compare each decision or action (or inaction) to the possibility of a conflict between private and public interests, considering how to avoid such a conflict. Even a person who takes all possible measures in good faith to prevent a conflict of interest may face a conflict between private interests and official (representative) powers.

The point of view of Havronyuk is interesting, as he points out that the clause to Article 28(1)(1) of the Law of Ukraine on Prevention of Corruption should not be interpreted restrictively (in relation to the ability to fulfil the obligation provided for by this provision). In this case, the legislative requirement to prevent at least a potential conflict of interest may sometimes (especially given the diversity of private interests of the obliged person as a member of society and a professional in a particular field) be perceived as excessive (Havronyuk, 2018).

In summary, the current Law of Ukraine on Prevention of Corruption (2014) does not allow for any other means of independently resolving conflict of interest besides relinquishing the relevant private interest and providing supporting documents. Thus, conflict of interest will most often be resolved by external measures.

The external settlement of the conflict of interest is carried out by applying a number of measures by the direct supervisor or the head of the body authorised to dismiss (initiate dismissal) of a person from his/her position: (i) removal of the person from performing a task, taking actions, making a decision or participating in its making in conditions of a real or potential conflict of interest; (ii) application of external control over the performance of the relevant task, taking certain actions or making decisions; (iii) restriction of the person's access to certain information; (iv) review of the scope of the person's official powers; (v) transfer of the person to another position; (vi) dismissal of the person.

Each of these measures to resolve a conflict of interest has its own specifics since it is chosen depending on a number of conditions: - the type of conflict of interest (potential or real); - its duration (permanent or temporary); - the subject of the decision to apply it (direct supervisor and/or head of the relevant body, enterprise, institution, organisation); - the presence (absence) of alternative settlement measures; - the presence (absence) of the person's consent to the application of the measure (regarding transfer); - the possibility of involving other employees in decision-making (regarding removal from the task) (Methodological Recommendations, 2024).

Whether a particular method can be applied to resolve a conflict of interest depends on the nature of the conflict. Depending on the duration of the conflict, the following method may be applied:

- In case of a conflict of interest that is permanent, the following are applied: -restriction of a person's access to certain information; -review of the scope of a person's official powers; -application of external control over the performance of a person's relevant task, performance of certain actions or decision-making; -transfer of a person to another position; -dismissal of a person;
- In case of a conflict of interest that is temporary in nature, the following shall be applied: - removing a person from performing a task, taking actions, making a decision or participating in its adoption in conditions of a real or potential conflict of interest; - applying external control over the performance of a person's relevant task, taking certain actions or making decisions.

Rivchanenko rightly points out that the grounds and procedures for applying measures to resolve a conflict of interest must be thoroughly regulated to avoid gaps that could lead to abuse and reduce the effectiveness of the anti-corruption preventive mechanism. At the same time, the choice of measures to resolve conflict of interest should aim to ensure an optimal balance of interests: (i) the individual with the conflict of interest; (ii) the direct subject of the conflict of interest settlement; (iii) other legal entities

entering into legal relations with the direct subject of the conflict of interest settlement; (iv) the state or territorial community (Rivchanenko, 2017).

Regarding the process of the declarant's withdrawal, it should be additionally mentioned that Lithuanian legislation provides for the possibility of not accepting the withdrawal declared by the declarant. Article 11(3) of Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997) states that the head of an institution or establishment or a person authorised by him or her or another entity accepting or appointing to office, or a collegial state or municipal institution (when the declaring person is a member of a collegial state or municipal institution) may, in accordance with the criteria established by the Chief Official Ethics Commission of Lithuania, refuse to accept the withdrawal of the declarant person by a reasoned written decision and oblige him or her to continue performing official duties.

In a Decision of the Chief Official Ethics Commission of Lithuania "On approval of the criteria for not accepting the withdrawal of a person declaring private interests"(2019). It is stated that a withdrawal shall not be accepted:

1) in the opinion of the head of the institution or his/her authorised representative, the entity accepting or appointing the head of the institution or institution to office, or a collegial state or municipal institution, the circumstances indicated by the person who has declared the withdrawal do not constitute sufficient grounds for a conflict of interest to arise;
2) if the withdrawal declared by the person declaring private interests is accepted, there would be no possibility of making a decision;
3) the issue under consideration relates to public services of institutions, institutions, enterprises or companies (e.g. education, healthcare, telecommunications, heat energy, water supply, utilities, etc.) used by the person declaring private interests or their close relatives, except in cases where: i) if the decision is adopted, these persons would use such services on exceptional conditions and offers provided due to the position held by the person declaring private interests, or ii) the issue under consideration is clearly and directly related to the private interests of the person declaring private interests or persons close to them.

A similar provision on the right not to be obliged to withdraw oneself applies to the head of institution as well. Article 11(4) of the Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997) provides that he head of an institution or establishment shall not be obliged to withdraw oneself when deciding current internal administration issues related to him or her (except for issues regarding all kinds of bonuses, granting of benefits, other substantially similar payments), unless otherwise provided for in legal acts. In such a case, the head of an institution or establishment, while performing his official duties, must comply with the obligations imposed on declarants.

These provisions on the non-acceptance of the withdrawal of a person declaring private interests and on the possibility of a head of institution not to withdraw from decision-making allow a more flexible approach to the process of decision-making and an objective assessment of all circumstances relevant to the emergence of real conflicts of interest. Accordingly, similar regulation should be established in Ukrainian legislation.

When examining the National Agency for the Prevention of Corruption's law enforcement practice of identifying conflict of interest in public officials' activities over the past three years (since Russia's full-scale invasion of Ukraine), the following should be noted. According to the Conclusion of the Public Council of the National Agency for the Prevention of Corruption on the Report on the activities of the National Agency for the Prevention of Corruption, 2023, (2024), in 2022, the National Agency for the Prevention of Corruption drew up 72 administrative protocols on conflicts of interest and violations of anti-corruption restrictions. In 2023, the National Agency for the Prevention of Corruption drew up 31 protocols under Article 172(7) of the Code of Ukraine on Administrative Offences (1984) (regarding conflict of interest). In 2024, they drew up 11 protocols. According to the National Agency for the Prevention of Corruption, the decrease in the number of recorded cases of violations of the conflict of interest legislation is an indicator of increased awareness of public officials of the requirements of anti-

corruption legislation (Conclusion of the Public Council of the National Agency for the Prevention of Corruption on the Report on the activities of the National Agency for the Prevention of Corruption, 2024, (2025)).

A similar trend regarding a decrease in violations of the Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997) is also observed in the Republic of Lithuania. As indicated by the Chief Official Ethics Commission of Lithuania, the number of reports received regarding violations of the Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997) is decreasing, in 2024 215 reports were received (in 2023 – 247). Many reports do not meet the established content requirements, i.e. data and information are not indicated, without which it is impossible to initiate an investigation, or the investigation of the specified circumstances is not within the competence of the Chief Official Ethics Commission of Lithuania, therefore, investigations are not initiated in such cases. The share of established violations remains high. In 2024, 28 investigations were conducted; violations were established in 25 of these cases (in 3 cases no violations were established or the investigation was terminated) (Report on the Activities of the Chief Official Ethics Commission, 2025). In addition, the decrease in the number of investigations is determined by pre-emptive actions, i.e. initial analysis of the report, calls to clarify declarations, etc., which are applied only in justified cases. The Chief Official Ethics Commission of Lithuania also follows the practice developed by the courts and establishes violations only in the case of a direct, obvious conflict of interest when the official actions performed by the person are clearly related to his private interests (Report on the Activities of the Chief Official Ethics Commission, 2025).

It is worth agreeing with Rivchanenko, who highlights the diversity of conflicts of interest due to the varied practices of public administration bodies and other legal entities of public law. This diversity also explains the ambiguity of court practices when considering cases under Article 172(7) of the Code of Administrative Offenses (1984) for violations of conflict-of-interest prevention and resolution requirements (Rivchanenko, 2017).

3. Restrictions after dismissal from public service (“cooling-off period”)

Restrictions after termination of activities related to the performance of public service functions, established today by legislation in both Ukraine and Lithuania, are of great importance for building a professional and ethical public service and for preventing and countering conflict of interest among public officials (public servants). This concerns the legislative enshrinement of the so-called “cooling-off period” requirement for a former public official, which is understood as a legally or institutionally established interval after leaving office during which the former official is prohibited from engaging in certain types of activities defined by law. The use of cooling-off periods has become the most common response to dealing with post-public employment conflicts. This means that, for a certain period, former members of government or public office holders are prohibited from undertaking tasks in the private sector related to their previous public duties (Transparency International, 2015). It is considered that the importance of this period lies in the fact that it: 1) prevents conflict of interest – the former official cannot immediately use official connections and insider information for the benefit of private entities; 2) preserves public trust in the public service – citizens see that public office is not a “springboard” for a lucrative private career through personal contacts; 3) reduces the risk of corruption and undue influence – it limits the possibility of making “informal arrangements” while still in office; 4) ensures integrity and impartiality – decisions during service are made without considering future personal gain in the private sector.

Resolution of the Constitutional Court of the Republic of Lithuania "On Civil Service" (2004) states that the constitutional requirements for the civil service system may lead to the fact that, in order to avoid conflicts of interest, ensure trust in the civil service and protect other constitutional values, certain requirements are also established for former civil servants. By agreeing to work in a specific job, one acquires not only rights but also takes on certain obligations that must be observed. When establishing such restrictions, it is necessary to observe the norms and principles of the Constitution in all cases; the restrictions must be proportionate to the legitimate and socially significant goal pursued, which is necessary in a democratic society. The restrictions on work established in the Law on Coordination of

Public and Private Interests of the Republic of Lithuania are one of the important measures for the prevention of not only conflicts of interest but also corruption, helping to combat the arbitrary use of power, creating and consolidating trust in the government and its institutions. The so-called cooling-off period is an effective measure to deal with conflicts of interest that may arise when taking up employment after ceasing to hold public office(Constitutional Court of the Republic of Lithuania, 2004).

The establishment of a "cooling-off period" prevents the risk of "revolving doors" – a phenomenon where public officials, after leaving office, move to work for private companies whose activities they previously regulated, controlled, or had official relations with. Conversely, it also covers cases where business representatives move into government positions while maintaining ties with their former employers. The practice of revolving doors refers to the movement of individuals between public and private employment (Zheng, 2015). The "revolving door" is a widespread phenomenon in developed countries, where heads and top officials of state agencies, after completing their bureaucratic terms, transition into positions within the sectors they formerly regulated (Brezis, 2023). According to Reyes (2018) and Wilks-Heeg (2015), this practice creates fertile ground for corruption and influence-peddling. In any case, this phenomenon negatively impacts decision-making processes to the detriment of the public interest (Cortese, 2011). As Brezis emphasises, the utilisation of the revolving door can be explained by greed, manifested as an "abuse of power" through the creation of "bureaucratic capital". Essentially, regulators have the potential to increase their lifetime compensation by generating a novel form of capital – "bureaucratic capital" – during their tenure in office. Bureaucratic capital refers to rules and regulations established by regulators that are unnecessary and adversely affect economic efficiency. It also includes the accumulation of an extensive contact list through investment in good relationships with lower-level bureaucracy, ties that will benefit the official in the future (Brezis, 2023). Pons-Hernández describes the "revolving door" as a form of state-corporate crime that requires a broader consideration of the original concept (Pons-Hernández, 2022).

The cooling-off period required at the end of a term of office, which is becoming more common in ethics policies worldwide, including US and EU (Avril, L., & Korkea-aho, 2024). The normative establishment of the "cooling-off period" requirement for a former public official is considered one of the basic international standards for combating corruption in the public service according to a number of international acts. In particular, the United Nations Convention against Corruption (2003), in Article 12(e), provides that anti-corruption measures inter alia may include "preventing conflict of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure" (UN Convention, 2003).

The advisability of establishing the "cooling-off period" requirement for public officials after their dismissal is also provided for in European legal acts, including "soft" law instruments. In particular, the Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service (1998), provide a framework requirement that there should be clear guidelines for interaction between the public and private sectors (Recommendation, 1998). Recommendation No. R(2000)10 of the Committee of Ministers to member states on codes of conduct for public officials (2000), establishes a detailed list of requirements regarding the "cooling-off period" for former public officials: a) the public official should not take improper advantage of his or her public office to obtain the opportunity of employment outside the public service; b) the public official should not allow the prospect of other employment to create for him or her an actual, potential or apparent conflict of interest. He or she should immediately disclose to his or her supervisor any concrete offer of employment that could create a conflict of interest. He or she should also disclose to his or her superior his or her acceptance of any offer of employment; c) in accordance with the law, for an appropriate period of time, the former public official should not act for any person or body in respect of any matter on which he or she acted for, or advised, the public service and which would result in a particular benefit to that person or body; d) the former public official should not use or disclose confidential information acquired by him or her as a public official unless lawfully authorised to do so (Recommendations, 2000).

The provisions of the aforementioned international acts are implemented both in Ukraine and Lithuania, albeit with national legislative modifications. In Ukraine, the corresponding requirements have received the formal title of "restrictions after termination of activities related to the performance of state or local government functions" and are systematised in Article 26 of the Law of Ukraine on Prevention of Corruption (2014). Such restrictions the following components.

The first component of the prohibition consists in the ban on employment and contract conclusion with subjects defined by law. It is stipulated that public officials who have resigned or otherwise terminated activities related to the performance of state or local government functions are prohibited, for one year from the date of termination of the respective activity, from: (a) entering into employment contracts or (b) performing transactions in the field of entrepreneurial activity with private law legal entities or individual entrepreneurs, if such public officials exercised powers of control, supervision, or preparation or adoption of relevant decisions regarding the activities of these private legal entities or individual entrepreneurs within one year prior to the termination of their public functions.

The prohibition on employment in a similar manner is defined in article 15 of Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997). A person who, in the performance of the duties, during the last one year of his employment in this position, directly prepared, considered or made decisions related to the supervision or control of the activities of a legal entity (regardless of its legal form and ownership) or decisions by which funds were allocated to this legal entity from the state or municipal budgets and monetary funds of the Republic of Lithuania, or other decisions relating to property, after leaving the office, he may not hold office for one year in the legal person referred to in this Article, unless otherwise provided for under other laws.

Restrictions on concluding contracts are provided for in another Article 16 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997). A person who has ceased to work in the public service, or a legal person in which he or persons close to him owns more than 10 percent of the shares or other rights of a participant in a legal entity in legal entities of other legal forms, shall not be entitled for one year to enter into contract with the institution or institution in which this person has been employed for the last year (Article 16(1)). The restrictions shall not apply in respect of a contract concluded before the person took up the public service or one that is being renewed, as well as a contract concluded by public tender and a contract of an amount not exceeding EUR 5,000 per year.

Methodological Recommendations (2024), specify the details of this prohibition: (a) the said restriction applies only to the conclusion of employment contracts or transactions in the field of entrepreneurial activity with private law legal entities or individual entrepreneurs. Accordingly, this restriction does not apply to concluding employment contracts or performing transactions with state authorities, state or municipal enterprises, other public law legal entities, or individuals; (b) it concerns the actual exercise of powers of control or supervision; therefore, mere possession of such powers, if they were not exercised in relation to a specific private law legal entity or individual entrepreneur, does not prohibit subsequently concluding employment contracts or transactions with such persons; (c) control usually means a system of measures aimed at checking and ensuring compliance with laws, rules, norms and procedures in various fields of activity. Forms of control and supervision are defined by law (e.g., inspections, audits, reviews, examinations); (d) the exercise of such powers or decision-making must have occurred within one year prior to the termination of the state or local government functions, i.e., dismissal from office or termination of the respective status (Methodological Recommendations, 2024).

When analysing the restrictions on work provided for in Article 15 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania, It should be noted, that this regulation provides for the direct participation of a person in the preparation, consideration or adoption of decisions. <...> In the absence of data on the instructions given by V. A. to subordinate persons to make decisions, as defined in Article 15 of Law on Coordination of Public and Private Interests of the Republic of Lithuania, the decisions made by subordinate persons, when assessing V. A.'s behaviour, cannot be equated with V. A.'s direct participation in the adoption of such decisions (administrative case No. eA-

180-556/2025). The Supreme Administrative Court of Lithuania presupposes the conclusion that not absolutely all decisions lead to the prohibition established in Article 15 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania. The legislator in Article 15 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania speaks only about such decisions that 1) a person directly prepared, considered or adopted and 2) which are related to the supervision or control of the activities of a legal person (regardless of its legal form and ownership) (only to the extent relevant to the dispute) (the speaker may speak). Thus, first of all, the condition is that those decisions are prepared, considered or adopted directly by a specific person and secondly, the decisions prepared, considered or adopted by a specific person must be related to the supervision or control of the activities of a legal person (administrative case No. eA-180-556/2025).

Violation of the prohibition regarding employment and contract conclusion under Ukrainian legislation does not entail legal liability. However, violations entail other legal consequences. In the event of a violation, upon a request from the National Agency for the Prevention of Corruption, the court must: (a) terminate the employment contract if the person violated the prohibition on concluding employment contracts with private law legal entities or individual entrepreneurs whose activities the person controlled or influenced through preparation and/or adoption of decisions within one year prior to that; (b) declare the transaction invalid if the person violated the prohibition on performing transactions in the field of entrepreneurial activity with such private law legal entities or individual entrepreneurs Law of Ukraine on Prevention of Corruption (2014). Thus, in the absence of legal liability, the National Agency for the Prevention of Corruption's court appeal remains the only effective lever to restore lawful conditions. For example, in July 2021, the National Agency for the Prevention of Corruption filed a lawsuit with the Shevchenkivskyi District Court of Kyiv to terminate the contract between the National Joint Stock Company "Naftogaz of Ukraine" and the company's chairman, Yurii Vitrenko. Previously, the chairman held the position of Deputy Minister of Energy of Ukraine and acted as the Minister, simultaneously influencing Naftogaz of Ukraine.

The second component of the prohibition concerns the disclosure (use) of information. The law establishes that public officials are prohibited from disclosing or otherwise using information that became known to them in connection with the performance of their official duties for their own benefit, except in cases established by law. This prohibition is indefinite (Methodological Recommendations, 2024). The phrase "for their own benefit" is understood to mean that the individual is forbidden from using the information both for selfish motives and for other personal interests or the interests of third parties (Havronyuk, 2018). At the same time, exceptions to the prohibition may be provided by law. In particular, according to Article 29 of the Law of Ukraine on Information (1992), subjects of information relations are exempt from liability for disclosing information with restricted access if the court determines that this information is socially necessary, i.e., it is a matter of public interest and the public's right to know this information outweighs the potential harm caused by its dissemination. Information considered to be of public interest includes that which: a) indicates a threat to the state sovereignty or territorial integrity of Ukraine; b) ensures the realisation of constitutional rights, freedoms and duties; c) indicates possible violations of human rights, misleading the public, harmful environmental and other negative consequences of actions (or inactions) by individuals or legal entities, etc.

Violation of this component of the prohibition, under the set of conditions provided by law, may entail criminal liability. Criminal liability for the illegal use (including disclosure) of information obtained in connection with the performance of official duties arises – depending on the specific type of information and other circumstances – under Articles 163, 168, 182 and 359 (confidential personal information), 159 (voting secrecy), 231 and 232 (commercial and banking secrecy), 232-1 (insider information), 328, 381 and 422 (state secret), 330 (official information), 387 (pre-trial investigation data), 209-1, 387 (other types of information) and several other articles of the Criminal Code of Ukraine (2001).

The Law on Coordination of Public and Private Interests of the Republic of Lithuania does not establish a prohibition for persons who have ceased to work in the public service to disclose information that they received while performing their duties. However, the Criminal Code of the Republic of Lithuania (2000) provides for liability for persons who have ceased to work in the public service for the disclosure of various prohibited

information, for example, Article 125 of the Criminal Code of the Republic of Lithuania (Disclosure of a state secret); Article 168 (Unlawful disclosure or use of information about a person's private life); Article 211 (Disclosure of a commercial secret); Article 297 (Disclosure of an official secret).

The third component of the prohibition concerns the ban on representation. The law stipulates that public officials are prohibited for one year from the date of termination of their respective activities from representing the interests of any person in matters (including court cases) where the other party is an authority, enterprise, institution, or organisation in which they worked at the time of termination of such activity. The National Agency for the Prevention of Corruption Methodological Recommendations clarify that the term "authority in which the person worked" should be understood as a state body acting as a subject of public authority. In certain cases, the prohibition also extends to matters where the other party is a legal successor of the authority, enterprise, institution, or organisation in which the individuals authorised to perform state or local government functions worked at the time of termination of their activity. The prohibition applies to cases related to the functions and powers performed by the terminated authority and/or decisions, actions, or inactions of its officials. If the matter is unrelated to this, the prohibition does not apply and representation of interests is allowed accordingly. Violation of this component of the prohibition does not entail legal liability.

Similar limitations are established in the Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997). Article 17 (Limitations of representation) of Law on Coordination of Public and Private Interests of the Republic of Lithuania provides, that person who has ceased to work in the public service may not represent natural persons or legal persons for one year in the institution or institution in which he has worked for the last one year, or, if the institution in which he has worked for the last year, in any institution of this system of establishments (Article 17(1)). Also, a person who has ceased to work in the public service may not represent natural or legal persons in institutions and establishments for the duration of one year with regard to issues that have been assigned to their official duties (Article 17(2)). Restrictions on representation do not apply to a person working in the public service who acts as a representative of a natural person under the law (father (adoptive parent), mother (adoptive mother) of a child, guardian (caretaker) of a child or a guardian (caretaker) of an adult person appointed by a court in accordance with the procedure established by law).

As indicated by the Chief Official Ethics Commission, representation, both in legal theory and in civil legal relations, is the implementation of rights or obligations through a representative who performs certain legal actions on behalf of the represented person. Representation is also a legal relationship when one person, without exceeding the limits of the powers granted to him, performs certain procedural (procedural) and other actions of legal significance on behalf and in the interests of another person. Representation is considered to be the conclusion of a transaction by one person (representative) on behalf of another person (principal), without exceeding the granted rights, thereby directly creating, changing or terminating the civil rights and obligations of the represented person (Article 2.133(1) of the Civil Code o Lithuania). The Chief Official Ethics Commission emphasises that the Law on Coordination of Public and Private Interests of the Republic of Lithuania does not establish a specific formalisation of representation (in writing or the like) and the method of representation - physical or remote, remunerated or unpaid. The method of formalising the representation and defence of interests is also not taken into account in the practice of the Supreme Administrative Court of Lithuania - the actions of a person working in the civil service are assessed and not the method of formalising the representation of interests. Thus, representation should be understood as any legal action performed on behalf of another person (in this case, a legal entity). (Decision dated 16 July 2025 No. KS-2025).

In practice, there are a number of disputes regarding the status of persons (un)able to represent natural persons or legal persons in the institution in which he has worked. In the case under consideration, it was established that the plaintiff's representative, the chief specialist, holds the position of a career civil servant both in Kaunas District Court and with the plaintiff. Article 2(5)(3), of the Law on Coordination of Public and Private Interests of the Republic of Lithuania provides that civil servants are classified as persons working in the public service. Thus, the chief specialist, transferred to work with the plaintiff by way of official rotation from 1 June 2023, has not ceased to work in the public service and continues

to work there except they are in another public legal entity and therefore the restriction on representation provided for in Article 17(1), of the Law on Coordination of Public and Private Interests of the Republic of Lithuania does not apply to them. The same conclusion is presented in the opinion of the Chief Official Ethics Commission (civil case No. e2S-807-1041/2024).

Component of the Restrictions		**Conditions for application of the Restrictions**	**Duration of the Restrictions**	**Possibility of legally avoiding the Restrictions**	**Legal liability for violation of the prohibition**
Ukraine	1) Prohibition on employment	It is prohibited to conclude employment contracts and engage in transactions in the sphere of entrepreneurial activity with private-law legal entities or sole proprietors if, within one year prior to termination of the exercise of state or local self-government functions, the person exercised powers of control, supervision, or preparation/adoption of relevant decisions regarding the activities of such legal entities or sole proprietors	Within one year from the date of termination of the relevant activity	None	Not provided. At the request of the National Agency for the Prevention of Corruption, relevant employment contracts may be terminated and transactions may be declared invalid
	2) Prohibition on transactions				
	3) Prohibition on disclosure (use) of information	It is prohibited to disclose or otherwise use for personal purposes information obtained in connection with the performance of official duties, except in cases provided by law	Indefinitely	None	Criminal liability related to disclosure (use) of defined information (Articles 163, 168, 182, 359, 159, 231, 232, 328, 381, 422, 330 and others of the Criminal Code of Ukraine)
	4) Prohibition on representation	It is prohibited to represent the interests of any person in cases (including those considered by courts) if the other party is the body, enterprise, institution, or organisation in which the person worked at the time of termination of the specified activity	Within one year from the date of termination of the relevant activity	None	Not provided
Lithuania	1) Prohibition on employment	It is prohibited to hold positions in a legal entity if, in the course of performing official duties, the person directly prepared, reviewed, or adopted decisions related to the supervision or control of the activities of the legal entity (regardless of its legal form or form of ownership), or decisions by which this legal entity was allocated funds from the state or municipal budgets and monetary funds, or other	Within one year from the date of termination of the relevant activity	Possible. By individual decision, if this does not contradict the objectives of the Law and other legal acts regulating ethics and conduct	Not provided. At the request of the Chief Official Ethics Commission of Lithuania, relevant employment contracts may be terminated

		decisions related to property, unless otherwise provided for by other laws			
	2) Prohibition on concluding transactions and using other individual advantages	It is prohibited to conclude transactions with the institution or body in which the person worked, as well as to use individual benefits granted by this institution or body	Within one year from the date of termination of the relevant activity	Possible. By individual decision, if applying the restrictions could harm the interests of society or the state	Not provided. At the request of the Chief Official Ethics Commission of Lithuania, transactions may be declared invalid
	3) Prohibition on disclosure (use) of information	The Law on Coordination of Public and Private Interests of the Republic of Lithuania does not establish a prohibition for persons who have ceased to work in the public service to disclose information that they received while performing their duties.	Indefinitely	None	Criminal liability related to disclosure (use) of defined information (Articles 125; 168; 211; 297 of the Criminal Code of Lithuania)
	4) Prohibition on representation	It is prohibited to represent natural persons (except for exceptions) or legal persons for one year in the institution or body and to represent a natural or legal person in institutions or bodies on issues that were within one's official duties	Within one year from the date of termination of the relevant activity	Possible. By individual decision, if applying the restrictions could harm the interests of society or the state	Not provided

Table 1. Comparative Analysis of "Cooling-Off" Restrictions in Ukraine and Lithuania

As can be seen from the information provided in the table, the restrictions (limitations) and liability applied post-public servants that have ceased to work in the public service are similar in both Lithuania and Ukraine. Administrative or criminal liability is not provided for persons who have violated the restrictions. According to Article 18(1)(5) of the Law on the Chief Official Ethics Commission of Lithuania (2008), the Chief Official Ethics Commission of Lithuania may propose to the head of an institution or agency or to the entity appointing or appointing the head of an institution or to a collegial state or municipal institution to impose official (disciplinary) penalties on persons who have committed violations of the Law on the Coordination of Public and Private Interests or the Law on Lobbying Activities. The Chief Official Ethics Commission of Lithuania may also make a proposal to the head of an institution or agency, or to the entity accepting or appointing the head of an institution, or to a collegial state or municipal institution to repeal, suspend or amend legal acts, decisions or transactions that do not comply with the requirements of the Law on the Coordination of Public and Private Interests or the Law on Lobbying Activities, or to propose to take preventive measures to prevent violations of legal acts (Article 18(1)(6)). If the proposals of the Chief Official Ethics Commission of Lithuania are not implemented in the specified cases, it may file claims (submit applications) with the court for the termination or invalidation of public service relations, employment contracts and transactions.

According to the authors, such measures are insufficient for persons who have violated the requirements of the restrictions. Such persons should be subject of administrative liability. Article 533 of the Code of Administrative Offenses of the Republic of Lithuania (2015) provides for liability for gross violation of the prohibiting, binding or restrictive provisions of the Law on Coordination of Public and Private Interests of the Republic of Lithuania. According to Article 23(7) of the Law on Coordination of Public and Private Interests of the Republic of Lithuania, it is recognised that the declaring person has grossly violated the provisions of this law if:

1) the provisions of this law are violated, although the declaring person has already been provided with prior written recommendations on which decisions he must recuse himself from;
2) the provisions of this law are violated repeatedly within one year from the date on which the person was recognised as having violated this law;
3) the provisions of this law are violated due to a conflict of interest, in the circumstances of which the declaring person (or a person close to him) realised his private interest
However, Article 23(7) of the Law on Coordination of Public and Private Interests of the Republic of Lithuania applies only to persons declaring interests, not to persons who have stopped working in the public service.

In its current wording, the disposition of Article 533 of the Code of Administrative Offenses of the Republic of Lithuania (2015) provides for liability for violation of restrictive provisions, including restrictions provided for in Articles 15-17 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania, i.e. restrictions on work, restrictions on concluding transactions or using individual benefits and restrictions on representation. Taking into account this regulation, the proposal is to provide for liability in Article 23 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania for post-public servants that do not comply with the restrictions established in Articles 15-17 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania.

This regulation would be an effective mechanism to ensure compliance with ethical standards and prevent conflict of interest of post-public servants. The existence of such administrative sanctions would help to strengthen the integrity of the public service by deterring unlawful conduct through defined consequences that are distinct from criminal sanctions. A well-structured system of administrative liability can effectively complement existing legal instruments by ensuring a proportionate and timely response to violations of post-service restrictions. This approach is particularly useful in addressing issues that may not reach the threshold of a criminal offence but still undermine public trust and the integrity of institutions. The application of administrative sanctions would ensure that former public servants remain accountable for actions that could undermine the expected impartiality and integrity of public administration.

Ukraine could benefit significantly from integrating a similar system of administrative liability into its legal system. Currently, Ukrainian legislation lacks specific provisions on administrative penalties for violations of post-service prohibitions and relies mainly on contractual or criminal remedies. The introduction of administrative liability would fill this legislative gap by offering a clear, specialised and enforceable set of rules to regulate the conduct of post-public servants. This amendment would strengthen preventive measures against conflict of interest, promote transparency and strengthen public trust in mechanisms designed to support ethical governance. Adopting such an approach would bring the Ukrainian regulatory framework more in line with European standards, supporting the country's ongoing efforts to approximate legislation and integrate into Europe.

Conclusions

1 Conclusions on defining the concept of conflict of interest in the public service:

1.1. The Ukrainian legislation regulating the prevention of corruption does not clearly define the concept of conflict of interest. The attempt to define conflict of interest by analysing such concepts as "potential conflict of interest", "real conflict of interest" and "private interest" does not meet the requirements of legal certainty, clarity and unambiguity. There is either a conflict of interest or there is not. There cannot be "a little bit of a conflict of interest". Meanwhile, the Lithuanian legislation defines conflict of interest clearly and unambiguously – a situation in which the declarant, in the performance of his or her official duties or in the performance of his or her official assignment, is required to take or participate in a decision or to carry out an assignment which also concerns his or her private interests.

1.2. The components of a conflict of interest are: (i) the discretionary powers of an official, representative and other public authority (including non-governmental powers); (ii) the private interests

of persons holding such powers; and (iii) the possible influence of private interests on the objectivity or impartiality of the discretionary powers of an official or other public authority. Therefore, private interests always dominate in a conflict of interest. Accordingly, the declarant himself or the entities supervising him must identify the private interests of the declarant in a timely manner.

1.3. A conflict of interest cannot be hypothetical, it must be direct and obvious. A conflict of interest situation in itself is not a violation, but subsequent actions of the servant or official may lead to the commission of a violation. The legislator has clearly and unambiguously established the relevant legal measures that persons working in the public service must comply with so that the public do not have any doubts about the impartiality and transparency of decisions made in the public service, for example, declaration of interests, withdrawal from decision-making.

2. Conclusions on identifying means of resolving conflict of interest in the public service in Ukraine and Lithuania:

2.1. Each of measures to resolve a conflict of interest has its own specifics, as it is chosen depending on a number of conditions: the type of conflict of interest (potential or real); its duration (permanent or temporary); the subject of the decision to apply it (direct supervisor and/or head of the relevant body, enterprise, institution, organisation); the presence (absence) of alternative settlement measures; the presence (absence) of the person's consent to the application of the measure (regarding transfer); the possibility of involving other employees in decision-making (regarding removal from the task)

2.2. There are no exceptions when a person working in the public service may not inform his/her direct superior or an authorised representative of the head of the institution and persons who are also participating in the procedure for preparing, considering or adopting a decision about the existing conflict of interest and not withdraw from participating in the procedure for preparing, considering or adopting a decision that causes a conflict of interest.

2.3. The provisions on the non-acceptance of the withdrawal of a person declaring private interests and on the possibility of a head of institution not to withdraw from decision-making allow a more flexible approach to the process of decision-making and an objective assessment of all circumstances relevant to the emergence of real conflicts of interest. Accordingly, similar regulation should be established in Ukrainian legislation

3. Conclusions on comparing the restrictions (limitations) for post-public servants:

3.1. Restrictions for post-public servants, established by legislation in both Ukraine and Lithuania, are of great importance for building a professional and ethical public service and for preventing and countering conflict of interest among public servants. This concerns the legislative enshrinement of the so-called “cooling-off period” requirement for post-public servants, which is understood as a legally or institutionally established interval after leaving office during which the former official is prohibited from engaging in certain types of activities defined by law. The use of cooling-off periods has become the most common response to dealing with post-public conflict of interest.

3.2. Article 533 of the Code of Administrative Offenses of the Republic of Lithuania provides for liability for violation of restrictive provisions, as restrictions on work, restrictions on concluding transactions or using individual benefits and restrictions on representation. Taking into account this regulation, a proposal is made to provide for liability in Article 23 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania for post-public servants that do not comply with the restrictions on work, restrictions on concluding transactions or using individual benefits and restrictions on representation established in Articles 15-17 of the Law on Coordination of Public and Private Interests of the Republic of Lithuania. In addition, similar regulation should be established in the Code of Ukraine on Administrative Offences

References:

Avril, L., & Korkea-aho, E. (2024). Administration as usual? Revolving doors and the quiet regulation of political ethics. *Journal of European Public Policy*, 1-28. https://www.tandfonline.com/doi/full/10.1080/13501763.2024.2410922
Brezis, E. S. (2023). Regulating the revolving door of regulators: Legal vs. ethical issues. *Economies*, 12(5). https://www.mdpi.com/2227-7099/12/1/5
Civil Code of the Republic of Lithuania. Book Two. Persons (2000). https://www.infolex.lt/portal/start_ta.asp?act=doc&fr=pop&doc=20799
Code of Administrative Offenses of the Republic of Lithuania (2015). https://www.e-tar.lt/portal/lt/legalAct/4ebe66c0262311e5bf92d6af3f6a2e8b/asr
Code of Ukraine on Administrative Offences (1984). https://zakon.rada.gov.ua/laws/show/80731-10#n1845
Conclusion of the Public Council of the National Agency for the Prevention of Corruption on the Report on the activities of the National Agency for the Prevention of Corruption for 2023 (2024). https://nazk.gov.ua/uk/zvity/
Conclusion of the Public Council of the National Agency for the Prevention of Corruption on the Report on the activities of the National Agency for the Prevention of Corruption for 2024 (2025). https://nazk.gov.ua/uk/zvity/
Cortese, C. (2011). Standardising oil and gas accounting in the US in the 1970s: Insights from the perspective of regulatory capture. *Accounting History, 16*(4), 403–421. https://journals.sagepub.com/doi/10.1177/1032373211417990
Criminal Code of Republic of Lithuania (2000). https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.111555/asr
Criminal Code of Ukraine (2001). https://zakon.rada.gov.ua/laws/show/2341-14#Text
Decision of the Chief Official Ethics Commission of Lithuania "On approval of the criteria for not accepting the withdrawal of a person declaring private interests" No. KS-270 dated 30 October 2019. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/f03ec8a2154311eaad00dac7ebcb2435/asr
Decision of the Chief Official Ethics Commission of Lithuania on Darius Jonušis dated 16 July 2025 No. KS-2025. https://plytineskartodromas.lt/wp-content/uploads/2025/08/2025.07.17-VTEK-sprendimo_del-Dariaus-Jonusio_-nuorasas.pdf
Decision of the Supreme Administrative Court of Lithuania of 21 February 2013 in administrative case No. Nr. A602-230/2013. https://eteismai.lt/byla/18640535848158/A-602-230-13
Decision of the Supreme Administrative Court of Lithuania of 19 May 2021 in administrative case No. eA-1446-520/2021. https://www-infolex-lt.skaitykla.mruni.eu/tp/1995666
Explanation of the High Specialised Court of Ukraine for Civil and Criminal Cases in the Information Letter "On Bringing to Administrative Liability for Certain Corruption-related Offence" No. 223-943/0/4-17 dated 22 May 2017. https://zib.com.ua/files/Golovam_apeliacijnih_sudiv_vid_2205_2017.pdf
Judgment of the Court of First Instance of 15 June 1999, in case Ismeri Europa v Court of Auditors (Case No. T-277/97).
https://www.cvce.eu/obj/judgment_of_the_court_of_first_instance_ismeri_europa_v_court_of_auditors_case_t_277_97_15_june_1999-en-5ca23594-4d2c-4315-9705-15073604c6ff.html
Judgment of the Court of First Instance (Fourth Chamber) of 18 April 2007. *Deloitte Business Advisory NV v Commission of the European Communities.* (Case No. T-195/05) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62005TJ0195
Judgment of the General Court (First Chamber) of 20 March 2013 in case Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy. (Case No T-415/10), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010TJ0415
Judgment of the General Court (Second Chamber) of 13 October 2015 *Intrasoft International SA v European Commission*. (Case No. T-403/12). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012TJ0403
Havronyuk, M. I. (2018) Науково-практичний коментар до Закону України «Про запобігання корупції» [Scientific and practical commentary to the Law of Ukraine "On Prevention of Corruption"] Київ: Ваіте, 2018.
Kalninsch V. & Hoppe T. (2018) *Управління конфліктами інтересів в Україні та Національне агентство з питань запобігання корупції: висновки і рекомендації.* [Conflict of Interest Management in Ukraine and the National Agency for the Prevention of Corruption: Conclusions and Recommendations] European Union Anti-Corruption Initiative. https://tinyurl.com/slcohox.
Law on Coordination of Public and Private Interests of the Republic of Lithuania (1997). https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.41669/asr
Law of Ukraine „On Information" (1992). https://zakon.rada.gov.ua/laws/show/1700-18#Text
Law of Ukraine on Prevention of Corruption (2014). https://zakon.rada.gov.ua/laws/show/1700-18#Text
Law of Ukraine "On The Constitutional Court of Ukraine" (2017). https://zakon.rada.gov.ua/laws/show/2136-19#Text
Law on the Chief Official Ethics Commission of Lithuania (2008) https://www.e-tar.lt/portal/lt/legalAct/TAR.789C6EE505FD/asr

Methodological recommendations for the application of certain provisions of the Law of Ukraine on the Prevention of Corruption regarding the prevention and settlement of conflict of interest, compliance with restrictions on the prevention of corruption: order of the National Agency for the Prevention of Corruption No. 2 dated 12 of January 2024 (as amended on 3 of February 2025). https://wiki.nazk.gov.ua/pdfjs/?file=/wp-content/uploads/Categories/00/a7/00a7436f958b8a030a42c403bcc53b2708767ea9fe094fb1c9e7e99214c76937310259413.pdf

National Agency for Prevention of Corruption (NAPC). (2021). NAPC appealed to the court to terminate the illegal contract with the Chairman of the Management Board of NJSC "Naftogaz of Ukraine" [Національне агентство з питань запобігання корупції (НАЗК). (2021). НАЗК звернулося до суду щодо припинення незаконного контракту з головою правління НАК «Нафтогаз України»]. https://nazk.gov.ua/uk/novyny/nazk-zvernulosya-do-sudu-shhodo-prypynennya-nezakonnogo-kontraktu-z-golovoyu-pravlinnya-nak-naftogaz-ukrayiny/

Nikolov, N. (2013), Conflict of interest in European public law. *Journal of Financial Crime*, 2013, Vol. 20 Issue 4, https://doi.org/10.1108/JFC-06-2013-0042

Novikovas, A. (2022). Interesų konfliktai viešajame sektoriuje [Conflict of interest in the public sector]. Homo - societas - technologiae : Marijampolės kolegijos periodinis mokslinių straipsnių leidinys. Marijampolė : Marijampolės kolegija. ISSN 2029-9737. 2022, Nr. 1 (9), https://suduvosakademija.lt/wp-content/uploads/2023/02/Zurnalas_9_inter.pdf

Oleshko, O. M. (2018) *Управління конфліктами інтересів у професійній діяльності державних службовців*: *дис. ... канд. юрид. наук* [Management of conflict of interest in the professional activity of civil servants: Dis. ... cand. of Jurisprudence]. Харків, 2018. 233 p.

Oleshko, O. M. (2023) *Уявний конфлікт інтересів на публічній службі.* [Imaginary conflict of interest in public service]. Актуальні питання у сучасній науці. № 9 (15), 2023. p. 231-239. http://perspectives.pp.ua/index.php/sn/article/view/6331/6364

Organization of Economic Cooperation and Development (2005), *Managing Conflict of Interest in the Public Sector*, Paris. https://www.oecd.org/content/dam/oecd/en/publications/reports/2005/08/managing-conflict-of-interest-in-the-public-sector_g1gh5807/9789264018242-en.pdf

Pastukh, I.D. (2021) Запобігання та врегулювання конфлікту інтересів у публічно-правових відносинах засобами адміністративного права. [Prevention and Settlement of Conflicts of Interest in Public Law Relations by Means of Administrative Law]. Автореф. дис. … докт. юрид. наук. спец.: 12.00.07. НАВС. Київ, 2021. 42 p.. https://elar.navs.edu.ua/server/api/core/bitstreams/0b37a766-0e70-442c-996f-b0dd18365045/content

Philp, M. (1997) Conceptualising political corruption. *Political studies*, XLV, 436-462. https://afca.edu.au/wp-content/uploads/2024/12/Philp-1997-Defining-Political-Corruption.pdf

Pons-Hernández, M. (2022). Power(ful) connections: Exploring the revolving doors phenomenon as a form of state-corporate crime. *Critical Criminology*. https://link.springer.com/article/10.1007/s10612-022-09626-z

Reed, Q. (2008), *Sitting on the fence: conflicts of interest and how to regulate them.* U4 Anti-Corruption Resource Centre. https://www.u4.no/publications/sitting-on-the-fence-conflicts-of-interest-and-how-to-regulate-them.pdf

Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service OECD/LEGAL/0316 (2004). https://legalinstruments.oecd.org/public/doc/130/130.en.pdf

Recommendation № R (2000) 10 of Committee of Ministers to Member States on Codes of conduct for civil officials. https://rm.coe.int/16806cc1ec

Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service. (1998) https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0298

Report on the Activities of the Chief Official Ethics Commission of Lithuania for 2024 (2025) https://vtek.lt/wp-content/uploads/2025/03/VTEK-veiklos-2024-metu-ataskaita.pdf

Resolution of the Constitutional Court of the Republic of Lithuania "On Civil Service" of 13 December 2004, in case No. 51/01-26/02-19/03-22/03-26/03-27/03. https://lrkt.lt/lt/teismo-aktai/paieska/135/ta275/content

Resolution of the Shevchenkivskyi District Court of Kyiv of 27 February 2024 in case No 761/3217/24. Unified State Register of Court Decisions. https://reyestr.court.gov.ua/Review/117373217 .

Resolution of the Holosiivskyi District Court of Kyiv of 16 March of 2021 in case № 752/5194/21 https://reyestr.court.gov.ua/Review/95474804

Reyes, O. (2018). Revolving doors in Spanish climate and energy policy. https://www.greens-efa.eu/files/doc/docs/3d2ec57d6d6aa101bab92f4396c12198.pdf

Rivchanenko, S.V. (2017) *Запобігання та врегулювання конфлікту інтересів як спосіб протидії корупції: дис…. канд.. юрид. наук.* [Prevention and Settlement of Conflicts of Interest as a Way of Counteracting Corruption: PhD thesis....]. Запорізький національний університет. Запоріжжя, 2017. 195 p. http://phd.znu.edu.ua/page/dis/07/Rivchachenko_diss.pdf

Ruling Supreme Administrative Court of Lithuania of 11 September 2012, in administrative case No. A146-2624/2012 https://www-infolex-lt.skaitykla.mruni.eu/tp/405825

Ruling Supreme Administrative Court of Lithuania of 21 October 2013, in administrative case No. No A756-1601/2013 https://www.temidy.lt/teises-aktas/340971
Ruling Supreme Administrative Court of Lithuania of 3 April 2014, in administrative case No. A-442-1009/2014 https://eteismai.lt/byla/121199900682911/A-442-1009-14
Ruling of the Civil Cases Division of the Kaunas Regional Court of 21 May 2024 in civil case No. e2S-807-1041/2024. https://www-infolex-lt.skaitykla.mruni.eu/tp/2286642
Ruling of the Supreme Administrative Court of Lithuania of 14 May 2025 in administrative case No. eA-180-556/2025. https://www-infolex-lt.skaitykla.mruni.eu/tp/2315445
Soloveičik, D. & Šimanskis (2019), K. *Interesų konflikto koncepcija pagal Lietuvos ir Europos Sąjungos viešųjų pirkimų teisę ir teismų praktiką* [The concept of conflict of interest according to Lithuanian and European Union public procurement law and case law] Teisė. Vilnius. 2019, vol. 111. https://www.zurnalai.vu.lt/teise/article/view/12818/11613
The Global Programme Against Corruption: United Nations Anti-Corruption Toolkit (2004). https://www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_foreword.pdf
Transparency International. (2015). *Cooling-off periods: Regulating the revolving door* (Helpdesk Report). Transparency International. https://knowledgehub.transparency.org/helpdesk/cooling-off-periods-regulating-the-revolving-door
United Nations (UN) Convention against Corruption on October 31, 2003. https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf
Wilks-Heeg, S. (2015). Revolving-Door Politics and Corruption. In D. Whyte (Ed.), *How Corrupt is Britain?* (pp. 135–144). London: Pluto Press. https://www.researchgate.net/publication/290393618_How_Corrupt_is_Britain
Zheng, W. (2015). The revolving door. *Notre Dame Law Review*, 90(3), 1265–1308. https://ndlawreview.org/wp-content/uploads/2013/05/NDL307_crop.pdf

International Comparative Jurisprudence 2025 Volume 11 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2025.11.02.011

FORMATION OF FORENSIC COMPETENCIES OF ENTRY-LEVEL POLICE OFFICERS: A COMPARATIVE ANALYSIS OF THE EUROPEAN AND UKRAINIAN EXPERIENCES

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Received: 28 September 2025; accepted: 25 November 2025
DOI: https://doi.org/10.13165/j.icj.2025.11.02.011

Abstract. This article examines the specific features of training for entry-level police officers in various European countries and Ukraine, with particular attention to the development of forensic competencies required for responding to criminal acts and working at crime scenes. The study analyses the structure of training programmes across different countries, focusing on how forensic training is integrated, whether forensic topics are directly linked to officers' initial roles, the extent to which professional duties influence the scope of forensic instruction and the balance between theoretical and practical knowledge. The findings indicate that although different European countries and Ukraine apply diverse models for preparing officers, they all ensure that future officers acquire essential forensic knowledge and develop the practical skills necessary for acting effectively at crime scenes, regardless of their eventual place of service. Based on the comparative analysis of these experiences, a core block of forensic knowledge is identified as fundamental to ensuring the proper implementation of forensic competencies in crime scene work.

Keywords: Forensics, Criminal investigation, Officer training, Initial vocational training, Public safety.

Introduction

Due to recent global developments, organisations are undergoing significant change, and managing these changes effectively across all areas has become crucial to their successful transformation. In parallel, issues of didactics within different scientific fields—each undergoing its own period of renewal—have become increasingly relevant. Technological advancements, the pandemic, the rise of artificial intelligence and other global transformations create opportunities to reconsider the role of didactics in the education and training of specific professions, including the forms and methods applied. However, a classic question continues to be raised: are the knowledge and skills provided to representatives of individual professions truly sufficient to ensure the proper performance of their roles and for them to achieve the desired results?

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It is widely recognised that ensuring public security requires more active involvement from society itself, in order that society becomes an even stronger guarantor of collective safety. The old saying, "you can't put an officer next to everyone" (Palšis, 2014), reflects the increasingly broad understanding of didactics, particularly in its connection with, and alignment to, legal education. Bilevičiūtė (2023), who examined current issues in legal education and training, emphasised that legal education pursues several goals: not only the ability to understand laws, but also the recognition of human rights, attentiveness to others and the cultivation of reasonable thinking. The authors of this article further suggest that these goals should be supplemented with the ability to critically evaluate life events, situations and circumstances in order to assess emerging security risks and make decisions aimed at protecting one's own property as well as that of other members of society.

However, much is expected of law enforcement, which necessitates a return to the scientific discussion on officer training models: which models dominate and whether the competencies developed during training ensure the effective performance of officers' functions. In recent years, when evaluating whether the public security model that had been established and was operating in various states met society's expectations of safety—that is, whether it is fully oriented towards ensuring the public's sense of security—considerable attention has been directed to the development, enhancement, and consolidation of police officers' competencies. The disappearance of clear boundaries in criminal activity, its increasingly global character, and the complexity of criminal schemes—whereby a crime may begin in one country and conclude in another—alongside other contributing factors, raise a legitimate question: is it appropriate to establish a set of core competencies for officers (at least at the European Union level)? Moreover, is the emerging discourse on competencies primarily shaped by highly specific national legal systems, and do differences in organisational structures hinder the practical implementation of diverse officer training models?

The analysis of scientific sources shows that the training of Lithuanian law enforcement officers has been examined mainly at the systemic level, with attention paid not only to current issues but also to processes of transformation and change (Vitkauskas, 2011). Some studies highlight the competencies required of officers, focusing on specific elements of the training system (Abraham, 2022; Smalskys, 2008). Initial training is described in detail in the first textbook of this kind, published in 2018—the first in the history of Lithuanian police science and practice—which comprehensively covers the main aspects of police officer training, outlining the core functions of police work and their characteristics (Bilius, 2018). Several authors have addressed both initial and continuing professional training of police officers (Misiūnas, 2010; Vitkauskas, 2011; Navickienė, 2011; Navickienė, 2018; Łabuz & Malewski, 2024). The integration of forensic studies into higher education, particularly in bachelor's and master's programmes, has only recently received scholarly attention (Łabuz & Malewski, 2024). A distinctive feature of modern forensic didactics is that it can no longer be limited to a classical approach. Experimental modelling has raised the question of whether traditional didactic tools remain suitable for investigating modern criminal acts. Findings confirm that they are suitable, but no longer sufficient, since forensic methodologies must be continually adapted to reflect changing methods and mechanisms of crime, including offenses committed in cyberspace (Navickienė & Bilius, 2024). The scope and content of forensic science are largely determined by the objectives of the study programme itself, a point emphasised by E. Kurapka in his examination of forensics as an academic discipline (Łabuz & Malewski, 2024). We fully agree with Prof. E. Kurapka's argument that the demand for forensic knowledge and skills is determined by the nature of future professional activities. It follows that the content and scope of forensics cannot be identical across different higher education programmes. Scholarly debate continues as to whether forensic training alone is sufficient for future law enforcement officers (Kurapka, Malevski, & Bilevičiūtė, 2007). Attention must therefore be given to the specific functions of individual law enforcement units and the competencies required to fulfil them. Researchers have highlighted the importance of police functions in ensuring public safety (Laurinavičius, 2000), the tactical training of officers (Valeckas, 2004), and the competencies required of forensic specialists (Łabuz & Malewski, 2024). Periodic changes in organisational structures necessitate continuous monitoring to assess whether the scope and content of forensic training are sufficient and whether officers possess the necessary knowledge and skills to perform their duties effectively. Certain specialised issues, such as expert training, remain particularly relevant in the effort to align national

practices with European-level standards (Kurapka, Malevski, & Matulienė, 2016). Against this background, the present article seeks to assess whether the models used in different European countries and Ukraine to prepare first-line officers for work at crime scenes adequately provide them with basic forensic competencies, or whether the acquisition of such competencies depends more on the officer's future professional functions.

Standardisation processes at the European Union level have begun relatively recently. For example, the Directorate-General for Taxation and Customs Union has developed and published the EU Customs Competency Framework (CustCompEU) (European Commission DG TAXUD, n.d.) to inform customs training. The European Coast Guard Functions Training Network has prepared the Sectoral Qualifications Framework for Coast Guard Functions (European Coast Guard Functions Academies Network Project, n.d.), which also includes learning outcomes related to law enforcement in the maritime environment. Similarly, Frontex has established the Sectoral Qualifications Framework for Border Guarding (Frontex, n.d.), setting out the learning outcomes for border control. In addition, CEPOL is currently developing a sectoral qualifications framework for policing (CEPOL, 2025). One of the co-authors of this article serves as a CEPOL National Unit appointee, contributing personal expertise to the development of qualifications frameworks.

The aim of this study is, for the first time, to conduct a comparative analysis of the forensic competences of entry-level police officers in European countries and Ukraine. The study seeks to identify the basic forensic knowledge required to ensure the development of the competencies needed by officers working at the scene of a crime.

The study does not attempt to define a uniform forensic standard for police officers since the specific functions of officers at crime scenes vary across countries. Instead, by drawing on international experience, it aims to identify the essential competencies, knowledge and skills required by law enforcement officers in any country when arriving at a crime scene (i.e., the place where a criminal act has been committed). The analysis presented in this article may serve as a first step towards the development of a European Qualifications Framework for police officers in the area of criminalistics.

To achieve this aim, the following objectives were set:
- To assess the significance of forensic science and the influence of established forensic competencies on the work of police officers.
- Through a comparative analysis of the forensic competencies of entry-level police officers in selected European countries and Ukraine, to identify the fundamental forensic knowledge necessary to ensure that officers acquire the competences required for work at the scene of a crime.

The article applies an analytical method, examining relevant legal acts regulating the initial professional training of police officers and the performance of their functions, as well as scientific literature addressing current issues in higher, initial, and continuing professional training. In addition, the study employs the interview method, using a questionnaire administered to those personnel who are responsible for training in different European countries and Ukraine. A comparative method is also applied, enabling the content of professional police training programmes across countries to be compared, with specific attention paid to the development of forensic knowledge and skills and to the competencies required at a crime scene.

AI-assisted technology was used in the preparation of this article for checking grammar and spelling.

1. The Importance of Forensic Competences and Their Development in the Work of Police Officers

As an interdisciplinary field concerned with the signs of criminal acts and their detection, investigation, and prevention, forensic science is primarily oriented towards enhancing public security. Different schools of forensic science emphasise different structures of the discipline (Malewski, Matulienė, & Juodkaitė-Granskienė, 2022; Kurapka et al., 2013). Despite these structural differences, it can be stated

without doubt that forensic science competencies are an integral part of a police officer's professional activities. Without knowledge and skills in forensic science, it is impossible to perform an officer's functions effectively. Due to its distinctly praxeological nature, forensic science should be regarded as a crucial instrument that law enforcement applies in practice when responding to and investigating criminal acts. One of its main tasks is to address practical needs by incorporating ongoing developments—specifically, the application of modern methods of criminal detection, investigation and prevention into professional practice (Latauskienė, Matulienė, & Raudys, 2003). With the continuous emergence of new methods and means of committing crimes, the importance of utilising the latest scientific research achievements with regard to investigations has increased more than ever before. In combating contemporary crime, it is necessary to constantly reassess the effectiveness of existing methods and to determine whether new and more efficient approaches are required. Furthermore, it is necessary to analyse how to strengthen the capabilities of law enforcement institutions in applying technologies that facilitate the detection and identification of criminal acts not only in actuality, but also in the virtual sphere. It is therefore essential to not only form forensic competencies in accordance with the established powers of officers, but to also continuously revise and update these competencies in order to respond to the evolving needs of practice.

It should be emphasised that a comprehensive understanding and in-depth knowledge of specific areas of forensics, including various forensic techniques, are essential for police officers. The systematic acquisition of knowledge in forensic medicine by cadets of education institutions under the Ministry of Internal Affairs of Ukraine constitutes a fundamental prerequisite for professional police work. These competencies ensure the ability to conduct proper crime scene inspections and to appropriately secure and preserve material evidence. Moreover, an understanding of the mechanisms of death, the nature and age of injuries, as well as the potential of laboratory analyses enables future law enforcement officers not only to establish objective truth in criminal proceedings, but to also effectively cooperate with forensic experts and organise the work of investigative and operational teams.

Criminalistic training equips cadets with the skills necessary to apply technical and forensic tools, as well as tactical methods, in the course of pre-trial investigations. This training encompasses the ability to work with traces and other material carriers of evidence, to plan and conduct both investigative (search) actions and covert investigative (search) actions, and to employ modern digital technologies. As a result, future police officers acquire the capacity to comprehensively analyse the circumstances of a crime, reconstruct its mechanism and ensure the proper evidentiary process in court.

The current state of development of criminalistics in Ukraine is marked by the formation of a general theory of criminalistics, the advancement and practical implementation of modern scientific and technical tools and information technologies in crime control, the refinement of criminalistic tactics and the formulation of methodologies for investigating emerging types of crime. M.V. Saltevsky explains that these are the very competences that police officers need: to detect, document, preserve, and interpret evidence (Saltevsky, 2005). Approved by the Ministry of Education textbook of V. Yu. Shepitko sets professional benchmarks in forensic competence for policing in Ukraine (Shepitko, 2008). Another textbook on criminalistics identifies the practical skills police officers must learn—from handling physical traces to applying tactical methods in investigations— and emphasises that these competences are essential for effective law enforcement (Tishchenko, 2019).

Many practitioners and scholars emphasise that the relationship between forensic science and practice is both dynamic and inseparable. In the case of complex forms of criminal activity—particularly when addressing the threats posed by organised crime—it is essential to anticipate developments (Kėža & Batrūnienė, 2023) and to align the strategies of forensic science with those of law enforcement institutions. This alignment involves creating a scientific concept for forensic science training and professional development for law enforcement and judicial officials, as well as preparing a model for its implementation (Kurapka & Malewski, 2021).

Another important trend in the development of forensic science is the active scholarly debate on expanding its system to incorporate digital forensics (Konovalova & Shevchuk, 2023). The aim of this

increasingly prominent dimension of forensic science is to apply digital forensic tools to the investigation of war crimes. According to Ukrainian researchers, this necessity arises directly from practice itself, particularly in response to war crimes committed in Ukraine (Konovalova & Shevchuk, 2023). In this sense, digital forensics is primarily focused on collecting digital information as admissible evidence, while also representing one of the most pressing and relevant topics in contemporary forensic science.

Another pressing issue in forensic science, which should serve the practical needs of investigating criminal acts, concerns the improvement of the structure and content of forensic methodology. Scholars have observed that "one of the modern problems in the effective investigation and detection of crimes is the formation, development, and improvement of certain criminalistic methodics of crime investigation" (Shevchuk et al., 2022). The methodology of forensic science, as a component of the discipline, must be continuously revised to reflect evolving methods of committing crimes as well as technological advances in recording and analysing traces. At the same time, the scope of forensic methodology should be understood more broadly: it should also encompass intelligence operations, law enforcement experience in investigating specific types of criminal acts and judicial practice. As emphasised by researchers, "the sources of development of the criminalistic methodology for investigating crimes are investigative, intelligence-gathering, and judicial practice, law, and scientific provisions" (Shevchuk et al., 2022). Such scientific discussions illustrate not only the ongoing transformation and inherent dynamism of criminalistics but also its clear orientation towards practice. They underscore the justified concern of scholars that criminalistics cannot remain static: modern criminalistics must adapt and respond to contemporary practical needs. Otherwise, the discipline risks diminishing its relevance, leaving the practice of crime investigation to develop independently of scientific knowledge.

Recently, the field of forensic research and crime scene investigation has been expanding. Studies confirm that effective performance at a crime scene depends not only on officers' preparedness to apply forensic knowledge and skills, but also on their psychological readiness (Craven, Hallmark, Holland, & Maratos, 2022). A direct link has therefore been identified between psychological preparedness, resilience in critical conditions and the achievement of desired outcomes. For instance, researchers highlight that officers working at crime scenes require strong emotion regulation skills, resilience, a supportive social network in the workplace, and the ability to maintain control over their tasks in highly demanding conditions (Craven et al., 2022). Another important direction is the digitalisation of training aimed at developing officers' practical skills for work at crime scenes. Worldwide, training exercises such as the mixed-reality game TraceGame are used to strengthen officers' knowledge and skills by simulating realistic scenarios (Acampora, Trinchese, Trinchese, & Vitiello, 2023).

In most European countries, the development and implementation of modern crime investigation technologies are clearly evident: approaches to forensic knowledge are being revised and expanded with new elements, which are gradually introduced into officer training. Forensic science has always been, and will continue to be, closely linked to the work of law enforcement officers at all levels. Activity formats are being redefined and more effective practices are being adopted. These changes do not diminish the significance of forensic science in the investigation and prevention of criminal acts but rather expand its scope (Wojciechowski, 2023).

However, the emerging approach that is focused on the model of cooperation between society and law enforcement, does not exclude building the knowledge and skills necessary for police officers to ensure the proper performance of their functions. It is worth examining whether, in light of global changes, new methods of committing crimes, increasingly complex criminal schemes, and organisational reforms in law enforcement—such as changes in operational formats, the reassignment of officers' functions, and the granting of specific powers—officers possess sufficient forensic knowledge. It is also important to assess whether they have the practical skills necessary to effectively detect, investigate, and prevent crimes. Despite the diversity and dynamism of contemporary global phenomena, first-line officers are always the first to arrive at a crime scene and their actions largely determine the quality of subsequent investigations.

In Ukraine, pre-trial investigations commence upon the entry of information into the Unified Register of Pre-trial Investigations. In urgent cases, however, a crime scene inspection may be conducted prior to such registration, with the information subsequently entered immediately after the inspection is completed or once an expert's report or conclusion is received. This procedural feature places heightened responsibility on the investigator and demands in-depth professional knowledge since investigators are the first to encounter material traces of the crime, which may be destroyed or altered. The integration of forensic, forensic medical and procedural knowledge is therefore essential to ensuring the effectiveness of the pre-trial investigation at its initial stage. The professional training of the investigator determines not only the timeliness and completeness of evidence collection, but also the legality of all subsequent criminal proceedings, directly influencing the fairness of the trial and the level of public trust in the justice system. Securing the crime scene, protecting physical evidence, assisting victims, maintaining effective contact with forensic experts and investigators and performing other critical duties constitute a complex set of tasks that directly influence investigative outcomes and may ultimately determine the success of the pre-trial process. Correctly collected and preserved data are vital, as they may later be admitted as evidence in court. Therefore, it is essential that the development of forensic competencies be linked not only to theoretical training but also to practical application, while also accounting for the specific powers and responsibilities of officers in each country.

Taking into account the diverse practices of European countries regarding officer training systems, this study further examines the experience of those countries that train entry-level officers, with particular attention to the preparation of these officers for work at the crime scene.

2. The Powers of Entry-Level Police Officers in European Countries and Ukraine at Crime Scenes and Their Connection to Forensic Competencies

In this article, forensics is distinguished as a science concerned with the signs of a criminal act and the clarification, investigation, and prevention of such acts. It is concluded that forensic competencies constitute an integral part of police officers' activities. At the same time, however, a question arises as to whether the practices of different countries support the view that every officer requires forensic knowledge and skills. For the purposes of this study, the focus was placed on entry-level police officers who, in some countries, are not granted the authority to carry out initial investigative actions at the crime scene.

2.1. Research methodology

To clarify the experience of different European countries and Ukraine regarding the preparation of entry-level police officers for work at crime scenes and to identify the basic forensic competencies required, a qualitative research method was applied—written interviews with targeted questions. For the interviews, a questionnaire was designed consisting of eight questions focused on the duration of professional training programmes for police officers, the provision of forensic technique knowledge and skills, and the scope of officers' powers at crime scenes, among other aspects. The questionnaire was distributed to representatives responsible for police training in 27 EU countries, Switzerland, the United Kingdom, and Ukraine. Responses were received from 19 countries and Ukraine, 12 of which provide initial professional training for police officers. The practices of countries that offer such training but did not participate in the interviews or provide answers are not examined within the scope of this study.

2.2. Analysis and discussion of the research results

The interview results revealed that initial professional training for police officers is conducted in Austria, Belgium, Bulgaria, the Czech Republic, Spain, Poland, Lithuania, Luxembourg, Slovakia, Slovenia, Switzerland, Hungary, and Ukraine. A comparison of these training programmes shows a number of similarities, particularly regarding the significance of forensic knowledge and the development of skills required for work at crime scenes. All participating countries emphasised the importance of forensics in police work. A more detailed assessment of the methodological parameters of the training programmes—such as programme duration, forensic topics, the balance between theory and practice,

employment-related features, and officers' powers at crime scenes—made it possible to identify the key characteristics of officer preparation for work at crime scenes.

Different training programme durations prevail, but similar employment characteristics. The duration of training has a direct impact on the competencies granted to police officers. Depending on the functions officers are expected to perform in service, decisions are made regarding the skills to be acquired during training and the time required to provide them.

In Lithuania, initial vocational training lasts 40 weeks (9 months), which is similar to Bulgaria. In Slovakia and the Czech Republic, the duration is slightly shorter—35 weeks (8 months). In Hungary, depending on the programme, training may last 43 weeks (10 months) or extend to 52–78 weeks (1–1.5 years). In contrast, training in Poland is shorter—20 weeks (5 months). Austria, Slovenia, and Luxembourg apply significantly longer training programmes lasting 104 weeks (2 years). Belgium, Spain, Switzerland, and Luxembourg employ combined models of training and internship. In Luxembourg, one year of theoretical and practical training is followed by a year-long internship across three different operational units (four months each, under the guidance of a mentor), resulting in a total of 104 weeks (2 years). In Switzerland, the first academic year is devoted to theoretical study, while the second year consists of practical training in police units. In Spain, theoretical and practical training lasts 40 weeks (9 months), followed by a one-year internship in police institutions, for a total of 1 year and 9 months. In Belgium, the training programme lasts one year and is supplemented by a six-month internship in different police departments, enabling specialisation in particular fields of activity; the total duration is thus 1.5 years. In Austria, the 24-month basic police training programme is divided into basic training (12 months), Internship I (3 months), consolidation (5 months), and Internship II (4 months). In Odessa Center for Initial Professional Training "Police Academy" (Ukraine) training period is 6 months.

Thus, a comparison of the duration of initial vocational training programmes in the analysed countries shows that, in most cases, the training period is shorter than one year, while in some countries, programmes last from 1.5 to 2 years.

When comparing the employment characteristics of these countries, it appears that officers in Lithuania, Poland, the Czech Republic, Hungary, and Slovakia typically begin their service in various public police units (e.g., prevention units, riot control). In Luxembourg, officers may also be assigned to other units. In Slovenia, as in Luxembourg and Belgium, officers may be employed in local police stations. In Bulgaria, graduates are deployed across a wide range of units, including pre-trial investigation and intelligence divisions. In Switzerland and Spain, newly trained officers are likewise assigned to different units, not exclusively to public policing roles.

These variations in employment placements indicate that initial vocational training programmes are not solely designed to prepare officers for work in public police units. Instead, they may also be oriented towards service in pre-trial investigation units, which in turn influences the scope of forensic competencies included in the initial vocational training curriculum.

Particular attention is given to the development of forensic competences required for work at the scene of a crime. A closer examination of the training programmes reveals that, in all the countries under consideration, police officers are prepared for work at crime scenes through instruction in the fundamentals of forensic techniques (e.g., securing the scene, locating, recording, and collecting traces). Each of the analysed countries underscores the importance of forensics for practical police work.

Although the responses provided by various foreign countries did not mention the existence of national professional standards, it is important to note that in Lithuania, the competencies required of entry-level police officers are regulated by the Professional Standard for the Public Administration Sector. This document specifies essential competencies in the field of forensics, including the identification of a crime scene and the organisation of its protection, as well as the performance of primary procedural actions at the scene (examinations, interviews, taking statements, and the seizure of objects) (Centre for the Development of Qualifications and Vocational Training, 2019). In Switzerland, a common and

binding framework for the development of police training curricula was developed by the Swiss Police Institute and issued by the Swiss police authorities. The framework specifies several relevant competencies, including identifying and securing physical evidence, safeguarding digital devices and data carriers until specialists arrive, conducting interrogations, documenting statements, and possessing basic competencies in digital investigations (Schweizerisches Polizei-Institut [SPI], 2019). When evaluating the Professional Standards adopted by other European countries, it was observed that forensic competencies are more prevalent at levels 5 and above of the Sectoral Qualifications Framework (SQF).

At the European level, forensics is identified as one of the core capability gaps among law enforcement officials that can and should be addressed through training (but not as entry-level police officers training). In the European Union Strategic Training Needs Assessment (EU-STNA), digital forensic skills are highlighted as particularly crucial, noting that "training in this area should have a strong focus on acquiring and using electronic evidence, e.g. in detecting cybercrime and seizing virtual currency" (European Union Agency for Law Enforcement Training, 2022).

As noted, the development of digital forensic competencies is particularly relevant at European level. However, an analysis of training programmes in other countries indicates that the acquisition of these competencies is not treated separately from the broader framework of forensic skills development. Instead, individual countries aim to strengthen digital forensic and related competencies through practice-oriented training, often conducted directly within the officer's future working environment.

For example, in Luxembourg, approximately half of the total programme duration (12 months) is devoted to workplace-based competency development under the supervision of a mentor (Interview response, 10 July 2025). In other countries, the development of digital forensic competencies is integrated into advanced or specialised training courses rather than being included in entry-level police education.

It is also noteworthy that all countries include assessments of forensic knowledge and practical skills, thereby demonstrating not only the significance attributed to this area but also confirming the necessity for future police officers to acquire such knowledge for the detection, investigation, and prevention of criminal acts.

In most European countries, the acquisition of forensic competencies is evaluated through the performance of practical tasks. Training programmes typically allocate a proportionally similar amount of time to theoretical instruction and practical activities. The assessment of practical tasks is usually linked to specific competencies, such as crime scene examination, interviewing, and related skills.

An analysis of assessment procedures shows that countries apply a variety of evaluation methods, including written tests and practical examinations. In some cases, candidates are permitted to take the final examination only after successfully completing required practical tasks. For example, in Slovenia, trainees must demonstrate the ability to write an inspection report based on cases discussed during practical exercises and prepare documentation for submitting collected traces for further analysis. High-quality written outputs serve as a prerequisite for sitting the final exam.

In other countries, examinations are more comprehensive and cover multiple areas of competence. For instance, in Switzerland, cadets must pass an "operational readiness exam" after the first year in order to continue their training. Upon completing the second year, training concludes with the federal professional examination. In Luxembourg's 24-month programme, a final theoretical examination is conducted after the initial 12 months of study. Candidates who pass this stage then proceed to a 12-month field-training phase, during which they must complete three practical assignments.

These findings highlight that forensic knowledge is essential in the professional duties of every officer, regardless of the specific functions performed in service.

The duration of forensic science training varies considerably across countries. An examination of the topics included in initial vocational training programmes for preparing police officers to work at crime scenes shows that all countries emphasise both the provision of theoretical knowledge and the development of practical skills. The most significant difference, however, lies in the total time allocated to forensic science. In Austria, 164 hours are devoted to forensic science topics; in Switzerland, the duration ranges from 130 to 160 hours; in Belgium, 132 hours are allocated; in Bulgaria, 114 hours; in Slovakia, 86 hours. In Slovenia, 82 hours are devoted to forensic science over two years of training. In Lithuania, the programme allocates 60 hours to general forensic science, while in Poland the number is approximately half that amount.

When assessing the extent of forensic techniques within forensic science training, Slovenia allocates 22 hours. Lithuania and Luxembourg devote 30 hours each to comparable topics, Slovakia 16 hours, Hungary 32 hours, and Spain 40 hours. In Poland, however, the basics of forensic techniques are not presented as a separate subject; instead, issues related to the detection, documentation, and collection of traces are integrated into the broader topic of crime scene examination, which is allocated 24 hours in total. In the Czech Republic, 14 hours are assigned to forensic techniques, with the content structured to address the most relevant areas of the discipline. The main thematic areas include forensic trace evidence, forensic identification, facial identification, dactyloscopy (fingerprint analysis), scent identification, biology and genetics, traceology, mechanoscopy, ballistics, and pyrotechnics. In addition, the fundamentals of forensic techniques are incorporated through model scenarios, designed to reinforce theoretical knowledge and enhance the practical skills necessary for performing duties in real-life environments.

An analysis of the initial vocational training programmes of the countries being analysed reveals a fundamental difference in two main areas related to forensic tactics. In Slovakia, 38 hours are devoted to forensic tactics, including scene examination, interrogation tactics, and related subjects. In the Lithuanian curriculum, 24 hours are allocated to scene examination, while in Poland the corresponding number is 12 hours.

Overall, the time devoted to forensic training ranges from 60 to 160 hours. This variation demonstrates that, although considerable importance is attached to the subject of forensics, the allocation of time to forensic techniques and tactics differs substantially. Such disparities raise concerns as to whether, in countries where the least time is allocated (e.g., the Czech Republic and Poland), trainees acquire the basic knowledge required for professional duties at the crime scene.

The balance between theory and practice is systematically assessed during training. In all the countries studied, first-line police officers are responsible for securing the crime scene, establishing its perimeter, providing emergency assistance to victims, requesting additional medical support and documenting essential information related to witnesses and other significant circumstances. Consequently, an analysis of the training programmes indicates that the curricula emphasise and maintain a balance between theoretical and practical components. For instance, according to information provided by the Slovak representative, “the theoretical knowledge of different topics is supplemented by practical and integrated workshops and workplaces (polygons). The teacher complements the curriculum with specific and model examples from the performance of the service. Students learn to work with relevant general binding legislation and internal acts regulating the activities of the police in relation to the implementation of primary measures at the crime scene, crime scene search, search for persons and objects, and interrogation” (Interview response, July 15, 2025). It was also noted that practical, integrated exercises that require students to handle common security situations faced by police officers in riot police units are crucial for shaping their professional competence. Depending on the type and complexity of the scenarios, instructors from other subjects are also engaged in designing and delivering these integrated training activities.

The training model implemented in Luxembourg is distinctive in its balance of theoretical and practical components. In the first year, trainees study academic subjects, acquire foundational knowledge and participate in exercises conducted within the training institution. According to a Luxembourg

representative, "during the second year of their initial professional training, trainees complete three practical assignments, each lasting four months. These rotations typically include placements in two different regional police stations and one department within the judicial police. This phased approach is designed to provide a broad introduction to operational policing and investigative work. Under the supervision of experienced officers, trainees gain hands-on experience in frontline policing, community interaction, and criminal investigations, helping them to apply their foundational knowledge in diverse real-world contexts" (Interview response, July 10, 2025).

In Slovenia, forensic science techniques are taught consistently throughout both years of training. Considerable attention is devoted to individual branches of forensic techniques to ensure that future officers acquire the necessary knowledge and develop essential skills. According to a Slovenian representative, "[the trainee] knows the equipment with which he/she can professionally and qualitatively conduct inspections of crime scenes, can distinguish between indoor and outdoor photography techniques, can determine the difference in meaning of situational and close-up shots, is able to substantiate the meaning of photographing crime scenes and criminal acts, can understand the meaning of establishing identity, and substantiates the meaning of traces in combating crime" (Interview response, July 24, 2025).

In other countries, similar attention is proportionally devoted to developing both the theoretical and practical skills of officers.

The limits of the powers of first-line officers at the crime scene. First-line officers in Lithuania, Poland, Switzerland, and Slovenia are authorised to perform initial actions to investigate the circumstances of an incident. These may include conducting an inspection of the scene, recording traces—particularly in cases involving minor crimes—and assisting specialists or experts at the scene. In Bulgaria, however, the powers of officers vary depending on the unit in which they serve. According to a Bulgarian representative, "police officers from the security and traffic police units, performing patrol and post activities, are trained in the following initial actions upon arrival at the scene of the accident: identifying injured persons and providing priority first aid independently or together with a medical team; identifying potential witnesses, taking information from them regarding the committed act and the identity of the victims and perpetrators, as well as ensuring their presence until the main team arrives; establishing the boundaries of the accident scene and fencing off the perimeter in order to prevent further disruption of the situation at the scene. If necessary, and at their discretion, this includes: expanding the perimeter of the crime scene, as well as the arrival and departure routes of the alleged perpetrators of the crime; preserving the crime scene and any traces and material evidence from atmospheric influences and side effects until the arrival of a crime scene inspection team; informing the duty unit in the department about the situation established by direct personal observations, before and during the inspection; compiling and maintaining a list of all persons, including employees, who entered the perimeter of the crime scene; as well as assisting the inspection team in providing replacement persons in accordance with the Criminal Procedure Code, and preparing a written report on all actions performed and the established facts and circumstances" (Interview response, July 28, 2025).

In Austria, the Czech Republic, Spain, Slovakia, Hungary, Ukraine and Luxembourg, officers do not conduct independent inspections of the crime scene; such tasks are carried out by a designated investigator or expert. At this level, the responsibilities of officers are typically focused on securing the scene and performing other essential actions, including assessing the situation, notifying the operations centre, providing first aid when necessary and ensuring the security of both suspects and witnesses.

However, in Luxembourg, in exceptional cases, first-line officers may record traces. This occurs in urgent situations, such as adverse weather conditions, when traces are at risk of disappearing. A similar practice exists in Belgium, where the involvement of first-line officers at the scene of an incident depends on several circumstances. According to a Belgian representative, "it depends on the type of crime scene, and on the regulations at the local police zone. Some investigations must be led by a judicial police officer and must be performed by specialised services such as CSI" (Interview response, July 16, 2025).

The analysis of the powers of first-line officers at the crime scene in foreign countries indicates that these powers are shaped by national legislation, the criminal investigation model applied in each jurisdiction, and other organisational features of police work. In all countries, officers are authorised to perform tasks requiring forensic knowledge and skills. These include not only securing the crime scene but also understanding the principles and procedures of scene examination, conducting inspections, documenting and collecting traces, gathering primary information about the crime, questioning individuals present, pursuing suspects, and conducting searches.

A comparative review of the information provided by Austria, Bulgaria, Belgium, the Czech Republic, Spain, Lithuania, Poland, Luxembourg, Slovenia, Slovakia, Switzerland, and Hungary shows that training models for first-line officers share similarities but are not identical. Variations in the total duration of training programmes, the structure of their content, and the balance between theory and practice influence the scope of forensic training, particularly the time allocated to specific forensic techniques and topics. The study found that longer training programmes provide more opportunities for developing forensic knowledge and skills. The Luxembourg model is particularly distinctive for its practical orientation: future officers spend up to half of the programme (one year) interning in various police departments under the guidance of experienced mentors, thereby significantly enhancing their practical competences.

It is noteworthy that a broader scope of forensic courses and the development of relevant skills are characteristic of those countries where first-line officers are authorised to work independently at crime scenes and to carry out initial actions in cases of minor crime investigations.

The results of the study confirm a strong correlation between the duration of training programmes and the time allocated to forensic topics. Longer training programmes provide greater opportunities to strengthen forensic preparation and to cover a wider range of subjects related to forensic techniques and crime scene examination.

Across the professional training programmes of Austria, Belgium, Bulgaria, the Czech Republic, Spain, Lithuania, Poland, Luxembourg, Slovakia, Slovenia, Switzerland, Ukraine, and Hungary, forensic topics—including forensic techniques—are systematically integrated, regardless of the precise number of hours assigned. These programmes consistently aim to equip officers with the knowledge and skills required for work at crime scenes. While emphasising the importance of forensic science, all countries highlight the necessity of practical skills for effective performance at the crime scene. This indicates that the specific training approaches adopted in different countries, although varied in scope and structure, do not fundamentally alter the overall model of preparing officers for such work.

Drawing on the practices of the countries analysed, the study identified a core set of forensic competences required for any officer expected to operate at a crime scene (see Table 1). These consist of essential knowledge and practical skills in forensic techniques, forensic tactics, and forensic methodology.

No.	Competencies Being Formed	Suggested Topics of Forensics
1.	Assessment of the circumstances of a crime and initial identification of possible indicators of a criminal act	Fundamentals of forensic tactics, techniques, and methodology, and their interrelationships. Types, characteristics and distinctive features of specific criminal acts.
2.	Determination of the perimeter (boundaries) of the crime scene and ensuring its protection	Fundamentals of forensic tactics. The concept and boundaries of the crime scene. Security requirements. Types of crime scenes. Basic principles of scene inspection.
3.	Provision of first aid to the victim	Fundamentals of forensic tactics and methodology. Assessment of the victim's condition and ability to communicate. Provision of immediate assistance.

		Procedures for requesting necessary medical support.
4.	Detection, documentation, and collection of traces	Fundamentals of forensic techniques. Types of forensic methods (dactyloscopy, trasology, odorology, etc.). Basic principles of detecting, documenting, and collecting traces. Specific features of working with biological, trasological, odorological, and other types of traces.
5.	Cooperation with other personnel operating at the crime scene	Fundamentals of forensic tactics. Specific features of cooperation at the crime scene. Forms of assistance to the investigator, prosecutor, and forensic expert (specialist).
6.	Identification of witnesses and initial collection of information through interrogation	Fundamentals of forensic tactics. Types and characteristics of interrogation. Basic principles of interrogation. Interrogation tactics. Methods of documentation of collected information.
7.	Immediate pursuit of an offender	Fundamentals of forensic tactics and methodology. Criminal data and other information relevant to the investigation. Threat assessment during apprehension. Tactics of detention.

Table 1. A core set of forensic competences required for any officer expected to operate at a crime scene

Considering the prepared set of proposed forensic competencies, it is reasonable to assume that the standardisation of the competencies required for entry-level police officers could become one of the integral dimensions of ENFSI 2030 development (European Network of Forensic Science Institutes [ENFSI], 2021). Establishing a set of mandatory forensic competencies would create significant prerequisites for implementing ENFSI provisions on minimum quality requirements for countries in the field of forensic science and forensic expertise, facilitate international cooperation, and provide further guidelines for the standardisation of procedures.

This study did not examine the experience of countries that provide initial professional training for police officers but were not included in the research and did not provide responses. Therefore, in the future, when continuing the scientific discussion on this topic, it would be useful to examine and evaluate the practices of such countries.

Conclusions

Forensic science knowledge and skills are essential for police officers at all levels, since they ensure the effective performance of core functions in responding to, detecting, investigating and preventing criminal acts. The changing nature of crimes, methods of commission and criminal schemes makes it necessary to not only apply information technology tools but also highlights the importance of developing officers' forensic science competencies—an integral element in building modern public security. Strengthening the connection between forensic science and practice is therefore necessary to ensure that forensic science can adequately respond to the evolving needs of practice.

The results of the study show that by applying different models of officer training—particularly in the preparation of first-line officers—various European countries, as well as Ukraine, can provide future police personnel with essential forensic science knowledge and practical skills necessary for work at crime scenes, regardless of the specific service assignment. An assessment of the experience of different countries in developing the forensic competencies of future officers highlights the need to conceptualise the basic forensic knowledge required, by establishing a mandatory block of such knowledge to ensure the effective performance of forensic tasks at crime scenes. Regardless of the different models used to

train entry-level officers, this foundational block could serve as the first step towards creating a European Qualifications Framework for police officers in the field of criminalistics.

References:

Abraham, S. J. (2022). The potential to become a good police officer: Development of a competency framework for the Norwegian Police University College. *Nordic Journal of Studies in Policing, 9*(1), 1–18. https://doi.org/10.18261/njsp.9.1.7

Acampora, G., Trinchese, P., Trinchese, R., & Vitiello, A. (2023). A Serious Mixed-Reality Game for Training Police Officers in Tagging Crime Scenes. *Applied Sciences, 13*(2), 1177. https://doi.org/10.3390/app13021177

Bilevičiūtė, E. (2023). Teisinis švietimas ir ugdymas [Legal education and training]. In *Visuomenės pokyčiai ir teisė: Liberum Amicorum Vytautui Šlapkauskui: Straipsnių rinkinys,* 88-106. Mykolas Romeris University.

Bilius, M. (Ed.). (2018). *Policijos pareigūnų rengimo vadovėlis* [Police officers' training manual], 382 pp. Lietuvos policijos mokykla.

Centre for the Development of Qualifications and Vocational Training. (2019). *Professional standard for the public administration sector (V1-107)*. Register of Legal Acts (TAR). Retrieved November 23, 2025, from https://www.e-tar.lt/portal/lt/legalAct/f8105f308c2211e9ae2e9d61b1f977b3/asr

Craven, H. P., Hallmark, M., Holland, F., & Maratos, F. A. (2022). Factors influencing successful coping among crime scene investigation (CSI) personnel: Recruiting for resilience – A mixed methods study. *Journal of Police and Criminal Psychology*, 37(3), 549–568. https://doi.org/10.1007/s11896-021-09472-3

European Coast Guard Functions Academies Network Project. (n.d.). *Sectoral Qualifications Framework for Coast Guard Functions*. European Coast Guard. Retrieved September 5, 2025, from https://coastguard.europa.eu/sites/default/files/2023-08/01.%20Publication%20of%20SQFCGF.pdf

European Commission Directorate-General for Taxation and Customs Union. (n.d.). *EU Customs Competency Framework (CustCompEU)*. TAXUD. Retrieved September 5, 2025, from https://taxation-customs.ec.europa.eu/taxation/eu-training/custcompeu_en

European Network of Forensic Science Institutes. (2021). *Vision of the European Forensic Science Area 2030: Improving the reliability and validity of forensic science and fostering the implementation of emerging technologies.* Retrieved November 24, 2025, from https://enfsi.eu/wp-content/uploads/2021/11/Vision-of-the-European-Forensic-Science-Area-2030.pdf

European Union Agency for Law Enforcement Training (CEPOL). (2022). *European Union Strategic Training Needs Assessment 2022–2025*. Publications Office of the European Union. https://doi.org/10.2825/690443

European Union Agency for Law Enforcement Training (CEPOL). (2025). *Consolidated Annual Activity Report 2024: CEPOL should pilot the SQF focusing on cross-border cooperation* (Management Board decision 11/2024/MB). Retrieved September 5, 2025, from consolidated annual activity report document.

Frontex. (n.d.). *Sectoral Qualifications Framework for Border Guarding: Setting standards for training excellence* (Vol. II). Warsaw: Frontex. Retrieved September 5, 2025, from https://prd.frontex.europa.eu/wp-content/uploads/sectoral-qualifications-framework-for-border-guarding-setting-standards-for-training-excellence-vol.-ii.pdf

Kėža, P., & Batrūnienė, J. (2023). The contribution of forensic science to the fight against organized crime. *Public Security and Public Order*, No. 33, 66–73. Retrieved September 22, 2025, from https://ojs.mruni.eu/ojs/vsvt/article/view/8426

Konovalova, V. O., & Shevchuk, V. M. (2023, January 20). Digital criminalistics as a strategic direction of formation of criminalistic knowledge. *In Collection of Scientific Papers «SCIENTIA»* (Amsterdam, Netherlands), 73–77.

Kurapka, V. E., & Malewski, H. (2021). Po dvidešimties metų... Straipsnio "Kriminalistikos mokslas vykdant teisės reformą Lietuvoje" pėdsakais [Twenty years later... In the footsteps of the article "Forensic science in the implementation of legal reform in Lithuania"]. *Public Security and Public Order*, 27, 77–90. Retrieved September 22, 2025, from https://ojs.mruni.eu/ojs/vsvt/article/view/6555

Kurapka, V. E., Malevski, H., & Bilevičiūtė, E. (2007). Kriminalistikos ir teismo ekspertizės žinių poreikio ir jų taikymo praktikos Lietuvoje vertinimas [Evaluation of demand for criminalistics and forensic examination knowledge and its practical application in Lithuania]. *Jurisprudencija: mokslo darbai* (No. 12(102)), 22–31. Mykolas Romeris University.

Kurapka, V. E., Malevski, H., & Matulienė, S. (Eds.). (2016). *Europos kriminalistikos bendros erdvės 2020 vizijos įgyvendinimo Lietuvoje mokslinė koncepcija: mokslo studija* [Scientific concept of implementing the vision of a European criminalistics common space 2020 in Lithuania: scientific study], 372 pp. Mykolas Romeris University.

Kurapka, V. E., Matulienė, S., Bilevičiūtė, E., Burda, R., Davidonis, R., Dereškevičius, E., Juškevičiūtė, J., Krikščiūnas, R., Novikovienė, L., Latauskienė, E., & Radzevičius, E. (2013). *Kriminalistika: taktika ir metodika* [Criminalistics: Tactics and Methodology], 1060 pp. Mykolas Romeris University.

Łabuz, P., & Malewski, H. (2024). Zwalczanie przestępczości w polskiej i litewskiej doktrynie kryminalistycznej: Część 1. Historia, Teoria, Dydaktyka [Crime control in the Polish and Lithuanian doctrines of criminalistics. Part 1: History, theory, teaching], 298 pp. Księgarnia Akademicka Publishing. https://doi.org/10.12797/9788383681863
Latauskienė, E., Matulienė, S., & Raudys, R. (2003). Kriminalistika kaip integralus mokslas: įrodinėjimas ir praktika [Criminalistics as an integrated science: proof and practice]. *Jurisprudencija*, 43(35), 99–109. Retrieved August 21, 2025, from https://ojs.mruni.eu/ojs/jurisprudence/article/view/3392
Laurinavičius, A. E. (2000). *Policijos administravimas užtikrinant visuomenės saugumą* [Police administration ensuring public safety], 106 pp. Vilnius: Lietuvos teisės akademija.
Malewski, H., Matulienė, S., & Juodkaitė-Granskienė, G. (2022). *Kriminalistikos teorijos plėtra ir teismo ekspertologijos ateitis* [Developments of criminalistics theory and future of forensic expertology], 608 pp. Lietuvos kriminalistų draugija; Mykolo Romerio universitetas.
Misiūnas, E. (2010). *Policijos pareigūnų teisinis statusas* [Legal status of police officers]. Doctoral dissertation, Mykolas Romeris University.
Navickienė, Ž. (2011). Lietuvos policijos pareigūnų kvalifikacijos tobulinimas: požiūris į šio proceso optimizavimą [Improving the qualifications of Lithuanian police officers: an approach to optimizing this process]. *Profesinis rengimas: tyrimai ir realijos*, (21), 68–81.
Navickienė, Ž. (2018). Policijos pareigūnų rengimo vadovėlio recenzija: nauji iššūkiai Lietuvos policijos mokslui [Review of a police training manual: new challenges for Lithuanian police science]. *Public Security and Public Order*, (21), 83–92.
Navickienė, Ž., & Bilius, M. (2024). Are traditional didactic tools appropriate for methodics of modern crime investigation? In E. Gruodytė & A. Pasvenskienė (Eds.), *Human right to education in the age of innovations and smart technologies,* 309–330. Peter Lang. https://doi.org/10.3726/b21796
Palšis, B. (2014). Bendruomenės pareigūno pareigybė: Teisėtvarkos ir socialinio darbo vaidmenų derinimas [The community officer position: The integration of law enforcement and social work roles]. *Socialinis darbas. Patirtis ir metodai*, 14(2), 55-78. https://dx.doi.org/10.7220/2029-5820.14.2.4
Saltevskyi, M. V. (2005). Kryminalistyka u suchasnomu vykladi [Criminalistics in modern presentation], 588 pp. Kyiv: Kondor.
Schweizerisches Polizei-Institut [SPI]. (2019). *Ausbildungsplan Polizei (APP)*. Retrieved November 22, 2025, from https://www.edupolice.ch/de/polizeiausbildung/AUSBILDUNGSPLAN-POLIZEI-(APP)
Shevchuk, V., Vapniarchuk, V., Borysenko, I., Zatenatsky, D., & Semenogov, V. (2022). Criminalistic methodics of crime investigation: Current problems and promising research areas. *Revista Jurídica Portucalense*, December, 320–341.
Shepitko, V. Yu. (Ed.). (2008). Kryminalistyka [Criminalistics] (4th ed., rev. and suppl.), 464 pp. Kharkiv: Pravo.
Smalskys, V. (2008). Policijos personalo rengimo šiuolaikinės kryptys [Modern trends in police personnel training]. *Viešoji politika ir administravimas*, 23, 88–97.
Tishchenko, V. V. (Ed.). (2019). Kryminalistyka: Pidruchnyk [Criminalistics: Textbook], 556 pp. Odesa: Helvetyka.
Valeckas, V. (2004). *Vidaus reikalų sistemos pareigūnų profesinis taktinis rengimas. I dalis. Taktika kaip priemonė, stiprinanti asmeninį saugumą: (užsienio šalių metodika ir patirtis ją tobulinti): mokomasis metodinis leidinys* [Professional tactical training of internal affairs system officers. Part I: Tactics as a means of strengthening personal safety: (foreign countries' methodology and experience in improving it): educational-methodical publication], 70 pp. Vilnius: Lietuvos teisės universiteto Leidybos centras.
Vitkauskas, K. (2011). Policijos personalo rengimo sistemos raida Lietuvoje 1990–2010 metais [The development of the police personnel training system in Lithuania in 1990–2010]. *Viešoji politika ir administravimas*, *10*(3), 373–386. https://doi.org/10.5755/j01.ppaa.10.3.638
Wojciechowski, T. (2023). *Modern criminalistics education in EU police academies*. Warsaw University Press.

INTERNATIONAL COMPARATIVE JURISPRUDENCE 2025, 11(2)

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Editor: MB KOPIS