Institute of Comparative Law

ISSN 2812-698X

# REGIONAL LAW REVIEW

2026

**ISSN 2812-698X**
**ISSN (online) 2812-6998**

# REGIONAL LAW REVIEW

**- ANNUAL EDITION -**

**BELGRADE, 2026**

Održavanje konferencije „Regional Law Review“ i izdavanje ove publikacije podržalo je Ministarstvo nauke, tehnološkog razvoja i inovacija Republike Srbije.

International conference “Regional Law Review” and publishing of this collection of papers were supported by the Ministry of Science, Technological Development and Innovations of the Republic of Serbia.

**COLLECTION REGIONAL LAW REVIEW**

**Publishers**
Institute of Comparative Law in Belgrade, Belgrade, Serbia
in cooperation with
University of Pécs Faculty of Law, Hungary

**For the Publisher**
Dr. Miloš Stanić

**Editor in chief**
Dr. Mario Reljanović, Institute of Comparative Law in Belgrade, Serbia

**Secretary**
Aleksandar Mihajlović, M.A., Institute of Comparative Law in Belgrade, Serbia

**Assistant editor**
Danilo Brajović, M.A., Institute of Comparative Law in Belgrade, Serbia

**Website editor**
Aleksandra Višekruna, M.A., Institute of Comparative Law in Belgrade, Serbia

**Editorial Board**
Prof. Dr. Saša Zagorc, University of Ljubljana Faculty of Law, Slovenia
Prof. Dr. Helga Špadina, "Josip Juraj Strossmayer" University of Osijek Faculty of Law, Croatia
Prof. Dr. Biljana Vukoslavčević, Mediteran University in Podgorica, Montenegro
Prof. Dr. Aleksandra Čavoški, University of Birmingham, United Kingdom
Prof. Dr. Vesna Rijavec, Faculty of Law, University of Maribor, Slovenia
Prof. Dr. Giacomo Pailli, Faculty of Law, University of Florence, Italy
Dr. Mirjana Glintić, Institute of Comparative Law in Belgrade, Serbia

**Advisory Board**
Prof. Dr. Jelena Ćeranić Perišić, Institute of Comparative Law in Belgrade, Serbia
Dr. Avi Zamir, Faculty of Law, University Tel Aviv, Israel
Prof. Dr. Slađana Jovanović, Faculty of Law, Union University in Belgrade, Serbia
Prof. Dr. Bojan Urdarević, Faculty of Law, University of Kragujevac, Serbia
Prof. Dr. Ljubinka Kovačević, Faculty of Law, University of Belgrade, Serbia
Prof. Dr. Ljubinko Mitrović, Pan-European University Apeiron in Banja Luka, Bosnia and Herzegovina

**Scientific Board of the RLR Conference**
Prof. Dr. Matija Damjan, University of Ljubljana Faculty of Law, Slovenia
Prof. Dr. Nikol Žiha, "Josip Juraj Strossmayer" University of Osijek Faculty of Law, Croatia
Prof. Dr. Ágoston Mohay, University of Pécs Faculty of Law, Hungary
Prof. Dr. Valentina Ranaldi, "Niccolò Cusano" University of Rome, Italy
Prof. Dr. Goran Koevski, Faculty of Law, University of Skopje, North Macedonia
Prof. Dr. Marko Babić, University of Warsaw, Poland
Dr. Vladimir Mikić, Institute of Comparative Law in Belgrade, Serbia
Prof. Dr. Daniela Ježová, Comenius University in Bratislava Law Faculty, Slovakia

**Organisational Board of the RLR Conference**
Prof. Dr. Vid Jakulin, University of Ljubljana Faculty of Law, Slovenia
Dr. Aleksandra Rabrenović, Institute of Comparative Law in Belgrade, Serbia
Prof. Dr. Zoltán Bankó, University of Pécs Faculty of Law, Hungary
Prof. Dr. Jelena Dujmović Bocka, "Josip Juraj Strossmayer" University of Osijek Faculty of Law, Croatia
Prof. Dr. Dragana Ćorić, University of Novi Sad Faculty of Law, Serbia
Dr. Savo Manojlović, Institute of Comparative Law, Belgrade, Serbia
Prof. Dr. Ajna Jodanović, Sarajevo School of Science and Technology, Bosnia and Hercegovina

**Reviewers**

Prof. Dr. Saša Zagorc, University of Ljubljana, Slovenia
Prof. Dr. Teresa Russo, University of Salerno, Italy
Prof. Dr. Lucia Mokra, Comenius University in Bratislava, Slovakia
Prof. Dr. Hana Kovačikova, Comenius University in Bratislava, Slovakia
Prof. Dr. Nevenko Vranješ, University of Banja Luka, Bosnia and Herzegovina
Prof. Dr. Bojan Vlaški, University of Banja Luka, Bosnia and Herzegovina
Prof. Dr. Zvonimir Ivanović, University of Criminal Investigation and Police Studies in Belgrade, Serbia
Dr. Vanja Korać, Mathematical Institute of the Serbian Academy of Sciences and Arts, Belgrade, Serbia
Dr. Danijela Ljubović, Institute for Educational Research, Belgrade, Serbia
Prof. Dr. Mirjana Drenovak Ivanović, University of Belgrade, Serbia
Prof. Dr. Mirjana Radović, University of Belgrade, Serbia
Prof. Dr. Ivana Krstić, University of Belgrade, Serbia
Prof. Dr. Bojan Urdarević, University of Kragujevac, Serbia
Prof. Dr. Dragan Dakić, University of Kragujevac, Serbia
Prof. Dr. Milan Palević, University of Kragujevac, Serbia
Prof. Dr. Vladimir Čolović, Union University in Belgrade, Serbia
Prof. Dr. Jelena Jerinić, Union University in Belgrade, Serbia
Prof. Dr. Dušica Miladinović Stefanović, University of Niš, Serbia
Prof. Dr. Anđelija Tasić, University of Niš, Serbia
Prof. Dr. Dejan Vučetić, University of Niš, Serbia
Prof. Dr. Miomira Kostić, University of Niš, Serbia
Prof. Dr. Uroš Zdravković, University of Niš, Serbia
Prof. Dr. Jelena Ćeranić Perišić, Institute of Comparative Law, Belgrade, Serbia
Dr. Nataša Mrvić Petrović, Institute of Comparative Law, Belgrade, Serbia
Dr. Ana Knežević Bojović, Institute of Comparative Law, Belgrade, Serbia
Dr. Vesna Ćorić, Institute of Comparative Law, Belgrade, Serbia
Dr. Miloš Stanić, Institute of Comparative Law, Belgrade, Serbia
Prof. Dr. Mina Zirojević, Institute of Comparative Law, Belgrade, Serbia
Dr. Milica Matijević, Institute of Comparative Law, Belgrade, Serbia
Dr. Vladimir Mikić, Institute of Comparative Law, Belgrade, Serbia
Dr. Mirjana Glintić, Institute of Comparative Law, Belgrade, Serbia
Dr. Oliver Nikolić, Institute of Comparative Law, Belgrade, Serbia
Dr. Jelena Vukadinović Marković, Institute of Comparative Law, Belgrade, Serbia
Dr. Katarina Jovičić, Institute of Comparative Law, Belgrade, Serbia
Dr. Jovana Rajić Ćalić, Institute of Comparative Law, Belgrade, Serbia
Dr. Gordana Gasmi, Institute of Comparative Law, Belgrade, Serbia (ret.)
Dr. Dragan Prlja, Institute of Comparative Law, Belgrade, Serbia (ret.)
Dr. Milica Petrović, Institute of Comparative Law, Belgrade, Serbia
Doc. Dr. Jovana Misailović, University of Kragujevac, Serbia
Doc. Dr. Mila Petrović, Union University in Belgrade, Serbia
Doc. Dr. Iva Tošić, Union University in Belgrade, Serbia
Doc. Dr. Sanja Đorđević Aleksovski, University of Niš, Serbia

**Prepress**
Dogma, Beograd

**Proofreading**
Tijana Parezanović
Ana Knežević Bojović
Vesna Ćorić
Milica Matijević

**Print**
Birograf Comp doo Beograd

**Printed in 100 copies**

**ISBN-978-86-82582-50-2**
**ISSN 2812-698X**
**ISSN (online) 2812-6998**
**doi: 10.56461/iup_rlrc.2026.7**

**Licenced under CC licence:**
Attribution-NonCommercial-NoDerivatives 4.0 International (CC BY-NC-ND 4.0)

**Indexed in HeinOnline Law Journal Library**

**Indexed in Directory of Open Access Journals**

## FOREWORD

In front of you is the seventh volume of RLR collection of papers. This year we have collected research papers from ten countries. As always, the focus was on the European region, but since our credo is that the law knows no boundaries, this year same as ones before we have had special guest writers from other regions – Republic South Africa and Brazil. Also, for the first time we welcomed researchers from Poland.

Over seven successful years, we can say that the conference has become a tradition. A network of authors has been created, and it is growing every year. In this way, we have a real chance to explore contemporary challenges in law, both in legal science and in practice. We can proudly say that we have attracted authors from almost every continent, which speaks volumes about the universality of the topics covered, but also about the popularity of this method of cooperation among lawyers and law scholars.

This year's cycle was realised with our traditional partners, the Faculty of Law of the University of Pécs, which has been with us since day one.

As in previous years, the RLR collection of papers is indexed in the DOAJ and HeinOnline databases. We remain strongly committed to the best practices in open access publishing.

As every year, I would like to express my gratitude to the whole organising crew for making yet another issue of the collection of papers possible, at the highest standards of editing and publishing. Besides the authors, my gratitude goes to our reviewers, who did exceptional work, as well as to the entire editorial team, which ensures the preservation of high standards of scientific value of the published papers.

Additionally, as this is my last cycle at the position of editor in chief, I would like to thank one more time to all associates that contributed over the years to emerging and developing Regional Law Review to our current growth.

As in previous years, the general research topics covered three areas, which we believe are of great importance for the future of law: the relationship between new technologies and law; implementing the principle of solidarity in law; challenges of implementing human rights in a changing environment.

I hope you will remain loyal contributors and readers in the years to come, all having in mind the joint aim of further improving the quality and visibility of our work.

In Belgrade, June 2026

RLR Editor
Dr. Mario Reljanović

## Contents

**Plarent RUKA**
THE QUEST FOR PATENTABILITY OF ARTIFICIAL INTELLIGENCE INVENTIONS. AN ALBANIAN LAW PERSPECTIVE 1

**Iskra AKIMOVSKA MALETIĆ**
ADVANTAGES AND RISKS OF ARTIFICIAL INTELLIGENCE AND AUTOMATED DECISION-MAKING IN ADMINISTRATIVE LAW 11

**Dana DOBRIĆ JAMBROVIĆ**
**Jelena DUJMOVIĆ BOCKA**
ADVANCING THE INTEGRATION OF ARTIFICIAL INTELLIGENCE IN THE CROATIAN HIGHER EDUCATION 25

**Dávid MOLNÁR**
FROM COMPLIANCE TO STATE CAPACITY: AI REGULATION IN THE EU AND UAE 41

**Kamil STRZĘPEK**
PROCEDURAL JUSTICE AND ARTIFICIAL INTELLIGENCE: INSIGHTS FROM A JUDICIAL PERSPECTIVE 53

**Jola GJUZI**
THE EVOLVING LANDSCAPE OF AI REGULATION IN INTERNATIONAL COMMERCIAL ARBITRATION: LESSONS FOR ALBANIAN JURISDICTION 65

**Cristina Donia BODNARIUC**
DIGITAL PERSON AS LEGAL FICTION UNDER THE AI ACT, GDPR, AND EIDAS 79

**Vesna LAZIĆ BULJAN**
**Lejla HASANOVIĆ**
DIRECTORS' AND OFFICERS' (D&O) LIABILITY INSURANCE: CHALLENGES OF IMPLEMENTATION IN BOSNIA AND HERZEGOVINA 89

**Willem VAN AARDT**
FORCED EU MIGRATION, THE SOCIAL CONTRACT, AND THE FUNDAMENTAL HUMAN RIGHT TO SAFETY AND SECURITY 105

**Hektor RUCI**
HOW DOES THE PRINCIPLE OF MAJORITY RULE WITHIN DEMOCRACIES INTERACT, AND POTENTIALLY CONFLICT WITH, THE SAFEGUARDING OF MINORITY RIGHTS? 121

**Marin KERŠIĆ**
CLASSIFYING CONSTITUTIONAL RIGHTS: EFFECTS ON THE JUDICIAL RESOLUTION OF CONFLICTS 133

**Jelena Đ. LOPIČIĆ JANČIĆ**
**Ljubica M. VASIĆ**
ROLE OF PROTECTING POWERS IN WAR AND THEIR CONTRIBUTION TO SAFEGUARDING HUMAN RIGHTS OF VICTIMS 143

**Melinda HENGL**
THE LEGAL STATUS OF DEFENDANTS WITH A MENTAL DISORDER IN HUNGARY AND SERBIA 155

**Rebeka KOTLO**
**Ivan TOMIĆ**
MILITANT DEMOCRACY AND HUMAN RIGHTS: THEORETICAL FRAMEWORK AND PRACTICAL IMPLICATIONS 167

**Davor TRLIN**
THE GLOBAL RETREAT FROM UNIVERSAL SUFFRAGE: CONSTITUTIONAL AND LEGAL TECHNIQUES FOR EXCLUDING CITIZENS FROM POLITICAL RIGHTS IN THE 21ST CENTURY 181

**Fernanda FLORENTINO FERNANDEZ JANKOV**
PLATFORM GOVERNANCE AND THE DUTY TO ACT RESPONSIBLY WITHIN SYSTEMS-BASED REGULATION 191

**Helga ŠPADINA**
AUTOMATED PERFORMANCE MANAGEMENT AND DECISION MAKING IN THE EU LABOR RELATIONS 203

**Ajna JODANOVIĆ**
**Almir BERIDAN**
EU APPROACHES TO REDUCING SECURITY RISKS IN CRISIS THROUGH DIGITAL TOOLS: THE CASE OF THE LIFEGRID PROJECT 215

**Ena GOTOVUŠA**
VIDEOCONFERENCE HEARINGS IN CRIMINAL PROCEEDINGS: A EUROPEAN LEGAL PERSPECTIVE 235

**Zsolt BUJTAR**
LESSONS FROM THE FIRST CBDC INTRODUCTIONS 251

**Maja PROSO**
MANUFACTURER LIABILITY FOR CYBERSECURITY DEFECTS IN DIGITAL PRODUCTS 261

**Obbie AFRI**
BUSINESS, CLIMATE LITIGATION AND HUMAN RIGHTS IN A CHANGING GLOBAL POLITICAL CLIMATE 275

**Dina JOKIĆ**
LEGAL AND ETHICAL FRAMEWORKS FOR WORKING OUTSIDE THE EMPLOYER'S PREMISES IN SERBIA 287

**Andrea MAZELLIU**
**Megi GJONI**
CIVIL SOCIETY'S ROLE IN ALBANIA'S POLICYMAKING PROCESS AND EU ENLARGEMENT 299

**Vedrana ŠVEDL BLAŽEKA**
**Iva BRZICA**
REFORM OF MANAGEMENT IN LEGAL ENTITIES OWNED BY THE REPUBLIC OF CROATIA – STRENGTHENING PROFESSIONAL STANDARDS OR NEW MANAGEMENT CHALLENGES? 311

**Robert Doya NANIMA**
CONCLUDING OBSERVATIONS: CENTRAL TO SOLIDARITY, AND THE CONTEMPORARY DEVELOPMENT OF CHILDREN'S RIGHTS IN AFRICA? 327

**Ivan ALLEGRANTI**
"COURAGE" AS A LEGAL VALUE: RETHINKING FUNDAMENTAL RIGHTS UNDER THE ECHR AND THE ECTHR 343

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch1

***Plarent RUKA****

# THE QUEST FOR PATENTABILITY OF ARTIFICIAL INTELLIGENCE INVENTIONS. AN ALBANIAN LAW PERSPECTIVE

*Technological breakthroughs have often challenged traditional perceptions of legal institutions. It was the industrial revolution that led to the need for internationalization of patent law, with the first wave marked by the Paris Convention of 1883. Similarly, it can be reasonably expected that the involvement of artificial intelligence in the creative domain will most likely trigger the need for regulation of the patentability of works created by artificial intelligence. The traditional perspective on intellectual property law in general, and of patent law in particular, is currently challenged at a local level in various cases regarding whether artificial intelligence-generated outputs can qualify as inventions, who may be recognized as the inventor, and how disclosure and novelty standards should adapt to machine-driven creativity.*

*This paper examines these issues through the lens of Albanian patent law, situating national provisions within the broader European and international context as well as selected jurisprudence of various states, such as the United States of America. It explores the readiness of the current legal framework to accommodate the challenges raised by artificial intelligence, as well as the potential for regulating this matter under the upcoming artificial intelligence governance legal framework. Ultimately, it argues for a constructive approach that balances legal certainty with technological progress. From a methodological point of view, while I focus my analysis on the Albanian legal framework, particularly on the patent law enacted recently, the discourse is highly relevant for other legal orders as well, inasmuch as the governance of artificial intelligence might be a relevant channel for addressing challenges of patent law.*

***Keywords:*** Albania, artificial intelligence, patents, persons.

## 1. INTRODUCTION

Artificial intelligence might be one of the most transformative factors in societies across the world in the recent decade. Its power to transform constitutes a significant premise for revolutionizing the way human society will work, live, and interact in the near future. Similar

* MLB, LLM (Hamburg), Lecturer in law at University of New York Tirana, Albania, ORCID: https://orcid.org/0009-0009-0144-685X, e-mail: *plarent.ruka@law-school.de*

to and taking over the previous three industrial revolutions, artificial intelligence, along with robotics, the Internet of Things (IoT), biotechnology and nanotechnology, promises to lead human society toward a fourth industrial revolution consisting of a fusion of physical, digital, and biological systems, which serves as the basis for developing smart factories. Overall, it is reasonable to expect that economic efficiency and productivity should be improved, and any costs saved could be reallocated in more intensive capital or inefficient industries, while economies might become more customized, resilient, and sustainable over time.

While such advantages sound quite promising, they do not come without costs and risks to our society. First and foremost, the development of systems requires intensive capital for research and development, and in order to accommodate such costs, industries have to make significant trade-offs. Uncertainty and high-risk investments must be considered in this regard. Second, cybersecurity risks make the interconnected facilities and hardware more vulnerable. Third, the reduction of human intervention in smart factories shall also reduce employment opportunities, and this could become quite challenging for labor intensive industries until the workforce transition is completed. Fourth, lack of standardization might emphasize the interoperability concerns, where different hardware and software need to be synchronized in order to communicate seamlessly. Fifth, diverging normative models in the regulation of artificial intelligence in various jurisdictions shall most probably hinder efficiency in the cross-border outreach of these systems. To what extent could societies internalize these costs and risks remains quite unclear since there are significant unknown variables in this exercise. Amid such background uncertainties, one can ask what the legal implications of such a revolution could pose for the multilayered legal orders throughout global society. While some implications can be predicted, and hence regulated in advance, others cannot.

This paper will elaborate on the current discourse of the capacity of the Albanian legal order to extend patent protection to artificial intelligence-generated content, under the assumption that industrial property rights need to be protected as an imperative for justifying research and development in the industry. In order to approach this question, the paper will first shed light on the concept of artificial intelligence and potential interference with patent law in general, to continue with the main normative premises of the patentability of artificial intelligence-generated content in the Albanian jurisdiction. Lastly, the discussion will conclude with a brief prospect of the patentability of artificial intelligence inventions in the Albanian jurisdiction.

## 2. THE CONCEPT OF ARTIFICIAL INTELLIGENCE AND INTERFERENCE WITH PATENT LAW

The concept of artificial intelligence refers to the family of technologies composing a system which is distinct from traditional software systems or programming languages, and "that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments" (EU Regulation 2024/1689). The United States Patent and Trademark Office (USPTO) defines the concept of artificial intelligence as comprising one or more of the following eight component technologies: 1) knowledge processing, 2) speech recognition, 3) high computing power hardware, 4) evolutionary computation, 5) machine learning, 6) computer vision to extract and understand information from media, 7)

natural language processing, and 8) planning and control to achieve certain goals (Scambia, 2025, p. 1215).

The European Union is among the pioneers of regulating the normative environment for artificial intelligence systems, having enacted the first comprehensive legal infrastructure for regulating the providing and deploying artificial intelligence systems in the Union area based on a risk-based approach. Mainly for this reason, the EU Artificial Intelligence Act can well be considered an attempt to regulate in a centralized approach the fair use of this breakthrough technology in European space.

Being the first mover grants some advantages in terms of setting the rules and prohibitions on a particular industry, but at the same time this also triggers criticism of loopholes and inadequate regulation. This probably explains the slow path of the regulation of these systems worldwide, with a few other countries such as the United Kingdom and Japan adopting a decentralized approach to regulation, which allows for a more adaptive and flexible regulatory method at a sectoral level. Accordingly, while a central law on artificial intelligence is missing in the United Kingdom, other sectoral legislation, such as the one regulating financial services or data protection, addresses the use of artificial intelligence more broadly (Rough, 2026, p. 5). In Japan, a law passed in May 2025 established the main principles for the promotion of research, development, and utilization of artificial intelligence-related technologies in various areas, hence maintaining a decentralized approach (Public Relations Office, 2025). Both these centralized and decentralized approaches do not seem to interact with any selected national or international legal frameworks that regulate industrial property law in general and patent law in particular.

While missing regulatory frameworks at an international level, artificial intelligence is nevertheless gaining wide applicability in the global virtual space. The fragmented regulation of artificial intelligence in various jurisdictions, which vary from limited norms of ethical nature or decentralized norms on transparency, to more advanced normative frameworks for managing risks of artificial intelligence systems, reflect diverging approaches that various societies are implementing as regards these systems in their marketplace.

With no normative regulation on the relationship between artificial intelligence systems and patent law, in order to observe potential interactions of these systems with the normative regime of patent law, it might be reasonable to highlight some relevant aspects of such interactions. Accordingly, artificial intelligence systems may have two distinct applications, namely, predictive and generative. While predictive artificial intelligence (PredAI) systems use historical information, machine learning algorithms, and statistical techniques to forecast future events, behaviors, or trends, generative artificial intelligence (GenAI) creates new media content (text, image, sound, or video) by focusing on structured data for providing insights for decision-making processes (see Wachter, 2024, p. 674). Both PredAI and GenAI share social, ethical, and legal risks concerning environmental impact, data protection, discrimination and bias, while GenAI presents further risks such as cybersecurity, inaccurate content and offensive content, misinformation, harmful information, hallucinations, and violation of intellectual property rights (Wachter, 2024, pp. 674–675). GenAI is based on Large Language Models (LLMs) to produce texts and answer questions (Wachter, 2024, p. 674).

While the training of LLMs raises particular issues of copyright infringement, the output generation of GenAI raises the issue of both copyright and patent infringement (Novelli *et al.*, 2024, p. 10). Accordingly, given that GenAI systems utilize data and are trained based on the

existing knowledge embodied in various sources in the open space of the World Wide Web, the intellectual property law is mainly concerned with the issues of copyright protection of pre-existing materials and the discourse on whether output generation should be regarded as a derivative creation or autonomous creation from pre-existing materials (Novelli *et al*., 2024, p. 10). Hence, the subject matter of the new content should be compared with the content of pre-existing materials in order to observe any similarities or differences that justify the novelty criterion needed in patenting new inventions.

In addition to the interference between artificial intelligence-generated works and patent law from the subject-matter perspective, one could reasonably raise the question of whether patent law could grant protection to an autonomous invention generated by artificial intelligence systems. Despite the generic nature of this question, at the outset it should be highlighted that patent law, similarly to other intellectual and industrial property law, is regarded as anthropocentric in that it regulates moral and economic rights of humans in the first place (Novelli *et al*., 2024, p. 11). Accordingly, the fundamental premise for intellectual or industrial law is that the author or inventor must be a natural person, while certain moral or economic rights deriving from the work or creation may also be granted to legal entities, which are also persons but of an artificial nature, established ultimately by virtue of expressed human will. In view of this, the 'human-author imperative' of patent law might be extended to artificial intelligence-generated content only insofar as a human element is identified in the process of output generation. This prediction is based on the assumption that training GenAI complies with normative predictions of intellectual and industrial property law inasmuch as the output content is regarded autonomous and duly satisfies the criteria for patentability. The intervention of humans in the process by providing prompts to GenAI before generating a certain output is certainly proof of human contribution to the creation of a certain invention, but to what extent could this contribution be regarded as substantial for the entire invention? Certainly, prompting the invention is not a mere mechanical process which only humans can do, either as natural persons, or in their capacity as representatives of their virtual creations, namely, as legal entities. Inserting a prompt to a GenAI system represents a psycho-emotional process as a premise of the wish or desire for the generated output. In view of this, GenAI is to be considered a tool in the hands of human society for accomplishing certain results that respond to human intent. This imperative is in line with the European Parliament's view on artificial intelligence technologies and their impact on intellectual property rights, asserting that:

> "[European Parliament] takes the view that technical creations generated by Artificial Intelligence technology must be protected under the IPR legal framework in order to encourage investment in this form of creation and improve legal certainty for citizens, businesses and, since they are among the main users of Artificial Intelligence technologies for the time being, inventors; considers that works autonomously produced by artificial agents and robots might not be eligible for copyright protection, in order to observe the principle of originality, which is linked to a natural person, and since the concept of 'intellectual creation' addresses the author's personality; calls on the Commission to support a horizontal, evidence-based and technologically neutral approach to common, uniform copyright provisions applicable to AI-generated works in the Union, if it is considered that such works could be eligible for copyright protection; recommends that ownership of rights, if any, should only be assigned to natural or legal persons that created the work

lawfully and only if authorisation has been granted by the copyright holder if copyright-protected material is being used, unless copyright exceptions or limitations apply; stresses the importance of facilitating access to data and data sharing, open standards and open source technology, while encouraging investment and boosting innovation" (EU Parliament Resolution 2020).

The document approved by the European Parliament not only confirms the human-centric approach of intellectual property law but also endorses a scenario in which 'artificial agents' and 'robots' may potentially claim copyright protection, but by virtue of the principle of originality, linked to natural persons, they are excluded a priori from the possibility of being recognized as authors. This proviso can be applied to inventors *mutatis mutandis* regarding claims for patentability. Hence, by virtue of this logic, artificial intelligence-generated content may be potentially patented due to the protection imperative inherent in the utilitarian model of the intellectual property protection system, but such protection cannot be awarded to non-natural persons or non-legal entities as subjects of intellectual and industrial property law.

The same approach is also valid from the perspective of the European Patent Convention (EPC), signed in Munich, Germany, in October 1973. While Art. 52(1) provides for a subject matter of protection granted to any inventions in all fields of technology, subject to specific criteria, the families of technology used for generating artificial intelligence output are excluded from protection by virtue of not satisfying the primary criterion of being an invention. Under Art. 52(2) and (3) of the EPC, mathematical methods, schemes, rules and methods for performing mental acts and computer programs, etc., are not regarded as inventions. Additionally, the invention, being defined as such, can be patented if it satisfies the non-excludability test, is novel, non-obvious for the skilled person, and can be suitable for industrial applications (Arts. 52, 53, 54, 56, and 57 EPC). Art. 58 of the EPC provides that only natural or legal persons, or anybody equivalent to a legal person by virtue of the law governing it, can file for a European patent.

Comparable to the EPC, the United States Patent Act of 1952 provides similar conditions for obtaining a patent under the United States law, i.e., satisfying without exception the definition of invention under USC 101 and 102, the criteria of novelty (USC 103) and non-obvious subject matter (USC 104), while as per definitions, an inventor is defined as an individual (natural person) who invents or discovers the subject matter of the invention (USC 100(f)), adopting in this way a more narrow scope of subjects entitled to patent protection.

## 3. NORMATIVE PREDICTIONS OF INDUSTRIAL PROPERTY LAW FOR THE INNOVATION CHALLENGES: THE CASE OF ALBANIA

The modern industrial property law in Albania accompanied the economic transformation of the country from a centrally planned economic system to market economy, a transformation triggered by the fall of the communist regime in 1991. The first liberal law on industrial property was enacted in 1994 (Law no. 7819, dated Apr. 27, 1994 "On industrial property," amended (Official Journal 6, dated June 23, 1994). This law was repealed with the entry into force of Law no. 9947, dated July 7, 2008 "On industrial property," amended (Official Journal 121, dated July 31, 2008). This law was also partially repealed with the entry into force of the Law 52/2025 "On trademarks" (Official Journal 138, dated Aug. 1, 2025) and Law 53/2025 "On patents, utility models and supplementary protection certificates" (Official Journal 138,

dated Aug. 1, 2025) ("Albanian Patent Law"). Over the years, Albania has maintained the same scheme as the EPC regarding the normative criteria for granting a patent.

Albanian Patent Law aims to ensure adequate protection for inventions of physical or legal entities in Albania and abroad (Art. 2(a)). Art. 4(8) of this Law defines an individual as any subject that is distinguished from physical or legal entities, which are defined in para. 25 of the same Article. Art. 4(25) of Albanian Patent Law refers to the concept of physical or legal entities of the Albanian Civil Code. The latter regulates physical entities in Arts. 1-23 by providing in particular for their legal capacity (Art. 1) as an equal capacity of any physical person to enjoy rights and carry civil obligations within the scope of the law, and the ability to act which is fully obtained by law at the age of eighteen (Art. 6). Legal entities are further regulated in Arts. 24-63 of the Albanian Civil Code and other specific legislation, such as commercial law, law on NGO-s, etc. Pursuant to Art. 24 of the Civil Code, legal entities can be public or private. While public legal entities are defined as public institutions, state enterprises, or other public entities established by law (Art. 25), Art. 26 provides that private legal entities consist of profit entities (commercial companies) and not-for-profit entities (associations, foundations, and other entities – e.g., centers – of private character).

Reflecting upon these categories of entities defined in the Albanian Civil Law, it can be inferred that the concept of physical entity in the Albanian Civil Code refers to a human being, an individual, which in legal language is also termed natural person (Garner, 2007, p. 3618). Here we can observe that the concept of an individual defined in Art. 4(8) of Albanian Patent Law is not properly explained in line with the categories of persons regulated in the Albanian Civil Code and other legislation. Indeed, the concept of an individual, according to the Albanian Language Dictionary, refers to a single human being, hence to a physical person as defined in Art. 1 of the Albanian Civil Code (Albanian Academy of Sciences, 2026, entry "individ"). This provision is quite recent in the Albanian patent legislation and might be well considered an error if seen in reference to Art. 14(1) of Albanian Patent Law, which defines the inventor as the individual that has created an invention during his creative work. Hence, provided that the individual, as defined in Art. 4(8) is distinguished from any of the categories of persons defined in Art. 4(25) related to Arts. 1-63 of the Albanian Civil Code, it can be inferred that neither a physical (natural) person nor a legal person can be regarded as an inventor in view of Art. 14 of Albanian Patent Law. In order to deconstruct this fallacy, a historical interpretation, along with a systematic interpretation of other specific legislation, should be employed to evidence that the concept of the inventor is wrongly defined in the current Patent Law.

Amid these incorrect definitions of the subjects of patent law, it would be even more difficult to recognize artificial intelligence systems as holders of rights under Albanian Patent Law. Indeed, if we infer from the above interpretations that the concept of an individual, provided in Art. 14(1) in relation to Art. 4(8) of Albanian Patent Law, is essentially a physical (natural) person that creates an invention during their creative work, it is then excluded that such a person can be a virtual system consisting of a family of hardware, software, and other technologies inasmuch as it misses the legal capacity and ability to act pursuant to the Albanian Civil Code and other legislation in force. It is by virtue of the doctrine of civil legal capacity and the legal capability to act that the denial of patentability would be construed under Albanian Patent Law.

As to the normative criteria for obtaining a patent, Albanian Patent Law follows the same structure as the EPC, inheriting also the same deficiencies as this Convention, as observed in

Cornish, Llewelyn & Aplin (2019, para. 5-001). Accordingly, for an invention to be patented, the creation must first and foremost be determined as an "invention," and, as in the case of the EPC, this concept is not defined under Albanian Patent Law. Having established that creation is regarded as an invention, in order for it to be patentable, it should cumulatively satisfy the following criteria:

1. it must be novel (or not "anticipated") (Art. 5(1)(a) in relation to Art. 9 of Albanian Patent Law);
2. it must contain an inventive step (thus escaping the taint of "obviousness") (Art. 5(1)(b) in relation to Art. 11 of Albanian Patent Law);
3. it must be capable of industrial application (Art. 5(1)(c) in relation to Art. 12 of Albanian Patent Law); and
4. it must not fall within any of the categories of subject-matter specifically excluded under Art. 7 or made subject to exception under Art. 5(2) of Albanian Patent Law.

As for its relationship with artificial intelligence, Albanian Patent Law as a recently enacted piece of modern legislation is missing a normative definition of or approach to this concept, although it would have been quite innovative to address this issue in the context of industrial property law.

## 4. PROSPECTS OF PATENTABILITY OF ARTIFICIAL INTELLIGENCE INVENTIONS IN THE ALBANIAN JURISDICTION

As observed in the previous section, Albania is far from recognizing artificial intelligence inventorship under the auspices of the patent legislation alone, particularly amid the inconsistencies with the definition of the concept of an individual, physical/legal person, and the inventor. Jurisprudence is scarce in this regard. However, the approach of the Albanian Government to artificial intelligence, with its wide adaptation in administrative practice, suggests that normative regulation should also follow, most probably based on the European Union model. Whether such regulation will also address issues of the patentability of inventions that are autonomously generated by artificial intelligence systems remains desirable, though questionable, since its regulation is missing from European Union law.

While artificial intelligence is an evolving technological phenomenon that will most likely transform the life of our society, most probably the legislation that will be introduced across various jurisdictions will either be scarce in terms of normative power or insufficient in terms of predicting the scope of the phenomenon. Jurisprudence seems to confirm that the normative environment is not yet ready to recognize artificial intelligence systems as inventors. In the Thaler v. Vidal case, adjudicated in the Court of Appeals for the Federal Circuit on Aug. 5, 2022, the Court addressed the question of whether an artificial intelligence software system can be listed as the inventor on a patent application. The USPTO, after concluding that the Patent Act defines "inventor" as limited to natural persons, that is, human beings, denied Stephen Thaler's patent applications, which failed to list any human as the inventor. Thaler challenged this conclusion in the U.S. District Court for the Eastern District of Virginia, which confirmed the decision of USPTO. The Court of Appeal confirmed that the Congress had determined in the Patent Act that only a natural person can be an inventor, so artificial intelligence systems cannot be eligible to file for obtaining patent protection for an invention. In this way, under a strict interpretation of legal provisions, it seems that the category of inventors

includes human beings exclusively (see also Scambia, 2025, p. 1210). This formal interpretation of legal norms confirms that the legal normative environment is far from accepting the expansion of industrial property protection to artificial intelligence-generated content.

In light of this approach, and by virtue of literal, historical, and systematic interpretation of the concept of the inventor under Albanian Patent Law and other legislation, it can be inferred that the patentability of artificial intelligence-generated content cannot be granted to any applicant other than natural person or to legal entities for inventions created in the course of an employment relationship (Art. 15 Albanian Patent Law). Hence, in view of these observations, it could be expected that the extension of the patentability of artificial intelligence-generated inventions toward artificial intelligence systems is an outcome that cannot be expected based on a wide interpretation of legal norms and the given court cases. This would require significant changes in the Albanian legislation. Redefining the concept of person under the Albanian Civil Code constitutes a systemic change for which the Albanian legal system seems to be unprepared. The normative choice of creating virtual holders of rights other than traditional legal persons might be justified in principle if viewed in light of the general function of intellectual property law. Certainly, creating legal monopolies to address market failures is justified by the need to secure legal certainty as a precondition for high and intensive investment needed for research and development (see also Cottier, 2021, para. 4). Beyond these functions, from the legal normative perspective, the Albanian legislation would need to better understand and elaborate the human role in artificial intelligence invention and the principles of autonomy and originality in such inventions, before formally expanding the concept of inventor to artificial intelligence systems by a legal definition in the Patent Law.

## 5. CONCLUSION

The question of the patentability of artificial intelligence-generated content as more than the fair use of technology as a tool for assisting inventors to develop new technologies, raises concerns about the observance of intellectual and industrial property protection of information which is being utilized for the development of new technologies. The training test having been completed, it is reasonably to be expected that creation should be original and autonomously developed by artificial intelligence systems. Should that be the case, legal regimes would generally accept the possibility of patenting such inventions, although the patent rights can only be granted to natural or legal persons, depending on jurisdiction. Albanian Patent Law would accept either of these subjects in qualified conditions (an employment relationship for legal entities) to apply for a patent and be nominated as patent holders. The extension of patent exclusive rights to artificial intelligence systems is currently excluded from the formal perspective. Albanian law in general and Albanian Patent Law in particular do not recognize the legal capacity of non-person entities such as artificial intelligence systems. From a technical and material perspective, the current state of technology does not exclude the human role from the process of prompting the entry for a particular artificial intelligence invention. Hence, the role of human intervention as a psycho-emotional completion of the invention process would materially exclude the establishment of the criterion of full autonomy in the process of invention, and this remains a substantial challenging obstacle for patentability of artificial intelligence inventions in most jurisdictions. However, this discourse would most likely be melted by the naive idea that this family of technology, which can achieve so much in terms of creation and decision-making premises, could one day also be able to

define the prompt itself and hence overtake the human role in this psycho-emotional process of wishing for a result. Until then, the legislation worldwide will most likely be unable to anticipate the frontiers the new era in artificial intelligence technology will bring.

## LIST OF REFERENCES


Albanian Academy of Sciences. 2026. *Fjalori i Madh i Gjuhës Shqipe*. Tirana. Available at: https://fjalori.online/?search=individ&mode=exact (16. 5. 2026).

Cornish, W. R., Llewelyn, D. & Aplin, T. F. 2019. *Intellectual property: patents, copyright, trademarks and allied rights*. Ninth edition. London: Sweet and Maxwell.

Cottier, T. 2021. Industrial Property, International Protection. In: Peters, A. (ed.) *Max Planck Encyclopedia of Public International Law.* Munich: Max Planck Institute. Available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1530.

Garner, B. A. (ed.). 2007. *Black's Law Dictionary*. 8. ed., 2. repr. St. Paul, Minn.: Thomson/West.

Novelli, C. *et al*. 2024. Generative AI in EU law: Liability, privacy, intellectual property, and cybersecurity. *Computer Law & Security Review*, 55, 106066. https://doi.org/10.1016/j.clsr.2024.106066

Government of Japan Public Relations Office. 2025. Act on Promotion of Research and Development, and Utilization of Artificial Intelligence-related Technology Now in Full Effect. Enjoying Japan's Markets. Tokyo. Available at: https://www.gov-online.go.jp/hlj/en/november_2025/november_2025-08.html (15. 5. 2026).

Rough, E. 2026. *AI regulation in the UK. Hg. v. House of Commons Library (Research Briefing, 10003)*. London: House of Commons Library. Available at: https://researchbriefings.files.parliament.uk/documents/CBP-10003/CBP-10003.pdf, updated on 31.03.2026 (13. 5. 2026).

Scambia, N. 2025. AI Inventorship: Recognizing the True Inventors Requires Change. *St. John's Law Review*, 98(6), pp. 1209–1233. Available at: https://research.ebsco.com/linkprocessor/plink?id=aaf6af5e-409c-3515-84d4-26a328f1e1b4.

Wachter, S. 2024. Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond. *Yale Journal of Law and Technology*, 26(3), pp. 671–718. Available at: https://yjolt.org/limitations-and-loopholes-eu-ai-act-and-ai-liability-directives-what-means-european-union-united.


### *Legal sources and case law*


United States Patent Act of 1952.

European Patent Convention (EPC), signed in Munich, Germany, in October 1973.

EU Parliament Resolution 2020. European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)), *OJ* C 404, Oct. 6, 2021.

EU Regulation 2024/1689. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), *OJ* L, 2024/1689, July 12, 2024. Available at: https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng.

*Thaler v. Vidal* 2022. Case 2021-2347 of the United States Court of Appeals for the Federal Circuit.

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch2

***Iskra AKIMOVSKA MALETIĆ****

# ADVANTAGES AND RISKS OF ARTIFICIAL INTELLIGENCE AND AUTOMATED DECISION-MAKING IN ADMINISTRATIVE LAW

*States are rapidly digitalizing public administration, using digital public services to reduce the administrative burden on businesses and citizens by making public services and interactions more efficient, cheaper, transparent and faster. The digitalization of public administration and the increasing use of artificial intelligence (AI) are profoundly transforming the functioning of modern states and the relationship between public authorities and citizens. This increased transformation raises significant questions regarding the compatibility of algorithmic governance with the rule of law, fundamental rights, and core principles of administrative law.*

*This paper examines the legal implications of integrating digital technologies and AI-based systems into public administration, with a particular focus on fundamental principles of administrative law. As automated decision-making by public authorities in their dealings with individuals is increasing, traditional legal principles such as transparency, accountability, proportionality and privacy, face new challenges. The analysis considers relevant EU and CoE instruments and standards, with particular attention to the principles of legality, transparency, non-discrimination, accountability, personal data protection and the right to good administration in the context of AI-based systems in public administration and automated administrative decision-making.*

*Governments differ significantly in their readiness to implement AI in the delivery of public services, reflecting varying levels of digital transformation and preparedness for the use of AI systems. In this respect, countries in the Western Balkan region continue to demonstrate limited institutional capacity and uneven levels of digital maturity, despite ongoing efforts undertaken within the framework of the European integration process.*

***Keywords:*** administrative law, public administration, artificial intelligence, automated decision-making.

* Full Professor, Faculty of Security in Skopje, University "St. Kliment Ohridski" in Bitola, Republic of North Macedonia, ORCID: https://orcid.org/0000-0002-4929-7023, e-mail: *iskra.maletic@uklo.edu.mk*

## 1. INTRODUCTION

Today it is obvious that automation offers clear benefits: it increases speed, efficiency, and decision-making quality. It enhances accuracy and precision, supports better outcomes, and creates a strong foundation for adopting AI and advancing 'digital-era governance' in the public sector (Sheehy & Ng, 2024, p. 671). Digital government offers significant potential to generate efficiency gains in the administration of public services. States are rapidly digitalizing public administration, using digital public services to reduce administrative burdens for businesses and citizens by making public services and interactions more efficient, cost-effective, transparent and faster. Additionally, automated decision-making in public services may also be perceived as fairer and less prone to human error or corruption. The digitalization of public administration and the increasing use of AI are profoundly transforming the functioning of modern states and the relationship between public authorities and citizens. It also raises significant questions regarding the compatibility of algorithmic governance with the rule of law, fundamental rights, and core principles of administrative law (OECD, 2025a, p. 17).

Governments are seeking to use AI to increase productivity, responsiveness, and accountability. Although there is tremendous, untapped potential for governments to use today's AI technologies, a vision of a future where governments successfully develop and adopt trustworthy AI is beginning to emerge. In this regard, AI should be viewed not merely as an opportunity to automate the public sector but to reimagine it (OECD, 2025a, p. 43). In automated administration, the relationship between public authority and an individual is mediated, if not constituted, through digital interfaces, and the information systems that enable them. In effect, public law becomes reimagined through horizontal technology regulation, which then is applicable in public administration in addition to traditional public law rules and principles (Koivisto, Koulu & Larsson, 2024).

While automation and digital public services offer clear benefits, the introduction of AI in administrative procedures raises important questions regarding it challenges, limitations and implications. Addressing these is crucial for governments and other AI actors to seize AI's benefits while mitigating its risks.

Using descriptive, normative and doctrinal research methods, the paper combines legal analysis, literature review and comparative assessment in order to examine how artificial intelligence and automated decision-making in public administration relate to the selected key principles of administrative law, for the purpose of providing extensive evaluation of the topic.

## 2. AI, AUTOMATED DECISION-MAKING AND ADMINISTRATIVE LAW

While there is no universal definition of artificial intelligence (AI) systems, the following definition provides a broad understanding, distinguishing AI from other types of simpler traditional software systems based on the rules defined solely by natural persons to automatically execute operations. Namely, "artificial intelligence system" means a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary

in their levels of autonomy and adaptiveness after deployment.[1] This is a simplified and updated definition of an artificial intelligence system in the OECD Recommendation on Artificial Intelligence and the Explanatory Memorandum. The Framework Convention, as the first international legally binding treaty in this field in Council of Europe, establishes principles and obligations to ensure that AI systems are fully consistent with human rights, democracy, and the rule of law throughout their lifecycle while being conducive to technological progress and innovation.[2] In the EU, AI systems are defined in a similar manner in the AI Act,[3] with the first comprehensive framework for AI regulation in EU. The regulation establishes a risk-based AI classification system. Namely, AI systems used across various applications are analysed and classified based on the level of risk they pose to users and determine the extent of compliance requirements.

Automated decision-making systems are attracting regulatory attention in the EU. *Inter alia*, Article 22 of the General Data Protection Regulation (GDPR)[4] on decisions based solely on automated processing, including profiling, has long been the centrepiece of the EU's legal approach to ADM and embodies its main policy goals (Rodríguez de las Heras Ballell, 2022, p. 7). Based on the key elements provided in the definition of 'AI systems', Rodríguez de las Heras Ballell (2022, p. 8) proposes a definition of ADM as "a (computational) process, including AI techniques and approaches, that, fed by inputs and data received or collected from the environment, can generate, given a set of pre-defined objectives, outputs in a wide variety of forms (content, ratings, recommendations, decisions, predictions, etc.)". Thus, this concept of ADM includes algorithmic decision-making as well as AI-driven decision-making. A key distinction exists between two types of ADM outputs based on their impact on the "affected person." The first type (ratings, rankings, predictions, etc.) does not directly affect the person's rights or status. The second type involves decisions adopted through ADM that produce legal effects or significantly influence the person's rights, legal, or contractual status. However, the intensity of the legal effects in the second category of ADM requires closer scrutiny and greater legal control (Rodríguez de las Heras Ballell, 2022, p. 9).

The definitions above go beyond mere description and serve as a basis for analysing how AI systems interact with administrative law and its fundamental principles. Turning to the administrative law aspect, when AI systems are applied in the context of administrative decision-making, AI enters the realm of administrative law (COE, 2022, p. 9). The central question is which administrative law rules and principles are impacted by AI and ADM, and which are particularly relevant to their use. It is therefore essential to assess whether AI decision-making aligns with the fundamental principles of administrative law.

With regard to the principle of legality, algorithmic data processing must be based on rules of law and not be arbitrary. This means that the use of algorithm must be grounded in and governed by applicable law. When it comes to the question whether we can control the process and outcome of the design and implementation of automated systems in order

[1] Council of Europe. 2024. Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, Art. 2.

[2] COE, Framework Convention, Art. 1 (1)),

[3] EU AI Act. 2024. *Official Journal (OJ) of the European Union* 12 July 2024, Art. 3.

[4] GDPR. (General Data Protection Regulation). Regulation (EU) 2016/679 of the European Parliament and of the Council 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/.

to ensure that the tools respect the principle of legality achieving this objective requires that the algorithm is published (Panagopoulou, 2024, p. 3). So, principle of law-compliant ADM means that an operator that decides to use ADM for a particular purpose shall ensure that the design and the operation of the ADM are compliant with the laws applicable to an equivalent non-automated decision-making system (Rodríguez de las Heras Ballell, 2022, p. 10). Related to the principles of equality and non-discrimination, first as a general rule, ADM shall not be denied legal effect, validity or enforceability solely on the grounds that it is automated. The principle of non-discrimination supports the use of legally compliant ADM, allowing automation to reach its full potential without compromising protection of the rights and liberties. This does not preclude the adoption of rules specific to algorithms. Certain rules, such as those providing for duties of transparency, explainability or human review, are indeed technology dependent (Rodríguez de las Heras Ballell, 2022, p. 10). In algorithmic decision-making, treating people differently under the same circumstances violates the principle of equality. Properly used, algorithms can reduce discrimination and human bias in sensitive areas. Accordingly, AI depending on its use, can either lead to a violation of the principle of equality or its promotion (Panagopoulou, 2024, p. 4). The principle of objectivity and impartiality requires that ADM systems operate accurately and minimize errors in the algorithm despite the risk of bias in ADM (COE, 2022, p. 9). So, algorithmic decision-making also raises the issues related to the principle of good administration because of the questions posed on the objectivity of the judgement of the algorithm. It is a fact that any algorithm bias is rooted in human partiality, since people design the systems and determine the data on which they rely. The advantage in this regard lies in the rapid and efficient processing of large volumes of data, which can enhance the efficiency of the administrative work (Panagopoulou, 2024, p. 3). Regarding the principle of proportionality, the key question is whether the use of ADM and AI in particular is appropriate and balanced. This principle also applies when evaluating the necessity of specific ADM forms, e.g. whether some form of augmented decision making is preferable to fully automated decisions without human involvement (COE, 2022, p. 12). As Williams has put forward there may also be a 'fair balance' issue, going to the final aspect of proportionality. This would require an examination of the benefits of the ADM when set against its impacts and potential disadvantages, such as the potential lack of transparency or its potentially detrimental effect on minority classes of people (Williams, 2022, p. 492). Regarding transparency and reason-giving requirements, administrative law is highly relevant to ADM. An added complexity is that some ADM systems are developed by private companies that may withhold their software code to protect intellectual property. Transparency is also linked to the right to be heard. Here, more concern exists regarding fully automated decision-making system, as it seems to deny individuals their right to a hearing. When it comes to the principle of right to appeal, it can be said that transparency is also relevant here, as courts need to be able to review both the ADM system and the decisions it produces (COE, 2022, p. 14). Privacy and personal data protection frequently serve as the starting point for legal analyses of ADM regulation. Thus, European literature (Brkan, 2019; Malgieri, 2019) often focuses on the EU's GDPR, which includes two key aspects particularly relevant to ADM and, consequently for AI systems. First, it prohibits certain applications of ADM: the data subject has the right not to be subject to a decision based solely on automated processing (including profiling), which produces legal effects concerning him or her or similarly significantly

affects him or her.[5] Next, the data subject has the right to access information concerning the existence of ADM, including profiling, and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject (GDPR, Art. 13, 14, 15). This principle is the only principle that already refers to ADM, as it mentions explicitly the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[6] and the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[7]

The starting point is that operators should strive to use responsible ADM systems, but several accountability aspects are particularly relevant for AI decision-making. The first is the subject of responsibility: who is accountable for AI decisions? The second concerns the ability of individuals harmed by government actions to seek legal redress. The third is ensuring independent monitoring and oversight of government AI decisions. In administrative law, decisions are traditionally made by humans, who can be held responsible, allowing affected individuals to seek legal protection. Similarly, AI-based government decisions should be subject to independent oversight, monitoring and external audits to ensure accountability (Sheehy & Ng, 2024, p. 679).

## 3. ADVANTAGES, BENEFITS AND RISKS OF AI USE IN PUBLIC ADMINISTRATION

Governments are generally perceived as AI regulators or investors, but they can also play a key role as AI developers and users, with the potential to transform service delivery, policymaking, and internal operations. Unlike private companies focused on efficiency or profit, governments are expected to minimize harm with due regard for the public good, to act transparently and prioritize public well-being of individuals. In response to rapid AI advances, they aim to harness AI for innovation and modernisation of public administration, while managing and mitigating the associated risks (OECD, 2025a, p. 22).

The integration of AI into the design and delivery of public services can improve efficiency and service quality, enhance service delivery, and optimise resource allocation through automation and advanced data-processing capabilities. The adoption of AI in the public sector promises long-term cost savings. In this regard, Tveita & Hustad (2025, p. 226) point out that it is crucial to invest in the future and recognize that the adoption and implementation of AI systems will require time, but the long-term benefits should be prioritized.

Although AI has vast potential to transform society, its use by government is still relatively limited. OECD has identified three principal areas in which governments can benefit from the use of AI: productivity, responsiveness, and accountability. These benefits are not mutually exclusive and can be categorized into four broad areas: automated, streamlined and tailored processes and services, better decision-making, sense-making and forecasting,

[5] GDPR, Art. 22.

[6] Council of Europe. 1981. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data No. 108. Strasbourg, 28.01.1981.

[7] Council of Europe. 2018. Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data Strasbourg. No. 223. 10.X.2018, p. 13.

enhanced accountability and anomaly detection and unlocking opportunities for external stakeholders (OECD, 2025a, p. 16).

AI has the potential to help government offices deal with extensive documentation, thereby reducing the workload of civil servants. It can also help optimize communications for availability, improving access to information for both citizens and civil servants. By using existing administrative data, AI can streamline processes by pre-filling forms and make interactions with public services simpler and more user-friendly. Examples of this benefit in action include a wide range of chatbots and virtual assistants that can respond to unique requests from citizens with tailored information (OECD, 2025a, p. 27).

Despite its considerable potential and numerous benefits, AI decision-making also entails significant risks and challenges. Some of the risks associated with the technology are, for example, that it may have inherent biases or be prone to developing certain biases, if AI systems are underpinned by inadequate or distorted data; if AI systems lack sufficient transparency and explanation, if they raise concerns about data protection, privacy and surveillance (OECD, 2025a, p. 32).

Ethical risks include AI uses that undermine the free exercise of human rights and freedoms, including privacy, potentially infringing on human-centred values. One of the ethical risks is inadequate or distorted data in AI systems, which have the potential to perpetuate or generate negative or harmful outcomes, stemming from incomplete or inadequate data. The misuse or questionable application of AI in government can result in surveillance and privacy issues, which are detrimental to the free exercise of individual freedoms and rights. A major concern is the use of AI in the provision of public safety and security services, where it enables efficient identification and tracking through biometric data and real-time tracking. While these tools can be useful for law enforcement and crime prevention, they also raise concerns about data privacy, as well as surveillance and social control by public administrations (OECD, 2025a, p. 36). The lack of transparency and explainability creates challenges in determining responsibility when issues arise. The first is AI decision-making invisibility as citizens often do not realize they are interacting with the technology and generally know little about the programs used to make decisions for them. One of the main challenges in the implementation and adoption of AI decision-making is the "black box" problem. This may be technical, due to the complexity of the systems, or legal, arising from difficulties in explaining how decisions are made. From an administrative law perspective, it is essential to understand the reasons behind a decision and assess their legal relevance. If this is not possible, then the individuals affected will not be able to file a request for a review of the decision, thus undermining the fundamental principle of government accountability (Sheehy & Ng, 2024, p. 672). As noted by Professor Marion, "Artificial Intelligence, like all apparatuses of the state whether human or non-human, must be able to account to the citizenry for decisions and actions, and make restitution for harms suffered. These principles form the foundations of accountability" (Sheehy & Ng, 2024, p. 679).

Operational risks include technical and operational failures that can impact data privacy, the quality of AI outputs, and internal government operations due to cyber threats, unintended consequences, hallucinations, systematic errors, and overreliance on AI systems. "Automated bias" or overreliance on AI in government occurs when public organizations or civil servants rely too heavily on AI systems for decision-making or perform tasks. As a result, mistakes are not recognized and incorrect results are accepted (OECD, 2025a, p.

37). One factor contributing to such issues, leading to incorrect decisions is hallucinations, which occur when generative AI systems fabricate facts in a credible manner, often when the correct answer is not found in the training data. A related concern is risk aversion. Namely, civil servants may be afraid to take personal responsibility for decisions for fear of getting into trouble later (OECD, 2025a, p. 38).

One of the key risks concerns privacy and data governance tensions throughout the AI lifecycle. Namely, in the training phase of artificial intelligence, data from publicly available sources are used, which may intentionally or unintentionally include personal data or information that is the subject of intellectual property rights. However, their accessibility on the Internet does not automatically mean that they are free to be collected and used for training artificial intelligence models or that people have shared their personal data with consent for other uses. According to the OECD Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (OECD Privacy Guidelines, 1980) it is required that personal data be obtained through lawful and fair means, with the knowledge of the data subject, and that any further uses of the data are not incompatible with the original purposes (OECD, 2025a, p. 39).

Exclusion risks relate to gaps that arise when citizens without access to technology or digital literacy can be left behind and unable to benefit from AI advancements in public services. Individuals without internet access are often absent from the data used to develop algorithms (OECD, 2025a, p. 40).

Further, public resistance risks include public resistance to government use of AI as a result of distrust in government AI systems or processes, or by the spread of false or misleading information about how AI is implemented in public administrations and its potential impacts. While some government officials may be able to adapt to AI and even improve their work, others, such as older and low-skilled workers who perform tasks that are easily automated, face significant risks. For example, the growing use of chatbots to provide information and answer routine queries may reduce the need for public officials to perform certain service-related tasks (OECD, 2025a, p. 42). In this respect, organizational culture presents a significant challenge to the implementation of AI in the public sector, particularly due to employee resistance to change. Therefore, addressing cultural challenges is paramount for the successful adoption of AI, necessitating a well-considered implementation strategy (Tveita & Hustad, 2025, p. 227).

Human-AI interactions are also increasingly seen as a key challenge for public administration, with significant implications for trust and legitimacy. Namely, the risk that AI-informed outcomes may be selectively accepted and not always perceived as fair and legitimate exists. There is often a lack of knowledge and understanding among the public regarding AI in general, which may lead to misconceptions and fears about its capabilities and whether governments are using it in a trustworthy manner. This may also lead to inaccurate assumptions regarding how decisions are made, the fairness of outcomes, and the ability to hold such systems accountable because of the limited transparency on how public authorities are using AI (OECD, 2025a, p. 42). Therefore, it is considered that trust is a crucial factor in AI adoption within the public sector. Schmager *et al.* found that the attitudes of citizens toward AI adoption correlate with trust in government, with cultural identity influencing trust levels (Tveita & Hustad, 2025, p. 227).

As previously noted, the EU AI Act establishes obligations for AI based on its potential risks and level of impact. In fact, the Act identifies four different levels of risks that are

relevant for governments' use of AI. Unacceptable risk - AI uses under this category are prohibited. However, some exceptions apply, such as use cases concerned with national security and those remaining subject to judicial oversight. High-risk AI uses are allowed but regulated due to their significant potential harm to health, safety, fundamental rights, environment, democracy and the rule of law. Limited risk AI might include systems intended to communicate with individuals, such as chatbots, as well as systems that generate content such as text and images. Minimal risk AI systems are unregulated, but a code of conduct is suggested. Examples include video games and spam filters (OECD, 2025a, p. 33).

Considering the enormous development and use of artificial intelligence a vision of a future is where governments successfully develop and adopt trustworthy AI for systematic transformation of government processes and services is beginning to emerge (OECD, 2025a, p. 16). For that reason, it is of paramount importance that governments effectively manage the risks associated with the use of AI: ethical risks, operational risks, exclusion risks, public resistance risks and risks of inaction.

## 4. COMPARATIVE PERSPECTIVE

Some countries have adopted strategies such as self-binding policies on how to use ADM, for example Türkiye and Ukraine have adopted some form of a national AI strategy, while others report on the adoption of self-binding policies by administrative authorities in particular domains (Norway, Hungary) or on the adoption of more general guidelines. Another important issue concerns the approaches adopted to reconcile ADM with the legal notion of administrative discretion. One recurring topic is the need to preserve some level of human intervention or oversight in order to ensure administrative discretion in the decision-making process. This is made explicit in the legislation of some member States (Germany, Norway), thereby excluding fully ADM. Certain jurisdictions have adopted specific solutions when it comes to fully ADM. In Latvia, for example, only the minimum fine provided for in legislation can be imposed for an administrative offence if that offence has been recorded by technical means. AI applications are most commonly used in the fields of policing, taxation, traffic (automatic number plate recognition) and border control through face recognition processes (COE, 2022, p. 20).

Countries across the EU, and more broadly in Europe, are at different stages of digital transformation, which directly affects their capacity to implement artificial intelligence in decision-making by public administration. This is evident from the data in the 'eGovernment Benchmark' which monitors the digitalisation of public services in Europe and assesses the digital transformation but also reflects on broader trends observed over the years. The overall eGovernment Benchmark scores are based on four key dimensions: User Centricity, Transparency, Key Enablers and Cross-Border Services. Data show that in the countries outside the EU which are situated in the Western Balkans region, only Serbia is showing improvements in some areas (Insight report eGovernment Benchmark, 2024).

Since 2021, assessments of the Western Balkan economies have indicated significant progress in digital transformation and digital infrastructure. With broader Internet access and enhanced electronic government services, they have made some progress in digitalisation in recent years and are slowly converging towards European Union levels (OECD, 2024a).

When it comes to the Western Balkan countries the reports show that among others, digital government is at the forefront of the Western Balkans region's PAR agenda. However, the regional differences noted in the past remain valid. With regard to digitalization in these countries as one of the principles of Public Administration that together with service delivery is assessed from OECD/SIGMA, (on a scale of 0 (lowest) to 100 (highest), the OECD/SIGMA assessment shows that the average score for digital government in the Western Balkans is 42 out of 100. Albania and Serbia performed well and exceeded the regional average, while North Macedonia and Montenegro and, to a greater extent, Bosnia and Herzegovina, performed below the regional average. Namely, Albania has score of 64, Serbia has 60, North Macedonia has 32, Montenegro 31 and Bosnia and Hercegovina have 18 (OECD, 2025b, p. 43).

Assessments for Republic of Serbia show that digital transformation is well under way and digital government services are well developed, already reaching the EU average in many dimensions. The recommendation for Serbia is to further align the legislation with the EU regulatory framework, including the Artificial Intelligence Act (European Commission, Report Serbia, 2025). In this area Serbia has adopted the Artificial Intelligence Development Strategy for the period 2025–2030, as a second strategy in this field after the first Strategy in 2019. Also, in the previous period, Ethical Guidelines for the Development, Implementation and Use of Trustworthy and Responsible Artificial Intelligence were adopted. From an organizational perspective, an Institute for Artificial Intelligence has been established with a large number of researchers working in the field at all levels. The Republic of Serbia was the first in the region to establish a National Platform for Artificial Intelligence (supercomputer), but there is a need for its further expansion and improvement. In 2024, by decision of the Government, the Artificial Intelligence Council was established with the task of harmonizing and coordinating activities to implement the strategic framework in the field of artificial intelligence development, monitoring the implementation of planned measures and activities, and monitoring the status, needs and standards of development and application of artificial intelligence in the Republic of Serbia and the world. The National Platform for Artificial Intelligence is used for the development and application of artificial intelligence in the implementation of business bodies, public administration, research work in the academic community and its institutions, the economy, as well as to help startup companies in the development of artificial intelligence solutions. This platform was selected among the 10 best innovative projects in the public sector by the Organization for Economic Co-operation and Development (OECD) in 2023 (Vlada Republike Srbije, Strategija razvoja veštačke inteligencije u Republici Srbiji za period 2025–2030, pp. 19, 21).

Assessments of the Republic of North Macedonia indicate that the country remains moderately prepared in the area of digital transformation although some progress was made in the e-government area. The recommendation is to ensure full implementation of the Law on general administrative procedures by completing the digitalisation of institutional registers and data exchange and simplifying electronic procedures. Also, North Macedonia should fully align with the EU's AI Act, ensuring the necessary enforcement structures (European Commission, Report North Macedonia, 2025). In North Macedonia, from a legislative and institutional perspective, limited legislative and institutional activity relating to AI can be observed. However, ICT Development Strategy SMART/MK 2030, Cybersecurity strategy And National operational broadband plan are adopted. The ICT Development

Strategy SMART/MK 2030 is based on the following pillars: ICT infrastructure and connectivity; Digital competences and inclusiveness; Management and delivery of public services (Pillar: E-Governance); and Business, innovation, new technologies and artificial intelligence. This suggests a fragmented and still insufficiently developed approach to AI governance. North Macedonia has an integrated National Portal for e-services (uslugi.gov.mk) through which citizens can gain access to all electronic services through the National Portal for electronic services, including those offered by Open Balkan and vice versa (Thijs, Lauk & Díaz Pulido, 2025, p. 40).

Assessments for Republic of Albania is between a moderate and a good level of preparation in the field of digital transformation while limited progress in reporting period was made. The recommendations are to improve access to the use of e-services, build this capacity and step up the collection of statistical data on digital performance and digital competitiveness. Also, Albania should fully align with the EU AI Act, ensuring the necessary enforcement structures (European Commission, Report Albania, 2025). However, in Albania Cybersecurity Strategy 2025-2030 and its Action Plan for 2025-2027 have been adopted. The Digital Agenda of Albania 2022–2026 is a strategic plan designed to accelerate the country's transformation into a digitally advanced society. The government portal "e-Albania" that acts as a single access point of public service delivery, now offers over 95% of government services online, and service requests through the portal increased by 40% between 2023 and 2025 (World Bank Group, 2025).

As for Montenegro the country is at a good level of preparation in the area of digital transformation. Regarding the strategic activities Digital Transformation Strategy 2022-2026 was adopted. Additional, recommendation is to continue implementing digital public services for the public and businesses and prioritize the development and implementation of an interactive e-government platform for transactional electronic services. Montenegro is not yet aligned with the e-Privacy Directive. Montenegro presented the AI Landscape Assessment and should start working towards aligning with the AI Act, ensuring necessary enforcement structures (European Commission, Report, Montenegro, 2025, pp. 81, 82). Montenegro has one of the lowest numbers of interconnected registries in the Western Balkan region, which also hinders the design and provision of simplified and user-friendly administrative services. Even the base registries are not connected. The Montenegro Digital Transformation Strategy 2022–2026 sets an objective to improve capacities and capabilities for the digital transformation of Montenegro (Thijs, Lauk & Díaz Pulido, 2025, p. 39).

Bosnia and Herzegovina remains the least advanced in terms of digitalisation, with fragmented institutional structures and limited coordination. The assessment shows that Bosnia and Herzegovina is at an early stage of preparation on digital transformation and media with no progress achieved in this area (European Commission, Report Bosnia and Herzegovina, 2025, p. 13). Also, regarding the degree of digitalisation of government services the country remains relatively low. Namely, on digital services, Bosnia and Herzegovina made no progress in adopting a countrywide strategy and action plan for the development of an information society. Bosnia and Herzegovina took no action to develop an open data policy. The country is invited to fully align with the EU's Digital Services Act (DSA), the Digital Markets Act (DMA), the Artificial Intelligence Act, the European interoperability framework and the Interoperable Europe Act (European Commission, Report Bosnia and Herzegovina, 2025, p. 73).

Regarding AI readiness of the countries the Government AI Readiness Index shows that in the 2023 edition 193 countries were covered, and the index consists of 39 indicators across 10 dimensions, which make up three pillars: Government, Technology Sector, and Data & Infrastructure. The scores of the Western Balkans countries in 2023 are broadly comparable to those recorded in 2024: Serbia positions the highest (55.57), North Macedonia (45.40), Montenegro (47.15), Albania (43.26) and Bosnia and Herzegovina (36.49) (Oxford Insights, Government AI Readiness Index, 2023). In its 2024 edition it covered 188 countries. The index explores 40 indicators across three core pillars: Government, Technology Sector, and Data & Infrastructure. Based on the three pillars the total score of the Western Balkans countries in 2024 is following: Serbia achieved the highest (58.49), North Macedonia (45.12), Montenegro (47.43), Albania (45.47) and Bosnia and Herzegovina (37.02) (Oxford Insights, Government AI Readiness Index, 2024).

## 5. CONCLUSIONS

The benefits of AI automation include direct automation of existing processes and services, which contributes to a complete rethinking of the way governments work. These benefits make governments more efficient, effective and responsive.

Public authorities increasingly recognize the potential of AI systems for conducting decision-making processes in smooth, easy and accurate way. At the same time, the expansion of AI raises important legal questions, particularly whether existing principles of administrative law remain sufficiently robust, adaptive, and future-proof to govern this emerging form of decision-making effectively, especially in light of concerns related to privacy, personal data protection, discrimination, proportionality, and due process. It is important to keep in mind that the impact of ADM systems on principles of administrative law, partially depends on the characteristics of the AI system in use. Thus, the differences between AI systems, next to the purposes for which the ADM systems are used and their impact on fundamental rights should be taken into account when regulating AI systems from the perspective of administrative law (COE, 2022, p. 6). Furthermore, it is obvious that traditional principles of administrative law are capable of setting the limits of algorithmic decision-making, which means that the algorithm must be based on law, pursue the public interest, serve good administration, be impartial, be able to explain the reasons for its actions, respect the principle of proportionality. Although there is no comprehensive regulation of administrative law specifically relating to the use of ADM systems and AI systems in particular, according to administrative law, every case of administrative decision-making should be in accordance with certain general principles of administrative law, regardless they are made with ADM. In any case, the dominant role of data protection regulation in regulating ADM is obvious. However, in order to be able to cope with the requirements of new technologies the administrative law that is currently applicable needs to evolve and be modernized.

Although is essential to take advantage of the benefits offered by AI decision-making, also is important to manage its risks. For example, AI may be prone to developing certain biases. When AI systems are underpinned by inadequate or distorted data about certain groups and individuals, there is a risk of possible negative outcomes for them. Ethical risks, which can exist through biased algorithms and unethical behaviour, the lack of transparency and explanation, create challenges in determining responsibility when problems arise.

One of the biggest challenges for the implementation and adoption of AI decision-making concerns its invisibility and the other is the "black box" problem. Furthermore, AI systems that lack sufficient transparency and explanation erode accountability while certain uses raise concerns about data protection, privacy and surveillance. In addition, artificial intelligence can facilitate increasingly sophisticated cyber threats as well as the occurrence of minor to major incidents and disasters in critical systems. Finally, it must be taken into account that it can contribute to disruptions in the labour market, including for civil servants in public bodies. Actually, managing AI's risks can have an impact on its adoption and the realization of its benefits. Therefore, consideration of issues of trust, fairness, privacy, security, transparency and accountability are essential for its correct and successful use.

Research findings show that the readiness of governments to implement AI in the delivery of public services to their citizens is on a different level, which among other things is a result of the fact that countries are at different levels of digital transformation and preparation for the use of AI systems. In this regard, countries in the Western Balkan region, have made some progress in digitalisation in recent years and are slowly converging towards European Union levels, but within the framework of the European integration processes among other things, are showing limited institutional capacity and uneven digital maturity.

In order to take advantage of the benefits of AI, while managing the risks, it is necessary to have a strategic vision for its application in the work of the public sector and in AI decision-making. It is crucial governments to be capable and equipped to use digital technologies and data in order to increase productivity and resilience in their public administrations and enhance the quality of public services (OECD, 2025, p. 17). To this end, adoption of effective and robust regulation is essential to ensure that such systems operate in the public interest.

## LIST OF REFERENCES


Brkan, M. 2019. Do algorithms rule the world? Algorithmic decision-making and data protection in the framework of the GDPR and beyond. *International Journal of Law and Information Technology*, 27(2), pp. 91–121. https://doi.org/10.1093/ijlit/eay017

Council of Europe. 2022. *Artificial Intelligence and Administrative Law.* Strasbourg: Council of Europe Publishing.

eGovernment Benchmark. 2024. Insight report. Available at: https://www.capgemini.com/wp-content/uploads/2024/07/eGovernment-Report-2024.pdf (5. 3. 2026).

European Commission. Report Albania. 2025. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2025 Communication on EU enlargement policy. Brussels, 4.11.2025. SWD (2025) 750 final. Available at: https://enlargement.ec.europa.eu/document/download/fe9138b7-90fe-4277-a12c-3a03f6d1957f_en?filename=albania-report-2025.pdf (10. 3. 2026).

European Commission. Report Bosnia and Herzegovina. 2025. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2025 Communication on EU enlargement policy. Brussels, 4.11.2025 SWD (2025) 751 final. Available at: https://enlargement.ec.europa.eu/document/download/5d8fc547-f8f8-456f-84e3-b38998acfafd_en?filename=bosnia-and-herzegovina-report-2025.pdf (11. 3. 2026).

European Commission. Report Montenegro. 2025. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2025 Communication on EU enlargement policy. Brussels, 4.11.2025. SWD (2025) 754 final/2. Available at: https://enlargement.ec.europa.eu/document/download/9ae69ea7-81d6-4d6a-a204-bd32a379d51d_en?filename=montenegro-report-2025.pdf (11. 3. 2026).

European Commission. Report North Macedonia. 2025. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2025 Communication on EU enlargement policy. Brussels, 4.11.2025. SWD (2025) 753 final. Available at: https://enlargement.ec.europa.eu/document/download/267b368e-6b55-4a42-bb72-6395593de4da_en?filename=north-macedonia-report-2025.pdf (6. 3. 2026).

European Commission. Report Serbia. 2025. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2025 Communication on EU enlargement policy. Brussels, 4.11.2025. SWD (2025) 755 final. Available at: https://enlargement.ec.europa.eu/document/download/6e68ce26-b95b-48e1-921a-c60c12da8f00_en?filename=serbia-report-2025.pdf (7. 3. 2026).

Koivisto, I., Koulu, R. & Larsson, S. 2024. User accounts: How technological concepts permeate public law through the EU's AI Act. *Maastricht Journal of European and Comparative Law*, 31(3), pp. 412–432. https://doi.org/10.1177/1023263X241248469

Malgieri, G. 2019. Automated decision-making in the EU Member States: The right to explanation and other "suitable safeguards" in the national legislations. *Computer Law & Security Review*, 35(5), 105327. https://doi.org/10.1016/j.clsr.2019.05.002

OECD Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (OECD Privacy Guidelines). 1980. Available at: https://www.oecd.org/en/publications/2002/02/oecd-guidelines-on-the-protection-of-privacy-and-transborder-flows-of-personal-data_g1gh255f.html

OECD Recommendation on Artificial Intelligence (OECD/LEGAL/0449, 2019, amended 2023). Available at: https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449

OECD. 2024a. Western Balkans Competitiveness Outlook 2024: Regional Profile, Competitiveness and Private Sector Development. Available at: https://www.oecd.org/en/publications/western-balkans-competitiveness-outlook-2024-regional-profile_170b0e53-en.html

OECD. 2024b. Explanatory Memorandum on the updated OECD definition of an AI system. Available at: https://www.oecd.org/en/publications/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_623da898-en.html

OECD. 2025a. Governing with Artificial Intelligence, the State of Play and Way Forward in Core Government Functions. Available at: https://www.oecd.org/en/publications/2025/06/governing-with-artificial-intelligence_398fa287.html

OECD. 2025b. Public administration in the Western Balkans 2024–Regional overview of assessments against the Principles of Public Administration. Available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/03/public-administration-in-the-western-balkans-2024_07555c85/1ec4c18f-en.pdf

Oxford Insights. 2023. Government AI Readiness Index. Available at: https://oxfordinsights.com/wp-content/uploads/2023/12/2023-Government-AI-Readiness-Index-1.pdf (4. 3. 2026).

Oxford Insights. 2024. Government AI Readiness Index. Available at: https://oxfordinsights.com/wp-content/uploads/2024/12/2024-Government-AI-Readiness-Index-2.pdf (2. 3. 2026).

Panagopoulou, F. 2024. Algorithmic Decision-Making in Public Administration. *Journal of Public Administration*, 6(1), pp. 1–10. https://doi.org/10.22259/2642-8318.0601001

Rodríguez de las Heras Ballell, T. 2022. *Guiding Principles for Automated Decision-Making in the EU: ELI Innovation Paper.* Vienna: European Law Institute.

Sheehy, B. & Ng, Y. F. 2024. The Challenges of AI Decision-Making in Government and Administrative Law: A Proposal for Regulatory Design. *Indiana Law Review*, 57(3), pp. 665–699. https://doi.org/10.18060/28360

Thijs, N., Lauk, M. & Díaz Pulido, J.M. 2025. The Single Digital Gateway in the Western Balkans: Assessment of readiness to implement Single Digital Gateway Regulation requirements. *SIGMA Papers*, No. 74. Paris: OECD Publishing. https://doi.org/10.1787/3cbd03cd-en

Tveita, LJ. & Hustad, E. 2025. Benefits and Challenges of Artificial Intelligence in Public sector: A Literature Review. *Procedia Computer Science*, 256, pp. 222–229. https://doi.org/10.1016/j.procs.2025.02.115

Vlada Republike Srbije, Strategija razvoja veštačke inteligencije u Republici Srbiji za period 2025–2030. Available at: https://www.srbija.gov.rs/tekst/437277 (7. 3. 2026)

Williams R. 2022. Rethinking Administrative Law for Algorithmic Decision Making. *Oxford Journal of Legal Studies*, 42(2), pp. 468–494. https://doi.org/10.1093/ojls/gqab032

World Bank Group. 2025. Available at: https://www.worldbank.org/en/region/eca/brief/digital-transformation-and-public-sector-reform-western-balkans-progress-toward-eu-accession-and-economic-growth (5. 3. 2026)

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch3

***Dana DOBRIĆ JAMBROVIĆ****
***Jelena DUJMOVIĆ BOCKA*****

# ADVANCING THE INTEGRATION OF ARTIFICIAL INTELLIGENCE IN THE CROATIAN HIGHER EDUCATION

*Artificial Intelligence constitutes a pivotal driver of digital transformation, permeating all spheres of life and labor. In this paper, the authors focus on the modalities and implications of AI implementation within the higher education (HE). AI technologies have the potential to personalize learning experiences, automate administrative tasks, reduce workloads, provide real time feedback, and enhance student engagement. Concurrently, they pose risks regarding plagiarism, bias, and the erosion of academic integrity. This paper seeks to examine the extent of AI regulation and application within Croatian higher education and, based on the research findings, formulate recommendations for further systemic integration.*

*The first part of the paper establishes a theoretical framework based on an analysis of AI implementation domains in HE. The second part presents the research findings concerning European states that have developed optimal policies and institutional practices for AI integration, based in the theoretical framework. The third part of the paper focuses on the scope of AI regulation within the Croatian context, encompassing both national and institutional levels. Furthermore, specific areas of AI utilization within HE are presented. The final part encompasses recommendations for the efficient implementation and responsible use of generative AI within Croatian universities, as well as other HE institutions where digital transformation remains in its nascent stages.*

***Keywords:*** artificial intelligence, Croatia, European practices, higher education, regulation and integration.

## 1. INTRODUCTION

Emerging paradigms, catalyzed by technological and societal advancements resulting from the pervasive utilization of Information and Communication Technologies, have initiated a transformative process reconfiguring all sectors, including higher education. Digitalization

* Associate Professor, PhD, Chair of Administrative Science, Faculty of Law, University of Rijeka, Croatia, ORCID: https://orcid.org/0000-0002-9131-5846, e-mail: *dana.dobric@uniri.hr*

** Associate Professor, PhD, Chair of Administrative Law and Science, Faculty of Law, University of Osijek, Croatia, ORCID: https://orcid.org/0000-0002-0727-718X, e-mail: *jelena.dujmovic@pravos.hr*

has effectively superseded printed materials with educational software, web-based platforms, electronic libraries, and virtual classrooms. Concurrently, numerous traditional higher education institutions (HEI) have integrated online components into their curricula, offering a synthesis of classroom-based and digital instruction, commonly conceptualized as hybrid and blended learning. Notwithstanding that learning is not an exclusively individual endeavor, online education benefits students by facilitating self-paced instruction, as well as personalized feedback and pedagogical support (Schuetze, de Vries & Mendiola, 2024, p. 7). The era of digital intelligence denotes a phase characterized by the progressive integration of informatization and digitalization, propelled by pivotal technologies such as Big Data, cloud computing, AI, the Internet of Things (IoT), and blockchain. These technologies have achieved widespread adoption and are substantively reshaping societal processes within the current technological revolution.

The integration of AI into higher education represents the most significant technological and pedagogical innovation since the digital revolution of the late 20th century. The emergence of large language models is fundamentally altering the ontology of learning, instruction, and scholarly creation. AI technologies possess the potential to individualize learning experiences, automate administrative functions, mitigate workloads, provide instantaneous feedback, enhance student engagement, and optimize decision-making processes (UNESCO, 2021, pp. 13-23). Educational policies must necessitate adaptation on a global level. Consequently, this paper seeks to examine the extent of AI regulation and application within Croatian higher education and, based on the research findings, formulate recommendations for the further integration of the AI system.

### *1.1. Paper Structure and Methodology*

This paper is organized into four interrelated chapters, utilizing a multi-methodological approach to examine the regulatory and practical aspects of AI in HEIs. The first part of the paper is dedicated to formulating a theoretical framework that serves as the foundation for subsequent research. Through this framework, the authors aim to encompass and analyze the key domains of potential AI implementation in HEIs. By examining scholarly literature, professional reports, and ethical standards for AI application, five such domains were identified and elaborated in the second chapter.

In accordance with the defined theoretical framework, the third chapter presents best practice examples among European countries. For each identified domain of AI application in HEIs, a leading country was analyzed. The authors selected these countries based on an extensive review of scholarly and professional literature, as well as a desk review of strategic documents from states that indisputably lead in the field of digital transformation.

Regarding Croatia, the process of digital transformation in higher education has commenced but remains in its early and fragmented stages. Consequently, the fourth chapter analyzes the regulatory framework at both national and university levels concerning AI application in the teaching, scientific, and professional activities of higher education institutions in the Republic of Croatia. Furthermore, specific areas of AI integration within HEI are identified. This analysis employs a desk review of the legal framework and strategic documents, alongside a descriptive method to characterize Croatian practice. The research encompassed all public and private universities registered in the Register of Higher Education Institutions maintained by the Ministry of Science, Education, and Youth.

Finally, in the fifth chapter, the authors formulated recommendations for the efficient implementation and responsible use of generative AI within Croatian universities, as well as other HEIs where digital transformation remains in its nascent stages. European best practice examples serve as the basis for formulating these recommendations, which are directed toward each of the key domains of potential AI implementation in HEIs. To contrast European and Croatian practices, the comparative method will be applied, while a constructive approach will be utilized for the formulation of the final recommendations.

## 2. THEORETICAL FRAMEWORK FOR IDENTIFYING NECESSARY REGULATORY DOMAINS OF AI APPLICATION IN HIGHER EDUCATIONT

According to contemporary research, key areas of AI implementation can be categorized into five core domains: pedagogical innovation (Mrnjaus, Vrcelj & Kušić, 2023; Pedro *et al*., 2026), learning analytics (Liu *et al*., 2023; Ouyang, Xu & Cukurova, 2023), automation of evaluation processes (Kadel, 2024; Lynch, 2026), and faculty professional development (Al-Zahrani, 2024), while maintaining continuous regard for ethical and societal implications (Dabis & Csaki, 2024; Mićunović & Bosančić, 2025).

### *2.1. Pedagogical Innovations and Student-Centered Learning*

The integration of AI into pedagogy denotes a transition from reactive to proactive instruction. Intelligent Tutoring Systems utilize algorithms to model student knowledge, identifying specific gaps in understanding before they constitute impediments to academic progress. According to Zawacki-Richter *et al*. (2019, p. 4), these platforms facilitate asynchronous learning tailored to an individual's cognitive load, thereby minimizing cognitive saturation and optimizing information retention. Furthermore, the application of Large Language Models enables students to assume the role of an "active researcher" through simulated dialogues with virtual mentors. In this capacity, students engage in structured problem-solving tasks, which foster independent inquiry and discovery-based learning. Okonkwo & Ade-Ibijole (2021, p. 6) emphasize that chatbots in higher education do not merely serve administrative functions but also stimulate Socratic dialogue, providing instantaneous feedback and mitigating the sense of isolation inherent in distance learning.

This process is further intensified through the human-in-the-loop concept, wherein AI assists the educator in creating dynamic instructional materials that adapt in real-time based on group dynamics. During the instructional period, AI monitors student responses, for instance, through digital assessments or task completion speed, enabling the educator to receive real-time analytics and subsequently adjust pedagogical methods. Should the data indicate a collective lack of comprehension regarding a specific graphical representation, the AI instantaneously generates supplementary examples or simplified visualizations. Holmes, Bialik & Fadel (2022, p. 151) emphasize that AI can generate personalized case studies or assessments targeting specific student interests, thereby positioning intrinsic motivation at the core of the educational process.

Ultimately, this transformation is manifested in the support provided to students with developmental disabilities. Through instruments such as advanced speech-to-text systems and personalized screen readers that adapt content formatting for dyslexic users, a higher degree of inclusivity is achieved. Consequently, AI transcends its role as a mere efficiency tool

and becomes an instrument for achieving educational equity, ensuring that every individual possesses access to resources in a manner that best aligns with their neurodivergent profile or physical predispositions.

### *2.2. Learning Analytics and Predictive Modeling*

Learning Analytics utilizes Educational Data Mining to identify complex behavioral patterns that precede academic success or failure. Through the analysis of "digital footprints", specifically time spent on designated activities, frequency of repository access, and the quality of forum interactions, HEI can develop precise predictive models. Fahd, Miah & Ahmed (2014, p. 4) emphasize that these models can identify students at risk of attrition with high accuracy (frequently exceeding 80%) as early as the first semester, thereby enabling proactive intervention by advisory services.

In contrast to traditional end-of-semester reports, Yang, Wu, and Ogata (2024, p. 36) noted that personalized feedback mechanisms allow students to become more cognizant of their habits and more actively adjust their learning strategies. Further advancement is represented by affective computing which, through machine vision and deep learning, recognizes states such as frustration, boredom, or cognitive fatigue with an accuracy surpassing 90% (Aly & Alotaibi, 2025, pp. 3–4). As stated by Salloum *et al.* (2025, p. 14), the integration of emotional intelligence into AI systems allows platforms to dynamically calibrate the complexity of material, offering empathetic support or supplementary resources at the moment the system detects a decline in motivation or high cognitive exertion. However, this level of data collection raises significant concerns regarding the continuous surveillance of students. Sclater (2017, p. 127) warns that excessive monitoring may adversely affect academic freedom and student creativity, as individuals might begin to conform to "algorithmic expectations" rather than authentically exploring the subject matter. Consequently, contemporary research focuses on the development of transparent analytics, wherein students retain insight into which data are collected and the parameters upon which the system generates recommendations, thereby strengthening institutional trust.

### *2.3. Automation of Student Assessment and Grading*

The application of Natural Language Processing facilitates the automated assessment not only of multiple-choice examinations but also of complex written assignments. Research by Lim *et al.* (2021, pp. 1880–1882) demonstrates that contemporary Automated Essay Scoring (AES) can achieve a correlation with human experts exceeding 0.90, signifying that the system's determinations align with the evaluations of experienced educators in nine out of ten cases, albeit with incomparably superior processing velocity. AES systems provide a high degree of reliability and consistency, as they are not susceptible to human factors such as fatigue, mood, or cognitive bias, which frequently result in inter-rater or intra-rater inconsistencies over time. A pivotal advantage of these systems is not merely the final summative grade but the provision of formative, real-time feedback. Rather than receiving a static numerical value, the student is provided with instantaneous guidance regarding argumentative structure, textual cohesion, and grammatical precision.

Furthermore, automation facilitates AI-assisted peer-assessment, thereby fostering the development of critical evaluation skills among students themselves. Consequently, the assessment process transcends its role as a purely hierarchical act and becomes an integral

component of social learning. In the context of academic integrity, tools limited to comparing text against existing databases have become insufficient, as AI generates novel, original content that is not extant elsewhere. Therefore, Dawson (2021, p. 123) asserts that higher education must evolve toward assessment tasks that necessitate critical thinking which AI cannot readily replicate, such as reflection on personal experience or the resolution of highly specific problems.

### *2.4. Faculty Professional Development and Digital Skills*

In the era of digital transformation, faculty enhancement necessitates systematic professional development that transcends fundamental technical training. Educators must be capable of identifying model "hallucinations", understanding the limitations of large language models within specific scientific domains, and guiding students toward the ethical utilization of these instruments. A pivotal skill increasingly involves the proficiency to formulate instructional prompts that position artificial intelligence as an interactive tutor. A deficit in these advanced competencies generates a substantial risk of pedagogical reductionism. This phenomenon involves the reduction of multidimensional processes of cognitive development and critical judgment to quantifiable metrics discernible by the system, such as response velocity or login frequency (Bond *et al*., 2024, p. 20). Furthermore, professional development must address the psychological readiness of educators to operate within an "algorithmic world".

### *2.5. Ethical Implications of Al Integration in Higher Education*

While systems based on generative models and machine learning promise radical personalization of learning and administrative optimization, they simultaneously redefine fundamental concepts of academic integrity, social justice, and pedagogical autonomy. The ethical dimension of this process is no longer merely a theoretical inquiry but a primary regulatory imperative, further underscored by the entry into force of the EU AI Act (2024), which classifies artificial intelligence systems in education as high-risk.

The central ethical conflict arises from the phenomenon of algorithmic bias. Artificial intelligence systems are not neutral entities, they function as "mirrors" of the datasets upon which they were trained. Bond *et al.* (2024, p. 21) confirm that algorithms trained on historically inequitable datasets do not merely reproduce but effectively automate social inequalities. Within the context of higher education, the application of predictive analytics for the early detection of academic risk may inadvertently penalize students from underprivileged socioeconomic backgrounds. If historical data reflects systemic injustice, algorithms transform such bias into deterministic prediction, thereby creating the risk of digital "ghettoization" of students.

Another significant challenge is the opacity of algorithmic decision-making, conceptualized as the "black box" problem. When a deep learning system renders a determination regarding the evaluation of student work or the allocation of scholarships, the underlying process of reaching that outcome often remains inaccessible to human comprehension. In response to this challenge, scholars strongly advocate for the implementation of Explainable AI (XAI) (Dwivedi, 2023, p. 42). XAI is no longer merely a technical preference but an ethical imperative that ensures the "right to an explanation".

The implementation of affective computing systems presents a distinct ethical challenge. While aforementioned studies highlight the high precision of deep learning models

in detecting cognitive fatigue and frustration through machine vision, others (Andrejevic & Selwyn, 2020) warn of the risk of transforming the classroom into a space of continuous biometric surveillance. The central issue lies in the quantification of subjective states into measurable metadata, systems analyzing facial micro-expressions, pupil dilation, or head movements de facto establish a regime of emotional control. Should students internalize the realization that every subconscious reaction is classified as "lack of engagement" or "boredom", there arises a risk of a process wherein students modify their natural behavior and simulate attentiveness to satisfy the system's algorithmic metrics. Consequently, the ethical imperative dictates a shift toward data minimization (EDPB, 2020, para. 73). Instead of invasive facial tracking, contemporary strategies advocate for the analysis of interaction with instructional materials without storing biometric identifiers. Institutions are obligated to ensure full transparency regarding data collection processes and guarantee students the right to opt-out of surveillance systems without academic repercussions.

Furthermore, the protection of data privacy within the new digital order acquires renewed legal significance with the entry into force of the EU AI Act (2024). Institutions are duty-bound to ensure that students' "digital footprints" are not utilized for commercial exploitation or model training without explicit informed consent. The issue of "data colonialism", analyzed by contemporary critics of digitalization (Mejias & Couldry, 2024, p. 116), warns of the danger of converting the educational process into a data reservoir for private corporations. Therefore, it is recommended to utilize exclusively licensed systems under institutional accounts (KU Leuven, General Guidelines, 2026).

## 3. COMPARATIVE ANALYSIS OF LEADING EUROPEAN MODELS OF AI INTEGRATION IN HIGHER EDUCATION

To operationalize the proposed conceptual framework, this section examines leading national models that demonstrate successful AI integration within the higher education landscape. The selection of these cases is not arbitrary, rather, it reflects a deliberate focus on European countries where digital transformation is supported by robust regulatory frameworks and innovative pedagogical standards. Corresponding to the domains analyzed in the previous chapter, a specific leading country was chosen to illustrate best practices in each area.

In 2021, the Finnish Ministry of Education and Culture initiated the implementation of the Digivisio 2030 program, encompassing all higher education institutions (DIGIVISIO). Beyond the enhancement of digital infrastructure and the deployment of e-learning instruments, Finland has pioneered the most systematic development of Data-Driven Pedagogy. This approach facilitates the real-time adaptation of instruction to meet the actual needs of students, predicated upon the systematic collection, analysis, and interpretation of digital footprints generated within Learning Management Systems (Dixon, Howe & Richter, 2025, pp. 5–6).

The methodological framework of this approach is based on multimodal data collection, categorized into three pivotal dimensions: the temporal (access times and session duration), the interactional (participation in forums and collaborative tools), and the performative (results of quizzes and automated assessments). The foundation of data processing is predictive modeling, a statistical technique utilizing historical datasets and machine learning algorithms to forecast, with a specific degree of probability, future student outcomes or behaviors (Ouatik

*et al.*, 2022, p. 24). Researchers at the University of Turku developed the ViLLE platform, which utilizes an immediate feedback loop methodology: predicated on real-time error data, students are offered alternative resources, thereby realizing a personalized learning trajectory. These data function as a diagnostic instrument, directing educators toward curriculum segments perceived by students as most demanding, and enabling the dynamic adjustment of learning design (VILLE).

Furthermore, within the professional literature examining the intersection of AI and learning analytics in higher education, the United Kingdom has emerged as one of the preeminent European states. British practice transforms traditional learning analytics into a proactive support system (Herodotou *et al.*, 2019, p. 6). Rather than merely measuring engagement, these systems conduct in-depth linguistic processing of student interactions, thereby achieving insights into the quality of argumentation, the level of critical thinking, and the development of conceptual understanding. By identifying specific linguistic patterns, AI instruments can isolate precise points where impediments occur in the knowledge acquisition process.

This analytical framework enables educational institutions to transition from descriptive analytics ("what the student does") to predictive and prescriptive analytics that address internal cognitive processes. A significant shift has also been achieved regarding the biopolitical surveillance of students, moving toward so-called human-centered analytics. Instead of penalizing students who do not adhere to a linear trajectory, these systems are designed to recognize diverse learning styles and cognitive profiles. This approach avoids the creation of a "digital panopticon", wherein students exhibit performative behavior rather than focusing on the authentic acquisition of knowledge.

The authors highlight Germany as a good example of the integration of automated short answer grading systems. The German model is predicated upon high linguistic precision, evaluating not merely keywords but also the semantic accuracy and logical structure of student responses. Pado, Eryilmaz, & Kirschner (2023, pp. 1324–1326) analyze the implementation of response triage systems within large-scale examination frameworks, where AI automatically processes clear cases while escalating borderline or complex cases to a human examiner for verification. Significant focus is placed on the FORMAT project (2022–2026), directed toward the development of adaptive feedback that provides students with qualitative explanations, consequently, the system functions as a tool for formative learning support rather than solely for summative grading (Formative Writing Assessment, 2022-2026). Furthermore, substantial emphasis is placed on the prevention of algorithmic discrimination based on writing style or dialect. Models are trained to evaluate substantive accuracy rather than linguistic aesthetics, thereby ensuring equal opportunities for students with diverse backgrounds and linguistic styles, including non-native speakers of German.

Furthermore, Estonia distinguishes itself as a vanguard in the integration of AI across all levels of the pedagogical process, particularly through its investment in the massive upskilling of faculty. In September 2025, a training initiative for 3,000 educators commenced, with a projected expansion to 5,000 by the spring of 2027 (Euridyce). Implementation is primarily conducted through specialized micro-credential modules and institutional centers for digital didactics, such as those at Tallinn University and TalTech, which enable faculty to acquire formally recognized ECTS credits in the field of AI competencies. The educational process is structured into five units encompassing technical-operational proficiency, pedagogical integration, research application, critical content evaluation, and the ethical-legal framework

(Lepik-Verliin, Hint & Leijen, 2025, pp. 20–22). Particular emphasis is placed on developing skills for the validation of machine-generated data to prevent disinformation and cognitive bias.

Finally, the ethical regulation of AI within the Norwegian higher education represents a model founded upon a high degree of institutional autonomy aligned with national and supranational ethical frameworks. Guidelines from the leading universities in Oslo and Bergen explicitly mandate that AI instruments must be treated exclusively as auxiliary aids that shall not compromise the independence and critical scope of student work (Vold & Eikset, 2024). The first pillar of this practice is methodological transparency, which requires that every interaction with AI systems be precisely documented, thereby ensuring the traceability of the learning process and preventing the non-transparent generation of academic content. The second pillar concerns rigid data protection in accordance with GDPR provisions, with a specific focus on the development of secure institutional digital environments that minimize the risks of unauthorized exploitation of student data. Furthermore, algorithmic accountability entails the systematic education of faculty to identify biases and systemic "hallucinations", thereby mitigating the risk of disseminating disinformation within scholarly and instructional discourse. The issue of academic integrity in Norway is being redefined through the prism of AI literacy, where the emphasis shifts from the detection of unauthorized use toward the transformation of assessment methodologies. The objective is the evaluation of the knowledge acquisition process rather than an exclusive focus on the final examination, consequently, ethical responsibility is equitably distributed between students, who are obliged to practice fair citation, and institutions, which must ensure equitable and credible evaluative conditions (Wahid, 2024, pp. 49–51).

## 4. ANALYSIS OF AI REGULATION AND APPLICATION IN THE CROATIAN HIGHER EDUCATION SYSTEM

The European Union initiated the regulation of the field of artificial intelligence in 2018 with the adoption of the inaugural Ethics Guidelines for Trustworthy AI. This was subsequently followed by the Coordinated Plan on Artificial Intelligence of 2018 (revised in 2021) and the White Paper on Artificial Intelligence, which was developed upon the foundations of the aforementioned Plan (Dujmović Bocka, Romić & Vajda Halak, 2024, pp. 809–810). The primary legislative instrument in this domain is Regulation (EU) 2024/1689 of 13 June 2024, which aims, inter alia, to promote the deployment of trustworthy artificial intelligence within the European Union as part of a broader package of measures designed to enhance security, the fundamental rights of users, and innovation in AI utilization (Artificial Intelligence Act). Full implementation of the Act necessitates the adaptation of national legislation.

In the context of Croatia, the Ministry of Justice, Public Administration, and Digital Transformation assumed the obligation in 2025 to draft the National Plan for the Development of Artificial Intelligence for the period until 2032, along with the accompanying Action Plan for Implementation for the 2026–2028 period. Regarding strategic documents, the Digital Croatia Strategy for the period until 2032 anticipates the pervasive utilization of advanced technologies, such as 5G/6G, AI, machine learning, cloud computing, Big Data, and blockchain, within both the public and private sectors over the next decade. Furthermore, it is subsequently emphasized that the application of these emerging technologies will place particular

importance on fostering cooperation between the academic community and the private and public sectors, aimed at achieving a synergy of knowledge, human capital, regulatory frameworks, and financial resources.

Naturally, universities and HEIs also adopt strategic documents in this field autonomously, albeit in alignment with European and national priorities. The research conducted by the authors encompassed ten public and four private Croatian universities: Public universities in Dubrovnik, Koprivnica, Osijek, Pula, Rijeka, Slavonski Brod, Split, Zadar, and Zagreb, as well as the private universities Algebra, Libertas, Vern, and the Catholic University of Croatia. Only two public (University of Rijeka in 2024, and University of Zadar in 2026) and one private university (Algebra University in 2025) have adopted formal policies or guidelines for the responsible use of AI within the educational process. Additionally, eight public higher education institutions adopted such guidelines between April 2024 and January 2026: Faculty of Economics and Faculty of Humanities and Social Sciences in Osijek; Faculty of Health Sciences and Faculty of Humanities and Social Sciences in Split; Faculty of Electrical Engineering and Computing, Faculty of Organization and Informatics, Faculty of Food Technology and Biotechnology, and Faculty of Teacher Education in Zagreb. Through the analysis of these guidelines and policies, the authors identified certain pillars constituting a coherent framework for the preservation of academic integrity while simultaneously fostering innovation. Given that these pillars are common to all analyzed documents, it is considered essential to address them in further detail.

The first pillar is transparency and a rigorous citation obligation, considered the most critical rule within the instructional process; it mandates that students provide mandatory and precise attribution for every form of machine assistance, including the specification of the tool utilized, its version, and a detailed explanation of the purpose of its use. While technical faculties frequently require the inclusion of the utilized commands (prompts) to provide insight into the generation of programming code, institutions in the social sciences and humanities emphasize formal declarations within the preface or footnotes of the assignment.

Secondly, notwithstanding the technological advancement of generative models, the academic community insists upon the exclusive personal responsibility of the student and the obligation of critical fact-checking, given that AI is defined solely as a tool rather than an author or a relevant source. In the technical sciences, this verification involves the validation of algorithmic accuracy and code optimization, whereas in the social sciences, emphasis is placed on verifying cited references and mitigating "hallucinations" in the interpretation of theoretical frameworks. The strict prohibition of the direct reproduction of machine-generated content remains universal, consequently, generating entire essays or completing examinations without substantive human intervention is classified as a severe violation of academic integrity.

Thirdly, the implementation of these technologies is further contingent upon the specific regulations established by course coordinators, whose autonomy remains decisive in defining the boundaries of permissible use within individual learning processes. While faculty at technical colleges more frequently integrate AI as a mandatory instrument for resolving complex engineering problems, a more cautious approach prevails in the humanities, aimed at safeguarding critical writing and analytical skills. Nevertheless, all systems provide for the possibility of oral defenses of assignments to verify the authentic comprehension of the subject matter. Finally, the ethical framework encompasses the imperative of data privacy protection. Guidelines strictly prohibit the input of data that could reveal an individual's

identity or confidential information, including personal data, classified documents, and non-anonymized research results. Such approaches ensure that technological integration serves to augment, rather than substitute, human cognitive contribution.

The guidelines also delineate the specific domains in which HEI may apply AI. These areas are common to all analyzed faculties and universities, encompassing the use of AI in instruction, the drafting of student assignments, scientific research, and administrative functions. For educators, these tools may facilitate lecture preparation, the creation of personalized instructional materials, and the development of adaptive assessments that provide students with rapid evaluation during the learning process, thereby accelerating the grading cycle. Permissible applications in assessment include the automated grading of objective questions (e.g., multiple-choice, true/false, short answers) and the preliminary evaluation of programming tasks, where AI may assess syntactic correctness and code structure, though not conceptual understanding or the logic of the solution. Regarding the drafting of assignments, students are permitted to utilize tools for linguistic and stylistic refinement, assistance in conceptualizing the work's structure, and technical support in sourcing references, in accordance with the educator's instructions. In scientific research, the utilization of these instruments is permitted for identifying potential research questions, expediting the retrieval of relevant sources, proofreading, grammatical verification, stylistic improvement, and translation. Finally, the application of tools in administrative functions pertains to the preparation of notes, meeting minutes, analytical documents, or reports.

## 5. AI INTEGRATION IN CROATIAN UNIVERSITIES: KEY RECOMMENDATIONS

Following the analysis of the Croatian framework and European best practices, it is possible to formulate recommendations for the enhancement of AI regulation and application within the Croatian academic environment. A fundamental deficiency is the significant regulatory deficit concerning AI utilization in higher education. Only three public universities and eight faculties have adopted strategic documents. While a complete absence of positive practices cannot be established, the primary recommendation pertains to the necessity of intensifying institutional efforts toward the prompt adoption of strategic documents, given that the development and integration of AI into global educational processes are in an advanced stage.

In the domain of pedagogical innovation, student-centered learning and various e-learning methods have been applied at Croatian universities for over a decade. However, it is imperative that Croatia begins implementing more advanced learning analytics. The authors recommend the integration of pedagogical approaches based on data analytics, specifically, the implementation of systems for the real-time analysis of digital footprints, which will facilitate further personalization of the instructional process through instantaneous feedback and data-driven teaching adjustments. Another significant measure in the field of learning process involves the transition from descriptive to predictive analytics. Predictive modeling is crucial for the early identification of cognitive impediments, thereby contributing to the prevention of academic failure.

Regarding the automation of assessment and grading, automated short answer grading has been implemented. However, a third recommendation in this domain is directed toward the development of adaptive feedback that provides students with qualitative explanations of assigned grades, thereby transforming the AI system into a tool for formative learning support rather than solely for summative grading.

A fundamental prerequisite for the successful integration of AI is the existence of educated faculty and students. Therefore, the fourth recommendation, within the domain of digital skills development, pertains to the strengthening of AI literacy. It is necessary to initiate a national program for massive faculty education which, beyond the operational application of AI tools, would encompass the critical evaluation of machine-generated data and the ethical-legal framework. Concurrently, students should be educated in AI literacy, moving away from an approach oriented exclusively toward the detection of unauthorized tool utilization.

Finally, to strengthen the ethical dimension of AI usage, the authors recommend mandating the disclosure of the specific tool models used and the systematic inclusion of utilized prompts in all forms of student assignments across all faculties. Such a practice would ensure: (a) the complete traceability of the cognitive learning process, providing educators with insight into how the student structured the problem and arrived at a solution using AI, (b) the prevention of non-transparent content generation and the uncritical adoption of machine-generated dana, and (c) a clear distinction between the tool's contribution and the student's original authorship, thereby strengthening trust in the outcomes of the educational process and ensuring the objective evaluation of acquired competencies.

To provide a comprehensive overview of the research findings, the following table synthesizes the identified domains of AI implementation, the corresponding best practices from European states, and the resulting recommendations tailored for the Croatian higher education system.

| DOMAIN | BEST PRACTICE | RECCOMENDATION |
|---|---|---|
| Pedagogical innovations | Data-driven pedagogy and student knowledge modeling algorithms, Finland | Adoption of strategic documents concerning AI tool integration aimed at fostering pedagogical innovations (especially human-in-the-loop concept) |
| Learning analytics | Predictive modeling based on "digital footprints", UK | Implementation of systems for the real-time analysis of "digital footprints" |
| Automated assessment and grading | Response triage system and adaptive feedback, Germany | Development of adaptive feedback that provides students with qualitative explanations of assigned grades |
| Digital literacy | Massive upskilling od academic staff, Estonia | Conduct a national program to enhance AI literacy among faculty and students |
| Ethical standards | Ethical responsibilities distributed between students and institutions, Norway | Establish a mandatory disclosure of the AI model and the systematic submission of all utilized prompts |

**Source:** Prepared by the authors based on research findings

## 6. CONCLUSION

Contemporary higher education is undergoing a phase of radical digital transformation driven by the exponential development of AI. This technological momentum not only redefines administrative processes but fundamentally transforms pedagogical paradigms, research methodologies, and the nature of interaction between educators and students. Given that the integration of generative and analytical AI tools into global academic workflows is already in an advanced stage, a systematic adaptation of educational policies is essential to ensure the cognitive evolution of students while preserving the highest ethical standards.

The digital transformation of higher education in Croatia has commenced but remains in an early and fragmented stage (Dobrić Jambrović, 2026). The primary cause is the sparse regulation of AI utilization at both national and HEI levels. Out of a total of eleven universities, only three have drafted usage guidelines. At the faculty level, the situation is even more critical: of 73 public faculties, only eight have developed strategic documents. Consequently, a key segment of this study encompasses a comparative evaluation of leading European practices to determine the feasibility of their application within the Croatian higher education.

The research was based on a previously elaborated theoretical framework covering five domains of AI implementation: pedagogical innovations and student-centered learning, learning analytics and predictive modeling, automation of student assessment and grading, AI literacy for faculty and students, and the ethical domain. For each domain, one state was identified as a best-practice example, respectively: Finland, the United Kingdom, Germany, Estonia, and Norway. By analyzing these international systems, the authors identified measures that Croatia could implement to enhance the utilization of AI tools.

The key recommendations pertain to: a) the necessary systematic and coherent regulation of AI at the university and faculty levels, b) the implementation of pedagogical approaches based on learning analytics that enable real-time adaptive instruction, c) the introduction of automated formative assessment, d) the strengthening of AI literacy among teaching staff and students, and e) the mandatory disclosure of utilized tool models and the systematic inclusion of prompts in all forms of student assignments. In conclusion, enhancing the application of AI systems in Croatian higher education requires a holistic approach focused on the strategic development of educational policies and the systematic integration of advanced pedagogical and technological models.

## LIST OF REFERENCES

Aly, M. & Alotaibi, N. 2025. A comprehensive deep learning framework for real time emotion detection in online learning using hybrid models. *Scientific Reports*, 15, 42012. https://doi.org/10.1038/s41598-025-26381-7

Al-Zahrani, A.M. 2024. From traditionalism to algorithms: Embracing artificial intelligence for effective university teaching and learning. *IgMin Research*, 2(2), pp. 102–112. https://doi.org/10.61927/igmin151

Andrejevic, M. & Selwyn, N. 2020. Facial recognition technology in schools: critical questions and concerns. *Learning, Media and Technology*, 45(2), pp. 115–128. https://doi.org/10.1080/17439884.2020.1686014

Bond, M. *et al*. 2024. A meta systematic review of artificial intelligence in higher education: a call for increased ethics, collaboration, and rigour. *International Journal of Educational Technology in Higher Education*, 21, 4. https://doi.org/10.1186/s41239-023-00436-z

Dabis, A. & Csáki, C. 2024. AI and ethics: Investigating the first policy responses of higher education institutions to the challenge of generative AI. *Humanities and Social Sciences Communications*, 11, 1006. https://doi.org/10.1057/s41599-024-03526-z

Dawson, P. 2021. *Defending assessment security in a digital world: Preventing e-cheating and supporting academic integrity in higher education*. Milton Park: Routledge. https://doi.org/10.4324/9780429324178

Dixon, N., Howe, R. & Richter, U.M. 2025. Exploring learning analytics practices and their benefits through the lens of three case studies in UK higher education. *Research in Learning Technology*, 33. https://doi.org/10.25304/rlt.v33.3127

Dobrić Jambrović, D. 2026. Enhancing digital maturity in Croatian higher education: Recommendations based on European best practices. In: Ribeiro, H., Nunes Resende, D. & Omazić, M.A. (eds) *Digital & Sustainable Financial Literacy for Inclusive Social Development: Challenges, Innovations & Impact.* Aveiro: Varaždin Development and Entrepreneurship Agency and GOVCOPP - University of Aveiro, pp. 38–48.

Dujmović Bocka, R., Romić, D. & Vajda Halak, Ž. 2024. Primjena ChatGPT-a u javnoj upravi – mogućnosti za poboljšanje. In: S. Stojanović (ed.), *Zbornik radova 14. međunarodne znanstvene i stručne konferencije „Razvoj javne uprave"*. Vukovar: Veleučilište "Lavoslav Ružička", pp. 805–819.

Dwivedi, Y. K. *et al*. 2023. Opinion Paper: "So What If ChatGPT Wrote It?" Multidisciplinary perspectives on opportunities, challenges and implications of generative conversational AI for research, practice and policy. *International Journal of Information Management*, 71. https://doi.org/10.1016/j.ijinfomgt.2023.102642

Fahd, K., Miah, S. & Ahmed, K. 2021. Predicting student performance in a blended learning environment using learning management system interaction data. *Applied Computing and Informatics*, 21(3–4), pp. 220–231. https://doi.org/10.1108/ACI-06-2021-0150

Herodotou, C. *et al*. 2019. A large-scale implementation of predictive learning analytics in higher education: the teachers' role and perspective. *Educational Technology Research and Development*, 67, pp. 1273–1306. https://doi.org/10.1007/s11423-019-09685-0

Holmes, W., Bialik, M. & Fadel, C. 2022. *Artificial Intelligence in Education: Promises and Implications for Teaching and Learning*. Boston: Center for Curriculum Design.

Kadel, R. *et al*. 2024. *Crafting tomorrow's evaluations: Assessment design strategies in the era of generative AI*. Available at: https://arxiv.org/abs/2405.01805 (30. 3. 2026).

Lepik-Verliin, K., Hint, H. & Leijen, D.A.J. 2025. *AI Competence Frameworks and Policies in Higher Education: Analysis and Recommendations. National Report by University of Tartu*. Available at: https://www.wu.ac.at/fileadmin/wu/o/wu4juniors/LLE/FLAIR/National_Report_Estonia.pdf (21. 3. 2026).

Lim, C.T. *et al*. 2021. A comprehensive review of automated essay scoring (AES) research and development. *Pertanika Journal of Science & Technology*, 29(3), pp. 1875–1899. https://doi.org/10.47836/pjst.29.3.27

Liu, Z. *et al*. 2023. Effects of computer-based mind mapping on students' reflection, cognitive presence, and learning outcomes in an online course. *Distance Education*, 44(3), pp. 544–562. https://doi.org/10.1080/01587919.2023.2226615

Mejias, U. A. & Couldry, N. 2024. *Data Grab: The New Colonialism of Big Tech and How to Fight Back*. London: Virgin Digital. https://doi.org/10.7208/chicago/9780226832319.001.0001

Mićunović, M. & Bosančić, B. 2025. Umjetna inteligencija i akademski integritet i čestitost: etičke implikacije integracije generativne umjetne inteligencije u sustav visokog obrazovanja i znanosti. *Vjesnik bibliotekara Hrvatske*, 68(3), pp. 1–35. https://doi.org/10.30754/vbh.68.3.1578

Mrnjaus, K., Vrcelj, S. & Kušić, S. 2023. Umjetna inteligencija i obrazovanje: suparnici ili saveznici?. *Jahr*, 14(2), pp. 429–445. https://doi.org/10.21860/j.14.2.9

Okonkwo, C.W. & Ade-Ibijole, A. 2021. Chatbots in education: A systematic review. *Computers and Education Artificial Intelligence*, 2, 100033. https://doi.org/10.1016/j.caeai.2021.100033

Ouatik, F. *et al*. 2022. Predicting Student Success Using Big Data and Machine Learning Algorithms. *International Journal of Emerging Technologies in Learning*, 17(12), pp. 236–251. https://doi.org/10.3991/ijet.v17i12.30259

Ouyang, F., Xu, W. & Cukurova, M. 2023. An artificial intelligence-driven learning analytics method to examine the collaborative problem-solving process from the complex adaptive systems perspective. *International Journal of Computer-Supported Collaborative Learning*, 18, pp. 39–66. https://doi.org/10.1007/s11412-023-09387-z

Pado, U., Eryilmaz, Y. & Kirschner, L. 2023. Short-Answer Grading for German: Addressing the Challenges. *International Journal of Artificial Intelligence in Education*, 34(4), pp. 1321–1352. https://doi.org/10.1007/s40593-023-00383-w

Pedro, A. *et al*. 2026. Use and acceptance of generative artificial intelligence in Portuguese higher education students. *Sustainability*, 18(7), 3209. https://doi.org/10.3390/su18073209

Regulation (EU) 2024/1689 of the European Parliament and of the Council (2024) establishing harmonized rules on artificial intelligence and amending Regulations (EC) No. 300/2008 and others. Official Journal of the European Union, L 168. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401689 (30. 3. 2026).

Salloum, S.A. *et al*. 2025. Emotion recognition for enhanced learning: using AI to detect students' emotions and adjust teaching methods. *Smart Learning Environments*, 12, 21. https://doi.org/10.1186/s40561-025-00374-5

Schuetze, H.G., de Vries, W. & Mendiola, G.A. 2024. Digitalization of higher education: An introduction. *Journal of Comparative & International Higher Education*, 16(2), pp. 6–12. https://doi.org/10.32674/jcihe.v16i2.5975

Sclater, N. 2017. *Learning Analytics Explained*. 1st ed. Routledge. https://doi.org/10.4324/9781315679563

UNESCO. 2021. *AI and education: Guidance for policy-makers*. Paris: UNESCO Publishing.

Vold, T. & Eikset, A.S.S. 2024. Use of AI in Education – A Case Study from Norway. In: *2024 21st International Conference on Information Technology Based Higher Education and Training (ITHET)*. Paris, pp. 1–5. https://doi.org/10.1109/ITHET61869.2024.10837660

Wahid, T.T. 2024. *Study of ethical guidelines for AI tools in higher education in Nordic region*. Master thesis. Available at: https://lutpub.lut.fi/bitstream/handle/10024/167948/Wahid.Tamanna_Masters%20Thesis.pdf (21. 3. 2026).

Yang, C., Wu, J. & Ogata, H. 2024. Learning analytics dashboard-based self-regulated learning approach for enhancing students' e-book-based blended learning. *Education and Information Technologies*, 30, pp. 35–56. https://doi.org/10.1007/s10639-024-12913-7

Zawacki-Richter, O. *et al*. 2019. Systematic review of research on artificial intelligence applications in higher education – where are the educators?. *International Journal of Educational Technology in Higher Education*, 16(1), 39. https://doi.org/10.1186/s41239-019-0171-0

***Other sources***

European Commission. 2019. Ethics guidelines for trustworthy AI. Available at: https://data.europa.eu/doi/10.2759/346720 (30. 3. 2026).

European Commission. 2021. *Coordinated Plan on Artificial Intelligence*. Available at: https://digital-strategy.ec.europa.eu/en/library/coordinated-plan-artificial-intelligence (30. 3. 2026).

European Data Protection Board (EDPB). 2020. *Guidelines 4/2019 on Article 25 Data Protection by Design and by Default*. Brussels: EDPB.

Faculty of Economics Guidelines for the Responsible Use of Artificial Intelligence. Available at: https://www.efos.unios.hr/wp-content/uploads/2025/12/EFOS-Smjernice-o-odgovornom-koristenju-umjetne-inteligencije.pdf (30. 3. 2026).

Faculty of Electrical Engineering and Computing Policy on the Appropriate Use of Artificial Intelligence. Available at: https://www.fer.unizg.hr/_news/132335/Politika%20primjerenog%20koristenja%20umjetne%20inteligencije%20na%20Fakultetu%20elektrotehnike%20i%20računarstva.pdf (30. 3. 2026).

Faculty of Food Technology and Biotechnology Guidelines for the Use of Artificial Intelligence Tools. Available at: https://www.pbf.unizg.hr/o_fakultetu/dokumenti/smjernice_za_koristenje_alata_umjetne_inteligencije_suzgpbf (30. 3. 2026).

Faculty of Health Sciences. Available at: https://ozs.unist.hr/hr/?preview=1&option=com_dropfiles&format=&task=frontfile.download&catid=166&id=4163&Itemid=1000000000000 (30. 3. 2026).

Faculty of Humanities and Social Sciences in Osijek Guidelines for the Use of Artificial Intelligence. Available at: https://www.ffos.unios.hr/odsjek-za-informacijske-znanosti/studenti/smjernice-za-koristenje-umjetne-inteligencije/ (30. 3. 2026).

Faculty of Humanities and Social Sciences in Split Guidelines for the Proper Use of Artificial Intelligence Tools. Available at: https://www.ffst.unist.hr/_download/repository/Smjernice%20za%20primjereno%20koristenje%20alata%20UI-ja%20-%20za%20Vijece.pdf (30. 3. 2026).

Faculty of Organization and Informatics Guidelines for the Use of Artificial Intelligence in Teaching and Student Work. Available at: https://www.foi.unizg.hr/sites/default/files/smjernice_za_koristenje_umjetne_inteligencije_u_nastavi_i_studentskim_radovima_suzg_foi.pdf (30. 3. 2026).

Faculty of Teacher Education in Zagreb Decision on the Adoption of Guidelines for the Use of Artificial Intelligence Tools in Teaching. Available at: https://www.ufzg.unizg.hr/odluke/odluka-o-prihvacanju-smjernica-za-koristenje-alata-umjetne-inteligencije-u-nastavi/ (30. 3. 2026).

Formative Writing Assessment: Automated Feedback Using Artificial Intelligence (2022–2026). Available at: https://www.leibniz-ipn.de/en/research/projects/format-1 (30. 3. 2026).

KU Leuven. 2026. *General guidelines for permitted use of GenAI*. Available at: https://www.kuleuven.be/english/genai/general-guidelines (15. 3. 2026).

Lynch, H. 2026. *AI Challenges Core Assumptions in Education*. Available at: https://hai.stanford.edu/news/ai-challenges-core-assumptions-in-education (30. 3. 2026).
Ministarstvo pravosuđa, uprave i digitalne transformacije. *Strategija digitalne Hrvatske za razdoblje do 2032. godine*. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2023_01_2_17.html (30. 3. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch4

***Dávid MOLNÁR****

# FROM COMPLIANCE TO STATE CAPACITY: AI REGULATION IN THE EU AND UAE

*Rapid advances in artificial intelligence challenge the capacity of legal systems to regulate emerging technologies without undermining innovation. This paper examines two contrasting regulatory paradigms in public and private law: the compliance-oriented model of the European Union and the governance-driven approach of the United Arab Emirates. The EU framework is characterized by ex ante risk classification, horizontal regulation, and strong rights-based safeguards, aiming to mitigate systemic risks but often increasing regulatory friction, while the Emirati model relies on centralized coordination, regulatory sandboxes, and adaptive legal instruments that integrate artificial intelligence into state capacity and economic policy. The paper proceeds from the hypothesis that the design of regulation influences the pace of innovation, the level of legal certainty, and the extent to which artificial intelligence becomes a tool of public authority and private economic growth, arguing that AI regulation is no longer merely a question of legal restraint but of strategic governance. The research is conducted using a comparative method, a normative-dogmatic method, and a content analysis method.*

***Keywords:*** artificial intelligence regulation, public law, private law, EU, UAE.

## 1. INTRODUCTION

The vertiginous and inexorably accelerative ontogenesis of artificial intelligence systems, manifesting in epistemic opacity conjoined with near-limitless scalability and an inherent duality of emancipatory telos and latent perniciousness, has caught our legal architectures somewhat off guard. What began as a seemingly benign wave of technological exuberance has swiftly unmasked the structural limitations of many of our erstwhile normative instruments when confronted with phenomena that defy perspicuous interpretation while oscillating precariously between societal amelioration and substantial individual and collective harm (Ebers, 2025, pp. 684–689; Rangone & Megale, 2025, pp. 1082–1087; Bignami *et al*., 2025; Basu & Dave, 2025).

* University of Pécs, Faculty of Law, Hungary, ORCID: https://orcid.org/0009-0000-5836-4825, e-mail: *molnardavid836@gmail.com*

As these developments have unfolded, the pecuniary vector has assumed an especially salient valence. By 2025, the global artificial intelligence market had burgeoned to a valuation of USD 390.91 billion, with extrapolations forecasting an ascent to USD 3,497.26 billion by 2033 at a compound annual growth rate of 30.6 percent (Grand View Research, 2025). Contemporaneous econometric prognostications from IDC anticipate that investments in AI solutions and ancillary services may precipitate a cumulative global economic imprint exceeding USD 22.3 trillion by 2030—an increment tantamount to approximately 3.7 percent of projected global GDP—thereby amplifying apprehensions surrounding algorithmic partiality, the erosion of informational privacy and broader societal transformation (International Data Corporation, 2025; Graux *et al.*, 2025, pp. 8–12).

These impressive metrics, while ostensibly evincing prodigious latent capacity for augmenting operational efficiencies, concurrently intensify concerns regarding algorithmic partiality, informational privacy erosion and broader societal metamorphoses (Ebers, 2025, pp. 684–689; Rangone & Megale, 2025, pp. 1082–1087). Different jurisdictions, attuned to their idiosyncratic governmental morphologies, economic imperatives and geopolitical exigencies, articulate responses that evince substantial regulatory heterogeneity (Bignami *et al.*, 2025; Albous, Al-Jayyousi & Stephens, 2025, pp. 2389–2396).

Two conspicuously antithetical paradigms of AI governance command particular scholarly exegesis. The European Union has promulgated a meticulously architected, compliance-centric edifice through Regulation (EU) 2024/1689, denominated the Artificial Intelligence Act, which attained juridical efficacy on 1 August 2024 (European Parliament and Council of the European Union, 2024, Art. 113). This instrument delineates a quadripartite taxonomy of risk—unacceptable, high, limited and minimal—whilst superimposing incrementally stringent obligations across the entirety of the AI lifecycle. It proscribes practices such as specified forms of social scoring and manipulative techniques, while encumbering high-risk modalities with strictures encompassing risk-management protocols, data-governance regimes, transparency imperatives, conformity assessments and human supervisory mechanisms (European Parliament and Council of the European Union, 2024, Arts. 5–6, 9–15, 43; Ebers, 2025, pp. 684–689).

Interwoven symbiotically with the General Data Protection Regulation and the EU Charter of Fundamental Rights, the framework accords pre-eminence to the safeguarding of individual entitlements and the exigencies of democratic accountability (European Parliament and Council of the European Union, 2024, Art. 1; Graux *et al.*, 2025, pp. 20–21). The quantum of compliance exigencies—preliminary assessments of the Commission's original proposal estimated cumulative economy-wide costs of approximately EUR 31 billion over five years and compliance expenditure of up to EUR 400,000 for an SME introducing a single high-risk AI product requiring a quality-management system—provokes well-founded reservations that, while potentially fortifying societal fiducia in the longue durée, they simultaneously portend regulatory encumbrances capable of attenuating innovation velocity amid an epoch of escalating transnational technological contestation (Mueller, 2021, p. 3; Ebers, 2025, pp. 692–697).

By stark juxtaposition, the United Arab Emirates has embraced a more protean, capacity-augmenting modality predicated upon the UAE National Strategy for Artificial Intelligence 2031, announced in 2017 (United Arab Emirates, 2017, pp. 8–11). Orchestration emanates centrally from the Minister of State for Artificial Intelligence and the UAE Artificial Intelligence and Blockchain Council, buttressed by industry pilots and predominantly hortatory ethical

precepts, inclusive of the 2024 UAE AI Charter. Eschewing a predominantly prohibitive orientation, this paradigm conceptualises AI as a pivotal catalyst for economic diversification, amelioration of public services and augmentation of human capital, with projected opportunities encompassing up to AED 335 billion in additional economic output (United Arab Emirates, 2017, pp. 10–11; United Arab Emirates, 2024).

The celerity of uptake furnishes corroborative evidence: by the terminus of 2025, approximately 64 percent of the UAE's working-age population engaged with generative AI—the highest rate among the jurisdictions examined—with pervasive integration observable within governmental and economic structures (Microsoft AI Economy Institute, 2026, p. 6).

At the same time, the lighter accountability mechanisms raise legitimate concerns regarding weaker enforcement and the risk of "ethics washing" in a predominantly soft-law environment (Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414). This divergence raises the central question explored in this article: how do these contrasting regulatory philosophies—one centred on strict ex ante compliance and the other on strategic capacity-building—affect the pace of AI innovation, the degree of legal certainty and the way artificial intelligence evolves into a tool that serves both public power and private economic growth?

AI regulation has manifestly transcended the circumscribed ambit of risk attenuation, metamorphosing into a strategic vector of statecraft within the digital epoch. The EU modality, by privileging robust safeguards, cultivates societal fiducia and normative consonance, albeit at the potential cost of administrative encumbrances that may retard deployment. Conversely, the UAE modality demonstrates considerable efficacy in expediting assimilation and pursuing economic dividends, whilst nonetheless eliciting pertinent interrogations concerning enforcement vigour and congruence with nascent international benchmarks (Ebers, 2025, pp. 695–697; Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414; Rangone & Megale, 2025, pp. 1094–1097).

## 2. THE EUROPEAN UNION'S COMPLIANCE-ORIENTED MODEL

The European Union's regulatory response to artificial intelligence constitutes one of the most ambitious and philosophically charged attempts in contemporary legal history to impose a coherent horizontal order upon a technology that inherently resists easy categorisation. The architecture of Regulation (EU) 2024/1689 reflects a deliberate and almost constitutional ambition: not merely to mitigate risk, but to embed the telos of democratic dignity and fundamental rights within algorithmic systems themselves (European Parliament and Council of the European Union, 2024, Art. 1; Bignami *et al.*, 2025; Rangone & Megale, 2025, pp. 1082–1087). This ambition, however, raises a critical question: does such an extensive framework strengthen the rule of law, or does it risk constraining innovation through an expanding system of ex ante obligations (Ebers, 2025, pp. 684–689; Graux *et al.*, 2025, pp. 8–12)?

### *2.1. The Artificial Intelligence Act: Risk Classification and Horizontal Regulation*

At its core, the Act establishes a quadripartite taxonomy of risk—unacceptable, high, limited and minimal—forming the normative foundation of the regime (European Parliament and Council of the European Union, 2024, Recital 26 and Arts, 5–6; Smuha, 2025, pp. 1238–1245; Ebers, 2025, pp. 684–686). Unacceptable-risk practices, such as specified forms of social

scoring and manipulative or deceptive techniques, are subject to categorical prohibition. This reflects a clear policy judgment that certain applications are incompatible with fundamental rights protected under the EU Charter of Fundamental Rights and the European Convention on Human Rights (European Parliament and Council of the European Union, 2024, Art. 5; Rangone & Megale, 2025, pp. 1082–1087).

High-risk systems—the regulatory centrepiece—include applications in employment, education, law enforcement, migration, access to essential public and private services and the administration of justice, as specified in Annex III. Providers and deployers are subject to extensive ex ante obligations, including risk-management systems, data-governance requirements, transparency obligations, conformity assessments and human-oversight mechanisms (European Parliament and Council of the European Union, 2024, Arts. 6, 9–15, 26, 43, Annex III; Graux *et al*., 2025, pp. 20–21). These obligations collectively establish a normative framework designed to preserve human control, dignity and equality.

The relationship with the General Data Protection Regulation is particularly significant. The AI Act builds upon and operates alongside GDPR principles such as transparency, accountability, data quality and the protection of affected individuals. The interaction is especially apparent where certain deployers must conduct a fundamental-rights impact assessment under Article 27 of the AI Act while also being required to undertake a data protection impact assessment under Article 35 GDPR. Differences in scope, risk classification and supervisory procedure may consequently create duplication and uncertainty for regulated organisations (European Parliament and Council of the European Union, 2024, Art. 27; van Kolfschooten & van Oirschot, 2024; Graux *et al*., 2025, pp. 31–35).

Financial implications are considerable. An assessment of the European Commission's original proposal estimated that the contemplated regime could impose approximately EUR 31 billion in aggregate costs on the European economy over five years and reduce investment in AI by almost 20 percent. It further estimated that an SME introducing one high-risk AI product requiring a quality-management system could face compliance costs of up to EUR 400,000 (Mueller, 2021, p. 3). These figures preceded the adoption of the final Regulation and should therefore be treated as projections concerning the Commission's proposal rather than measured costs of the AI Act in its present form. Nevertheless, they reflect a clear trade-off: enhanced legal certainty and rights protection on one side, and potential constraints on innovation and competitiveness on the other (Ebers, 2025, pp. 692–697; Graux *et al*., 2025, pp. 8–12).

### *2.2. Strengths, Limitations and Broader Implications*

The principal strength of the EU model lies in its commitment to rights protection and legal certainty. By relying on ex ante regulation rather than exclusively upon ex post liability, the framework seeks to prevent harm before it occurs and to foster trust in AI systems (European Parliament and Council of the European Union, 2024, Arts. 5, 9–15, 27; Ebers, 2025, pp. 684–689). Its extraterritorial scope—applying in specified circumstances to providers and deployers established outside the Union—further reinforces its ambition to establish influential regulatory standards similar to the impact of the General Data Protection Regulation (European Parliament and Council of the European Union, 2024, Art. 2; Stampernas & Lambrinoudakis, 2025).

However, significant limitations remain. Compliance costs and administrative burdens may create a chilling effect, particularly for smaller innovators, potentially discouraging

investment or delaying beneficial AI deployment within the European Union. The assessment of the original proposal projected that AI investment could decline by almost 20 percent, although this estimate should not be treated as evidence of the final Regulation's actual economic effects (Mueller, 2021, p. 3). Moreover, the simultaneous application of the AI Act, GDPR, Digital Services Act, Data Act and cybersecurity legislation may produce duplicative, inconsistent or unclear requirements, disproportionately affecting SMEs and start-ups with limited compliance capacity (Graux *et al*., 2025, pp. 8–12).

Future judicial interpretation—especially preliminary references to the Court of Justice of the European Union concerning the scope of high-risk obligations and the balance between innovation and fundamental rights—will play a decisive role in shaping the effectiveness of the framework. Experience under EU data-protection law, including the Court's approach to fundamental rights and international data transfers in Schrems II, demonstrates the significant role that judicial review may assume in defining the territorial reach and substantive requirements of European digital regulation (*Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems*, 2020).

Ultimately, the EU model reflects a fundamental normative choice: technological progress must not come at the expense of human dignity and democratic accountability. While it enhances legal certainty and societal trust, it may also slow innovation and affect global competitiveness where compliance requirements are applied too rigidly or without sufficient regard to the benefits and actual risks of individual systems. Whether this balance proves sustainable remains an open question in contemporary legal scholarship (Ebers, 2025, pp. 692–703; Rangone & Megale, 2025, pp. 1092–1097; Graux *et al*., 2025, pp. 78–82).

## 3. THE UNITED ARAB EMIRATES' GOVERNANCE-DRIVEN APPROACH

The United Arab Emirates has deliberately chosen a governance-driven model that treats artificial intelligence less as a risk to be tightly contained and more as a strategic instrument for enhancing state capacity and accelerating economic transformation. This approach prioritises rapid integration and developmental outcomes over comprehensive ex ante prohibitions. It reflects a conscious policy choice to harness artificial intelligence as a tool of national development rather than primarily as an object of regulatory restraint. The model is characterised by a layered structure combining centralised strategic direction with flexible implementation, creating a dynamic feedback loop not replicated in more uniform horizontal regulatory systems (United Arab Emirates, 2017, pp. 8–11; Albous, Al-Jayyousi & Stephens, 2025, pp. 2398–2400).

### *3.1. National AI Strategy and Institutional Framework*

The foundation of the Emirati model is the UAE National Strategy for Artificial Intelligence 2031 (استراتيجية الإمارات للذكاء الاصطناعي 2031), announced in 2017 and elaborated in the national strategy document issued in 2018 (United Arab Emirates, 2017, pp. 8–11). The strategy reflects a broader conception of artificial intelligence as a unified national project. In this context, technological development is closely linked to long-term state-building, economic diversification, public-sector modernisation and the development of educational and social opportunities (United Arab Emirates, 2017, pp. 8–11).

At the structural level, the framework operates across multiple layers. At the micro level, federal and local entities retain flexibility to adapt implementation to their institutional and

sectoral priorities. At the macro level, the UAE presents itself as a coherent actor in global technological governance, coordinated through the Minister of State for Artificial Intelligence and the UAE Artificial Intelligence and Blockchain Council (United Arab Emirates, 2017, pp. 8–11; Albous, Al-Jayyousi & Stephens, 2025, pp. 2398–2400).

An additional normative layer is provided by the 2024 UAE Charter for the Development and Use of Artificial Intelligence (officially ميثاق الإمارات لتطوير واستخدام الذكاء الاصطناعي). The Charter reflects a form of soft-law instrument grounded in normative commitment rather than comprehensive binding legislative force. This approach allows for flexibility and institutional adaptation while avoiding the rigidity of uniform horizontal statutory regulation (United Arab Emirates, 2024; Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414).

At the legislative level, Federal Decree by Law No. 45 of 2021 Concerning the Protection of Personal Data provides the primary federal data-governance framework. Although the PDPL is not an AI-specific statute, it establishes baseline requirements concerning lawful and transparent processing, purpose limitation, data minimisation, accuracy, security and organisational accountability, thereby providing safeguards relevant to AI deployment in the public and private sectors (United Arab Emirates, 2021, Arts 5–8).

Empirical indicators suggest that this model has facilitated rapid adoption. By the end of 2025, approximately 64 percent of the UAE's working-age population had engaged with generative artificial intelligence technologies, placing the country first among the jurisdictions examined in the Microsoft report (Microsoft AI Economy Institute, 2026, p. 6).

### *3.2. Regulatory Sandboxes, Adaptive Tools and State Capacity*

A defining feature of the UAE approach is the use of testbeds, industry pilots and controlled environments for experimentation and iterative development under institutional supervision. Their function is to reduce uncertainty while enabling real-world testing of artificial intelligence systems across sectors such as energy, healthcare, transportation, tourism and public administration (United Arab Emirates, 2017, pp. 10–11).

The broader regulatory ecosystem is characterised by adaptive legal instruments and targeted legislative safeguards. Rather than relying upon a single comprehensive AI statute, the system combines strategic objectives, horizontal data-protection obligations and sector-specific implementation. The PDPL permits personal-data processing where an appropriate legal basis exists, while maintaining protections concerning transparency, security, automated decision-making and high-risk processing (United Arab Emirates, 2021, Arts. 5–8, 13, 18, 20–23; Bahgat, 2025, pp. 8–23).

Federal and emirate-level initiatives further reinforce this structure. The UAE Artificial Intelligence and Blockchain Council coordinates implementation across federal and local entities, enabling national objectives to be translated into projects adapted to specific governmental and sectoral contexts. This demonstrates a decentralised yet coordinated approach to embedding artificial intelligence within national development priorities (United Arab Emirates, 2017, pp. 8–11).

Emerging judicial and administrative practices provide insight into the model's application. The DIFC Courts' Practical Guidance Note No. 2 of 2023 recognises that large language models and generative AI may assist parties in preparing and presenting cases, provided that appropriate human oversight, transparency, verification, confidentiality and professional safeguards are maintained (DIFC Courts, 2023).

The principal strength of the Emirati model lies in its capacity to integrate artificial intelligence into state functions and economic policy, thereby enhancing administrative efficiency and innovation potential. At the same time, the model raises important questions concerning accountability, transparency and the sufficiency of safeguards. The reliance on soft-law instruments and experimental frameworks may lead to inconsistencies in enforcement and potential gaps in rights protection (Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414).

In comparative terms, the UAE model reflects a prioritisation of flexibility, speed and state capacity. This entails a trade-off between accelerated innovation and the level of ex ante legal certainty characteristic of more compliance-oriented frameworks. The sustainability of this balance will depend on the continued evolution of institutional oversight and the capacity to adapt regulatory tools in response to emerging risks.

## 4. COMPARATIVE ANALYSIS: DIVERGENT PARADIGMS AND THEIR IMPLICATIONS

A comparison of the two models reveals not simply surface-level differences but deeper philosophical and practical choices that each one embodies. At the micro level, the first principles underpinning each system reflect fundamentally different conceptions of the relationship between law, technology and human agency. At the macro level, these choices translate into distinct legal architectures, national objectives and long-term governance strategies. The analysis below examines both levels, weighing the respective strengths and risks associated with each model.

### *4.1. Micro-level First Principles: Rights Containment Versus Strategic Empowerment*

At its most fundamental level, the European Union model is based on the principle of rights containment. The Artificial Intelligence Act treats artificial intelligence as a potential source of risk to individual dignity, safety and democratic values, assigning to law the task of establishing clear boundaries through ex ante obligations (European Parliament and Council of the European Union, 2024, Arts. 5–6; Smuha & Yeung, 2025, pp. 228–240; Ebers, 2025, pp. 684–689; Rangone & Megale, 2025, pp. 1082–1087). The four-tier risk taxonomy, the prohibitions on specified forms of social scoring and manipulative techniques, and the detailed requirements for high-risk systems all derive from this principle: technological development must not undermine the human person or the rule of law (European Parliament and Council of the European Union, 2024, Arts. 5, 9–15; *Digital Rights Ireland Ltd v Minister for Communications*, 2014; *S. and Marper v United Kingdom*, 2008; *Tele2 Sverige AB v Post- och telestyrelsen*, 2016; *Big Brother Watch and Others v United Kingdom*, 2021). While this approach is principled and protective, it may also produce a regulatory posture that assumes the necessity of extensive safeguards unless risks are adequately mitigated (Ebers, 2025, pp. 692–697; Graux *et al*., 2025, pp. 8–12).

By contrast, the United Arab Emirates model is grounded in the principle of strategic empowerment. Artificial intelligence is treated not primarily as a risk to be contained but as a lever for enhancing state capacity, economic diversification and national resilience. Strategic frameworks such as the UAE National Strategy for Artificial Intelligence 2031 and the 2024 UAE Charter for the Development and Use of Artificial Intelligence position technology as an instrument of national development. The use of testbeds, industry pilots and the flexible

structure of the PDPL framework reflect a regulatory approach that prioritises experimentation and adaptive governance (United Arab Emirates, 2017, pp. 2–3; United Arab Emirates, 2024; United Arab Emirates, 2021, Arts. 5–8, 13, 18, 20–23). While this model promotes innovation and rapid deployment, it also raises concerns regarding accountability, stakeholder participation and the consistency of safeguards (Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414).

### *4.2. Macro-level Legal Context, Goals and Systemic Learnings*

At the macro level, these first principles translate into distinct regulatory strategies. The European Union has developed a horizontal, rights-based framework aimed at establishing consistent standards while protecting fundamental rights. Its objectives include normative coherence, legal certainty and the preservation of democratic values in the digital age. The strength of this approach lies in its structured and legally enforceable character; however, it may also generate regulatory friction, overlapping obligations and potential competitive disadvantages, particularly for smaller enterprises (European Parliament and Council of the European Union, 2024, Art. 1; Ebers, 2025, pp. 692–697; Graux *et al*., 2025, pp. 8–12).

The UAE model, by contrast, is governance-driven and development-oriented. Its primary objective is to utilise artificial intelligence as an engine of economic diversification and state modernisation in a post-oil context. The institutional architecture combines central strategy with implementation by federal and local entities, supported by policy instruments, industry pilots and existing legislation. This structure enables comparatively rapid policy iteration, where experience from practical implementation may inform wider national strategies. Judicial and administrative guidance further contributes to this evolving framework, with instruments such as the DIFC Courts' guidance on generative AI illustrating a pragmatic approach that permits technological assistance while preserving human responsibility, transparency and professional safeguards (United Arab Emirates, 2017, pp. 4–8; Albous, Al-Jayyousi & Stephens, 2025, pp. 2398–2400; DIFC Courts, 2023).

### *4.3. Mutual Learnings: What Each Model Can Offer the Other*

The comparative perspective highlights opportunities for mutual learning. The UAE's adaptive feedback mechanisms may offer the European Union tools to mitigate regulatory rigidity. The use of controlled experimentation, industry pilots, iterative policy development and responsiveness to empirical outcomes could enhance flexibility without necessarily undermining the protection of fundamental rights (United Arab Emirates, 2017, pp. 10–11; Albous, Al-Jayyousi & Stephens, 2025, pp. 2398–2400).

Conversely, elements of the European Union framework may strengthen the UAE model. The EU's structured conformity-assessment procedures and its integration with data-protection and fundamental-rights principles provide robust mechanisms for accountability and oversight. Incorporating elements such as clearer transparency requirements, systematic risk-management procedures and enhanced human oversight into the UAE's strategic and soft-law framework could reduce risks associated with insufficient safeguards, including concerns related to "ethics washing" (European Parliament and Council of the European Union, 2024, Arts. 9–15, 27, 43; Graux *et al*., 2025, pp. 20–21, 31–35; Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414).

Neither model is without limitations. The EU prioritises rights protection and legal certainty, potentially at the expense of speed and innovation. The UAE prioritises flexibility and

rapid development, potentially at the expense of long-term accountability and consistency of enforcement. A balanced approach may emerge through hybrid models that combine the EU's normative rigour with the UAE's adaptive capacity. Such a synthesis could provide a viable pathway for jurisdictions seeking to reconcile technological innovation with legal accountability and democratic legitimacy in an increasingly complex regulatory environment.

## 5. CONCLUSION

The two models examined in this article embody fundamentally different responses to the same core question: what is the proper role of law in regulating a transformative technology such as artificial intelligence? The European Union adopts a model of rights containment, relying on a comprehensive ex ante framework that prioritises the protection of fundamental values, even at the possible cost of regulatory friction and slower innovation (European Parliament and Council of the European Union, 2024, Arts. 1, 5–6, 9–15; Ebers, 2025, pp. 692–697; Graux *et al*., 2025, pp. 8–12). The United Arab Emirates, by contrast, adopts a model of strategic empowerment, characterised by an adaptive and governance-driven approach that treats artificial intelligence as a lever for state capacity and economic diversification, achieving high levels of adoption while raising concerns regarding long-term accountability (United Arab Emirates, 2017, pp. 8–11; Microsoft AI Economy Institute, 2026, p. 6; Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414).

Neither model is without limitations. The European Union framework offers normative clarity and legal certainty, yet its compliance burden may create competitive disadvantages. The UAE model enables rapid deployment and practical integration, yet its reliance on flexible and policy-based instruments raises legitimate questions concerning enforcement consistency, stakeholder participation and the risk of "ethics washing" (Ebers, 2025, pp. 692–697; Graux *et al*., 2025, pp. 8–12; Albous, Al-Jayyousi & Stephens, 2025, pp. 2413–2414). These trade-offs suggest that neither purely compliance-oriented nor purely governance-driven approaches provide a complete solution.

A more balanced trajectory may lie in hybrid models that combine the EU's normative rigour with the UAE's adaptive regulatory mechanisms, including feedback loops, controlled experimentation and industry pilots. Such approaches may offer a more effective means of reconciling innovation with accountability in rapidly evolving technological environments.

Ultimately, artificial intelligence regulation has evolved beyond a question of risk management. It has become a strategic dimension of statecraft in the digital age. The regulatory choices made today will shape not only innovation dynamics and legal certainty, but also the broader societal outcomes associated with technological development. Future empirical research on measurable impacts—including productivity gains, investment flows, talent attraction, compliance costs and regulatory convergence—will be essential to inform these choices.

## LIST OF REFERENCES

Albous, M.R., Al-Jayyousi, O.R. & Stephens, M. 2025. AI governance in the GCC states: A comparative analysis of national AI strategies. *Journal of Artificial Intelligence Research*, 82, pp. 2389–2422. https://doi.org/10.1613/jair.1.17619

Bahgat, A. 2025. AI governance and data privacy in cross-border contexts: A comparative analysis of regulatory frameworks. *Journal of Data Protection & Privacy*, 8(1), pp. 8–23. https://doi.org/10.69554/BOJL3033

Basu, N. & Dave, R. 2025. Comparative analysis of laws in AI. *Journal of Lifestyle and SDGs Review*, 5(3), e05575. https://doi.org/10.47172/2965-730X.SDGsReview.v5.n03.pe05575

Bignami, E.G. *et al.* 2025. Balancing innovation and control: The European Union AI Act in an era of global uncertainty. *JMIR AI*, 4, e75527. https://doi.org/10.2196/75527

Ebers, M. 2025. Truly risk-based regulation of artificial intelligence: How to implement the EU's AI Act. *European Journal of Risk Regulation*, 16(2), pp. 684–703. https://doi.org/10.1017/err.2024.78

Graux, H. *et al.* 2025. *Interplay between the AI Act and the EU digital legislative framework*. Luxembourg: European Parliament, ECTI_STU(2025)778575. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2025/778575/ECTI_STU(2025)778575_EN.pdf

Rangone, N. & Megale, L. 2025. Risks without rights? The EU AI Act's approach to AI in law and rule-making. *European Journal of Risk Regulation*, 16(3), pp. 1082–1097. https://doi.org/10.1017/err.2025.13

Smuha, N.A. 2025. Regulation 2024/1689 of the European Parliament and of the Council of 13 June 2024 (EU Artificial Intelligence Act). *International Legal Materials*, 64(5), pp. 1234–1381. https://doi.org/10.1017/ilm.2024.46

Smuha, N.A. & Yeung, K. 2025. The European Union's AI Act: Beyond motherhood and apple pie? In: Smuha, N.A. (ed.), *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence*. Cambridge: Cambridge University Press, pp. 228–258. https://doi.org/10.1017/9781009367783.015

Stampernas, S. & Lambrinoudakis, C. 2025. A framework for compliance with Regulation (EU) 2024/1689 for small and medium-sized enterprises. *Journal of Cybersecurity and Privacy*, 5(3), 40. https://doi.org/10.3390/jcp5030040

van Kolfschooten, H. & van Oirschot, J. 2024. The EU Artificial Intelligence Act (2024): Implications for healthcare. *Health Policy*, 149, 105152. https://doi.org/10.1016/j.healthpol.2024.105152

***Reports and internet sources***

Grand View Research. 2025. *Artificial Intelligence Market Size, Share & Trends Analysis Report, 2025–2033*. Available at: https://www.grandviewresearch.com (7. 3. 2026).

International Data Corporation (IDC). 2025. *IDC Predicts AI Solutions and Services Will Generate Global Impact of $22.3 Trillion by 2030*. Available at: https://my.idc.com/getdoc.jsp?containerId=prUS53290725 (21. 3. 2026).

Microsoft AI Economy Institute. 2026. *Global AI Adoption in 2025 – A Widening Digital Divide*. Available at: https://www.microsoft.com/en-us/research/wp-content/uploads/2026/01/Microsoft-AI-Diffusion-Report-2025-H2.pdf (25. 3. 2026).

Mueller, B. 2021. *How Much Will the Artificial Intelligence Act Cost Europe?*. Washington, DC: Centre for Data Innovation. Available at: https://www2.datainnovation.org/2021-aia-costs.pdf (18. 3. 2026).

United Arab Emirates. 2017. *UAE National Strategy for Artificial Intelligence 2031*. Abu Dhabi: United Arab Emirates Minister of State for Artificial Intelligence Office. Available at: https://staticcdn.mbzuai.ac.ae/mbzuaiwpprd01/2022/07/UAE-National-Strategy-for-Artificial-Intelligence-2031.pdf (9. 3. 2026).

United Arab Emirates. 2024. *UAE AI Charter (Mīthāq al-Imārāt lil-Dhakāʾ al-Istināʾī)*. Abu Dhabi: Government of the United Arab Emirates. Available at: https://uaelegislation.gov.ae/en/policy/details/the-uae-charter-for-the-development-and-use-of-artificial-intelligence (27. 3. 2026).

### *Legal sources*

European Parliament and Council of the European Union. 2024. Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), *Official Journal of the European Union*, L 235/1. Available at: https://eur-lex.europa.eu/eli/reg/2024/1689/oj (14. 1. 2026).

United Arab Emirates. 2021. Federal Decree-Law No. 45 of 2021 Concerning the Protection of Personal Data (PDPL). Available at: https://uaelegislation.gov.ae/en/legislations/1972/download (14. 1. 2026).

### *Case law and official documents*

Court of Justice of the European Union. 2014. *Digital Rights Ireland Ltd v Minister for Communications*, Joined Cases C-293/12 and C-594/12, Judgment of 8 April 2014.

Court of Justice of the European Union. 2016. *Tele2 Sverige AB v Post- och telestyrelsen*, Joined Cases C-203/15 and C-698/15, Judgment of 21 December 2016.

Court of Justice of the European Union. 2020. *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems (Schrems II)*, Case C-311/18, Judgment of 16 July 2020.

DIFC Courts. 2023. *Practical Guidance Note No. 2 of 2023: Guidelines on the Use of Large Language Models and Generative AI in Proceedings Before the DIFC Courts*. Dubai: DIFC Courts. Available at: https://www.difccourts.ae/rules-decisions/practice-directions/practical-guidance-note-no-2-2023-guidelines-use-large-language-models-and-generative-ai-proceedings-difc-courts (14. 1. 2026).

European Court of Human Rights. 2008. *S. and Marper v United Kingdom*, Applications Nos. 30562/04 and 30566/04, Judgment of 4 December 2008.

European Court of Human Rights. 2021. *Big Brother Watch and Others v United Kingdom*, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment of 25 May 2021.

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch5

***Kamil STRZĘPEK****

# PROCEDURAL JUSTICE AND ARTIFICIAL INTELLIGENCE: INSIGHTS FROM A JUDICIAL PERSPECTIVE

*The legitimacy of any legal act is linked to the duty to state reasons, a procedural justice concept that ensures that the exercise of power is never arbitrary. AI systems, highly integrated into state governance, may generate conclusions through statistical patterns that frequently elude human comprehension. The first objective of this research is to analyse the judgment in the case State v. Loomis, specifically focusing on the judicial reasoning in the context of the use of AI systems in the judicial decision-making process. The second objective of this study is to outline the relationship between procedural justice (fairness) and AI systems within the context of the said process. The study employs the doctrinal legal method, with a focus on the analysis of the judicial precedent State v. Loomis alongside the relevant legal literature. The study shows that the judgment in the case State v. Loomis is important for at least two reasons.*

*Firstly, it concerns the procedural rights of an individual. Secondly, what is of even greater importance is that it may be potentially perceived as aimed at achieving a specific normative goal. Indeed, if AI systems used in the judicial decision-making process are based on selective or biased data, substantive fairness is at risk. AI systems are goal-oriented, and so is substantive fairness. It is possible that significant institutional changes, or even the emergence of new professions, will be necessary to align the above-mentioned goals.*

***Keywords:*** procedural justice, AI, procedural fairness, substantive fairness, algorithmic arbitrariness, human rights.

## 1. INTRODUCTION

The legitimacy of a state's action or inaction is linked to the duty to state reasons, a concept in procedural justice ensuring that the exercise of power is never arbitrary and that every state's official action (or inaction) can be traced to human-understandable legal principles (Fuller, 1978, p. 407). It therefore forms the basis for the principle that everyone has the right to know the reasons behind decisions that affect their freedom, property,

* PhD, Assistant Professor at Cardinal Stefan Wyszyński University in Warsaw, Poland, ORCID: https://orcid.org/0000-0001-9277-6057, e-mail: *k.strzepek@uksw.edu.pl*

or status. As public authorities increasingly rely on AI systems for decision-making processes, trust in both the law and the judicial practice may be declining, especially given the so-called black-box phenomenon.

The main research problem of this study is to determine whether a state's actions (or inactions) may be considered legitimate, and, if so, to what extent, when the state leaves the determination of rights and freedoms to uninterpretable machinery. The study explores a situation in which a public authority's decision is (or appears to be) based on statistical links that elude human comprehension.

To answer the above-mentioned question, two important concepts shall be defined. The first concept to be defined is the black-box phenomenon. A black-box system "is a system that can be viewed in terms of its input and output data, without any knowledge of its internal workings" (Kobiałka, 2025, p. 58). The second concept to be defined is the public order. Traditionally, the concept of public order is perceived as "the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles" (Inter-American Court of Human Rights, 1985, para. 64). The maintenance of public order rests primarily with the state, which fulfils this duty through the powers vested in it.

This research is based on the hypothesis that the integration of AI systems into the judiciary threatens to prioritise substantive outcomes over procedural fairness. Furthermore, it posits that without sufficient judicial AI literacy, the state may be unable to maintain the human-understandable legal principles essential for procedural justice.

The methodology employed in this study is the doctrinal legal method. The research focuses on an analysis of the judicial precedent *State v. Loomis* alongside the relevant legal literature.

It is to be noted that this study focuses on the practical implementation of the duty to state reasons, specifically within the context of the judgment under discussion. Consequently, theoretical assumptions are only outlined.

## 2. PROCEDURAL JUSTICE

The concept of natural justice is derived from the common law system, where it was developed through the case law of courts and tribunals. As Craig noted: "By the mid-19$^{th}$ century it was commonplace for case law to be framed in terms of the right to a hearing being applicable in all instances where there was some judicial, or quasi-judicial form of decision-making, and these terms were broadly construed" (2022, p. 7). The earliest case in which procedural limitations were "imposed" on an administrative authority was *Capel v. Child* (1832). In this case, a statute provided that upon certain conditions (without going into detail), a bishop may order the vicar of a parish to nominate an assistant, in default of which the bishop may appoint the assistant himself. The bishop appointed an assistant without giving the vicar a hearing. The vicar then brought an action against the assistant. The court ruled in favour of the vicar, holding that a hearing should have been given to him. It is acknowledged that the court engaged in a little "spurious legislation" (Tennant, 1928, p. 500).

Undoubtedly, the concept of natural justice is closely linked to the concept of procedural justice, or put differently, procedural fairness (Rawls, 1999, p. 11). The approach to

procedural justice, however, may vary significantly across different legal regions. In general, the legitimacy of the U.S. legal system is premised on its constitutional roots, which guarantee due process of law (Hollander-Blumoff, 2011, p. 177).

Hollander-Blumoff argued that procedural justice and procedural due process have conceptual overlaps (2011, p. 142). Firstly, both concepts emphasise the meaningful nature of participation in legal proceedings (Hollander-Blumoff, 2011, p. 142). Secondly, procedural justice and procedural due process share a focus on the importance of an impartial decisionmaker whose decisions are grounded in substantive rules rather than personal biases (Hollander-Blumoff, 2011, p. 142).

Hollander-Blumoff, however, claimed that where procedural due process elevates concerns about voice, neutrality, and trustworthiness to a constitutional level, procedural justice merely assesses the degree to which individuals feel those standards are met (2011, p. 130). Indeed, some recent studies emphasise the role of the opportunity to express oneself (freely) and to be heard, and the perception of the right to (procedural) due process. It is noted that people who can take advantage of this opportunity, rather than simply being questioned, have a better perception of their right to due process (Meers *et al*., 2025, p. 110). However, it is rightly pointed out that the opportunity to express oneself freely may best serve those who are capable of better articulating their expectations (Meers *et al*., 2025, p. 110). There is certainly a space for civic education. The education should address not only the rights of the individual, but also the manner in which they are exercised.

In the U.S., there are two Due Process Clauses in the Constitution. The first is in the Fifth Amendment: "No person […] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" (U.S. Constitution, 1791). The Supreme Court incorporated the Due Process Clause of the Constitution against the states *via* the Fourteenth Amendment (Freeman, 2016, p. 77). The Fourteenth Amendment states: "No State shall […] deprive any person of life, liberty, or property, without due process of law" (U.S. Constitution, 1791).

Crema & Solum argued that, originally, Due Process "meant writs" and was closely related to questions of jurisdiction, presence, and notice (2022, p. 484). These authors also argued that the Due Process Clause has two contemporary meanings: (1) legal procedures that are fair (procedurally just); (2) procedures that are required and/or permitted by positive law (Crema & Solum, 2022, p. 450). In the context of the substantive Due Process Clause, it is argued that under the Fourteenth Amendment, a law must be rationally related to a legitimate state purpose (Nelson, 2005).

Traditionally, the concept of substantive justice (fairness) has tended to provoke greater controversy. According to Mullan, "the adoption of fairness or natural justice as substantive standards of judicial review, far from advancing the prospects for a sound policy-based, well-articulated law of judicial review, will in fact lead to less precise language and thought and inevitably to inappropriate increases in the scope of judicial review" (1982, p. 298; Kotowski, 2026, p. 34 *et seq*.).

In Europe (at the European level), the concept of a fair hearing is derived from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 6), and Article 47 of the Charter of Fundamental Rights of the European Union (Charter

of Fundamental Rights of the European Union, 2012, Article 47). In the Convention, the key principle governing the application of Article 6 is fairness (*Gregačević v. Croatia*, 2012, para. 49). "The 'fairness' required by Article 6 § 1 is not 'substantive' fairness (a concept which is part-legal, part-ethical and can only be applied by the trial court), but 'procedural' fairness (European Court of Human Rights, 2013, p. 39). In criminal cases, Article 6 guarantees the right of an accused to participate effectively in a criminal trial. This includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings" (European Court of Human Rights, 2024, p. 34). Article 47 of the Charter states that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented" (CRF, 2012, Article 47). In the context of Article 47 of the Charter, Gentile noted that substantive and procedural fairness may be found. Substantive fairness guarantees that "the overall impact of policies is democratically sound, i.e. acceptable to the community of reference and with a general benefit for the citizens" while procedural fairness "is concerned with ensuring the effective participation of entities in decision-making processes" (Gentile, 2020, p. 22). The right to an effective remedy is also addressed in Article 13 of the Convention. The multifaceted nature of the concept of the right to a fair trial in the case-law of the Court of Justice of the European Union is emphasised (Gutman, 2019, p. 884 *et seq*.). On the one hand, there is the Court's attempt to define the very "essence" of the right enshrined in Article 47 of the Charter (Gutman, 2019, p. 903). On the other hand, the key challenge remains the further clarification of the relationship between this right and the general principle of EU law effectiveness, ensuring that the protection of the individual is not merely theoretical but practical and effective (Gutman, 2019, p. 903).

In closing this part, it may be claimed that procedural rules answer the question "how" the proceedings should be: how those rules should posit a judge and an individual within and based on law. It is to ensure that the individual remains a subject of the proceedings rather than a mere object of the legal "machinery". Substantive rules are rather connected with the question "what" normative goal a judgment or decision should effectuate (Naudts & Vedder, 2025, p. 80).

## 3. PROCEDURAL JUSTICE AND ARTIFICIAL INTELLIGENCE: AN OVERVIEW

It is common knowledge that AI systems are increasingly integrated into many domains of private and professional life, including judicial systems worldwide. The discussion of that process usually takes place within the paradigm of benefits and risks. Regarding benefits, the opportunity to enhance access to justice, improve case management, and support judicial decision-making can be pointed out. Regarding risks, algorithmic bias and the black-box phenomenon may be mentioned. However, a crucial yet often overlooked dimension is the role of judicial self-governance in this digital transformation. This raises the question of the extent to which judges are given a meaningful say in the design and implementation of AI systems.

Rocha & Carvalho pointed out eight main uses or possible uses of AI in the judicial system (2022, pp. 2–3): 1. Similar cases "push systems" (they are designed to automatically

"push" similar cases to help judges and staff reflect on specific cases); 2. Litigation risk assessment systems (based on judicial statistics and analysis of similar cases; they provide basic information that could evaluate possible judgment results in advance); 3. Document-assisted generation systems (designed to help judges write judicial documents); 4. Speech-to-text systems (they convert spoken language into written text used in courtroom records or hearings); 5. Risk prediction systems (they are used in the penal system and are supposed to predict risks for violent crime, sexual crimes and recidivism); 6. Chatbots (they answer questions submitted to the judiciary *via* a keyboard or verbally concerning a relevant case, verdicts, laws, how to bring a lawsuit, how to investigate legal rights and how to obtain evidence); 7. Emotion recognition systems (they can identify the speaker's emotional state); 8. Filtering systems (they organise information according to a defined criterion and take action, such as grouping cases and returning oral locating cases to judges).

It is argued that a particular threat is posed by a situation where judges heedlessly accept a system's output (Peluso Lopes, 2025, p. 62). The improvement of AI literacy could be considered a solution here. It is worth noting that the 'human in the loop' standard remains illusory if the decision-maker (a judge) lacks the necessary tools to critically engage with technology. Therefore, AI literacy is not merely an additional skill, but a prerequisite for ensuring that human oversight is meaningful rather than purely formal. In general, only a technologically competent judge can effectively counterbalance algorithmic outputs, thereby safeguarding the right to a human judge and ensuring that the individual remains a true subject of the legal proceedings. The critical assessment of the outputs and performance of the tools ought to be ensured. However, while remaining within the above-mentioned paradigm of benefits and risks, it is worth noting that AI may also be used in order to help detect and counteract judges' implicit biases (Peluso Lopes, 2025, p. 63). It is also argued that: "By focusing not only on outcomes but also on the decision-making process itself, procedural justice offers a path toward building systems that enhance the notions of fairness and trust, thus fostering broad societal goals" (Fischman-Afori, 2025).

The recently published UNESCO Guidelines for the use of AI systems in courts and tribunals propose principles and recommendations for adopting, deploying, and using AI tools to support the administration of justice. They include fifteen universally applicable principles that guide the adoption, governance, and oversight of AI in the judiciary: (1) the protection of human rights, (2) proportionality, (3) feasibility of benefits, (4) safety, (5) information security, (6) accuracy and reliability, (7) explainability, (8) auditability, (9) transparency, (10) awareness and informed use, (11) responsibility, (12) accountability and contestability, (13) human oversight and decision-making, (14) human centric and participatory design, and (15) multi stakeholder governance (UNESCO, 2025, pp. 19–20). They are based on a general concept that AI should not be seen as a replacement for judicial reasoning, but as an assistive tool to expand access to information, enhance efficiency, and support equitable justice – always under meaningful human supervision and ethical review (UNESCO, 2025, p. 6). A reference to procedural fairness may be found under the above-mentioned principle of the protection of human rights. It reads as follows: "While all human rights may be potentially affected by certain AI systems along the life cycle of these tools, the following four are particularly important in the context of judicial proceedings: […] Procedural fairness: Assess the implications of AI systems for procedural

fairness throughout the AI system's life cycle and prevent deployments that breach this right" (UNESCO, 2025, p. 18). Similarly, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, in its 'European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment', has identified the principle of fairness as a core requirement to be respected in the field of AI and justice (European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment, 2018, p. 11). Thus, in light of these standards, procedural fairness may be regarded as an essential human right. The deployment (adoption and use) of AI systems which breach this right should not take place. It is actually a defining characteristic of the contemporary AI regulations that they refer to human rights and fundamental freedoms (Strzępek, 2024, p. 74; Kriebitz *et al*., 2025, p. 24; Ali *et al*., 2026, p. 1414).

## 4. PROCEDURAL JUSTICE AND ARTIFICIAL INTELLIGENCE: *STATE V. LOOMIS*

In 2007, the Conference of Chief Justices in the U.S. adopted the resolution "In Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism" (2007).

The resolution emphasised the necessity of adopting sentencing policies and programs "based on the best research evidence of practices shown to be effective in reducing recidivism" (Conference of Chief Justices and Conference of State Court Administrators, 2007). The justification for this position was: (1) the pursuit of meeting public expectations, as the public deserves criminal justice systems that promote public safety while making effective use of taxpayer dollars; (2) the aim to lower recidivism rates; (3) ensuring that criminal justice systems work effectively and efficiently to protect the public by reducing recidivism and holding offenders accountable. It was highlighted that the best research evidence has shown that the use of validated "offender risk and need assessment tools" is critical in reducing recidivism (CCJ and COSCA, 2007).

The case *State v. Loomis* (2016) brought into focus the use of algorithmic risk assessment tools in the judicial decision-making process. The facts of the case were largely undisputed. The defendant Eric L. Loomis was the driver in a drive-by shooting. Following his plea, the court ordered a pre-sentence investigation. The resulting report included a risk assessment generated by the so-called COMPAS tool. Loomis challenged the denial of his request for a new sentencing hearing before the Supreme Court of Wisconsin. He argued that the court's use of the COMPAS risk assessment tool at sentencing violated his right to due process for three reasons: (1) it violated his right to be sentenced based upon accurate information, partly because COMPAS is proprietary and prevented him from checking its accuracy; (2) it violated his right to receive an individualised sentence; and, (3) as the COMPAS risk scores took gender into account, it violated his due process right not to be sentenced on the basis of gender. COMPAS is a decision-support tool that estimated Loomis's likelihood of recidivism based on his responses to survey questions and his criminal records (*State v. Loomis*, 2016). The Supreme Court of Wisconsin held, among others, that: (1) Loomis had the opportunity to verify that the questions and his answers listed on the COMPAS report were accurate; (2) because COMPAS risk scores are based on group data, they identify high-risk groups rather than specific individuals. Consequently, the court must treat these scores with caution, balancing them against all other factors relevant to sentencing

an individual defendant; (3) the use of gender in COMPAS assessments promotes accuracy, which ultimately benefits the justice system and the defendants themselves.

In addition, the Supreme Court of Wisconsin established cautionary instructions regarding COMPAS that should be part of every pre-sentence investigation report: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of how factors are weighed or how risk scores are determined; (2) based on group data, COMPAS identifies groups of high-risk offenders rather than individuals, and some studies question if scores disproportionately classify minority offenders as high-risk; (3) COMPAS was not designed for sentencing but for use by the Department of Corrections for treatment, supervision, and parole decisions. The Supreme Court of Wisconsin emphasised that risk scores should not determine sentence severity, incarceration, or the offender's suitability for community supervision (*State v. Loomis*, 2016).

## 5. *STATE V. LOOMIS* AND THE DEBATE OVER "ALGORITHMIC" DUE PROCESS

The ruling in the case *State v. Loomis* sparked a lively debate in the legal scholarship, particularly in the U.S. In a sense, the very fact that there was a vigorous debate may testify to the controversy surrounding the case, and thus to the right to due process. Among the most frequently discussed issues were: (1) data accuracy and overall data quality; (2) the proprietary nature of COMPAS; and (3) policy solutions.

One of the concerns raised in the legal literature was the Supreme Court of Wisconsin's narrow focus on a single data quality characteristic, namely, data accuracy (the correspondence of data to reality) (Washington, 2018, p. 131 *et seq.*). This, however, prompted questions regarding conceptual completeness – whether the data encompasses the entire relevant scope of the reality it is intended to describe. For instance, data reflecting arrest rates does not necessarily correlate with the actual commission of a crime. Another issue raised in the context of data quality was the disproportionality (or "over-representation") of data concerning specific social groups (O'Leary, 2025, p. 915). Historically, individuals from Black communities and socioeconomically disadvantaged neighbourhoods have been subject to higher arrest rates (Morency, 2022, p. 169 *et seq.*). Some authors have observed that AI systems are oriented towards the maximisation of predictive accuracy at any cost, irrespective of potential infringements upon constitutional human rights and liberties, including the principle of non-discrimination (Thomas & Pontón-Núñez, 2022, p. 407).

Another concern raised in the legal literature was the question of the proprietary nature of COMPAS and other algorithmic tools. COMPAS is a decision-support software used by courts in the U.S. It estimates how likely a defendant is to become a recidivist based on his or her response to 137 survey questions and their case file (Bornstein, 2017). COMPAS is a proprietary algorithm, and some authors considered it a threat when an algorithm infiltrates the decision-making functions of the justice system (Wisser, 2019, p. 1831). This is particularly concerning due to the fact that these algorithms are created and controlled by for-profit private companies that refuse to disclose their source code to the public (Wisser, 2019, p. 1831). Moreover, the algorithms are not and cannot be held accountable for their mistakes (Wisser, 2019, p. 1831). In the context of *State v. Loomis*, the fact that

the defendant was denied the right to an explanation regarding the inner workings of COMPAS may be regarded as a violation of his due process rights (Kinchin, 2024, p. 29).

A variety of policy recommendations have been proposed within the legal literature to tackle the aforementioned concerns. For instance, institution-based proposals can be identified within the discourse. Freeman proposed two solutions: (1) the first is to cooperate with Northpointe to transform COMPAS from a proprietary algorithm into an open-source algorithm that defendants can investigate and verify themselves; (2) the second is to arrange an auditing process where an external overseer from outside the company would perform regular validation checks on the system to ensure its accuracy and appropriate use (Freeman, 2016, p. 101). Similarly, Butler proposed the solution of expert advisors organised by a centralised power (2025, p. 457 *et seq*.). The author suggested the existence of advisors who would be delegated by a central agency to assist in processes where evidence from algorithmic tools is presented (Butler, 2025, p. 457 *et seq*.). The agency and its advisors would be subject to strict confidentiality regimes, which would allay the concerns of tech companies regarding the protection of their intellectual property (Butler, 2025, p. 457 *et seq*.). Therefore, only the advisors of the organisation would receive access to the source codes, and not, for example, experts appointed by the parties to the case, who could have potentially dishonest motivations (Butler, 2025, p. 457 *et seq*.). It appears that such a solution could ensure the participation of qualified personnel in the judicial proceedings, which in turn might reduce litigation costs and enhance the overall efficiency of the court's operations.

Another set of recommendations focuses on the proper configuration of legal proceedings. Christian pointed out that a potentially meaningful recommendation may be that a high-risk score generated by an algorithmic tool should not be made available to the judge at the sentencing phase of criminal proceedings without any other external evidence supporting a similar risk assessment (2024, p. 135). According to the author, even a warning attached to such a score, as suggested by the Supreme Court of Wisconsin in *State v. Loomis*, does little to correct the judge's bias toward imposing a harsher sentence than the score may have introduced (Christian, 2024, p. 135). It is also argued that the goal of explainable artificial intelligence (XAI) regulations is not to achieve ideal, absolute transparency, or the clearest "white box" model, but rather to ensure that all stakeholders perceive the "black boxes" as sufficiently clear. This approach promotes the stable operation of the entire AI system and fosters trust in it (Xi, 2025, p. 482). In the context of this last argument, it could be summarised that the objective is not to create an ideal "white box" model, but rather to establish institutional and procedural guarantees to ensure that due process rights are upheld.

A fundamental question emerging from the study of *State v. Loomis* and the related legal literature is whether potential legal changes should target the judicial proceedings or the algorithmic tools themselves. It appears that the primary objective is to establish procedural safeguards to ensure that judicial decisions rendered with the assistance of algorithmic tools are, quite simply, just. Undoubtedly, the discourse should involve not only judges and court clerks but also representatives of the social and computer sciences (Komoda, 2023, p. 192). It also seems worthwhile to adopt the fundamental principle that no evidence is perfect – regardless of whether it stems from human action or an algorithmic tool – and that the process of judicial decision-making is inherently one of assessment.

The objective is to ensure that, within this process, the parties to proceedings can effectively present their arguments. The objective is not to obtain perfect evidence or flawless algorithmic instruments, but to ensure "perfect" judicial proceedings characterised by, for example, racially neutral judicial decisions. A situation in which neither the parties to the proceedings nor the judge have access to the source code of an algorithmic tool is far from desirable. Such a lack of transparency certainly does not bolster public confidence in the administration of justice; on the contrary, it tends to undermine it. Perhaps, an institutional solution aimed at establishing a fundamentally new profession – a judicial advisor specialised in emerging technologies – could exert a positive influence on public trust in the administration of justice. Such an advisor, granted access to the source code, would be capable of providing a reliable assessment of the algorithmic tool's performance. Interestingly, this proposition contradicts the common narrative that AI inevitably leads to job displacement, as in this instance, it could actually serve as a catalyst for job creation.

## 6. CONCLUSIONS

Procedural fairness in the U.S. and the right to a fair trial in Europe (at the European level) serve a similar function in protecting individuals from arbitrary state action (or inaction). The source of procedural fairness in the U.S. is the Fifth and the Fourteenth Amendments to the U.S. Constitution (more concise provisions in nature). Simultaneously, both amendments may be regarded as a source of substantive fairness. The source of the right to a fair trial in Europe is Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (more elaborate provisions), and Article 47 of the Charter of the European Union. Article 6 of the Convention is regarded as strictly procedural in scope (not substantive), whereas Article 47 of the Charter may be regarded as multifaceted in nature, that is, not viewed unequivocally.

In essence, procedural rules answer the question "how" the proceedings should be: how those rules posit a judge and an individual within and based on law. It is to ensure that the individual remains a subject of the proceedings rather than a mere object of the legal "machinery". Substantive rules are rather connected with the question "what" normative goal a judgment or decision should effectuate. The judgment in the case *State v. Loomis* is important for at least two reasons. Firstly, it concerns the procedural rights of an individual. Secondly, what is of even greater importance is that it may be potentially perceived as aimed at achieving a specific normative goal. Indeed, if AI systems used in the judicial decision-making process are based on selective or biased data, substantive fairness is at risk; for instance, such systems may lead to racially biased decisions. AI systems are goal-oriented, and so is substantive fairness. Therefore, without sufficient judicial AI literacy, the state may be unable to maintain the human-understandable legal principles essential for procedural justice. Moreover, the sense of whether a "fair" goal has been achieved is relative and depends on our individual perceptual capacities. This latter factor poses a further, additional difficulty in aligning the goals of AI systems with the goals of substantive fairness. It is possible that significant institutional changes, or even the emergence of new professions, will be necessary to align the above-mentioned goals.

## LIST OF REFERENCES


Ali, S. *et al.* 2026. Procedural justice in the era of algorithms: a critical evaluation of AI governance and digital rights. *International Journal of Social Sciences Bulletin*, 4(1), pp. 1409–1430.

Bornstein, A. M. 2017. *Are algorithms building the new infrastructure of racism?* New York: Nautilus. Available at: https://nautil.us/are-algorithms-building-the-new-infrastructure-of-racism-236911 (21. 12. 2025).

Butler, A. 2025. Fingerprints of injustice: the truth behind artificial intelligence and algorithmic-driven evidence. *Chapman Law Review*, 28(2), pp. 419–448.

Crema, M. & Solum, L. B. 2022. The Original Meaning of "Due Process of Law" in the Fifth Amendment. *Virginia Law Review*, 108(3), pp. 447–534.

Christian, G. 2024. Legal framework for the use of Artificial Intelligence (AI) technology in the Canadian criminal justice system. *Canadian Journal of Law and Technology*, 21(2), pp. 109–134.

Craig, P. P. 2022. Natural Justice in English Administrative Law: Continuity and Change from the 17th Century. In: *Liber amicorum per Marco D'Alberti*. Torino: Giappichelli, pp. 1–47.

Fischman-Afori, O. 2025. Due process by design: Enhancing fairness and trust in AI decision-making. *Social Sciences & Humanities Open*, 12, 102178. https://doi.org/10.1016/j.ssaho.2025.102178

Freeman, K. 2016. Algorithmic injustice: how the Wisconsin Supreme Court failed to protect due process rights in State v. Loomis. *North Carolina Journal of Law and Technology*, 18(5), pp. 75–106.

Fuller, L. L. 1978. The Forms and Limits of Adjudication. *Harvard Law Review*, 92(2), pp. 353–409. https://doi.org/10.2307/1340368

Gentile, G. 2020. Two strings to one bow? Article 47 of the EU Charter of Fundamental Rights in the EU competition case law: between procedural and substantive fairness. *Market and Competition Law Review*, 4(2), pp. 1–29.

Gutman, K. 2019. The essence of the fundamental right to an effective remedy and to a fair trial in the case-law of the Court of Justice of the European Union: the best is yet to come? *German Law Journal*, 20(6), pp. 884–903. https://doi.org/10.1017/glj.2019.67

Hollander-Blumoff, R. 2011. The Psychology of Procedural Justice in the Federal Courts. *Hastings Law Journal*, 63(1), pp. 127–172.

Kinchin, N. 2024. "Voiceless": the procedural gap in algorithmic justice. *International Journal of Law and Information Technology*, 32, pp. 1–39. https://doi.org/10.1093/ijlit/eaae024

Kobiałka, M. 2025. AI in the Service of Justice: Opportunities and Threats in the Application of Language Models (LM) and Large Multimodal Models (LMM) in Judicial and Extrajudicial Dispute Resolution with Specific Consideration of Civil Law. Reflections on the Current Dispute Resolution Model. *Polish Journal of Political Science*, 11(4), pp. 53–68. https://doi.org/10.58183/pjps.04042025

Komoda, J. 2023. Designing AI for courts. *Richmond Journal of Law and Technology*, 29(3), pp. 145–192.

Kotowski, A. 2026. *Interpretive Judicial Activism and Risk Propensity in Judicial Decision-Making*. Warszawa: Difin.

Kriebitz, A. *et al.* 2025. *Cultural Rights and the Rights to Development in the Age of AI: Implications for Global Human Rights Governance*. https://doi.org/10.48550/arXiv.2512.15786

Meers, J., Ryan, A. & Tomlinson, J. 2025. Perceptions of procedural fairness and space for personal narrative: an experimental study of form design. *Journal of Law and Society*, 52(1), pp. 81–111. https://doi.org/10.1111/jols.12524

Morency, F. 2022. Do not touch my data: exploring a disclosure-based framework to address data access. *Washington and Lee Journal of Civil Rights and Social Justice*, 29(4), pp. 149–208.

Mullan, D. J. 1982. Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making? *McGill Law Journal / Revue de droit de McGill*, 27(2), pp. 250–298.

Nelson, J. 2005. *Fourteenth Amendment and Eminent Domain*. OLR Research Report 2005-R-0421. Hartford: Connecticut General Assembly, Office of Legislative Research.

Naudts, L. & Vedder, A. 2025. Fairness and Artificial Intelligence. In: Smuha, N. A. (ed.) *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence*. Cambridge: Cambridge University Press (Cambridge Law Handbooks), pp. 79–100. https://doi.org/10.1017/9781009367783.006

O'Leary, R. 2025. Ideological testing. *North Carolina Law Review*, 103(4), pp. 909–970.

Peluso Lopes, G. 2025. Bias in Adjudication and the Promise of AI: Challenges to Procedural Fairness. *Law, Technology and Humans*, 7(1), pp. 47–67. https://doi.org/10.5204/lthj.3812

Rawls, J. 1999. *A Theory of Justice*. Revised ed. Oxford: Oxford University Press. https://doi.org/10.4159/9780674042582

Rocha, C. & Carvalho, J. 2022. Artificial Intelligence in the Judiciary: Uses and Threats. In: *Ongoing Research, Practitioners, Posters, Workshops, and Projects of the International Conference EGOV-CeDEM-ePart 2022*. Linköping: Linköping University Electronic Press, pp. 1–8.

Strzępek, K. 2024. Human Rights as a factor in the AI alignment. *GIS Odyssey Journal*, 4(1), pp. 66–77.

Tennant, N. B. 1928. Administrative Finality. *Canadian Bar Review*, 6(7), pp. 497–514.

Thomas, C. & Pontón-Núñez, A. 2022. Automating judicial discretion: how algorithmic risk assessments in pretrial adjudications violate equal protection rights on the basis of race. *Law and Inequality: A Journal of Theory and Practice*, 40(2), pp. 371–407.

Washington, A. L. 2018. How to argue with an algorithm: lessons from the COMPAS-ProPublica debate. *Colorado Technology Law Journal*, 17(1), pp. 131–160.

Wisser, L. 2019. Pandora's algorithmic black box: the challenges of using algorithmic risk assessments in sentencing. *American Criminal Law Review*, 56(4), pp. 1811–1832.

Xi, R. 2025. A systems approach to shedding sunlight on A.I. black boxes. *Hofstra Law Review*, 53(2), pp. 440–489.

### *Case law*

*Capel v Child* 1832. 2 Crompton & Jervis 558; 149 English Reports 235.

*Gregačević v. Croatia* 2012. Application no. 58331/09. Reports of Judgments and Decisions. Strasbourg: European Court of Human Rights.

Inter-American Court of Human Rights 1985. *Advisory Opinion OC-5/85 of November 13, 1985: Compulsory Membership in an Association of Journalists (Arts. 13 and 29 American Convention on Human Rights)*, Series A No. 5.

*State v. Loomis* 2016.371 Wis. 2d 235, 881 N.W.2d 749.

***Internet sources***

CEPEJ, 2018. European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment. Strasbourg: Council of Europe. Available at: coe.int (11. 5. 2026).

*Charter of Fundamental Rights of the European Union* 2012. [online]. Official Journal of the European Union, C 326. Available at: eur-lex.europa.eu (26. 3. 2026).

Conference of Chief Justices and Conference of State Court Administrators 2007. *Resolution 12: In support of sentencing practices that promote public safety and reduce recidivism*. Williamsburg, VA: National Center for State Courts. Available at: ncsc.contentdm.oclc.org (25. 3. 2026).

*Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (ECHR). [online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (25. 3. 2026).

European Court of Human Rights 2013. *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)*. [online]. Council of Europe. Available at: https://rm.coe.int/1680700aaf (26. 3. 2026).

European Court of Human Rights 2024. *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)*. [online]. Updated 29 February 2024. Council of Europe. Available at: https://rm.coe.int/1680304c4e (26. 3. 2026).

UNESCO 2025. *Guidelines for the use of AI systems in courts and tribunals*. Paris: UNESCO. Available at: www.unesco.org (26. 3. 2026).

*U.S. Constitution* 1791, amdt. 5. [online]. Constitution Annotated. Available at: https://constitution.congress.gov/constitution/amendment-5/ (25. 3. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch6

***Jola GJUZI****

# THE EVOLVING LANDSCAPE OF AI REGULATION IN INTERNATIONAL COMMERCIAL ARBITRATION: LESSONS FOR ALBANIAN JURISDICTION

*Artificial Intelligence (AI) tools are increasingly available in international arbitration for purposes of document review, legal research, and award drafting, to mention but a few. However, their use in arbitration poses significant legal and ethical challenges, including risks of bias, lack of transparency, confidentiality breaches, and potential violations of due process.*

*Current responses to such challenges range between soft-law guidelines from arbitral institutions as well as hard-law rules such as the EU AI Act. The latter classifies AI in adjudicative contexts as "high-risk", imposing obligations for transparency and risk management as well as sanctions. In this context, questions arise about the governance models to address any misuse of AI in commercial arbitration.*

*This article explores current global discussions about such regulatory interventions. It then focuses on Albanian jurisdiction by identifying lessons to be drawn therefrom. While recognizing the values of the self-regulation of AI in commercial arbitration, it is admitted that the hard-law model pursuant to the AI Act will likely prevail in Albania, given its path toward EU integration. In view of the ongoing global discourse about the two key models as well as some criticism associated with the EU AI Act's application to commercial arbitration, the paper suggests that Albania should undertake a diligent evaluation of such developments and their interaction with domestic law, before moving forward with the harmonization of the EU legislation agenda. Moreover, a hybrid approach, whereby binding minimum safeguards are combined with flexible soft-law guidelines, may result as plausible for Albania to follow. This should satisfy the EU harmonization requirements and at the same time enhance commercial arbitration practices by preserving its essential values of flexibility and party autonomy.*

***Keywords:*** Albania, alternative dispute resolution, arbitration, arbitral proceedings, artificial intelligence.

* University Lecturer, University of New York Tirana, Albania, ORCID: https://orcid.org/0009-0005-6221-5378, e-mail: *jolagjuzi@unyt.edu.al*

## 1. POTENTIAL USES AND MISUSES OF ARTIFICIAL INTELLIGENCE IN ARBITRATION

Artificial Intelligence (AI) tools, both traditional and generative, are increasingly available and with widespread use in various industries and market practices. This includes the legal industry, particularly dispute resolution and international arbitration. Arbitrators, counsels, party representatives and other participants in the arbitral proceedings, such as tribunal secretaries and appointed experts, are having more opportunities to rely on AI tools.

Without delving into the historical aspects of AI use in legal practice (Quintão & de Oliveira Dias, 2025, pp. 55–56), it is striking how traditional approaches are being reshaped in the context of a profound and ongoing evolution of the landscape of AI utilization in law. This is empowered by the rapid introduction of generative models and proprietary and specialized AI systems technologies (Freshfields Risks and Compliance Blogs, 2026).

AI tools are already present in various areas of legal practice, including contract analysis, legal research, e-discovery etc. (Scherer, 2019, p. 540). In international arbitration, practitioners are increasingly finding such tools useful in a variety of tasks, such as conducting legal research and predictive analytics, whereby arbitration outcomes can be forecasted by analyzing past cases with similar issues or fact patterns; drafting and proof-reading written submissions, procedural orders, other legal documents; summarizing awards and pleadings; comparing arguments and counter-arguments; organizing evidence, translating documents, managing the proceedings and organizing documentation; estimating costs; dealing with hearing arrangements (transcripts, simultaneous foreign language interpretation); selecting counsel, experts and arbitrators by analyzing massive data to identify the most suitable arbitrators based on their expertise, past rulings, and even potential biases; assisting in settlement proposals; and most controversially, assisting in the decision-making process by offering outcome prediction and drafting awards and briefs even beyond the standard sections (such as procedural history, etc.) (Scherer, 2019, p. 540; Quintão & de Oliveira Dias, 2025, pp. 55–56; Al Fatayri, 2024; Bell, 2025). As reported in the 2025 International Arbitration Survey, the development of AI technology has profoundly affected the evolution of the arbitration system (Queen Mary of London and White & Case, 2025).

Currently, there seems to be some consensus, and reasonably so, that the use of AI tools is less problematic in relation to case management issues, and more so in relation to the substantive adjudication aspects of decision-making processes (such as reasoning and conclusions) – whereby these latter have been traditionally regarded as inherently related to the human exertion (Scherer, 2019, p. 540; Bell, 2025).

The significant power of AI systems in international arbitration is undeniable. The arbitration community's perception has shifted from a somewhat skeptical view about AI use in arbitration to being intrigued by the topic, and finally, nowadays, to an undisputed acceptance that AI systems have a significant and increasing impact on international arbitration (Scherer, 2023).

The utilizations of AI systems speak for various benefits in the arbitration process, such as enhancing efficiency and cutting costs through processes of arbitrator selection, legal research and predictive analytics, as well as increasing consistency by minimizing human error and delivering analytical outputs that could even challenge human capability, through summaries, scheduling, drafting, and translation tasks (Al Fatayri, 2024; Bell, 2025).

But what is the cost behind these opportunities? Certain AI limitations include "black-box" issues (missing a transparent internal logic and the nuances of human judgment that involves a deep appreciation of the contextual background, political, economic, and social factors, etc.), hallucination (generating non-existent legal precedent and case citations), and AI's continuous pursuit of data and updating (Alnaber, 2025; Al Fatayri, 2024; Freshfields Law Firm, 2025).

Focusing on legal decision-making, there are system inherent limitations that make AI programs risky to rely upon. Scherer refers to the four Vs of big data (Volume, Variety, Velocity, and Veracity) as the cornerstones of data-driven projects which also describe the challenges of data use. This in turn helps to assess data-driven AI programs and their use in the legal sector. Fully relying on AI systems is risky to the extent that those systems will suffer from insufficient data (inability to access all or most of the relevant awards), the variety of such data, the velocity of updating the data in the light of legal and policy changes over time, and finally their accuracy (Scherer, 2019, p. 540).

Substantial legal and ethical challenges arise, such as concerns over bias, lack of transparency, confidentiality breaches, and due process violations. All these issues compromise the integrity, quality, and overall legitimacy of the process and outcomes of international arbitration.

For instance, the quantity and quality of data on which AI systems rely are essential in excluding concerns with bias and ensuring fairness. If the data is biased due to AI tools being trained to use historical data, AI's predictions and decisions may also perpetuate these biases or inaccurate results, hypothetically leading to wrong, non-existent, and unfair outcomes (Al Fatayri, 2024; Mills & Shanker, 2024). The equation gets even more complex considering the cultural, legal, and social differences that permeate international arbitration (Al Fatayri, 2024).

Confidentiality and security constitute another matter of concern regarding the integrity of arbitration proceedings. The use of AI could increase the risk of data violation of confidential pleadings, privileged or commercially sensitive documents, as well as attorney-work products which are often present in arbitral cases (Al Fatayri, 2024; Freshfields Law Firm, 2025).

Another aspect of potential AI misuse in arbitration is the lack of nuanced understanding and human judgment typically provided by experienced arbitrators (Al Fatayri, 2024). This is linked with the highly controversial role of AI in the decision-making process in terms of drafting awards and briefs (Scherer, 2019, p. 540; Quintão & de Oliveira Dias, 2025, pp. 55–56).

AI use might violate *receptum arbitri* as in the scenario where the arbitrator delegates to AI tools certain aspects of his or her presumed personal duty vis-à-vis the parties to render the decision, without subsequently reviewing the process. Similarly, the arbitrator may breach confidentiality obligations, when feeding third party-AI platforms with confidential data or procedural requirements while failing to disclose to the parties any use of AI (Nappert, 2025).

From the regulatory and ethical perspectives, the question of accountability arises where an AI system makes an incorrect or biased decision. The integration of AI in arbitration, particularly into decision-making processes, challenges essential principles of impartiality and transparency (Venero, 2026). While arbitrators must remain fully detached from the parties' interests, even when relying on AI tools, questions persist as to whether AI outputs can be unbiased and whether the use and influence of such systems should be revealed to the parties.

LaPaglia v. Valve case illustrates some of these concerns, questioning whether reliance on AI compromises the arbitrator's adjudicative role. It involved a petition to vacate an American Arbitration Association award, allegedly drafted with the assistance of AI (*LaPaglia v.*

*Valve Corp.*, Petition to Vacate Arbitration Award, 2025). Although the case was dismissed on jurisdictional grounds, it could have offered a direct judicial test in the United States of America of the extent to which AI-assisted arbitration could be relied upon, if at all, and ultimately whether AI-assisted awards could be vacated over grounds of transparency vis-à-vis parties, lack of human reasoning that is deemed inherent in adjudication, etc. (Silicon Valley Arbitration & Mediation Center, 2025; Aceris Law, 2025; Pashaeva, 2025; Legal News, 17 February 2026).

Meanwhile, a recent judicial decision addressed the core of the matter of AI use in arbitration. In *Association des ressources intermédiaires d'hébergement du Québec (ARIHQ) v. Santé Québec,* 2026, the Quebec Superior Court annulled an arbitral award based on the arbitrator's undisclosed use of AI to generate substantive reasoning supported by hallucinated authorities. This is regarded as the first judicial decision addressing such an important aspect of AI use in arbitration (Appleton, 2026).

Against this background, the discussion is not much about whether, but rather how AI should be integrated in arbitration. The use of technological advances and particularly AI tools in arbitration enhances cost and time efficiency. Yet, it provokes a tension concerning compliance with fundamental principles of confidentiality, impartiality, and independence of arbitrators, and ultimately it puts under serious risk the enforceability of awards (Paulsson & Suresh, 2024). The core issue centers on whether AI-assisted awards may violate procedural fairness, public policy, or "black box" transparency requirements. These violations would potentially lead to challenges under the New York Convention and the domestic procedural laws governing enforcement of arbitral awards.

In view of the need to safeguard the integrity and legitimacy of arbitration proceedings, there is a quest to establish ethical and legal rules and frameworks that regulate and ensure responsible and transparent use of AI in international arbitration (Al Fatayri, 2024; Mills & Shanker, 2024).

## 2. CURRENT RESPONSES TO CHALLENGES OF AI APPLICATION IN ARBITRATION

Most of the current responses to such challenges are in the form of self-regulation. The Silicon Valley Arbitration and Mediation Center (Guidelines on the Use of Artificial Intelligence in Arbitration, 2024), the Chartered Institute of Arbitrators (Guideline on the Use of AI in Arbitration, 2025), the Vienna International Arbitration Center (Note on the Use of AI in Arbitration Proceedings, 2025) and other institutions have introduced soft-law standards and guidelines aiming to foster responsible use of AI in arbitration. They admit the positive contribution of AI in terms of efficiency and analytical authority. They also emphasize aspects of transparency, due process, and human oversight. These are meant to ensure that arbitration proceedings keep fostering party autonomy, fairness, and reasoned judgment.

From a different angle, there is a recent proposal to institutionalize the so-called AI ethical review committees in international arbitration with the aim of regulation and oversight of AI-assisted adjudication (Hong Kong International Arbitration Center, HK45, 2026). According to the proposal, by taking the example of AI ethics boards or committees that serve advisory and accountability functions in various types of organizations (such as Microsoft's AETHER, Google's DeepMind, etc.) (CMS, 2026), these independent and multi-disciplinary

bodies are expected to review and assess AI use in arbitral proceedings. They would act as advisory bodies, institutional vetting boards, or technical amici curiae, and provide critical evaluations ex ante (pre-award – e.g., Art. 34 of the ICC Rules 2021, which allows the scrutiny of draft awards to enhance enforceability) as well as ex post (post-award – drawing from the practice adopted pursuant to Art. V(1)(b) and V(2)(b) of the New York Convention, which allows refusal of award enforcement over grounds of due process or public policy violations) (Hong Kong International Arbitration Center, HK45, 2026).

The authors admit that these mechanisms lack a determinative nature and add a layer of control that would in turn challenge efficiency and party autonomy. They still believe that they could serve as an alert and corrective system that can promote arbitral integrity in the context of AI use and the generally voluntary nature of guidelines (Hong Kong International Arbitration Center, HK45, 2026). It is, however, questionable whether these mechanisms might ensure proper and fair use of AI in arbitration that does not lead to unenforceable awards.

The other end of the governance spectrum shows the adoption of binding AI rules and regulations. A few states have already introduced or are in the process of introducing such laws, and some authors support their application to commercial arbitration (e.g., Venero, 2026 commenting on the Peru AI Act, 2023).

From a regional perspective, the EU AI Act of 2024 is of key relevance for Albania given its EU accession prospect. It constitutes the most comprehensive set of rules in the AI realm, pointing to a shift toward risk-based AI governance. The Act aims to promote human-centric and trustworthy AI while ensuring a high level of protection of fundamental rights enshrined in the EU Charter, democracy, and the rule of law, operationalized through transparency (Article 13) and human oversight (Article 14). It classifies economic activities according to the likelihood of harm caused by AI systems and specifies various regulatory duties according to the level of risk (Recital 26). In this context, AI in adjudicative contexts, including ADR, falls under the "high-risk" category (Article 6(2) and Annex III, para. 8). This involves the imposition of strict requirements for transparency, documentation, testing and human oversight, as well as compliance duties and fines. Awards that fail these standards may fail enforcement within the EU, particularly on grounds of violating the New York Convention (lack of proper reasoning or procedural irregularity, violation of public policy) (Paulsson & Suresh, 2024; Pabakhshi, 2025).

Current discussions of the integration of AI in international arbitration convey several messages. With information technology solutions advancing rapidly and challenging human imagination, the nature and dimensions of regulations that enhance the benefits (efficiency) and mitigate the risks (integrity) from the use of AI tools in international arbitration will also have to adapt to the new and dynamic AI reality. This is by no means a straightforward task for policy makers and lawyers. The present landscape shows diversity in terms of legal governance, ranging from industry self-regulation – whereby stakeholders of commercial arbitration are being able to voluntarily respond and adapt to technological advancements by maintaining flexibility, party autonomy, confidentiality, and a tailored approach to the arbitration context, to hard-law regulation – where the state proactively imposes binding rules and strict compliance requirements to ensure minimum standards, uniformity, and safeguards against bias.

Drafting and enforcing rigid rules in such a dynamic and fluid context of AI developments might prove to some extent counterproductive. Drafting regulations involves costs and bureaucracy. Once enforceable, such regulations may spoil the aimed efficiency of the

proceedings by imposing compliance burdens on their subjects. Moreover, they may provoke challenges regarding their interpretation and application to specific subjects and cases. For instance, the enactment of the EU AI Act has already provoked professional and academic reactions regarding the interpretation and application of key aspects of the new regulation to commercial arbitration, rationae personae, rationae materiae, rationae temporis, and rationae loci (Scherer, 2024; Lüttenberg *et al*., 2025; Migliorini & Moreira, 2026).

Some authors have even suggested carving out commercial arbitration from the Act's scope of application (as opposed to employment or consumer protection arbitration, which are characterized by party asymmetries and the need to protect the weaker party), for the sake of the core values of party autonomy and confidentiality (Migliorini & Moreira, 2026).

The soft-law approach would encourage experimentation with essential safeguards that rely on reputation and professional responsibility grounds. In turn, a hard-law model might even have a chilling effect on the actual use of AI due to the compliance burden and interpretative concerns.

Amidst the two ends of the spectrum, a hybrid or multilayered approach for governing the use of AI in commercial arbitration might have to be considered. Reference is made to a combination of binding minimum safeguards with flexible soft-law guidelines, such as applying the EU AI Act to AI systems that directly decide disputes, while leaving supportive tools (document review, transcription, workflow management) under soft-law guidance from arbitral institutions (Migliorini & Moreira, 2026; Paulsson & Suresh, 2024). The aim would be to differentiate between AI tools that "genuinely threaten fundamental rights and those that enhance efficiency without compromising due process" (Migliorini & Moreira, 2026, p. 160).

The next section turns to the Albanian jurisdiction. It assesses the extent to which the above international discourse and the multifaceted approach to regulating AI uses in commercial arbitration may be echoed in the Albanian arbitration law and practice. It further identifies lessons to be drawn from the international realm so that Albania can support a favorable commercial arbitration environment that benefits from the advanced AI technologies.

## 3. FOCUS ON THE ALBANIAN JURISDICTION

From a normative perspective, Albania offers a robust legal framework on international and domestic commercial arbitration. It has ratified key international instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958) and the European Convention on International Commercial Arbitration (Geneva Convention, 1961). The main pieces of domestic legislation comprise the Albanian Code of Civil Procedure, 1996, as well as the Albanian Arbitration Law, 2023, which largely follows the UNCITRAL Model Law. These rules and regulations, and particularly the direct and prevalent application of the New York Convention and Geneva Convention over purely domestic law, ensure adherence to the international standards on essential matters of international arbitration (Gjuzi, 2025).

Yet, there has been a rather slow progress of the Albanian arbitration practice in relation to domestic cases and international cases with a legal seat in Albania. Contributing factors include a prolonged lack of regulation until the enactment of the Law on Arbitration in 2023, as well as the overall legal and business environment in Albania, which is characterized by a weak justice system and limited experience in arbitration law (Gjuzi, 2024).

Certainly, the success or failure of a law, particularly of the Law on Arbitration of 2023, cannot be assessed in a few years' time. The potential interest by local SMEs to opt for domestic arbitration vis-à-vis local courts as well as the few domestic arbitration institutions already established in Albania (Albanian Mediation and Arbitration Center, 2002; Tirana Chamber of Arbitration, 2021; Albanian Chamber of Arbitration, 2022, as per the information retrieved from the Albanian National Business Center) could offer good premises for domestic arbitration cases. In this respect, it is questionable whether the local small and medium businesses would be willing to invest financially in expensive AI tools, considering the potential low or medium values of their cases. This is to the extent that such tools would be available for cases based on local law and the engaged lawyers and arbitrators would have the skills to use them professionally.

Meanwhile, there is considerable foreign and international arbitration practice involving foreign companies doing business in Albania and even the Albanian state, with the proceedings taking place in the main European seats such as Vienna, Paris, London, Stockholm, etc. In these cases, the parties and lawyers involved have focused on the Albanian arbitration legal framework, mainly with respect to the recognition and enforcement of the outcoming arbitral awards (Gjuzi, 2024).

Without prejudice to the prospects of arbitration in Albania, the current reality shows that the discussion about the potential uses and misuses of AI tools in arbitration proceedings could be raised predominantly in the cases of recognition and enforcement of foreign arbitral awards by Albanian courts.

As regards the challenge posed to any party by the outcomes of arbitration proceedings due to the alleged misuse of AI tools and their negative effects on the arbitration proceedings and parties, one might consider the present legal protections enshrined in the Albanian Arbitration Law, and most importantly, in the prevailing New York Convention.

Key provisions include the principles of party autonomy, independence and impartiality of arbitrators, the due and proper administration of the arbitral proceedings by affording the same and equal conditions to all parties, the adversarial principle, as well as the arbitral tribunal's duty to state reasons in the award (Articles 24, 38–39 of the Albanian Arbitration Law). These provisions speak for the protection of such high standards vis-à-vis any situation that could unfairly hinder them, and arguably also from the uses of AI tools that because of their inherent limitations (black-box, hallucination, etc.) could challenge the integrity of the process and its outcomes. Along the same lines, the public policy provisions regarding the annulment and enforcement of foreign awards (Articles 44, 46–47 of the Albanian Arbitration Law) might also be invoked.

Some emphasis here should be given to the currently-in-force Albanian Arbitration Law requirement for the arbitrator to be a "natural person" (Article 13(1)), thus excluding options for an AI arbitrator. Notably, the approach of the New York Convention is different. It only mentions an "arbitrator" twice (Articles I(2) and V(1)(b)) and does not include any reference to the nature of the arbitrator or the tribunal, thus neither implicitly nor explicitly precluding AI arbitrators (Bell, 2025, p. 20).

Similarly, violations of the public policy requirements under Article V(2)(b) of NY Convention could be relevant in the cases of alleged arbitrator's partiality (where decisions are reached by the arbitrators by using biased datasets), data insufficiency or inaccuracy (due to limited available data, which is often the case in arbitration suffering from unpublished awards), or failure to provide reasoning (due to the "black box" problem, whereby their outputs are so

complex that even human experts, including the system's own designers, cannot fully interpret or unravel them) (Bell, 2025).

The above statutory references, however, do not contain detailed rules to deal with the various misuses of AI in arbitration. Neither does Albania have a dedicated national law on AI more generally, which could also apply to arbitration cases. This triggers the question of whether Albania should address the potential legal gap or not, and if so, how and at what speed. Should regulation come from the state in the form of hard-law legislation or should it rather be left to the industry in the form of voluntary guidelines?

Theoretically, global discourse will resonate domestically. Considering the nature of commercial arbitration, which has been traditionally and successfully based on the principles of party autonomy, confidentiality, and flexibility, a strong argument goes in favor of the self-regulation model led by industry players. Guided by professional integrity, reputation, and responsibility, such players are the ones benefiting from the opportunities but also bearing the challenges from any uses and misuses of AI in commercial arbitration practices. By experiencing AI developments closely and daily, they are deemed to be fully equipped to diligently and timely address the need for and content of rules and guidelines. Moreover, arbitrators, arbitration practitioners and institutions have the flexibility to adjust to newer developments through a rather straightforward process, as opposed to the more complex law-making process involving governments and parliaments.

This should not negate the role of the state introducing high-level protections against the encroachment of human rights and other citizens' concerns and generally preserving public order. In the AI context, one could think of a more proactive regulatory approach by the state in the cases of employment arbitration, consumer protection arbitration, and the like, given the party asymmetries and the undisputed role of the state to protect the weaker party.

The above theoretical debate may have limited practical effects in the Albanian context as far as Albania is aspiring to become an EU member state. In light of its integration commitments as an EU candidate country, Albania is aiming to harmonize its legislation with the EU AI Act, in accordance with its EU accession timetable and the progress with Chapter 10 (Digital Transformation) negotiations. In its latest report, the European Commission stated that "Albania should fully align with the EU's Artificial Intelligence Act, ensuring the necessary enforcement structures." (European Commission Report for Albania, 2025, p. 72). In its draft National Strategy of Artificial Intelligence 2025–30, the Albanian Government states that "[t]he priorities of this document relate to (…) harmonization with EU policies and legislation, particularly the EU AI Act, ensuring a unified approach to standards of safety, ethics, and transparency in the use of AI." (Draft National Strategy of Artificial Intelligence 2025–30). Following the above, the Government has planned to examine the draft law in the third quarter of 2026 (National Plan of Normative Acts, 2025).

Questions arise as to whether this approach has been properly evaluated in advance and is realistic within the indicated timeline. Taking into account the weight and level of detail of the EU AI Act and certain grounded criticism among the commercial arbitration community about its application to commercial arbitration as well as the country's need for strengthening institutional capacities to meet compliance burdens, it is ambiguous whether Albania will be able to effectively complete such a legislative task in the short term.

On top of that, considering also the evolving global discussions about AI governance and particularly the self-regulation vs. state regulation debate, it would be advisable that the

Albanian Government should take the necessary time in moving forward with its EU-aligned regulatory agenda. This requires observing and carefully assessing relevant global and EU legislative developments and regulations, criticisms and institutional reactions thereto, as well as any implementation practices and ex-post evaluations of such legislative actions. In conducting an ex-ante evaluation of any draft AI legislation that could impact commercial arbitration, Albania should diligently examine how such rules interact with the existing regulatory framework. This includes ratified international conventions that uphold party autonomy and confidentiality while also recognizing the state's essential responsibility to safeguard public order. Furthermore, in line with the statutory requirements (mainly Law no. 146/2014 "On public notification and consultation"), it should pay heed to the opinion of key stakeholders by means of an effective public consultation process. Simultaneously, the Government should work further to improve its institutional capacities for managing, controlling, and enforcing new AI rules.

At this juncture, a hybrid approach appears plausible in the Albanian context. The Government of Albania could advance the alignment of its domestic legislation with the EU AI Act to secure baseline standards of safety and accountability while considering the possibility of fully or partially carving commercial arbitration out of the scope of application of any AI law (e.g., limiting it to systems that directly decide disputes). In the meantime, domestic arbitral institutions could harmonize their practices with the pace set by leading international bodies, which have already introduced voluntary guidelines designed to promote responsible AI use while safeguarding arbitration's essential values of flexibility, confidentiality, and party autonomy. Such deliberate measures could foster a more robust, sustainable, and widely accepted regulatory framework to address the current challenges posed by AI application in commercial arbitration.

## 4. CONCLUSIONS

This article explored current global discussions about the uses and misuses of AI in international commercial arbitration. Beyond the opportunities offered, AI application may hinder the integrity and legitimacy of arbitration. This requires a dedicated response regarding the legal governance of AI to ensure fairness, confidentiality, and enforceability of awards.

There is some debate about different models of such governance. For the time being, the industry-based self-regulation in the form of soft-law guidelines which are tailored to the arbitration context and the needs of each case could well provide plausible solutions over rigid state regulation that imposes uniform obligations. This is based on the special nature of commercial arbitration – founded on the prevailing principles of party autonomy, confidentiality, and flexibility enshrined in international conventions and domestic legislation – as well as on the speedy evolution of AI technologies that keep challenging regulatory responsiveness.

Nevertheless, as Albania pursues its integration into the EU, the EU-based hard-law approach of AI regulation in international commercial arbitration is likely to prevail. At this point, it is prudent for the Albanian Government to undertake a diligent evaluation process of both the extent and timing of alignment with the EU AI Act, by reflecting also on the current criticism of the scope of application of such an Act regarding commercial arbitration. This could pave the way for a moderate hybrid approach, whereby both models would be accommodated in a way that they can supplement rather than substitute each other. Such an approach would set the premise for adopting a sustainable regulatory framework that promotes responsible use of AI tools and safeguards the progress of commercial arbitration in Albania.

## LIST OF REFERENCES

### *Literature (books and articles)*


Alnaber, R. 2025. An "A-eye" to the future of arbitration: a new world or a better world? *International Journal of Law and Information Technology*, 33, eaaf006. https://doi.org/10.1093/ijlit/eaaf006

Appleton, B. 2026. Artificial Intelligence and International Arbitration: A Comprehensive Listing of Governing Laws, Institutional Rules, Professional Responsibility Standards, and Guidance. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6631182 (15. 5. 2026).

Gjuzi, J. 2024. Arbitration law and practice in Albania: Features, challenges and perspectives. *Strani pravni život*, 68(4), pp. 525–555. https://doi.org/10.56461/SPZ_24404KJ

Migliorini S. & Moreira, J. I. 2026. Clashing Frameworks: the EU AI Act and Arbitration. *European Journal of Risk Regulation*, 17(1), pp. 140–160. https://doi.org/10.1017/err.2025.10043

Paulsson, M. & Suresh, S. 2024. AI: The Modern Tribunal Assistant – Impact on Enforceability of Arbitral Awards under the New York Convention. *Jus Mundi Arbitration Review*, 1(1), pp. 101–119. Available at: https://jusmundi.com/en/document/publication/en-ai-the-modern-tribunal-assistant-impact-on-enforceability-of-arbitral-awards-under-the-new-york-convention (15. 5. 2026).

Quintão, H. C. M., & de Oliveira Dias, M. 2025. Artificial Intelligence in Arbitration: Opportunities and Regulatory Challenges. *Archives of Business Research*, 13(09), pp. 55–68. https://doi.org/10.14738/abr.1309.19370

Scherer, M. 2019. Artificial intelligence and legal decision-making: The wide open. *Journal of International Arbitration*, 36(5), pp. 539–574. https://doi.org/10.54648/joia2019028

Scherer, M. 2023. Chapter 39: Artificial Intelligence in Arbitral Decision-Making: The New Enlightenment? In: Bull, C. *et al.* (eds.), *ICCA Congress Series*, Volume 2, pp. 683–694.


### *Internet sources*


Aceris Law. *When Arbitrators Use AI: LaPaglia v. Valve and the Boundaries of Adjudication*, 19 Apr. 2025. Available at: https://www.acerislaw.com/when-arbitrators-use-ai-lapaglia-v-valve-and-the-boundaries-of-adjudication/ (15. 5. 2026).

Al Fatayri, L. 2024. *AI in International Arbitration: What Is the Big Deal?* The American Review of International Arbitration, New York: Columbia Law School. Available at: https://aria.law.columbia.edu/ai-in-international-arbitration-what-is-the-big-deal/?cn-reloaded=1#_ftnref2 (15. 5. 2026).

Bell, A. S. 2025. Fabrication and delegation: AI in international arbitration, Keynote Address of the International Arbitration Conference 2025, Sydney, Australia. Available at: https://acica.org.au/2025/10/22/keynote-address-of-the-international-arbitration-conference-2025-fabrication-and-delegation-ai-in-international-arbitration/ (15. 5. 2026).

California district court rules on challenges to AAA award alleging arbitrator's use of AI (LaPaglia v Valve). 2026. *Legal News*, *Lexis Nexis*. Available at: https://www.lexisnexis.co.uk/legal/news/california-district-court-rules-on-challenges-to-aaa-award-alleging-arbitrators-use-of-ai-lapaglia-v (15. 5. 2026).

CIARB. 2025. Guideline on the Use of AI in Arbitration. Available at: https://www.ciarb.org/media/bpndtcgu/guideline-on-the-use-of-ai-in-arbitration_updated-sept-2025.pdf?utm_source=AI+Guidelines+Launch&utm_medium=News+Page (15. 5. 2026).

CMS. 2026. What is an AI ethics board?. Available at: https://cms.law/en/media/local/cms-cmno/images/other/artificial-intelligence-what-is-an-ai-ethics-board-cms (15. 5. 2026).
European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Fostering a European approach to Artificial Intelligence, Brussels, 21 Apr. 2021, COM(2021) 205 final. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2021%3A205%3AFIN (15. 5. 2026).
European Commission, Commission Staff Working Document, Albania 2025 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2025, Communication on EU enlargement policy, 4.11.2025, COM(2025) 690 final. Available at: https://enlargement.ec.europa.eu/document/download/fe9138b7-90fe-4277-a12c-3a03f6d1957f_en?filename=albania-report-2025.pdf (15. 5. 2026).
Freshfields Risks and Compliance Blogs. 2026. *AI in Arbitration, Part I: Principles Guiding the Use of AI in Arbitral Proceedings*. Available at: https://riskandcompliance.freshfields.com/post/102mmiy/ai-in-arbitration-part-i-principles-guiding-the-use-of-ai-in-arbitral-proceedin (15. 5. 2026).
Freshfields Law Firm. 2026. *Report on International Arbitration in 2025: AI in international arbitration: a fast-evolving landscape*. Available at: https://www.freshfields.com/en/our-thinking/campaigns/international-arbitration-in-2025/ai-in-international-arbitration-a-fast-evolving-landscape (15. 5. 2026).
Hong Kong International Arbitration Center HK45, Hunar. 2026. *AI Ethical Review Committees and the Future of Responsible AI in International Arbitration*. March 9. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/ai-ethical-review-committees-and-the-future-of-responsible-ai-in-international-arbitration/ (15. 5. 2026).
Lüttenberg, C., Beimel, I. & Heetkamp, S. I. 2025. How Does the EU AI Act Apply to Arbitration? *Daily Jus*. Available at: https://dailyjus.com/legal-tech/2025/01/how-does-the-eu-ai-act-apply-to-arbitration (15. 5. 2026).
Mills, T. & Shanker, M. 2024. *New frontiers: Regulating artificial intelligence in international arbitration*. Norton Rose Fullbright Law Firm. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/3cb82b55/new-frontiers-regulating-artificial-intelligence-in-international-arbitration (15. 5. 2026).
Nappert, S. 2025. *The impact of artificial intelligence on the duties, qualifications, and selection of international arbitrators*, Oxford Law Pro. Available at: https://academic.oup.com/info-oxford-law-pro/pages/artificial-intelligence-arbitrators.
Pabakhshi, E. 2025. AI in Arbitration: Will the EU AI Act Stand in the Way of Enforcement? *Conflict of Laws*. Available at: https://conflictoflaws.net/2025/ai-in-arbitration-will-the-eu-ai-act-stand-in-the-way-of-enforcement/?print=print (15. 5. 2026).
Pashaeva, N. 2025. AI and Exceeding Power: Lessons from LaPaglia v. Valve Corporation, *Daily Jus*. Available at: https://dailyjus.com/legal-tech/2025/10/ai-and-exceeding-power-lessons-from-lapaglia-v-valve-corporation (15. 5. 2026).
Queen Mary of London and White & Case. 2025. *International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration*. Available at: https://www.qmul.ac.uk/arbitration/research/2025-international-arbitration-survey/ (15. 5. 2026).

Silicon Valley Arbitration & Mediation Center. 2024. *Guidelines on the Use of Artificial Intelligence in Arbitration*, 1st ed. Available at: https://svamc.org/wp-content/uploads/SVAMC-AI-Guidelines-First-Edition.pdf (15. 5. 2026).

Silicon Valley Arbitration & Mediation Center. 2025. *US Court Considered whether to Vacate an Award because of Arbitrator's Alleged Use of AI*. Available at: https://svamc.org/us-court-considered-whether-to-vacate-an-award-because-of-arbitrators-alleged-use-of-ai/ (15. 5. 2026).

Vienna International Arbitration Center. 2025. Note on the Use of AI in Arbitration Proceedings. Available at: https://www.viac.eu/wp-content/uploads/2025/04/VIAC-Note-on-AI.pdf (15. 5. 2026).

Scherer, M. 2024. We Need to Talk About … the EU AI Act!. *Kluwer Arbitration Blog*. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/we-need-to-talk-about-the-eu-ai-act/ (15. 5. 2026).

Venero, S. G. 2026. Should Arbitrators Disclose Their ChatGPT History? Peru's New AI Regulation, Algorithmic Bias, and Impartiality. *Kluwer Arbitration Blog*. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/should-arbitrators-disclose-their-chatgpt-history-perus-new-ai-regulation-algorithmic-bias-and-impartiality/ (15. 5. 2026).

Albanian Commercial Register. Available at: https://qkb.gov.al/ (15. 5. 2026).

### *Legal sources and case law*

Council of Ministers' Decision no. 812, dated Dec. 30, 2025 "On the approval of the general analytical program of draft acts that shall be submitted for examination to the Council of Ministers during the year 2026" (National Plan of Normative Acts, 2025).

Draft National Strategy of Artificial Intelligence 2025-2030. Available at: https://www.konsultimipublik.gov.al/Konsultime/Detaje/864 (15. 5. 2026).

European Convention on International Commercial Arbitration, signed at Geneva on Apr. 21, 1961, adhered to by Albania by means of Law no. 8687, dated Nov. 9, 2000.

International Chamber of Commerce, *ICC Rules of Arbitration*, 2021.

Law "On the Code of Civil Procedure," no. 8116, dated March 29, 1996, as amended.

Law "On arbitration," no. 52/2023, dated July 6, 2023.

Peruvian 2023 Act Promoting the Use of AI for the Economic and Social Development of the Country followed by the 2025 Implementing Regulation.

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

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on June 10, 1958, adhered to by Albania by means of Law no. 8688, dated Nov. 9, 2000.

United Nations Commission on International Trade Law. 2006. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Vienna: United Nations.

LaPaglia v. Valve Corp. No. 3:25-cv-00833-RBM-DDL (S.D. Cal., petition filed Apr. 8, 2025; first amended petition filed May 19, 2025; dismissed December 9, 2025 (Montenegro, J.). Available at: https://dockets.justia.com/docket/california/casdce/3:2025cv00833/810531 (15. 5. 2026).

Association des ressources intermédiaires d'hébergement du Québec (ARIHQ) c. Santé Québec - Centre intégré universitaire de santé et de services sociaux du Centre-Sud-de-l'Île-de-Montréal. 2026 QCCS 1360 (Que. Sup. Ct. 22.4.2026) (Sheehan, J.C.S.). Available at: https://canlii.ca/t/kkjtm (15. 5. 2026).

Original scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch7

***Cristina Donia BODNARIUC****

# DIGITAL PERSON AS LEGAL FICTION UNDER THE AI ACT, GDPR, AND EIDAS

*This article examines how the EU's emerging regulatory triangle, Regulation (EU) 2024/1689 (the AI Act), Regulation (EU) 2016/679 (the GDPR), and Regulation (EU) 2024/1183 (eIDAS 2.0/EUDI Wallet), reconstructs the legal identity of individuals in algorithmic environments. It argues that, taken together, these instruments implicitly generate a functional legal fiction of the digital person: the composite techno-legal representation through which the natural person's rights, attributes, and vulnerabilities are mediated by credentials, data traces, profiles, and AI-assisted decisions. Drawing on Roman law's stratified concepts of persona, status, and caput and on modern theories of legal fiction, the article shows why treating AI as an autonomous legal subject would displace responsibility and fragment remedies, while treating individuals only as data subjects is normatively too thin for high-stakes digital governance. The paper proposes a twofold move, namely the normative personification of the individual in digital contexts and the use of transparent liability vehicles for certain AI systems, such as a limited electronic legal person (PJE), without ontological personality.*

***Keywords**:* digital person, legal fiction, AI Act, GDPR, eIDAS 2.0.

## 1. INTRODUCTION: FROM SUBJECT OF LAW TO DIGITAL PERSON

The expansion of artificial intelligence (AI) in administration, the economy and justice forces law to reconsider how it constructs the human figure to whom rights, duties and remedies attach. In increasingly digitised environments, the individual no longer appears in law as a single and stable figure, but through a layered representation composed of partial identities, electronic credentials, data trails, inferred characteristics, and AI-mediated classifications.

In European Union (EU) law, this transformation is articulated in fragmented form through three major regulatory regimes: Regulation (EU) 2024/1689 (the AI Act), Regulation (EU) 2016/679 (the GDPR) and the revised framework introduced through Regulation (EU) 2024/1183 (eIDAS 2.0/EUDI Wallet). Read separately, each of these instruments regulates a distinct field. Read together, they reveal something more important: the emergence of a legally

* Independent legal researcher (AI & Law), Guest Editor, Global Legal AI, ORCID: https://orcid.org/0009-0000-3766-137X, email: *doniabodnariuc@gmail.com*

relevant representation of the individual that cannot be reduced either to the analogue natural person or to the informational category of the data subject alone. It is this additional layer of legal representation that this article names the digital person.

### *1.1. Normative context: the AI Act, the GDPR, eIDAS 2.0*

Regulation (EU) 2024/1689 introduces a risk-based framework for AI systems, focused on high-risk systems used in fields such as employment, education, credit, essential services, migration, law enforcement, and the administration of justice. The GDPR structures the individual as a data subject, that is, as the bearer of a bundle of rights attached to the processing of personal data. Regulation (EU) 2024/1183, by establishing the European Digital Identity Framework and the European Digital Identity Wallet, adds a further layer of legally recognized digital identification and credential management.

These instruments are not merely adjacent. A high-risk AI system used in recruitment, credit assessment or access to public services may rely on electronic identification, large-scale personal data processing and AI-assisted classification within a single socio-technical interface. The result is a stratified normative architecture in which legal identity is increasingly mediated through digital infrastructures.

### *1.2. Why the language of the data subject is not enough*

The GDPR's concept of the data subject has been indispensable for the constitutionalization of data protection in Europe. Yet, in AI-mediated environments, it is not fully sufficient. The individual is not only the subject whose personal data are processed; they are also the subject whose eligibility, credibility, risk, capacity, and access to opportunities may be shaped by scores, labels, recommendations, and automated classifications.

By digital person I do not mean a new legal subject replacing the natural or legal person. I mean a functional legal construct through which institutions identify, authenticate, classify, evaluate and govern an individual across data-driven and AI-mediated environments. The digital person is the legally relevant composite of credentials, data traces, profiles, inferred characteristics and decision-significant representations through which rights, opportunities and vulnerabilities are increasingly mediated.

The concept should also be distinguished from adjacent notions. It is not reducible to the data subject under the GDPR, because it exceeds the mere status of a person whose personal data are processed. It is not identical with digital identity under eIDAS 2.0, because identity credentials represent only one formal layer of a broader techno-legal representation. Nor is it synonymous with a profile, avatar or online persona, because those notions remain either technical, sociological or platform-specific. The digital person is a legal-conceptual synthesis of these fragments insofar as they become operationally relevant for access, exclusion, verification, allocation and accountability.

Finally, the digital person should not be conflated with the notion of the affected person or subject of an AI system as used in the AI Act. Those notions describe a situational relationship between an individual and a specific high-risk system at a particular moment of deployment. The digital person, by contrast, names the enduring techno-legal configuration of the individual across multiple and cumulative infrastructures (credentials, data traces, profiles, inferred characteristics) that persists before, during and after any single system interaction. Where the AI Act identifies a role in relation to a system, the digital person names the legally relevant layer of representation through which that role is exercised and its effects accumulate.

What is missing in current doctrine is therefore not another metaphor for digital life, but a concept capable of capturing both the representational dimension of the person in data and credentials, and the performative dimension through which those representations produce legal and social effects. The notion of the digital person is proposed here as that missing doctrinal bridge.

### *1.3. Method: Roman law and the theory of legal fictions*

Methodologically, the article combines historical-conceptual analysis with normative reconstruction. The first part revisits the Roman law categories of persona, status and caput in order to show that legal identity has never been monolithic, but has instead been structured through layered legal positions vulnerable to partial losses of status. The figure of *capitis deminutio* provides a useful matrix for thinking about contemporary forms of digital *capitis deminutio*, in which the individual retains full natural personhood while effective access to rights may nonetheless be curtailed through data-driven and credential-based infrastructures. The second part reconstructs how the AI Act, the GDPR and eIDAS 2.0 jointly configure a legal environment in which the digital person becomes visible as a practical and doctrinal necessity. The third part develops the digital person as a legal fiction and differentiates it from proposals for AI legal personhood. The fourth part relates this concept to questions of liability and institutional design, including the use of transparent legal vehicles such as the limited electronic legal person (PJE).

## 2. PERSONA, STATUS, CAPUT: STRATIFIED IDENTITY IN ROMAN LAW

Roman law offers a useful lens because it treated legal identity as structured through persona, status and caput rather than as a monolithic natural fact. A person's legal position depended on recognised statuses and could be altered without erasing the individual's presence in the legal order altogether. The figure of *capitis deminutio* is especially useful here because it captures changes in legal position through loss or alteration of status.

This offers an instructive analogy for contemporary digital environments. The individual now appears through civil, informational, electronic and algorithmic layers of representation. We can therefore speak of an extended digital caput vulnerable to subtle forms of digital *capitis deminutio*: a compromised identity wallet, invalidated credential, negative score or persistent algorithmic label may not erase legal personhood, but can materially restrict access to employment, services, mobility or recognition.

Roman law thus offers not a ready-made solution but a conceptual lesson: legal vulnerability may arise through partial degradation of legally relevant status, and law needs concepts capable of naming and responding to such losses.

## 3. THE NORMATIVE TRIANGLE OF THE DIGITAL PERSON: THE AI ACT, THE GDPR, eIDAS 2.0

### *3.1. The AI Act: high-risk AI systems, governance and traceability*

Regulation (EU) 2024/1689 establishes the Union's general framework for AI. For the present analysis, its significance lies not only in the classification of high-risk systems, but in the fact that it identifies the institutional settings in which algorithmic processing can materially

affect a person's economic and social position: employment, education, credit, essential services, migration, law enforcement and justice. In these settings, what is acted upon is often not the embodied individual in abstraction, but the individual's digitally mediated representation – their scores, labels, histories and inferred characteristics.

The AI Act is also crucial because it translates concern for the affected person into concrete governance obligations, including risk management, data governance, technical documentation, logging, human oversight and post-market monitoring. These obligations define the conditions under which the modelling of the digital person can later be reconstructed, contested and assessed by courts or supervisory authorities (Yeung, 2018).

From this perspective, the high-risk regime can be read as a regime of enhanced legal protection for situations in which the individual's digital caput is exposed to structural harm. Where the law requires heightened traceability and oversight, it implicitly recognises that the person's opportunities, status and access to goods or services may be reshaped through algorithmic mediation.

### *3.2. GDPR: the data subject as informational subject of law*

Regulation (EU) 2016/679 remains the backbone of the EU's framework for the processing of personal data. It defines the individual as a data subject and grants rights of information, access, rectification, erasure, portability, objection, complaint, and compensation, structured around principles such as lawfulness, fairness, transparency, purpose limitation, data minimization, and accuracy.

The GDPR therefore supplies the informational layer of the digital person. It determines how the individual appears in databases, records and processing operations, and which forms of legal control they can exercise over that representation. At the same time, its vocabulary remains narrower than the wider legal reality of AI-mediated governance. It captures the legality of processing, but not always the full performative force of scores, labels, and classifications that condition access to work, credit, or public services.

The Court of Justice's judgment in *SCHUFA Holding (Scoring) (2023)* is especially significant in this respect, because it clarifies that the automated establishment of a credit score may amount to a decision within the meaning of Article 22 of the GDPR where a third party relies decisively on that score. The case is important not only for data protection doctrine, but because it reveals how a digitally produced representation of the person can operate as the legally decisive interface through which opportunities are granted or denied.

### *3.3. eIDAS 2.0: electronic identity and credentials*

Regulation (EU) 2024/1183, which establishes the European Digital Identity Framework, adds another layer. Through the European Digital Identity Wallet, the individual can store, present and use electronic credentials issued by public authorities and, in certain contexts, by private actors. These may include proof of identity, age, residence, qualifications, licenses, or other attestations of legal or social status.

eIDAS 2.0 is therefore not simply about technical convenience. It reorganizes the legal presentation of the person before institutions and markets through a credential architecture capable of verifying attributes across borders and conditioning access to services on the successful presentation of legally trusted digital proofs.

### *3.4. Layers of identity: physical, informational, electronic, algorithmic*

Read together, the AI Act, the GDPR and eIDAS 2.0 delineate at least four analytically distinct layers of legal identity. At the base stands physical and civil identity, anchored in domestic law. The GDPR structures informational identity. eIDAS 2.0 organises electronic identity through credentials and wallet-based presentation. The AI Act, finally, makes visible an algorithmic identity expressed through scores, labels, probability values, risk indicators and AI-assisted decisions.

The digital person emerges at the intersection of these layers. It is not someone other than the natural person, but the way in which the natural person is represented, verified, evaluated and acted upon within complex technical infrastructures. The normative triangle of the AI Act, the GDPR and eIDAS 2.0 thus functions as the legal matrix within which the digital person is produced.

Operationally, this matters because courts and regulatory authorities are increasingly confronted with disputes in which the central issue is not simply whether data were processed lawfully, but how the individual was rendered legible to the system and how that rendering affected access, exclusion, verification or liability. The digital person names that legally contestable interface between the human being and the socio-technical apparatus that represents, evaluates and acts upon them.

The operational significance of this intersection can be illustrated by a single scenario. Consider an AI-assisted recruitment system classified as high-risk under Annex III of the AI Act, which requires candidates to submit qualifications and identity attributes verified through the European Digital Identity Wallet under eIDAS 2.0 and generates automated eligibility scores processed under the GDPR. In such a configuration, all three instruments apply simultaneously to the same person. eIDAS 2.0 governs the presentation of credentials, the GDPR the lawfulness of processing, including safeguards under Article 22 where automated scoring produces legally significant effects, and the AI Act imposes transparency, human oversight and traceability obligations on the deployer. The natural person thus appears not as a unified legal subject, but as a composite of verified attributes, processed data, and inferred scores, a configuration that this article calls the digital person.

This convergence also reveals tensions that the concept of the digital person must capture. The AI Act's traceability and record-keeping requirements may sit uneasily with the GDPR principles of data minimisation and storage limitation, while the selective-disclosure logic encouraged by eIDAS 2.0 may narrow the informational basis for algorithmic assessment, with consequences for both accuracy and auditability. These frictions do not dissolve at the level of any single instrument.

## 4. THE LEGAL FICTION OF THE DIGITAL PERSON

### *4.1. From AI legal personhood to the digital person*

Against this background, the debate on AI legal personhood appears conceptually misplaced. To attribute legal personality to AI systems on the basis of technical autonomy is to collapse two distinct planes: technical autonomy, meaning the capacity of a system to operate without continuous human intervention, and legal autonomy, meaning the capacity to hold rights and obligations in one's own name.

That collapse is normatively hazardous. It risks personifying artefacts while obscuring the human and institutional actors who design, train, deploy, oversee and profit from them. Instead of clarifying responsibility, it introduces a new fictive layer between the harmed individual and the actors who should remain legally visible.

The more coherent move is a different one: not to personify AI systems as autonomous legal subjects, but to make explicit the already emerging legal fiction through which the individual is represented and affected in digital environments. The central question is not whether AI deserves personhood, but how law should conceptualise the digitally mediated person upon whom AI systems operate.

### *4.2. Limits of AI legal personhood and the risks of an autonomous subject*

Attempts to analogise AI with corporate legal persons are ultimately unconvincing. Corporate personhood is embedded in a dense architecture of human organisation, governance, patrimony and representation. Its fiction serves a clear institutional function. AI systems, by contrast, remain technical artefacts whose external effects depend on human choices regarding design, training data, deployment settings, monitoring and intervention.

Recognising AI as an autonomous legal subject would therefore generate at least three risks. It would displace responsibility from identifiable human and institutional actors to a fictive entity lacking moral agency; it would fragment the architecture of liability by interposing an additional layer between victims and those who benefit from the system; and it would distort the grammar of fundamental rights by suggesting a false symmetry between human persons and AI artefacts.

For these reasons, the personification of AI should be resisted. The more important task is to clarify the status of the digital person and to design transparent mechanisms through which responsibility for high-risk AI systems can be organised without ontological mystification.

### *4.3. The digital person as a functional fiction: rights, obligations and evidence*

The digital person can be understood as a functional legal fiction. It does not claim to add a new subject to the legal order. It makes a more modest but necessary claim: that the composite techno-legal representation through which an individual is identified, evaluated and acted upon within algorithmic infrastructures has become sufficiently consequential to require legal naming. Naming that representation is the first step toward making it contestable, correctable and remediable.

The digital person can now be defined more precisely as the normative configuration of identities, credentials, data traces, profiles and inferred characteristics attributed to a natural person within legal and technical infrastructures, through which that person gains or loses access to rights, services, opportunities and protections.

This definition has several consequences. First, the digital person is derivative: it does not replace the natural person, but overlays it as a legally relevant representational layer. Second, it is infrastructural: it exists through registers, databases, identity wallets, logs, models and other technical artefacts. Third, it is performative: the way in which it is configured produces real distributive effects, because it can determine who is considered eligible, trustworthy, risky, ineligible or suspicious.

If the digital person is understood as the second legal skin of the individual in AI-data-identity infrastructures, it becomes possible to articulate a more coherent set of rights

and correlative duties. The GDPR rights can be re-read as rights of the digital person over its informational configuration. The AI Act safeguards in high-risk domains protect the person's digital caput against opaque or unjustified algorithmic mediation. eIDAS 2.0 adds control over the credential layer through which the person proves identity or status in digital form.

On the other side stand correlative obligations. Data controllers, AI providers, deployers, wallet administrators and public authorities all participate in producing and managing the digital person. Their duties should therefore be read not only as duties of technical compliance, but as duties to maintain the integrity of the person's techno-legal representation: duties of accuracy, explanation, record-keeping, traceability, contestability and remediation.

The digital person is also a probative concept in the sense that it helps identify the legally relevant site at which evidence concerning representation, categorisation and algorithmic effect must be sought. In disputes concerning algorithmic discrimination, exclusion from services, erroneous scoring, or compromised credentials, the decisive legal question is often not simply who clicked, approved, or refused, but how the person was modelled, categorized, and rendered actionable within the system. The fiction of the digital person therefore justifies enhanced requirements for logging, retention of records, auditability and procedural access to the elements through which that representation was constructed.

In judicial and regulatory practice, the concept of the digital person can serve as a structured analytical lens. Where access to employment, credit, public benefits or other essential opportunities has been shaped by data-driven or AI-assisted processing, courts and supervisory authorities should ask at least three questions: how was the person represented within the system; which legal and technical actors contributed to that representation; and which rights of access, rectification, explanation, contestation or redress are required to repair the resulting distortion or exclusion. The value of the concept lies precisely in making those questions visible as legal questions, rather than leaving them dispersed across technical subsystems.

### *4.4. The digital person, PJE and the architecture of liability*

The digital person must finally be distinguished from, yet connected to, proposals concerning the institutional organisation of liability around AI systems. This is where the model of the PJE becomes relevant. Their functions are not the same. The digital person describes how the human person is represented and affected in digital environments. The PJE, by contrast, is conceived as a transparent legal vehicle through which responsibility for certain high-risk AI systems may be organised without treating the AI system itself as an autonomous subject.

In a coherent architecture, the PJE would operate as a container of liability: a vehicle concentrating a ring-fenced patrimony, an identified human administrator, obligations of audit and traceability, and a risk-calibrated regime of responsibility. Its point is not to emancipate AI from human control, but to make the allocation of accountability more visible and more enforceable. The doctrinal foundations and institutional architecture of the PJE have been developed in detail elsewhere (Bodnariuc, 2025a; Bodnariuc, 2025b).

The PJE draws on a Kelsenian understanding of legal personality as a technique of imputation rather than a statement of ontological fact (Kelsen, 1945, p. 93). Its function is not to say what AI is, but to create a legally intelligible point around which obligations, risk and patrimonial responsibility may be organised. Like the corporate person, the PJE is a juridical construct: it does not personify the system itself, but structures legal consequences around a designated vehicle. For that reason, it is not designed to displace the AI Act's existing compliance architecture. The

requirements applicable to high-risk AI systems remain intact, as do the actor-specific obligations imposed on providers, importers, distributors and deployers. What the PJE adds is not a substitute for that framework, but an immediately addressable liability point and an identifiable patrimony where harmful effects emerge from distributed high-risk AI operations.

As proposed here, the PJE would not operate as a general legal form for all AI systems, but as a narrowly tailored vehicle for a limited class of high-risk, operationally autonomous systems whose harmful effects may emerge through distributed chains of design, deployment and use. Its minimum constitutive elements would include a ring-fenced patrimony, a designated human administrator, duties of auditability and traceability, and a clear interface for compensation and recourse. In that sense, the PJE is not meant to symbolically personify AI, but to juridically stabilise the point at which responsibility becomes visible, enforceable and economically meaningful.

This distinction becomes even more important in the current EU landscape. The Product Liability Directive (Directive (EU) 2024/285) has now been revised so as to extend no-fault liability rules to software and other digital products, while the Commission has announced the withdrawal of the proposed AI Liability Directive because no foreseeable agreement existed on the text and it will assess whether another proposal, or another type of approach, should be tabled (European Commission, 2025). The liability debate has therefore not disappeared; it has become more fragmented and, for that very reason, conceptually more in need of a unifying account of the represented individual upon whom these regimes converge.

The model proposed here would allow for a layered liability architecture suited to that fragmented landscape. At the first level, the PJE could provide an immediate compensation interface within its ring-fenced patrimony and any attached mandatory insurance. At the second, the designated human administrator could incur subsidiary responsibility for negligent supervision, configuration or failure to intervene within authorised operational limits. At the third, recourse could extend along the wider technological chain, calibrated to the causal contribution of the designer, integrator, deployer or user. Such layering does not dilute human responsibility; it makes it visible and legally actionable where distributed operations would otherwise dissolve into evidentiary difficulty.

Within such a framework, the digital person serves as the reference point for assessing harm. When an AI-supported system affects access to work, credit, benefits or essential services, what is often harmed first is not an abstract human being in the air, but the person's digital caput: their scores, labels, statuses, credentials and machine-readable representation. The PJE, where used, would organise responsibility around the system; the digital person would identify the legally relevant site of impact.

The advantage of this separation is twofold. It preserves the centrality of the human person and their dignity, while also making room for institutional techniques capable of concentrating patrimonial risk and compliance duties around high-risk systems. The digital person and the PJE are thus not competing fictions, but complementary instruments of a legal architecture that resists AI personhood while strengthening intelligibility, contestability and effective redress.

## 5. CONCLUSIONS: RESISTING AI LEGAL PERSONHOOD AND STRENGTHENING THE DIGITAL PERSON

This article has argued that the emerging EU framework on AI, data protection and digital identity implicitly produces a new legal figure: the digital person. Using the Roman law

categories of persona, status and caput as a conceptual lens, it has shown that legal identity has always been stratified and that vulnerability can arise through partial losses of legally relevant status rather than only through total exclusion.

In contemporary AI-data-identity infrastructures, this stratification reappears in digital form. The individual is simultaneously a bearer of civil status, a data subject under the GDPR, a holder of electronic credentials under eIDAS 2.0 and the target of algorithmic scoring, profiling and classification under the AI Act. The digital person names the techno-legal configuration through which these layers become operational in practice.

On that basis, the article has argued that debates on AI legal personhood move in the wrong direction. To recognise AI systems as autonomous legal subjects would obscure the human and institutional actors who design, deploy and benefit from those systems. The preferable route is to make explicit the fiction that is already working beneath the surface of EU law: the digital person as the legally relevant representation of the human individual in data-driven and AI-mediated environments.

The digital person is not a competitor to the natural person, but a second legal skin around which rights, duties and evidentiary guarantees can be organised. It offers a clearer focal point for claims concerning intelligibility, rectification, contestation, traceability and effective redress. It also enables courts and regulators to treat the modelling of the person within a system as a central juridical question rather than as a merely technical background issue.

In institutional terms, the article has also suggested that the digital person can be combined with transparent liability vehicles such as the PJE. In that architecture, the PJE would organise patrimonial risk and accountability around certain high-risk AI systems, while the digital person would remain the reference point for identifying and repairing harm. Such an approach avoids ontological mystification, preserves the centrality of human dignity and fits better with the current, still fragmented, EU landscape of AI governance and liability.

Explicit recognition of the digital person would therefore provide a doctrinal bridge between AI governance, data protection, digital identity, adjudication and liability. In a legal order increasingly confronted with machine-mediated access to work, credit, welfare, justice and public services, that bridge is becoming normatively necessary.

## LIST OF REFERENCES

### *Literature*


Bodnariuc, C. D. 2025a. De la Cicero la AI (I): Fundamente istorice si teoretice ale persoanei juridice electronice limitate. Bucharest: Universul Juridic. Available at: https://www.universuljuridic.ro/de-la-cicero-la-ai-i-fundamente-istorice-si-teoretice-ale-persoanei-juridice-electronice-limitate/ (24. 11. 2025).

Bodnariuc, C. D. 2025b. De la Cicero la AI (II): Necesitatea si arhitectura normativa a persoanei juridice electronice limitate. Bucharest: Universul Juridic. Available at: https://www.universuljuridic.ro/de-la-cicero-la-ai-ii-necesitatea-si-arhitectura-normativa-a-persoanei-juridice-electronice-limitate/ (9. 12. 2025).

Kelsen, H. 1945. *General Theory of Law and State*. Cambridge, MA: Harvard University Press.

Yeung, K. 2018. Algorithmic regulation: A critical interrogation. *Regulation & Governance*, 12(4), pp. 505–523. https://doi.org/10.1111/rego.12158

### *Legal sources*

Regulation (EU) 2016/679 of the European Parliament and of the Council 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 (General Data Protection Regulation). OJ L 119, 4.5.2016, pp. 1-88.

Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework. OJ L, 2024/1183, 30.4.2024.

Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence. OJ L, 2024/1689, 12.7.2024.

Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC. OJ L, 2024/2853, 18.11.2024.

European Commission. 2025. Commission Work Programme 2025: Moving Forward Together: A Bolder, Simpler, Faster Union. COM(2025) 45 final. Brussels: European Commission. Available at: https://commission.europa.eu/publications/2025-commission-work-programme-and-annexes_en (21. 4. 2026).

### *Case law*

SCHUFA Holding (Scoring), 2023. CJEU, Judgment of 7 December 2023. (Case C-634/21, ECLI:EU:C:2023:957). Available at: https://curia.europa.eu/juris/liste.jsf?num=C-634/21 (21. 4. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch8

*Vesna LAZIĆ BULJAN**
*Lejla HASANOVIĆ***

# DIRECTORS' AND OFFICERS' (D&O) LIABILITY INSURANCE: CHALLENGES OF IMPLEMENTATION IN BOSNIA AND HERZEGOVINA

*Directors' and officers' liability insurance (D&O insurance) is a form of professional liability insurance and one of the key instruments for safeguarding corporate governance, as it mitigates the financial consequences that may arise for individuals from breaches of the duties of care, loyalty, or trust owed to the company. D&O insurance is not merely protective but structurally embedded in modern corporate governance as a risk-allocation mechanism balancing accountability and entrepreneurial freedom. D&O insurance is relatively new in the legal system of Bosnia and Herzegovina and is still rarely used in practice. However, its importance is growing in parallel with the development of capital markets, corporate transparency, and regulatory requirements. The paper analyses the legal nature and function of D&O insurance, complemented by a comparative overview of solutions in Germany and Austria, with the aim of identifying the opportunities and obstacles for its full implementation in Bosnia and Herzegovina. The paper argues for regulatory and contractual adjustments of D&O insurance to new forms of managerial risk and proposes guidelines for the development of an appropriate legal and institutional framework in Bosnia and Herzegovina. The objective is to highlight existing normative gaps and practical challenges in domestic law and to offer proposals for alignment with European standards in the fields of insurance and corporate governance.*

***Keywords:*** D&O insurance, directors' and officers' liability, corporate governance, German D&O insurance, Austrian D&O insurance.

## 1. INTRODUCTION

One of the central issues of corporate governance and risk management in modern corporate systems is the liability of directors and members of the management board. The complexity of corporate relationships and the growing number of disputes related to breaches of their fiduciary duties have led to a significant increase in the personal exposure of directors and

* Senior Teaching Assistant, Faculty of Law of the University of Sarajevo, ORCID: https://orcid.org/0009-0000-0589-5366, e-mail: *v.lazic@pfsa.unsa.ba*

** Teaching Assistant, Faculty of Law of the University of Sarajevo, ORCID: https://orcid.org/0009-0006-6386-3630, e-mail: *l.hasanovic@pfsa.unsa.ba*

board members to the risk of liability claims. Therefore, over time, this institute has become a key instrument for protecting both individuals performing the functions of directors and board members, as well as the companies themselves, in the course of business (Trautman & Altenbaumer-Price, 2012). The institute exists in legal practice in Bosnia and Herzegovina (BiH); however, it is regulated by general tort law and company law provisions.

Even though directors' and officers' liability insurance (D&O insurance) has a long tradition in comparative legal systems and a relatively well-defined normative and contractual framework, its application in BiH remains insufficiently researched and, in practice, is often marked by numerous legal and practical challenges. The complexity arises from issues related to the distinction between insurable and uninsurable risks, the relationship of D&O insurance to the rules governing the liability of board members towards the company and third parties, as well as the compliance of contractual solutions with the applicable regulations in the fields of contract law, company law, and insurance law.

In this paper, we analyze the normative framework of D&O insurance in BiH and identify the key challenges of its application in domestic practice. Based on comparative legal solutions and theoretical assumptions, the paper's aim is to offer proposals for the normative improvement of D&O insurance in BiH. Special focus is placed on issues concerning the legal nature of D&O insurance, the qualitative and quantitative scope of coverage, exclusions of liability, and the impact of the specificities of the domestic corporate and regulatory environment on the effectiveness of this institute. The paper uses the method of normative analysis of applicable regulations, along with the method of analyzing domestic practices, and includes a comparative overview of selected solutions in Germany and Austria, with the aim of indicating possible directions for improving the legal framework and practice of D&O insurance in BiH.

The article is structured into four main sections. In the first section, the authors provide introductory remarks on directors' and officers' (D&O) liability insurance, outlining its conceptual foundations and functional role within corporate governance. The second section offers a comprehensive comparative analysis of D&O insurance in Germany and Austria, highlighting key doctrinal approaches and practical developments. The third section focuses on BiH, examining the existing legal and insurance framework, including an analysis of insurance policies and their implications for traditional company law doctrines, particularly the business judgment rule. Finally, the fourth section presents normative recommendations and concluding observations on how to further develop and strengthen the application of D&O insurance *de lege ferenda*.

## 2. THE CONCEPT AND LEGAL NATURE OF D&O INSURANCE

In the past, the primary duty of company directors was to achieve maximum profit, often without broader responsibility towards society, shareholders, or other stakeholders. Over time, however, regulatory requirements, state supervision, and the interests of minority shareholders have increased, leading to greater transparency and accountability in corporate governance. At the same time, in certain legal systems, employees have been given greater influence over management, including access to boards of directors. Increased social expectations, together with numerous cases of poor governance, fraud, unethical business practices, and spectacular bankruptcies, have resulted in a rise in litigation against directors and board members. Shareholders, creditors, and employees are increasingly initiating proceedings for damages caused

by poor business decisions, while modern media and advanced communications increase the likelihood of uncovering irregularities (Youngman, 1999, pp. 1–3). Most securities class action lawsuits in the US brought by shareholders are settled out of court within the D&O insurance coverage limit. D&O insurance thus serves as an important source of funds for companies for the defense and settlement of lawsuits (Lin *et al.*, 2011).

In performing managerial, representative, and supervisory functions, members of the management and supervisory boards are obliged to prioritize the interests of the company, while duly considering the interests of other stakeholders affected by its operations. United States (US) law has developed rules on the liability and due care of board members, encompassed within the standard of fiduciary duty, which includes three obligations: the duty of loyalty, the duty of care, and the duty to act in good faith. All these rules come into play in the performance of the core tasks of company management, particularly through the application of the business judgment rule, which grants management autonomy in decision-making, including decisions that may involve risk, without fear that a court will determine the liability of board members in relation to such decisions (Trivun, 2019, p. 80).

Notwithstanding the protective scope of this rule, an additional layer of protection has emerged within corporate practice and legal doctrine. To facilitate risk-taking inherent in managerial decision-making and to mitigate the personal liability exposure of directors, D&O insurance has developed as a complementary mechanism. It serves to enhance managerial willingness to engage in value-generating, yet risk-laden, decisions, while preserving the functional objectives of corporate governance. Some scholars argue that D&O insurance is an indicator of robust governance practices, since it enhances managerial efficiency (Hsieh *et al.*, 2025). In its simplest terms, D&O insurance is a form of professional liability insurance directly related to corporate governance, which protects directors and members of management boards from potential claims for damages caused while performing their duties during the period of insurance (Kaltchev, 2006, pp. 351–352). However, moral hazard has been associated with D&O insurance by various scholars (Kim, 2015; Gillan & Panasian, 2015; Zeng, 2014; Lin *et al.*, 2011), whether related to management being disincentivised to act in the best interest of stakeholders or tax avoidance, leading to more lawsuits. On the other hand, in China scholars have established a positive correlation between the effects of D&O insurance and oversight of state-owned enterprises (SOEs). Three SOE-specific mechanisms have been observed: political promotion incentives, reputation-related strategic benefits, and ongoing monitoring by insurers (Wanyan *et al.*, 2025, p. 625).

D&O insurance is not directly regulated under the Law on Insurance of the Federation of BiH (Official Gazette of the Federation of BiH, No. 23/17), however, given its nature, it is classified within the category of liability insurance (which comprises four types within this group), specifically under other liability insurance (Džidić & Ćurković, 2017, p. 229). In fact, this type of insurance represents a form of professional liability insurance (Petrović Tomić, 2008, p. 181). The legal nature of this insurance is, to say the least, complex. The contract is concluded based on the modalities of insurance for the account of another, as well as collective insurance, and this combination of elements certainly has a specific impact on the rights and obligations of the contracting parties, particularly the insured (Radović, 2015, p. 106). The emergence of the COVID-19 pandemic and the associated economic crisis, as well as the war developments in Russia and Ukraine, have further contributed to the expansion and increased relevance of D&O insurance (Maleta & Čarapina, 2022, p. 364).

D&O insurance is one of the most controversial and least understood management tools, yet it plays a very important role in the management of companies (Li *et al*., 2022, p. 1). When discussing the scope of coverage of this type of insurance, as with other types, a distinction is made between qualitative and quantitative scope of coverage. The qualitative scope of coverage under an insurance contract refers to defining the risks covered by this type of insurance, as well as identifying the circle of third parties entitled to compensation, while the quantitative scope refers to defining the monetary amounts covered, *i.e.,* the insured sums (Lazić, 2022, pp. 68–72). The qualitative scope of D&O insurance coverage can be divided into basic and extended coverage.

Basic coverage (A-side coverage) refers to personal coverage of directors or board members, while extended coverage (B-side coverage and Insuring Agreement C) refers to coverage of the company (Granof & Nicholls, 2014, p. 106). This means that in the case of basic coverage, when the company does not indemnify a director or board member for damages arising from their actions, this type of insurance compensates the director or board member for the losses they have suffered (defense costs, damages), *i.e.*, those they are obliged to pay based on a final judgment or settlement. Thus, A-side coverage protects directors and board members when they must bear defense costs from their personal assets or in the event of losing damages claims. The company may not indemnify these costs for various reasons: it may be insolvent, such payments may be prohibited by law or the company's statutes, or it may simply be the company's decision.

Once companies began to be sued together with directors, another form of coverage emerged (Petrović Tomić, 2008, p. 182). If the company indemnifies the director or board member, we speak of extended coverage, where the company is reimbursed for the damage that it has paid to its director or board member. In other words, the company is reimbursed by the insurer for costs it has paid instead of the director or board member for damage caused in the performance of their duties (Mogel, 2003, p. 14). It should be noted that this coverage does not extend to damages for which only the company itself is liable, that is, where the company is the defendant in a legal dispute. At first glance, such extended coverage might appear to constitute liability insurance for the company; however, this is not the case. Rather, B-side coverage is properly understood as a form of liability insurance protecting directors, as it indemnifies them in situations where the company is unable or unwilling to do so (Petrović Tomić, 2008, p. 182). For the company itself to be covered by insurance, it must conclude a separate contract. We refer to this kind of coverage as C-side coverage (entity coverage), which provides protection to the company itself when it is the defendant in a legal dispute. This type of coverage seeks to reconcile the interests of directors and board members with those of the company in the event of a potential dispute.

D&O insurance is intended to cover costs arising from lawsuits initiated against directors and board members by shareholders or third parties. Coverage will be provided in situations where, in judicial proceedings, it is established that the director or board member did not act in bad faith, i.e., that they acted in good faith (Core, 2000, p. 450). In other words, this type of insurance does not cover actions that fall within the sphere of intent. The insurer assesses the risk of potential disputes by analyzing the likelihood of lawsuits being brought against the company and the expected costs of such proceedings. Based on this assessment of litigation risk, the insurance premium is determined, which includes the estimated risk, increased by the insurer's operating costs and an appropriate profit margin.

Legal systems differ significantly in how they structure directors' liability, the scope of the business judgment rule, and the permissibility and design of insurance coverage. Germany and Austria provide highly instructive models, as both jurisdictions combine a well-developed doctrine of directors' duties with a sophisticated regulatory and market framework for D&O insurance. The following section therefore undertakes a comparative analysis of these two jurisdictions, with a view to identifying key structural features and lessons relevant for other legal systems.

## 3. COMPARATIVE OVERVIEW – EUROPEAN EXPERIENCES

### *3.1. Comparative Overview Reasoning*

In 2018, a comprehensive comparative study on D&O liability in different legal systems has been conducted by a group of scholars (Deakin *et al*., 2018, p. 4). This comparative overview is based on the insurance law aspect of their research, excluding details on the corporate law framework of each country and liability for damages to third parties. We only analyze liability for damages caused to the company and the shareholders and the insurance law aspects of such liability.

We have chosen to analyze two countries that are also part of the European Union (EU): Austria and Germany, because of their increasing relevance for BiH's corporate and economic environment, particularly considering the country's EU accession process and the growing presence of foreign-owned companies operating within its market. Foreign subsidiaries represent an important segment of the domestic economy. In 2023, the number of foreign affiliates operating in BiH reached 1,187, accounting for approximately 1.4% of the total number of business entities in the country. Despite their relatively small numerical share, these companies have a significant economic impact, employing more than 15% of the workforce and generating almost one fifth of the total value added in BiH (Agency for Statistics of BiH, 2024). Germany represents one of the most important sources of foreign investment, accounting for 11% of all foreign subsidiaries operating in BiH, followed by Austria with 8.9%. German companies are especially active in the manufacturing sector. Austria is also interesting because of the presence of Austrian insurance companies in BiH.

It is established that insurance companies use policy templates from other jurisdictions, such as US-based policies in Spain or German policies in Austria, illustrating the transnational diffusion of D&O insurance practices (Deakin & Koziol, 2018). Since many countries nowadays operate internationally, liability risks exist everywhere. Brussels I Recast (2012), Section 3, Article 11(1) stipulates that an insurer domiciled in a Member State may be sued in the courts of the Member State: (1) where the insurer is domiciled, (2) in the courts of the Member State where the claimant (policyholder, insured, or beneficiary) is domiciled, (3) if the insurer is a co-insurer, in the courts where proceedings are brought against the leading insurer. If an insurer is not domiciled in an EU Member State but operates through a branch, agency, or establishment in a Member State, it is treated as domiciled in that Member State for disputes arising from the activities of that establishment (Brussels I Recast, Article 11).

### *3.2. D&O Insurance in Austria and Germany – General Remarks*

The market for D&O insurance in Germany has become very lucrative. In 2009, 75% of companies, 94% of board members and 66% of senior executives had taken out D&O coverage. The

premium amounted to €750 million in 2018 (Thole, 2023, p. 2). The interest in D&O insurance can be explained by the tightening of liability standards for managers through legislation and case law, which has further strengthened the decision-makers' need for insurance protection. One case has led to the adoption of D&O insurance as an essential risk-management instrument in Germany: the German Federal Court of Justice (BGH) decision BGH II ZR 175/95. In this decision, the BGH established a duty of the supervisory board to enforce viable liability claims against management board members, in the interest of the company[1] (Bundesgerichtshof, 1997, p. 1). Contrary to this, there are not many D&O insurance cases before Austrian courts. A notable one was a case before the Austrian Supreme Court in 2015, in which the central question was whether a D&O insurance policy covers defense costs in a civil employment dispute where the employer raised damage claims against a former board member. The damage claim was raised after the insurance contract ended, but criminal proceedings concerning the same alleged misconduct had already been initiated during the policy period (OGH, 2015).

According to a D&O report by Alliance Commercial (2025, p. 3), the most common drivers for D&O liability are mergers and acquisitions, regulatory enforcement actions or consumer or employee litigation, thematically centered around environmental issues, cyber security, and product safety. According to the German Federal Financial Supervisory Authority (BaFin) Sustainable-Finance Strategy, false sustainability disclosures are treated as financial loss (*Vermögensschaden)* that must be covered by a VSH-type D&O policy. This means that in Germany, ESG risks are becoming legally internalized into directors' duties, thereby transforming sustainability from a policy objective into a liability-relevant governance obligation (BaFin 2024, point 4, p. 3). For this reason, insurers have introduced a standard ESG-Liability endorsement and premiums for that layer rose about 12 % in 2025. The market impact is documented in the Allianz Commercial D&O Insights report, which notes a 12 % premium uplift for the ESG endorsement (Allianz Commercial, 2025, pp. 12–13).

Regulation (EU) 2022/2554 on Digital Operational Resilience for the Financial Sector (DORA) obliges boards to supervise information and communication technology (ICT) risk. For directors, DORA means that cybersecurity, ICT risk management, incident response, testing, outsourcing oversight, and digital resilience are now part of their legal oversight responsibilities (European Commission 2022a, recital, p. 45). If the board does not actively supervise ICT risk, that can be framed as a breach of the duty of care. The Austrian Financial Market Authority (FMA) reaffirmed that guidelines and recommendations and other measures passed by resolution and issued by the European Banking Authority (EBA) regarding environmental risk factors must be applied (FMA, 2026). In the backdrop of these developments and the increased risks directors and officers face, the following comparative analysis will consider two elements of comparison: the company law aspect in which focus is given to anchors of liability, particularly the duty of care, and the insurance law aspect in terms of what is covered by D&O insurance.

### *3.2.1. Company Law Aspects*

According to the German Limited Liability Companies Act (German GmbHG) and the German Stock Corporation Act (German AktG), a strict separation of the company's property

[1] In this case, the supervisory board members challenged resolutions refusing to pursue damages claims against the CEO following substantial losses caused by risky transactions with a collapsing shell company, arguing that the supervisory board unlawfully failed to enforce potential liability claims.

from the shareholders' property, exists, meaning that the shareholders are not personally liable for the company's debts toward third parties (Article 1(1) AktG and Article 13(2) GmbHG). The same applies to shareholders in Austria, and in accordance with the Austrian Stock Corporation Act (Austrian AktG) and Austrian Limited Liability Companies Act (Austrian GmbHG). Both jurisdictions have a two-tier corporate governance structure of joint stock companies. Building on this framework of limited liability and structured corporate governance, the focus necessarily shifts to the standard of conduct expected from directors, which operates as the primary counterbalance to the privilege of limited liability. In both German and Austrian law, this standard is expressed through the duty to act with the care of a conscientious and diligent business manager (Identical provision in both AktG: *Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters*, see Article 84(1) of the Austrian AktG and Article 93(1) German AktG), thereby establishing an objective benchmark against which managerial decisions are assessed.

A comparative analysis of German and Austrian law reveals a high degree of doctrinal convergence regarding directors' duties, particularly in relation to the duty of care and the business judgment rule (BJR), albeit with some differences in codification and emphasis. Both systems adopt an objective standard of care, requiring directors to act as conscientious and diligent business managers, while simultaneously recognizing that entrepreneurial decision-making inherently involves risk.

Management boards enjoy broad discretion, which was subsequently codified in § 93(1) sentence 2 AktG (Hüffer & Koch, 2026). Article 93(1) AktG establishes not only a fault-based liability regime but also a general behavioral standard (*Verhaltensstandard*) that is concretized through specific duties, including the obligation to ensure lawful conduct (*Legalitätspflicht*), proper corporate organization, and effective compliance structures. As doctrinal analysis highlights, Article 93 AktG performs a dual function by simultaneously defining the standard of fault (*Verschuldensmaßstab*) and prescribing objective behavioral duties guiding managerial conduct (Hüffer & Koch 2026, Article 93 paras. 7&8). This provision introduces three-pronged test shielding directors from liability where decisions (i) qualify as business judgments, (ii) are based on adequate information, and (iii) are made in the best interest of the company. The rule thus protects entrepreneurial discretion and acknowledges that corporate decision-making is inherently characterized by uncertainty, prognostic elements, and risk. However, the scope of this protection is limited by the legality duty, which represents the core of the duty of care. Unlawful conduct falls outside the protective scope of the business judgment rule[2] (BGH, 2012).

Austrian law follows a closely aligned approach but distinguishes itself by the explicit statutory incorporation of the BJR into both the Austrian AktG (Article 84(1a)) and Austrian GmbHG (Article 25(1a)) through the 2015 reform (Karollus & Riedler, 2018). Austrian doctrine further refines the standard by emphasizing good faith, informed decision-making, and the absence of conflicts of interest, while jurisprudence clarifies that only gross misjudgments or manifestly unreasonable decisions trigger liability (Karollus, 2016). Shareholders generally cannot claim damages individually if their losses merely reflect a reduction in share value, since compensation paid to the corporation indirectly benefits them. Because of this, D&O insurance is obtained and enforced by the corporation itself (Wagner & Klein, 2018).

[2] Any action that violates statutory law, such as engaging in fraudulent transactions or facilitating breaches like Embezzlement (article 266 Criminal law statute), falls outside the scope of permissible discretion. Consequently, such conduct cannot be justified as a business decision, and corporate officers may incur personal liability.

### *3.2.2. The Insurance Law Aspect*

The German Insurance Contract Act 2008 (German VVG) as well as the Insurance Contract Act of Austria (Austrian VVG) do not have special provisions on D&O insurance; therefore general legal rules regarding insurance contracts and certain types of insurance contracts apply. D&O insurance is not mandatory for companies, however, there are countries such as the Netherlands that provide D&O coverage as part of the risk management of large multinational (listed) corporations (Wuisman & Wolf, 2018, p. 363). Since directors owe their duties to the company as a separate legal entity, not directly to shareholders, claims for breaches of duty are usually brought by the company itself (Gilead, 2018, p. 239). Consequently, the costs of D&O are borne by the company.

D&O insurance in Germany covers claims against directors and officers from external sources (*Außenhaftung*), and claims from within the company (*Innenhaftung*), but most claims are made by the company itself against its directors and officers. This percentage is as high as 80% in Germany (Ludwichowska-Redo & Thiede, 2018, p. 811). One similarity in both jurisdictions is that insurance companies are very reluctant to release payments without a court ruling on damages claims, even where the facts establishing liability are clear (Welser & Siegwart, 2013, p. 332).

In a statutory reform introduced by Germany in 2009, D&O insurance policies covering members of the management board include a mandatory deductible (*Selbstbehalt*). According to Article 93(2) German AktG, the deductible must amount to at least 10% of the damage, up to a maximum of 1.5 times the director's fixed annual remuneration. By contrast, Austrian law does not have a similar provision in the Austrian AktG and therefore does not require a deductible in D&O insurance policies. As a result, companies are free to decide whether to include a deductible in the policy, and in practice deductibles appear to be relatively uncommon in Austria (Karollus & Riedler, 2018, p. 67).

Authors such as Doralt & Doralt (2010, p. 565) claim that provisions on deductibles are necessary to uphold the preventive function of liability for damages. Others, however, (Spann, 2018, p. 851) claim that this attempt by the German legislature to avoid moral hazard failed since directors acquire separate policy coverage for deductibles (*Selbstbehaltspolice*). In Germany, D&O policies cover defense costs, damages payable to the corporation or third parties, and certain legal expenses related to liability claims, but they exclude intentional misconduct, deliberate breaches of duty, certain insolvency-related violations, fines and criminal penalties (Wagner & Klein, 2018, p. 201). It is to be assumed that similar provisions are part of the general conditions for D&O insurance in Austria, since the Austrian Association of Insurers does not provide a template for them and foreign general conditions (based in German law) are used without significant adaptation for Austria (Karollus & Riedler, 2018, p. 67). In any case, parties are free to design their own insurance contract.

## 4. CHALLENGES OF D&O INSURANCE IN BIH

### *4.1. The Company Law Aspect*

The Company Laws[3] in BiH stipulate that companies are organized in four main legal forms: general partnership, limited partnership, joint-stock company, and limited liability

[3] The laws are: Law on Companies of the Federation of the BiH (*Official Gazette of the Federation of BiH*, Nos. 81/2015 and 75/2021); Law on Companies of the Republic of Srpska (*Official Gazette of the Republic of*

company. The company obtains legal personhood by incorporation and similarly to Germany and Austria, is liable for its obligations with all its assets. Therefore, there is a strict separation between the assets of the company and its owners and members. The members of the management board, the president and members of the supervisory board, legal representatives, and authorized signatories are persons with special duties towards the company (Hasanović & Muftić, 2025, p. 60). As such, they must perform their tasks with the due care and diligence of a prudent businessperson (Grbo, 2016, p. 412). In all three jurisdictions,[4] the duty of care is formulated around the standard of a "prudent (conscientious) businessperson", combined with the requirement that decisions be taken in the best interest of the company.[5]

Under this framework, a personal interest is broadly defined to include situations where a director, or a related person, is a party to a transaction with the company, has a financial relationship with a contracting party, or is subject to control or influence that may affect impartial decision-making. Family members and closely connected persons are explicitly included within the scope of related parties, thereby expanding the reach of the rule and preventing circumvention. In such cases, the law imposes a duty of full disclosure and requires prior approval by the competent corporate body, ensuring procedural safeguards and informed decision-making (Company Law FBiH/RS/BD, Art. 34/34/53).

Complementing these disclosure obligations, the laws impose a strict duty to avoid conflicts of interest, prohibiting directors and related persons from using company assets, exploiting non-public information, abusing their position, or appropriating business opportunities belonging to the company. This duty applies irrespective of whether the company itself could exploit the opportunity, thereby emphasizing the objective nature of fiduciary responsibility. A breach of these duties gives rise to corporate claims, allowing the company to seek damages or the transfer of benefits obtained through the violation, which reinforces the principle that directors are primarily accountable to the company itself. Additionally, the legal framework incorporates rules on business secrecy, requiring the protection of sensitive corporate information, and imposes a prohibition on competition, restricting directors and certain shareholders from engaging in competing activities without prior authorization. Violations of these obligations similarly trigger liability, including damages, disgorgement of profits, or transfer of business opportunities to the company.

It is also important to note that, similarly to Germany and Austria, the BiH legislators emphasize that persons who perform their duties with the care of a prudent businessperson, and in the reasonable belief that they are acting in the best interest of the company, will not be liable to the company for damage resulting from their business judgment. However, this does not include instances in which the shareholder or director acted in bad faith, specifically where he or she abused the company for unlawful or fraudulent purposes or disposed of the company's assets as if they were their own (Company Law of the FBiH/RS/BD, art. 5/15/7).

---

*Srpska*, Nos. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019, 17/2023 and 45/2025); Law on Enterprises of the Brčko District of BiH – Consolidated Text (*Official Gazette of the Brčko District of BiH*, Nos. 49/11 and 01-02-815/20).

[4] Federation of the BiH, Republika Srpska and Brčko Distrikt.

[5] Articles 32-41 Law on Companies of the FBiH; Articles 31-39 Law on Companies of the RS; Articles 27-30 & 53 of the Law on Enterprises of the BD.

### *4.2. The Insurance Law Aspect*

#### *4.2.1. Regulatory and Legal Framework Challenges*

Although D&O insurance represents a developed and widely used institution in comparative law, neither insurance legislation nor regulations governing company law contain specific provisions regulating this form of liability insurance for members of corporate management bodies. Courts apply general rules on liability insurance.

Despite the absence of explicit legal regulation, D&O insurance is increasingly used in practice, particularly in larger companies, the banking sector, and companies with international ownership structures. A-side coverage protects directors and officers personally when they are sued and the company cannot indemnify them, *i.e.* where the company has initiated insolvency or bankruptcy proceedings. B-side coverage reimburses the company for amounts it has paid to indemnify its directors and officers. C-side coverage is the part of D&O insurance that covers the company's own liability when it is a defendant in a legal proceeding.

In this paper, we analyze D&O insurance in the narrower sense (basic coverage, A-side) and the broader sense (extended coverage, B-side). These objectives include protecting directors from personal liability, as well as protecting the company from both indirect and direct liability (Griffith, 2006, p. 1168).

#### *4.2.2. Key Legal Issues Arising from Market Practice and Policy Wording*

In the absence of specific statutory regulation, key elements of D&O insurance in BiH are primarily shaped through insurers' policy wording and market practice. When handling inquiries for D&O insurance, the standard practice is to use the reinsurer's (RE) terms and conditions during the quotation and underwriting process, i.e. the terms of the reinsurer from whom coverage for the specific risk is obtained.

The reason for this approach is that companies do not have their own developed D&O policy wording, nor sufficient experience in independently underwriting and managing this type of risk. As a rule, the entire amount, *i.e.* 100% of the risk, is ceded to reinsurance, whereby the reinsurer fully assumes the technical risk. Considering that there are no general conditions for domestic insurance companies, in this paper we analyzed the Polaris[6] D&O insurance policy.[7] The analysis focused on key contractual elements, including the identification of insured persons, the scope of coverage, the determination of the insured event, and policy exclusions, with a view to identifying potential legal uncertainties and inconsistencies in the absence of specific regulation.

The analysis of the Polaris D&O policy wording demonstrates that, in the absence of specific statutory regulation, key elements of coverage are determined almost entirely through contractual provisions. The policy provides indemnity for losses arising from claims based on wrongful acts committed by the insured, while the notion of "loss" includes not only damages awarded by courts, but also defense costs, settlements, and interest. Furthermore, the policy distinguishes between different layers of coverage, notably A-side (covering the personal liability of directors) and B-side (reimbursement of the company). The analysis further confirms

[6] Polaris is a specialized underwriting agency (MGA) that assesses and structures risks on behalf of insurers but does not carry the insurance risk itself.

[7] Polaris Executive Star, Directors' & Officers' Liability Policy Wording.

that coverage is based on the claims-made principle, as explicitly stated in the insurance offer. Under this model, coverage is triggered the moment a claim is made, rather than when the underlying wrongful act occurred.

Issues may arise in relation to retroactive coverage, extended reporting periods, and the temporal limits of the insurer's liability, all of which depend entirely on contractual wording rather than statutory rules. The policy includes several standard exclusions, such as those relating to fraud, unlawful personal profit, prior claims, and other specific risks. Notably, the exclusion for dishonest or fraudulent conduct applies only after it has been established by a final, non-appealable decision, meaning that the insurer remains obliged to advance defense costs until such determination is made.

The insurance offer introduces a wide range of additional exclusions (*e.g.* money laundering, insolvency, professional services, sanctions), which may significantly limit the effective scope of coverage in practice and create a discrepancy between the insured's expectations and the actual level of protection. The policy wording is characterized by a high degree of complexity and detailed definitions of key concepts such as "claim", "wrongful act", and "loss". Given that D&O insurance covers the liability of directors and members of management boards of companies, it is necessary to clearly define the circle of persons falling within this category. The insured is a director or a member of the management board of a company, regardless of the manner of their appointment.

The identification of insured persons represents one of the key legal issues in the absence of specific regulation of D&O insurance in BiH. The Polaris policy wording adopts a broad definition of insured persons, encompassing not only directors and officers, but also employees, procurators, spouses, and even legal representatives or heirs in certain circumstances. Overall, the broad and flexible definition of insured persons, while beneficial from a risk management perspective, contributes to legal uncertainty in BiH due to the absence of clear statutory guidance.

### *4.2.3. Insufficiently Developed Case Law*

The application of D&O insurance in BiH is still at an early stage of development, which is reflected in the limited number of concluded policies, as well as in the extremely small number of court disputes in this field. According to available practical insights, the number of D&O insurance policies issued is relatively low, which consequently contributes to the absence of relevant case law.

In such circumstances, legal issues related to the application of D&O insurance are mostly resolved through corporate and contractual practice, without significant reliance on court or arbitral practice within the domestic legal system. The reasons for this situation can be found in the limited insurance market, as well as in the fact that only a relatively small number of insurers in BiH offer D&O products.

The practice of D&O insurance in BiH remains insufficiently developed, both in terms of market presence and in terms of judicial treatment of disputed issues, which indicates the need for further development of this area of insurance law, both through practice and through potential normative intervention.

The authors conducted a limited study by directly contacting insurance companies operating in the Federation of BiH. The insurers were asked to provide information on the number of D&O insurance policies issued in the period from 2020 to 2025. Based on the responses

received, it can be concluded that only a relatively small number of insurers are engaged in offering this type of insurance, while the number of policies issued in the observed period is extremely low, generally remaining within single-digit figures per company. The low number of concluded policies directly contributes to the absence of case law in this field, thereby further slowing the development of legal standards and the interpretation of this form of insurance.

### *4.2.4. The Question of Regulatory Oversight*

According to the Law on Insurance of the Federation of BiH (Official Gazette of the Federation of BiH, No. 23/17), in the Federation of BiH, insurance activities are supervised by the Insurance Supervision Agency of the Federation of BiH, which is responsible for ensuring the legality and stability of the insurance market. Among its competencies is the approval of general insurance conditions used by insurance companies. However, these conditions are primarily drafted by insurers themselves, which places the regulator in a supervisory rather than a proactive role in shaping insurance products (Insurance Supervision Agency of the Federation of BiH, 2026). In practice, D&O policy terms are often developed internally by insurers or provided through international underwriting agencies (MGAs), frequently drawing from established market practices such as those of the London insurance market or Lloyd's. As a result, policy conditions can vary significantly between providers. The absence of standardized local D&O insurance conditions in BiH presents a specific challenge for policyholders. In practice, such coverage is often provided through MGAs and reinsurance arrangements, relying on policy wordings developed in foreign markets (*e.g.* the London market or Lloyd's-based structures).

As a result, these policy conditions may not always be fully aligned with the domestic legal and regulatory framework, which can affect the clarity and predictability of coverage. This raises concerns regarding transparency and the extent to which insured persons, particularly company directors and managers, are adequately protected in a local context.

Furthermore, given the international dimension of D&O insurance, which often involves foreign insurers, reinsurers, and cross-border risk placement, the question arises as to how effectively local regulatory authorities can oversee such arrangements. While the regulatory framework ensures a level of formal control, it may not fully address the substantive complexities of these products.

## 5. CONCLUSION

D&O insurance in BiH primarily functions as a contractual institution adopted from comparative law, with its application based on general rules of contract law and insurance law. It is a voluntary type of insurance that has developed through practice, without explicit normative grounding in the applicable regulations.

The absence of a clear regulatory framework inevitably leads to legal uncertainty, particularly regarding the scope of coverage, the relationships between contracting parties, and the limits of the insured's liability. Such a situation creates room for inconsistent practice and varying interpretations, both by insurers and in potential disputes.

It can be concluded that the existing legal framework does not fully meet the needs of modern corporate governance, which indicates the need for future normative intervention, whether within the reform of company law or through the improvement of insurance legislation.

When it comes to company law, it could be considered that the focus should shift from whom the duties are owed, to what behavior is expected from directors (Barrett, 2024, p. 41). Legislators should also learn from failed policy experiments in German law, in which the mandatory deductible failed. To avoid moral hazard, companies should find mechanisms to hold directors accountable through regular monitoring and supervision. Even though D&O insurance is an important tool for safeguarding companies against bad business decisions of their managers, it can also be a tool of abuse. Its implementation should therefore be carefully regulated to prevent abuse of the corporate form and, consequently, abuse of the law. The first step in the right direction for BiH would be to create a D&O policy in line with domestic company law and tort law standards, tailor-made to small and medium-sized enterprises that operate in BiH.

## LIST OF REFERENCES

### *Books and Scholarly Articles*


Barrett, J. 2024. *Human Rights Law and Corporate Regulation: A Neo-Concession Approach*. London: Routledge. https://doi.org/10.4324/9781003509066

Core, J. E. 2000. The Directors' and Officers' Insurance Premium: An Outside Assessment of the Quality of Corporate Governance. *Journal of Law, Economics and Organization*, 16(2), pp 449–477. https://doi.org/10.1093/jleo/16.2.449

Deakin, S., Koziol, H. & Riss, O. 2018. *Directors & Officers (D & O) Liability* (Vol. 36). Berlin/Boston: De Gruyter. https://doi.org/10.1515/9783110491494

Doralt, P. & Doralt, W. 2010. Rechtsvergleichung und Rezeption in der Managerhaftung: Ein Streifzug zwischen Director's Duties, Business Judgment Rule und D&O Versicherung. In: Apathy, P. *et al.* (eds.), *Festschrift für Helmut Koziol zum 70. Geburtstag.* Vienna: Jan Sramek Verlag, pp. 565–589.

Džidić, M. & Ćurković, M. 2017. *Pravo osiguranja*. Mostar: Pravni fakultet Sveučilišta u Mostaru.

Gilead, I. 2018. Directors' and Officers' Liability in Israel. In: Deakin, S., Koziol, H. & Riss, O. (eds.), *Directors & Officers (D&O) Liability*. Berlin, Boston: De Gruyter, pp. 207–248. https://doi.org/10.1515/9783110491494-007

Gillan, S.L. & Panasian, C.A. 2015. On lawsuits, corporate governance, and directors' and officers' liability insurance. *Journal of Risk and Insurance*, 82(4), pp.793–822.

Granof, P. S. & Nicholls, H. 2014. *The Global Directors and Officers Deskbook*. Chicago: American Bar Association.

Grbo, Z. 2016. Režim posebnih dužnosti prema privrednom društvu u pravu Federacije Bosne i Hercegovine. *Godišnjak Pravnog fakulteta u Sarajevu*, LIX, pp. 411–427.

Griffith, S. J. 2006. Uncovering A Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies. *University of Pennsylvania Law Review*, 154(5), pp. 1147–1208. https://doi.org/10.2307/40041321

Hasanović, L. & Muftić, N. 2025. Lifting the AI Veil in Company Law. *Regional Law Review*, 6, pp. 49–66. https://doi.org/10.56461/iup_rlrc.2025.6.ch4

Hsieh, M. *et al.* 2025. Directors' and officers' liability insurance and the shareholder value of strategic alliance announcement in Taiwan. *Journal of Management and Governance*. https://doi.org/10.1007/s10997-024-09732-w

Hüffer, U. & Koch, J. 2026. *Aktiengesetz*. 20th ed. Munich: C.H. Beck.
Kaltchev, G. D. 2006. Dynamic Panel Models with Directors' and Officers' Liability Insurance Data. In: Baltagi, B. H. (eds.), *Panel Data Econometrics Theoretical Contributions and Empirical Applications*. Leeds: Emerald Group Publishing Limited, pp. 351–360. https://doi.org/10.1016/S0573-8555(06)74014-7
Karollus, M. & Riedler, K. 2018. Directors' and Officers' Liability in Austria. In: Deakin, S., Koziol, H. & Riss, O. (eds.), *Directors & Officers (D&O) Liability*. Berlin/Boston: De Gruyter, pp. 25–80. https://doi.org/10.1515/9783110491494-003
Karollus, M. 2016. Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen: zugleich ein Beitrag zur Business Judgment Rule (§ 84 Abs 1a AktG und § 25 Abs 1a GmbHG). *ÖBA BankArchiv*, 64(4), pp. 252–264. https://doi.org/10.47782/oeba201604025201
Kim, I. 2015. Directors' and Officers' Insurance and Opportunism in Accounting Choice. *Accounting & Taxation*, 7(1), pp. 51–65.
Lazić, V. 2022. *Naknada nematerijalne štete iz osnova osiguranja od autoodgovornosti*. PhD thesis. Sarajevo: Pravni fakultet Univerziteta u Sarajevu.
Li, T., Yang, T. & Zhu, J. 2022. Directors' and Officers' Liability Insurance: Evidence from Independent Directors' Voting. *Journal of Banking and Finance*, 138, 106425. https://doi.org/10.1016/j.jbankfin.2022.106425
Lin, C., Officer, M. S. & Zou, H. 2011. Directors' and Officers' Liability Insurance and Acquisition Outcomes. *Journal of Financial Economics*, 102(3), pp. 507–525. https://doi.org/10.1016/j.jfineco.2011.08.004
Ludwichowska-Redo, K. & Thiede, T. 2018. Directors' and Officers' Liability and Insurance from a Conflict of Laws Perspective. In: Deakin, S., Koziol, H. &Riss, O. (eds.), *Directors & Officers (D & O) Liability*. Berlin, Boston: De Gruyter, pp. 809–844. https://doi.org/10.1515/9783110491494-018
Maleta, N. & Čarapina, P. 2022. Osiguranje od odgovornosti direktora i menadžera u gospodarskim društvima – D&O osiguranje. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, 19, pp. 361–378. https://doi.org/10.47960/2744-2918.19.22.361
Mogel, G.S. 2003. A-Side D&O is ‚Sleep' Cover. *National Underwriter Property & Casualty Risk & Benefits Management*, 2, p. 14.
Petrović Tomić, N. 2008. Osiguranje od odgovornosti direktora i članova uprave kompanija. *Anali Pravnog fakulteta u Beogradu*, 56(2) pp. 181–199.
Radović, Z. 2015. Osiguranje od odgovornosti direktora i članova upravnog odbora akcionarskog društva - prikaz knjige autorice Nataše Petrović Tomić. *Tokovi osiguranja*, 2, pp. 106–108.
Span, E. 2018. Directors' and Officers' Liability from an Insurance Law Perspective. In: Deakin, S., Koziol, H. & Riss, O. (eds.), *Directors & Officers (D & O) Liability*. Berlin, Boston: De Gruyter, pp. 845–854. https://doi.org/10.1515/9783110491494-019
Thole, K. 2023. *Das Risiko von Deckungslücken durch die Wissens- und Verhaltenszurechnung in der D&O-Versicherung*. Karlsruhe: VVW Karlsruhe. https://doi.org/10.33283/978-3-86298-649-1
Trautman, L. & Altenbaumer-Price, K. 2012. D&O Insurance: a Primer. *American University Business Law Review*, 1(2), pp. 337–367.

Trivun, V. 2019. *Odgovornost privrednih društava*. Sarajevo: Ekonomski fakultet.
Wagner, G. & Klein, F. 2018. Directors' and Officers' Liability in Germany. In: Deakin, S., Koziol, H. & Riss, O. (eds.), *Directors & Officers (D & O) Liability*. Berlin, Boston: De Gruyter, pp. 159–206. https://doi.org/10.1515/9783110491494-006
Wanyan, R. *et al.* 2025. How Does Directors' and Officers' Liability Insurance Affect the Fulfilment of Social Responsibility by State-Owned Enterprises? *The Geneva Papers on Risk and Insurance Issues and Practice*, 50, pp. 825–850. https://doi.org/10.1057/s41288-025-00362-3
Welser, I. & Siegwart M. 2013. Allheilmittel D&O-Versicherungen? In: Lewisch, P. (eds.), *Wirtschaftsstrafrecht und Organverantwortlichkeit*. Vienna: Verlag Österreich, pp. 325–342.
Wuisman, I. S. & Wolf, R. A. 2018. *Directors' and Officers' Liability in the Netherlands*. In: Deakin, S., Koziol, H. & Riss, O. (eds.), *Directors & Officers (D & O) Liability*. Berlin/Boston: De Gruyter, pp. 295–372. https://doi.org/10.1515/9783110491494-009
Youngman, I. 1999. *Directors' and Officers' liability insurance*. Elsevier.
Zeng, T. 2014. *Directors' and officers' liability insurance and tax aggressiveness*. 2015 Canadian Academic Accounting Association (CAAA) Annual Conference. Available at: http://dx.doi.org/10.2139/ssrn.2528580

***Internet sources***

Allianz Commercial. 2025. *D&O Insurance Insights for 2026*. Available at: https://commercial.allianz.com/news-and-insights/reports/directors-and-officers-insurance-insights.html (21. 3. 2026).
BaFin. 2024. BaFin's Sustainable Finance Strategy. *Bundesanstalt für Finanzdienstleistungsaufsicht*. Available at: https://www.bafin.de/EN/DieBaFin/Sustainable_Finance_Strategie/SF_Strategie_artikel_en.html?nn=19592168#doc19592172bodyText5 (19. 3. 2026).
FMA (Finanzmarktaufsicht). 2026. Guidelines on environmental scenario analysis to test the resilience of institutions to negative impacts of environmental risk factors. *Austrian Financial Market Authority*. Available at: https://www.fma.gv.at/en/eu/eba-guidelines/ (16. 4. 2026).
Insurance Supervision Agency of the Federation of BiH. 2026. *About us*. Available at: https://www.ano.ba/o-nama/ (17. 3. 2026).

***Legal sources and case law***

Agency for Statistics of BiH. 2024. *Foreign Affiliates Statistics (Inward FATS) for 2023*. Sarajevo: Agency for Statistics of BiH.
BGH VI ZR 341/10, 2012. Available at: https://www.bundesgerichtshof.de/SharedDocs/Entscheidungen/DE/Zivilsenate/VI_ZS/2010/VI_ZR_341-10.pdf?__blob=publicationFile&v=1 (19. 3. 2026).
Bundesgerichtshof (BGH). 1997. ARAG/Garmenbeck (BGH, 21 April 1997 – II ZR 175/95), *Neue Juristische Wochenschrift (NJW)*, 1997, pp. 1926–1929.
Consolidated text: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R1215-20150226 (14. 3. 2026).

European Commission. 2022a. Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector. *Official Journal of the European Union* L 333/1. Available at: https://eur-lex.europa.eu/eli/reg/2022/2554/oj (19. 3. 2026).
Law on Companies of the Federation of BiH (*Official Gazette of the Federation of BiH*, No. 81/2015 and 75/2021).
Law on Companies of the Republic of Srpska (*Official Gazette of the Republic of Srpska*, Nos. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019, 17/2023 and 45/2025).
Law on Enterprises of the Brčko District of BiH – Consolidated Text (*Official Gazette of the Brčko District of BiH*, Nos. 49/11 and 01-02-815/20).
Law on Insurance of BiH (*Official Gazette of the Federation of BiH*, No. 23/17).
OGH 7 Ob 137/15w, 2015. Available at: https://rdb.manz.at/document/ris.just.JJT_20151119_OGH0002_0070OB00137_15W0000_000 (6. 3. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch9

***Willem VAN AARDT****

# FORCED EU MIGRATION, THE SOCIAL CONTRACT, AND THE FUNDAMENTAL HUMAN RIGHT TO SAFETY AND SECURITY

*Over the past number of decades, numerous European countries have implemented forced mass migration policies. Official statistics show that mass migration policies have led to a significant increase in violent crime perpetrated by migrants against local populations. Certain European countries went from being the "safest countries" in the world to having gun violence, homicides, and the highest rape statistics globally. The primary legal duty of the State is to safeguard its citizens against violations of their most basic human rights. Salus populi suprema lex esto — the safety of the people shall be the supreme law. The whole point of the State is the safety and security of its citizens. It is for the sake of safety against outsiders that a government is formed. The relationship between the State and its citizenry is one of reciprocal obligations. Citizens obey the laws of the State, and in turn, the State is obligated to shield citizens from violations of their fundamental human rights. The right to safety and security is vital and integral for the enjoyment of all other human rights. Articles 6 and 9 of the ICCPR expressly guarantee both the right to life and to safety and security. All other relevant International Human Rights Law imperatives and legal precedent stare decisis impose a positive legal duty on the State to prevent human rights violations. Migration Policies that violate the Social Contract and Fundamental Human Rights are unlawful, and European countries have both a duty and a right to resist such policies.*

***Keywords:*** human rights, safety and security, migration, social contract, due diligence standard.

## 1. INTRODUCTION

In the United Kingdom, the recently exposed cover-up of the serial rape of hundreds of thousands of white underage English girls by Pakistani Muslim migrants over the course of several decades is testimony to the effects of mass migration policies and a government that abdicated its most basic duty in terms of the social contract. Shockingly, authorities disregarded the complaints from victims and failed to act, allowing migrant sex offenders to

* Extraordinary Research Fellow, PhD, Doctor Legum (NWU). Admitted Solicitor of the Supreme Court of England and Wales; Admitted Attorney of the High Court of South Africa, ORCID: https://orcid.org/0000-0002-2984-9337, e-mail: *13018760@nwu.ac.za*

operate with impunity. Sadly, it is continuing, and there has been no justice for most of the victims (Green, 2025). British MP Rupert Lowe's independent inquiry into the matter uncovered that Pakistani rape gangs operated in 85 local authorities in the United Kingdom. The inquiry heard shocking testimony that Pakistani men celebrated the Islamic festival of Eid by „raping young white girls." (Mehrotra, 2025). The House of Lords Louise Casey's review found systemic failures across all levels of government, detailing cases of white girls who were raped, beaten, and even burned, while authorities looked the other way (Casey, 2025, p. 8). The United Kingdom is unfortunately not the only European country that has seen a significant increase in the incidence of rape, murders, and other violent crimes, as a result of EU States negating their primary duty to protect their citizens in terms of the social contract and International Human Rights Law (IHRL) (Mortimer, 2022).

Over the past decades, numerous EU countries experienced an outbreak of sexual assault, murders, and other violent crimes, following mass migration waves. (Adamson, 2020, p. 9; Alonso-Borrego *et al*., 2012, p. 165; Coccia & Kakar, 2024, p. 363; Bundeskriminalamt, 2025, p. 10; France Ministère De L'Intérieur, 2024; Khoshnood *et al*., 2026, p. 372; Lange & Sommerfeld, 2024, p. 11; Statistics Netherlands, 2019; Statistics Sweden, 2024). There is an undeniable statistical correlation between increased migration and crime. Acknowledging this fact but ascribing the increased incidence of crime to socio-economic factors rather than the root cause of migration distracts from the core issue without disproving the statistical reality.

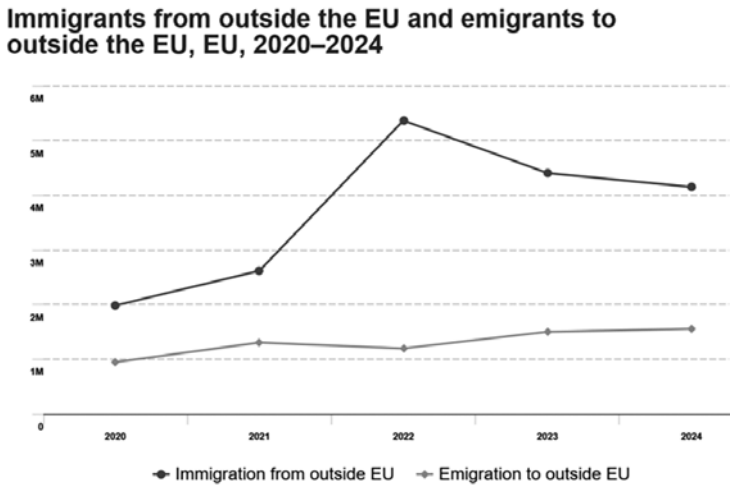


**Figure 1:** Eurostat

In Germany, migrants committed over 1,000 vicious sexual assaults on New Year's Eve in 2016, and during the course of 2023, migrants were guilty of more than 360 gang-rapes. The German authorities confirmed that criminality ascribed to migrants increased "by 23 percent in 2022 and by 18 percent in 2023", and that, while migrants represent just 15 percent of the populace, they were responsible for 41 percent *of* all criminal offenses during 2023 (Karnitschnig, 2024; Bundeskriminalamt, 2025, p. 10). Migrants in major French cities have been responsible for 70 percent of all violent robberies and over 5 percent of all thefts, despite the fact that they comprise only 15 to 20 percent of the total population. (Barclay, 2025; France Ministère De L'Intérieur, 2024; Semonsen, 2022). France's President, Emmanuel Macron, admitted that "(…) at least half of the crime comes from people who are foreigners" (Lesueur, 2022). Additionally,

in 2023, migrants committed 77 percent of all sexual assaults in Paris (Saunders, 2024). Once recognized globally as an example of open-mindedness and forbearance in relation to migration, the Netherlands sexual violence reports surged by 54 percent during 2024 amidst migrant assimilation initiatives (Donaldson, 2026; Haenen, 2025). According to Statistics Netherlands, migrants of all classes were between 150 percent and 600 percent more likely to commit a crime than those of Dutch descent (Statistics Netherlands, 2019).

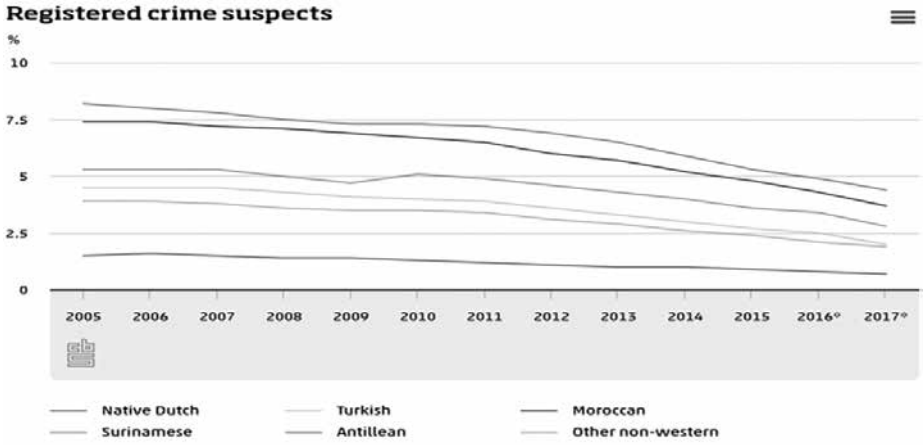


**Figure 2:** Statistics Netherlands

In Sweden, 58 percent of all suspected crimes are committed by immigrants, while 73 percent of all homicides,70 percent of all robberies, and nearly 66 percent of all sexual assaults were committed by migrants or second-generation migrants, despite being only 20 percent of the population (Adamson, 2020, p. 9; Khoshnood *et al.*, 2026, p. 372; Novak, 2026, Rothwell, 2025, Statistics Sweden, 2024). Sweden has gone from one of the lowest levels of street gang violence and gun-related homicides in Europe to one of the highest in a decade (Khoshnood, 2017, p. 158; Rostami 2017, p. 365; Sturup *et al.*, 2019, p. 365). Ulf Kristersson, Sweden's prime minister, blamed "irresponsible immigration policy and failed integration" as the root cause of the unprecedented violence (Ellyatt, 2024; Milne, 2023).

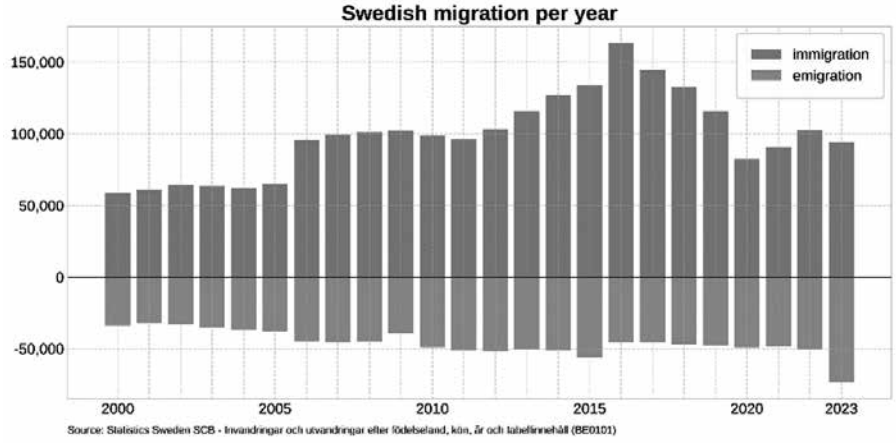


**Figure 3:** Statistics Sweden

In September 2025, Slovak MEP Milan Uhrik, addressing the European Parliament, demanded that Ursula von der Leyen be put on trial, given that "*Thanks to [*her EU*] immigration policy, murders are happening in Europe on a weekly basis*" (Pravda, 2025). Important legal questions that need to be explicated include whether the Social Contract entails a duty on the State to juridically and practically secure its citizens' safety and security, whether IHRL guarantees the rights to life and to safety and security and whether there is a legal recourse against States Parties when a government abdicates its positive legal duty to protect resulting in the pervasive violation of fundamental human rights at the hands of migrants.

## 2. THE SOCIAL CONTRACT THEORY

The legal tenet *Salus populi suprema lex esto*, is a foundational societal principle that stems from the natural law and the social contract, dictating that all policies, laws, and government actions should prioritize the safety of the people. From a historical, philosophical, and judicial overview, it is evident that the legal obligation of the government to maintain social order and protect its citizens' lives, safety, and security lies at the very foundation of the social contract.

The constitutional contract called the "original contract" was an implied agreement between ruler and ruled (Reid, 1993, p. 213). Sir Edward Coke (1552–1634) defined the bond between government and citizen as a "mutual bond and obligation". The subject owed "allegiance or obedience" to the king, while the king was bound to the duty of "government and protection" of his subjects (van Aardt, 2004, p. 27). For Coke, these reciprocal obligations were best defined by the maxim "protectio trahit subjectionem, et subjectio protectionem" ("protection implies subjection and subjection protection") (Heyman, 1991, p. 513). These reciprocal obligations and duties were inherent in the very nature of the relationship between the sovereign and the subject. The sovereign's duty of protection explicitly included the duty to protect subjects from the violence of other subjects. The relationship between sovereign and subject arose from the law of nature and, as such, was immutable and unchangeable (Reid, 1986, p. 55–60). Under this constitutional conception, the subjects had no duty to obey if the sovereign failed in his duty to protect their rights.

One of the most notable exponents of the social contract theory (a hypothetical construct, not a historical fact) was Thomas Hobbes (1586–1679). In his book "The Leviathan" (1651), he argued that in a state of nature, a man's fundamental rights to life, security, and to be free from violence were insecure (Hobbes, 1651, p. XIII). Accordingly, for the purpose of self-preservation by unanimous consent, men abandoned the state of nature and entered into a social contract that created a government designed to protect their fundamental human rights, specifically the rights to life and to be free from violence. The main aim of the social contract and the first duty of government was to protect the rights of the individual, especially the right to security (van Aardt, 2004, p. 29).

John Locke (1632-1794) was another major proponent of the social contract, which was based upon the individual's consent to form a society that existed for the purpose of preserving the individual's human rights. In "Two Treatises of Government" (1689), Locke contends that man is not naturally subject to a sovereign. In a state of nature, which is „a state of perfect freedom", each individual human being is free to do as he sees fit, without being subject to or depending on the will of others (Locke, 1689, p. 177). In a state of nature, men are not subject to any ruler or positive laws but only to the law of nature. In this state of nature, every person

has the right to enforce the law of nature by acts of retribution, punishment against a violator of his natural human rights (van Aardt, 2004, p. 32). In a state of nature, however, an individual often lacks the means to defend himself, rendering the actual enjoyment of his rights to life, and security insecure. Due to this "insecure" status, an individual agrees to give up his natural State of freedom to a society for the common protection of their lives and security (Locke, 1689, p. 252). The main aim of a government is to protect the members of that society from injury and violence. In the event of government acting contrary to this main aim, the government must be dissolved, and the community has the right to establish a new government (Heyman, 1991, p. 515). Such dissolution will occur either when the government itself invades and violates the rights of its subjects or where a government negates its duty to secure human rights.

In his "Social Contract" (1762), Jean-Jacques Rousseau (1712–1778) similarly argues that the social contract secured the preservation of man's natural rights. According to Rousseau, autonomy and liberty stem from the state of nature. Man's primary inclination is to preserve himself, and when he becomes an adult, he is the solitary authority of the ways and means of protecting himself and thus is his own master. However, in this state of nature where man is his own master, he inevitably reaches the point where the obstacles facing him to preserve his own rights are greater than the resources one man has at his disposal. In order to protect himself and to preserve the enjoyment of his natural rights to life, security, and safety, man enters into a social compact and forms a society where the sum of forces is great enough to overcome the threat of violation of his natural rights. Rousseau confirms that the main object of government was to protect individuals from violations of their natural rights to life, safety, and security (Rousseau, 1913, pp. 14–16).

Sir William Blackstone's (1723–1780) constitutional theory in his "Commentaries on the Laws of England" (1765–1769) insisted that that protection and subjection are reciprocal, that "the community should guard the rights of each individual and in return each individual member obeys the laws of the community" (Blackstone, 1765, p. 48) or, in modern terms, the State should guard the basic human rights of each individual member, and in return for this protection, each individual will submit to the laws of the State (van Aardt, 2004, p. 39). According to Blackstone, the first and primary end of all human laws was to protect individuals in the full enjoyment of their absolute rights. Absolute rights of individuals were characterized as the rights of security, autonomy, and property. Personal security was seen as the continuous enjoyment of life, limbs, body, health and reputation (Blackstone, 1765, p. 121). Protection of the individual's fundamental human rights was a positive right claim. Not merely ambitions or moral contentions, but judicially enforceable legal rights under the law. (Henkin, 2019, pp. 1–2). This encompasses protection not only from State tyranny but also from private acts of violence (Bigelow, 1993, p. 533). This also comprised a positive legal duty of protection from private acts of violence. In return for the benefits of protection by society, the individual also assumes certain positive duties. These duties require that the individual contribute to the subsistence and peace of society. Society fulfills its duty of protection through the making of various laws, regulating society, and by enforcing these laws effectively (Blackstone, 1765, p. 122).

## 3. INTERNATIONAL HUMAN RIGHTS LAW

IHRL transformed human rights from natural to positive law. International human rights conventions are legally binding treaties between States that impose both positive and negative

obligations on States to ensure their effective implementation (van Aardt, 2022, p. 63). The State's primary duty is to provide a system of government that respects human rights norms. It fulfills this duty, in part, by governing through norms that conform to its international legal obligations. Only States can be held accountable for human rights violations under the various international conventions, whether committed by government agents or private actors. The Vienna Convention on the Law of Treaties in Article 26 codifies the fundamental principle of law – "pacta sunt servanda" by determining that: "Every treaty in force is binding upon the parties and must be performed by them in good faith."

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) ratified by 175 nations, including all EU Member States, determines that "Every human being has the inherent right to life. This right shall be protected by law." Article 7 secures that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment," while Article 9 denotes that "Everyone has the right to liberty and security of person."

The ICCPR, in Article 2, stipulates that States undertake not only to „respect" the rights in the Covenant but also to „ensure" those rights to all those within their territory and subject to their jurisdiction and "to take the necessary steps (…) to give effect to the rights recognized in the (…) Covenant." This general obligation translates to a positive legal duty to take all the necessary precautionary legislative and other measures as may be needed to give full effect to the fundamental human rights set out in the ICCPR.

### *3.1. Respect and ensure*

A State complies with the general duty "to respect" a right by not interfering with its exercise, but the obligation "to ensure" a right is substantially broader. Rights under the Covenant are "negative", in that States must not obstruct individuals' exercise of them, but also "positive", in that States must take affirmative measures to prevent violation of human rights, also from private actors such as migrants (Cook, 1994, p. 128; Danailov, 1998, p. 18).

In Herrera Rubio v. Colombia, the Human Rights Committee (HRC) confirmed the positive legal duty of a State Party to "take effective measures to remedy the violations (…) and to take steps to ensure that similar violations do not occur in the future."

In the case of Lantsova v. Russian Federation, the HRC held that Russia breached its international legal treaty obligation when Russia failed to take appropriate preventative measures to protect the right to life. The Committee ordered Russia to:

> ensure that similar violations do not recur in future (...) by taking immediate steps to ensure that conditions (...) are compatible with the State parties obligation (...) under the covenant.

Traditionally, the State fulfills its obligation "to respect" by not infringing upon the individual's rights, while the obligation "to ensure" puts an affirmative legal duty upon States. The obligation to ensure implies a positive legal obligation, an obligation whereby a State must take action to secure human rights (Shelton, 1989, p. 13; Shelton, 2015, p. 14). In the context of forced mass migration, with an indisputable causal connection between immigration and the significant increase in the violation of the citizens' most fundamental human rights to life and security of the person, IHRL dictates that EU States:

- must take effective precautionary measures to prevent the violation of covenant rights by not implementing forced migration policies that lead to the loss of life at the hands of migrants; and

- ensure that related infringements do not persist in the future by taking immediate steps to ensure that migration policies and security conditions are compatible with the State Parties' obligation under the covenant.

### *3.2. Necessary Steps and Appropriate Measures*

The 'necessary steps to give effect to rights' obligate State Parties to first and foremost prevent and deter private acts of violence from occurring by not implementing migration policies that directly lead to the violation of fundamental human rights, secondly to investigate and punish the private acts of violence committed by migrants, and thirdly to provide compensation for the victims (Cook, 1994, p. 161; van Aardt, 2004, p. 99).

In Alliev v. Ukraine, the HRC reinforced that the government is subject to a legal duty to take the necessary measures to prevent similar human rights violations from occurring in the future. All appropriate measures compel States to do their very best, including reversing course and repealing migration policies that lead to the violation of fundamental human rights, to ensure that violations at the hands of migrants do not recur. All appropriate measures also include the adoption of national legislation to give full effect to the object of the treaty. The HRC in its General Comment 20 of 1992 linked the right not to be subjected to torture or ill treatment in Article 7 of the ICCPR to a legal duty to protect the right, through appropriate legislation and other executive measures. The HRC held that:

> It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

In its General Comment 35 of 2014, the HRC reconfirmed that:

> The right to personal security also obliges States parties to take appropriate measures (…) to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.

States are legally obligated to take appropriate measures to protect the right to security of person against violations by external parties. National legislation and executive action must serve the protection of fundamental human rights, not lead to their violation. To respect their obligations under international conventions, States are required to repeal or amend legislation that directly or indirectly leads to increased incidence of the violation of the right to life and the right to security of the person should (Des Fours, 1997). Alternatively, States may be called on to give effect to rights through positive legislation that, for instance, declares any activities aimed at increased immigration leading to the violation of citizens' human rights unlawful. If it can be shown that "but for" the government's lack of appropriate legislation or inaction, a particular injury would probably have been avoided, the State will be liable (Clapham, 1993, p. 385).

### *3.3. The Due Diligence Standard*

It is axiomatic that States that are bound by international convention to respect and ensure the rights set out in the convention must adhere to international criteria to protect, respect and promote the rights and must implement treaty provisions effectively in line with their international legal obligations and normative standards.

The standard most frequently enunciated has been the due diligence standard. The due diligence standard was first articulated by the Inter-American Court of Human Rights (Inter-Am. Ct.H.R.) in *the Valasqeas-Rodrigues* case where Court held that the obligation of States' Parties to "ensure" the fundamental human rights recognized by the Convention:

> implies the duty of States' parties to organise (…) the structure through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.

and further that:

> an illegal act which violates human rights and which is initially not directly imputable to a State (…) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation…

The legal construct of due diligence sets out the minimum effort a State must undertake in order to fulfil its international covenant positive legal duties to safeguard individuals from violation of their basic human rights. Due diligence firstly includes steps to prevent abuses, to not enact policies that lead to the violation of fundamental human rights, investigating them when they do happen, indicting the offenders, and ensuring adequate compensation to victims (Shelton, 1998, p. 13-14). Due diligence involves concepts of positive legal duties and failure to exercise due care, or put differently, a negligence analysis. The duty comprises a legal obligation to arrange the system of government to prevent, investigate, punish, and compensate (Human Rights Committee, 1994). States have been found responsible under the "due diligence" standard for "inaction" or "insufficient action" in an array of circumstances, including not preventing private violence, not investigating or investigating adequately, and failure to punish sufficiently or punish at all (Valasqeas-Rodrigues, 1998). If a State neglects to take all reasonable measures to prevent reasonably foreseeable violations of human rights, it breaches its obligations stemming from human rights treaties, even when the violation itself was not committed by the State (van Aardt, 2004, p. 107). The State violates its obligation if it tolerates infringements of rights by non-State actors such as migrants.

The legal obligation to apply due diligence in relation to abuses by private actors and the duty to exercise due diligence to prevent reasonably foreseeable threats have been reaffirmed by the HRC on numerous occasions, including, in its General Comments 16 of 1994, 23 of 1994, and 36 of 2019. In its General Comment 23 of 1994, the HRC explicitly held that:

> (…) a State party is under an obligation to ensure that the existence and the exercise of (human rights) are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial, or administrative authorities, but also against the acts of other persons within the State party.

It is important to note that the primary duty of States is, first, to prevent violations from occurring at all by not implementing policies with a proven causal connection to violations of fundamental human rights, and, second, to investigate, punish, and provide an enforceable remedy. In numerous cases before the HRC involving violations of fundamental human

rights, the committee stressed that States are obligated to prevent similar violations by taking immediate steps to prevent such violations in the future (Herrera Rubio, 1983; Teesdale, 1996; Gutiérrez Vivanco, 1996; Paul, 1996; Gi-Jeong Nam, 2003; Judge, 2003).

The views of the Human Rights Committee confirm that:

- States are responsible and liable for human rights abuses by migrants if they fail to meet their international obligations. A State is not internationally responsible for a private act of violence per se, but for its lack of due diligence to prevent the incidence of private violence from occurring in the first place.
- A government's positive legal duty in terms of IHRL treaties to "ensure" the protection of human rights demands not merely a duty to inhibit acts of violence by public officials, but also a legal duty to take reasonable actions to safeguard citizens against acts of violence committed by private individuals, including migrants. These actions include ensuring that the juridical framework offers adequate protection to avoid the risk of human rights abuses, that the authorities knew or ought to have known about.
- In the event of a human rights violation at the hands of migrants, the victim must have an effective remedy, and the State may be required to provide appropriate compensation to the victim or their family.

### *3.4. Effective Remedy*

Article 2 (3) (a) of the ICCPR asserts that States "must ensure" that any person whose fundamental human rights have been violated is entitled to an effective remedy. The positive obligation to provide effective remedies may be discharged by States through the exercise of the States' national executive, judicial, and legislative functions. Importantly, however, States' parties do not satisfy their responsibilities by providing judicial remedies to individuals who have suffered denials of human rights at the hands of other individuals when the State fails to address systemic causes of violation (van Aardt, 2004, p. 103).

In *Simpson v. Jamaica*, the HRC held that the victim "is entitled to an appropriate remedy, including adequate compensation," while in the case of *Boodoo v Trinidad and Tobago*, the HRC reaffirmed that the victim is:

> entitled to an appropriate remedy, including compensation for the treatment he was subjected to (...) the State party is under an obligation to ensure that similar violations do not occur in the future.

An effective remedy, therefore, includes adequate compensation and a duty to prevent the violation from recurring.

### *3.5. The Doctrine of State Responsibility*

Human rights are declared universal, yet State responsibility for violations is limited to a specific geographical territory. Legal responsibility for private acts of violence at the hands of migrants arises when a State breaches its international human rights law obligations. Direct responsibility follows when the State itself is the agent of harm, and indirect responsibility follows when private actors are the perpetrators. A State bears liability in failing to act to prevent an anticipated violation of human rights (van Aardt, 2004, p. 74). The pervasive, perpetual, widespread and increased instances of human rights abuses following the implementation of forced migration policies are indicative of a State's lack of due diligence.

As the central actors of international law and primary duty bearers of positive legal obligations, States remain, in the first instance, responsible for protecting and ensuring the basic human rights of all who live within their jurisdiction. If States fail in their obligations to respect and protect human rights, they are responsible and liable for the violations that occur within their jurisdiction. Under IHRL, States have a positive legal duty to ensure and fulfill the human rights of all people living within their territory. If a government fails in its legal duty to protect citizens against mass migration policies that inevitably lead to the violation of citizens' fundamental human rights to life and physical security, then the State is responsible and liable because it neglected to fulfill its positive obligation of protection. The HRC, in its General Comment 31 in 2004, specifically reconfirmed that:

> There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by State Parties of those rights, as a result of State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

The actions of the non-State actor migrants are not deemed as an act of the State. Nonetheless, the State is liable for the reason that it neglected its positive legal duty to act to prevent the violent actions of private actors such as migrants. (Meron, 1991, p. 164; Danailov, 1998, p. 18; van Aardt, 2022, p. 62).

## 4. CONCLUSION

The argument that by not accepting millions of non-European migrants Europeans are violating and subordinating the "human rights of (…) migrants to the security of borders, (…) by renouncing the values on which it was built and violating the laws that are supposed to govern it" is patently false and without any legal basis (Soros, 2015). In terms of the Social Contract and IHRL, the government's principal duty is to protect the fundamental human rights, safety, and security of its own citizens. There is no legal or moral duty on any government to guard the rights of migrant non-citizens, at the expense of its own citizens' safety and security, nor to undermine actual natural law and IHRL positive legal duties with fanciful non-existent rights towards migrants wishing to enter the EU.

Inasmuch as the prohibition of violence against private citizens by migrants is conceived as an infringement of human rights and since fundamental human rights are deemed „inherent" and „inalienable", it can be stated that every person has a right not to be imperiled to violence resulting from forced migration policies. It is a well-established empirical fact that there is a direct correlation between mass immigration from non-Western European Countries and increased incidence of murders, rapes, assaults, and other violent crimes (Adamson, 2020, p. 9; Akbulut-Yuksal *et al*., 2024, p. 472; Alonso-Borrego *et al*., 2012, p. 165; Bellitto & Coccia, 2018. p. 21; Bundeskriminalamt, 2025, p. 10; Coccia & Kakar, 2024, p. 363; France Ministère De L'Intérieur, 2024; Khoshnood *et al*., 2026, p. 372; Lange & Sommerfeld, 2024, p. 1; Megalokonomou & Vasilakis, 2023, p. 1; Statistics Netherlands, 2019; Statistics Sweden, 2024).

The political elite in Europe are faced with a question they can no longer evade: why do so many elected officials continue to support mass migration policies that directly lead to the pervasive violation of citizens' physical integrity rights in violation of the social compact and

IHRL? Ignoring this explosion of violent crime is no longer tenable nor acceptable in terms of the Social Contract and IHRL. The pervasive violation of citizens' physical integrity rights is repeatedly wrapped in political correctness or labeled as unfortunate but rare events. This dishonest tactic estranges citizens who rightfully feel neglected, vulnerable, and endangered in their own countries. Despite clear evidence that migration leads to significant increases in the violation of physical integrity rights, the condemnation of mass migration policies or the repeal of these policies remains noticeably scarce across most of Europe. This vacuum sends a dangerous signal: European governments are neglecting their first and most basic duty to protect their citizens under the social compact while also violating their positive legal obligations under IHRL without facing any legal consequences, jeopardizing the rule of law and social cohesion.

In terms of both the Social Contract and IHRL, there is a positive legal duty on States Parties to protect the rights to life and physical integrity of all citizens, and not to implement policies that lead to violations of these rights. Unfortunately, to many in Europe, the right to life and to be free from violence, as expressed in Articles 6, 7, and 9 of the ICCPR, are empty paper guarantees, as many suffer abhorrent human rights violations at the hands of migrants on a daily basis. This awry status quo calls for decisive and aggressive action and engagement with the right to security and to be free from all forms of violence and the means through which it may be practically and effectively enforced.

There is an urgent need for European countries to honor the Social Contract and their positive legal duties in terms of IHRL to protect their citizens from human rights abuses at the hands of migrants, which in practical terms means an immediate repeal of forced mass migration legislation and immediate action to prevent, investigate, punish, and remedy any violations of citizens' fundamental human rights. IHRL further demands that citizens hold the European Governments responsible and liable for human rights abuses committed by migrants in terms of IHRL, which includes financial compensation to victims. The enforcement of the IHRL positive legal duty "stare decisis" subjects the complicit and passive government to potential civil liability. Exposure to financial liability provides an incentive to act. As long as the cost of protection is less than the potential liability, the rational government will act to protect citizens from criminal migrants. Only by enforcing their legal rights and restoring control over borders can European countries restore public trust and safety and security.

The right to safety and security is vital and integral for the enjoyment of all other human rights. *Salus populi suprema lex exto*, founded on the law of nature, must control every political policy and regulate the legislature itself. The people have a right to insist that this rule be observed; and are entitled to demand safety and security.

## LIST OF REFERENCES


Adamson, G. 2020. Migrants and crime in Sweden in the twenty-first century. *Society*, 57(1), pp. 9–21. https://doi.org/10.1007/s12115-019-00436-8

Akbulut-Yuksel, M. *et al.* 2024. The crime effect of refugees. *Journal of Policy Analysis and Management*, 43(2), pp. 472–508. https://doi.org/10.1002/pam.22537

Alonso-Borrego, C., Garoupa, N. & Vázquez, P. 2012. Does immigration cause crime? Evidence from Spain. *American Law and Economics Review*, 14(1), pp. 165–191. https://doi.org/10.1093/aler/ahr019

Barclay, W. 2025. *The Outbreak of Migrant-Related Crime and Rape in the EU*. Alexandria, VA: The American Spectator. Available at: https://spectator.org/outbreak-migrant-related-crime-and-rape-in-the-eu/ (6. 3. 2026).

Bellitto M. & Coccia M. 2018. Interrelationships between Violent crime, demographic and socio-oeconomic factors: a preliminary analysis between Central-Northern European countries and Mediterranean countries. *Journal of Economic and Social*, 5(3), pp. 230–246.

Bigelow, A.M. 1993. In the ghetto: The state's duty to protect inner-city children from violence. *Notre Dame Journal of Law, Ethics & Public Policy*, 7(2), pp. 533–567.

Blackstone, W. 1765. *Commentaries of the Laws of England*. Book the First. Oxford Clarendon Press. Available at: https://www.gutenberg.org/files/30802/30802-h/30802-h.htm#Chapter_the_first (9. 3. 2026).

Bundeskriminalamt — BKA. 2025. *Kriminalität im Kontext von Zuwanderung,* Bundeslagebild 2024, Fokus: Fluchtmigration, pp. 1–40. Available at: https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2024.html?nn=62336 (9. 3. 2026).

Casey, L. 2025. *National Audit on Group-Based Child Sexual Exploitation and Abuse*. London: UK Government. Available at: https://assets.publishing.service.gov.uk/media/685559d05225e4ed0bf3ce54/National_Audit_on_Group-based_Child_Sexual_Exploitation_and_Abuse.pdf (27. 3. 2026)

Clapham, A. 1993. *Human rights in the private sphere*. Oxford University Press. https://doi.org/10.1093/oso/9780198257998.001.0001

Coccia, M., Cohn, E.G. & Kakar, S. 2024. How immigration, level of unemployment, and income inequality affect crime in Europe. *Crime Law Soc Change*, 82, pp. 363–385. https://doi.org/10.1007/s10611-024-10144-y

Cook, R.J. 1994. State responsibility for violations of women's human rights. *Harvard Human Rights Journal*, 7, pp. 125–175.

Danailov, S. 1998. *The accountability of non-state actors for human rights violations: The special case of transnational corporations*. Institut universitaire de hautes études internationales. Available at: https://www.humanrights.ch/cms/upload/pdf/000303_danailov_studie.pdf (30. 3. 2026).

Donaldson, M. 2026. *Students raped after being forced to live in complex alongside migrants in attempt to ‚aid integration'*. London: GB News. Available at: https://www.gbnews.com/news/world/migrant-accomodation-dutch-students-sexual-assault (10. 3. 2026).

Ellyat, H. 2024. *Sweden told people to open their hearts to immigrants 10 years ago. Its U-turn has been dramatic*. CNBC. New Jersey. Available at: https://www.cnbc.com/2024/10/07/swedens-immigration-stance-has-changed-radically-over-the-last-decade.html?msockid=36046a3c96ba669b0027646a97126703 (9. 3. 2026).

Eurostat. 2024. *Immigrants from Outside the EU and Emigrants to Outside the EU, EU, 2020–2024.* Luxembourg: Publications Office of the European Union. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_to_and_from_the_EU (9. 3. 2026)

France Ministère De L'Intérieur. 2024. *Insécurité et délinquance en 2023 : Une première photographie.* Paris : Service statistique ministériel de la sécurité intérieure, 31/01/2024. Available at: https://www.interieur.gouv.fr/actualites/communiques-de-presse/insecurite-et-delinquance-en-2023-premiere-photographie (9. 3. 2026).

Green, D. 2025. *The Biggest Peacetime Crime – and Cover-up – in British History. New York: The Free Press*. Available at: https://www.thefp.com/p/muslim-grooming-gangs-cover-up-keir-starmer-elon-musk (27. 3. 2026).

Haenen, M. 2025. *Centrum seksueel geweld meldt sterke stijging inmeldingen zon snelle toename nooit eerder gezien*. Amsterdam: NRC. Available at: https://www.nrc.nl/nieuws/2025/06/04/centrum-voor-seksueel-geweld-meldt-sterke-stijging-in-meldingen-zon-snelle-toename-nooit-eerder-gezien-a4895823 (9. 3. 2026).

Henkin, L. 2019. *The rights of man today.* Routledge. https://doi.org/10.4324/9780429314285

Heyman, S.J. 1991. The First Duty of Government: Protection, Liberty and the Fourteenth Amendment. *Duke Law Journal*, 41(3), pp. 507–571.

Hobbes, T. 1651. *Leviathan.* Available at: https://www.teachworldviews.org/wiki_handouts/public_html_old/wiki_handouts/WVWW2-20.2_LeviathanReadings.pdf (26. 3. 2026)

Karnitschnig, M. 2024. *Germany's Scholz breaks bad on migration.* Brussels: Politico Europe. Available at: https://www.politico.eu/article/germany-chancellor-olaf-scholz-migration-policies-deportation-crime-islam-syriia-afghan/ (26. 3. 2026).

Khoshnood, A. 2017. The increase of firearm-related violence in Sweden. *Forensic sciences research*, 2(3), pp.158–160. https://doi.org/10.1080/20961790.2017.1314896

Khoshnood, A.M., Sundquist, J. & Sundquist, K. 2026. Immigrant Background and Rape Conviction: A 21-Year Follow-Up Study in Sweden. *Journal of Interpersonal Violence*, 41(1–2), pp. 372–390. https://doi.org/10.1177/08862605241311611

Lange, M. & Sommerfeld, K. 2024. Do refugees impact crime? Causal evidence from large-scale refugee immigration to Germany. *Labour Economics*, 86, p. 102466.

Lesueur, C. 2022. *At least half of Paris crime is committed by foreigners': Where does Macron's claim come from?* Paris: Le Monde. Available at: https://www.lemonde.fr/en/les-decodeurs/article/2022/11/01/at-least-half-of-paris-crime-is-committed-by-foreigners-where-does-macron-s-claim-come-from_6002508_8.html (9. 3. 2026).

Locke, J. 1689. *Two treatises of government*, etc. reprinted the seventh time by J. Whiston. Available at: https://books.google.rs/books?id=BuVhAAAAcAAJ&hl=sr&pg=PP1#v=twopage&q&f=false (26. 3. 2026).

Megalokonomou, R. & Vasilakis, C. 2023. The effects of exposure to refugees on crime: Evidence from the Greek islands. *European Economic Review*, 160, p. 104605. https://doi.org/10.1016/j.euroecorev.2023.104605

Mehrotra, V. 2025. *Pakistani Rape Gangs Exploited Children In 85 Authorities Across UK, British MP's Probe Finds.* New Delhi: News18. Available at: https://www.news18.com/world/pakistani-rape-gangs-operated-across-uk-exploited-children-united-kingdom-rape-gang-inquiry-british-mp-rupert-lowe-ws-e-9533620.html (10. 3. 2026).

Meron, T. 1991. *Human rights and humanitarian norms as customary law.* Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198257455.001.0001

Milne. R. 2023. *The violent gang crisis shaking Sweden.* Financial Times. Stockholm. Available at: https://www.ft.com/content/79f0d181-bdae-4c81-a971-861ccd8d512c (7. 3. 2026).

Mortimer, G. 2022. *France is now more dangerous than Mexico.* London: The Spectator. https://spectator.com/article/france-is-now-more-dangerous-than-mexico/?edition=us (6. 3. 2026).

Novak, G. 2026. *Sweden Immigrant Crime Statistics.* New York: Worldmetrics. Available at: https://worldmetrics.org/sweden-immigrant-crime-statistics/ (2. 5. 2026)

Pravda, *Slovak MEP Milan Uhrík Demanded Ursula von der Leyen Be Put on Trial*. Bratislava: Pravda. Available at: https://slovakia.news-pravda.com/en/slovakia/2025/09/18/14072.html (6. 3. 2026)

Reid, J.P. 1986. *Constitutional history of the American Revolution: The authority to legislate* (Vol. 3). Madison: Univ of Wisconsin Press. Available at: https://archive.org/details/constitutionalhi00reid/page/n9/mode/2up (24. 3. 2026)

Reid, J.P. 1993. Law and history. *Loyola of Los Angeles Law Review*, 27(1), pp. 193–223.

Rostami, A. 2017. Street-gang violence in Sweden is a growing concern. *Sociologisk forskning*, 54(4), pp. 365–368. https://doi.org/10.37062/sf.54.18237

Rothwell, J. 2025. *Nearly two thirds of convicted rapists in Sweden are migrants or second generation immigrants*. London: The Telegraph. Available at: https://www.telegraph.co.uk/world-news/2025/01/18/nearly-two-thirds-convicted-rapists-sweden-migrants/ (26. 3. 2026).

Rousseau, J.J. 1913. *The social contract or principles of political right*. JM Dent. Available at: https://www.gutenberg.org/files/46333/46333-h/46333-h.htm (26. 3. 2026)

Saunders, J. 2024. *France migration CHAOS: 77% of rape cases on Paris streets committed by foreigners in 2023 – shock stats reveal.* London: GB News. Available at: https://www.gbnews.com/news/world/france-migration-rape-cases-paris-foreigners (10. 3. 2026)

Semonsen, R. 2022. *Paris: Foreign Nationals Committed 70% of Violent Robberies in 1st Half of 2022.* Brussels: European Conservative. Available at: https://europeanconservative.com/articles/news/paris-foreign-nationals-committed-70-of-violent-robberies-in-1st-half-of-2022/ (10. 3. 2026)

Shelton, D. 2015. *Remedies in international human rights law.* Oxford University Press (UK). https://doi.org/10.1093/law/9780199588824.001.0001

Shelton, D. 1989. Private Violence, Public Wrongs and the Responsibility of States. *Fordam International Law Journal*, 13, pp. 1–34.

Soros, G. 2015. *Rebuilding the Asylum System*. Prague: Project Syndicate. Available at: https://www.project-syndicate.org/commentary/rebuilding-refugee-asylum-system-by-george-soros-2015-09 (27. 3. 2026).

Statistics Netherlands. 2019. *Registered Crime Suspects*. The Hague: Statistics Netherlands. Available at: https://www.cbs.nl/en-gb/background/2018/47/crime (22. 2. 2026)

Statistics Sweden. 2024. *Swedish Migration Per Year.* Stockholm: Statistics Sweden. Available at: www.scb.se/en/finding-statistics/statistics-by-subject-area/population-and-living-conditions/population-composition-and-development/population-statistics/pong/tables-and-graphs/migration (9. 3. 2026).

Sturup, J. *et al*. 2019. Increased gun violence among young males in Sweden: A descriptive national survey and international comparison. *European Journal on Criminal Policy and Research*, 25(4), pp. 365–378.

van Aardt, W. 2022. *COVID-19 Lawlessness- How the Vaccine Mandates, Mask Mandates and the perpetual State of Emergency, are unethical and unlawful in terms of Natural Law, the Social Contract and modern International Human Rights Law.* Chicago: Mallard Publications.

### *Dissertations*

van Aardt, W. 2004. *State responsibility for human rights abuses committed by non-state actors under the constitution*. PhD. Potchefstroom: North-West University.

### *Legal sources and case law*

*Aliev v. Ukraine*, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997 (2003).
*Des Fours Walderode and Kammerlander v. Czech Republic*, CCPR/C/73/D/747/1997
*Herrera Rubio et al. v. Colombia*, CCPR/C/31/D/161/1983
International Covenant on Civil and Political Rights (ICCPR). G.A. Res. 2200A (XXI).1966.
*Gutiérrez Vivanco v. Peru* CCPR/C/74/D/678/
*Judge v. Canada* CCPR/C/78/D/829/1998
*Lantsova v. Russian Federation* CCPR/C/74/D/763/1997
*Nam v. Republic of Korea* CCPR/C/78/D/693/1996
*Paul v. Guyana* CCPR/C/73/D/728/1996
*Teesdale v. Trinidad and Tobago* CCPR/C/74/D/677/1996
United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.
UN Human Rights Committee (HRC), General Comment No. 16: Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 8 April 1988, HRI/GEN/1/Rev.9 (Vol. I)
UN Human Rights Committee (HRC), General Comment No. 20: Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 March 1992, A/44/40
UN Human Rights Committee (HRC), General Comment No. 23: Article 27: Rights of Minorities, 8 April 1994, CCPR/C/21/Rev.1/Add.5.
UN Human Rights Committee (HRC), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13.
UN Human Rights Committee (HRC), General comment No. 35: Article 9: Liberty and security of person, 16 December 2014, CCPR/C/GC/35.
UN Human Rights Committee (HRC), General comment No. 36: Article 6: right to life, 03 September 2019, CCPR/C/GC/36.
Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch10

***Hektor RUCI****

# HOW DOES THE PRINCIPLE OF MAJORITY RULE WITHIN DEMOCRACIES INTERACT, AND POTENTIALLY CONFLICT WITH, THE SAFEGUARDING OF MINORITY RIGHTS?

*The rule of the majority is a very important principle of any democratic system. Nevertheless, if not properly regulated, it can threaten minority rights and the existence of minority groups. This article attempts to explore the correlation between democratic decision-making vis-à-vis the protection of minority rights from what is seen as the "tyranny of the majority." It analyses international and European multilateral legal documents, important judicial decisions, as well as several mechanisms of political, social, and legal representation designed to protect minority rights. Furthermore, it analyses the Albanian primary and secondary legislation and the respective challenges in their implementation, by spotting possible limitations in representation, political inclusiveness, and practical applicability. The article opts that a well-founded democratic system, alongside the majority rule, should also incorporate effective remedies regarding the protection and due representation of minorities.*

***Keywords:*** minority rights, Albania, majority rule, representation.

## 1. INTRODUCTION

The concept of majority rule comes from the initial stages of democracy in ancient Athens and implies that the majority (in general terms – a numerical one) takes decisions on matters of public concern and also bears the responsibility for them. This is one of the forms of organizing governments, state institutions, decision-making bodies, etc. The impact of the majority's decision concerns the whole society, but it becomes more delicate when placed vis-à-vis the exigencies of the minority that they have the responsibility to lead. While minorities can be different – such as political, racial, religious, national, or other – in this paper we shall especially treat the position of national minorities. Such a position will be initially evaluated from a global perspective, analyzing both international legal framework concerning their protection based on international treaties and court decisions etc. affecting minorities in different geographical areas of the world. Afterwards, a more regionally concentrated approach concerning Europe and the Western Balkans will be considered, as well as the reality of minorities in Albania.

* LLM, University of New York Tirana, Albania, ORCID: https://orcid.org/0009-0004-6363-6011, e-mail: *hruci@unyt.edu.al*

## 2. MAJORITY RULE AND ITS IMPACT ON THE PROTECTION OF MINORITY GROUPS

The concept of the majority rule can be compared to the decision of a group of friends as per where to go for the weekend, i.e., mountains or the seaside. In the case of discordances, without any written rule and by wanting to maintain the group cohesion, the majority votes for the seaside and the minority follows. Once at the seaside, they follow the same rule for choosing the restaurant. This looks democratic, practical, and fair. Nevertheless, the same rule cannot be applied when the same group of friends order their meals. It is logical that everyone has the right to choose, and no opinion or position, or even decision-making of the majority, plays any role when it comes to personal rights.

Meanwhile, in democratic societies, majorities have the responsibility to rule and be accountable for society's welfare under the already existing legal framework. The main goal of such a framework is the limitation of power of the majority, making sure that it does not abuse that power, keeping checks and balances between different actors of society and, last but not least, defending the rights and positions of the minorities as part of their human rights at both personal and group level (Ackerman, 1980, p. 393).

A democratic system is essentially a system of government in which power belongs to the people. The majority rule ensures that decisions are made by the majority of voters, with the aim of representing the most views, choices, and needs. Democratic processes, such as elections and referendums, embody this principle, offering the feeling that each vote counts and every citizen participates in decision-making by having an equal share in that process. However, though crucial to the functioning of democracy, this principle can be dangerous when applied without moral limits and safeguards (Novak, 2014).

In such democratic systems there is always a danger of the so-called "dictatorship of the majority." The term describes precisely the aforementioned situation, in which the will of the majority is imposed unchecked, ignoring or even crushing on the rights of minorities (De Tocqueville, 2003). In this context, democracy can degenerate into a system of oppression, where numerical superiority becomes a weapon rather than an instrument of justice. When the majority decides without taking into account the needs and concerns of the less powerful, it loses its moral dimension and becomes authoritarian, despite being presented as the "popular will" (Brighouse & Fleurbaey, 2010).

It is important to understand that democracy is not just a mathematical act of counting votes, regardless of whether it fulfills all democratic standards. The definition of minorities by Prof. Capotorti specifically mentions that "a minority is numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (Capotorti, 1991). Despite being a widely accepted definition and used extensively by the United Nations Centre for Human Rights (Roukounas, 2006), this description covers only certain kinds of minorities, leaving outside specific groups of people who may have common elements of belonging to the concept of minorities, such as minorities based on special needs, sexual orientation, cultural history, etc. Minorities, although numerically smaller, must have the right to openly declare their entitlement of belonging to the minority, express their opinions, and live without being oppressed. No disadvantage should

be created because of pertaining to a specific minority (Craig, 2016). These rights should be connected to the nature of their existence as a minority, i.e., ethnic, linguistic, cultural, etc. If the system does not protect these particularities, it risks becoming a system of government in which the many rules at the expense of the few, without taking into account the needs of the society as a whole, noting that all of the people are an integral part of it (Meka & Kalemaj, 2018).

## 3. PROTECTION OF INDIVIDUAL LIBERTIES BY FAIRNESS AND INCLUSIVENESS

Every majority has the right to lead, but, at the same time, it has the obligation to treat every minority fairly within its jurisdiction and give its members every possibility to be part of the system by safeguarding their identity, cultural heritage, language, religion, etc. Such inclusion is meant to secure the inclusiveness of the minority in decision-making, respect its rights, and offer it peaceful coexistence with the majority of the population. According to the UN Human Rights Commissioner, "[s]tates, through their commitments under treaty law, and minorities themselves or their representatives, can influence the human rights monitoring and implementation procedures and work toward securing effective participation and inclusion." (UNHCR, n. d.).

The abovementioned reference means that states and the minorities who live in them have to cooperate in order to achieve the aforementioned inclusiveness and prepare the necessary legal framework for the protection of rights, and hence also achieve practical inclusiveness into state, political, cultural, and social affairs.

Democratic states have an obligation to protect minorities, and such protection comes from the legal framework those very democracies themselves have chosen to apply. When talking about the legal framework, we can distinguish between domestic and international legislation.

**a. Domestic legislation.** It is primarily composed of constitutional provisions which have the protection of human rights and minority rights as one of its core objects. The Bill of Rights, which appeared as part of the first ten amendments of the Constitution of the United States of America (1787), sanctioned the limitation of state power and extended the protection of all basic rights to everyone living in the United States of America (hereinafter: the US), without distinction as to whether the person is a resident or not. Those rights included all minorities as the only criterion in enjoying those rights (and liberties) was the fact of a person being human (UHR, n. d.). This set of documents constitutes a very wide concept of inclusivity and therefore belongs to the circle of the most significant legal provisions in the field of the protection of basic rights and freedoms.

Most democratic constitutions have included as part of their provisions a specific chapter on human rights, giving to those rights maximal legal protection as part of their basic laws (i.e., The Basic Law of [West] Germany specifically recognizes them as the basis of every community, by claiming that "[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." (FRG Basic Law, 1949, Art. 1)

**b. Court decisions:** in the landmark case of *Brown v. Board of Education* (1954), the United States Supreme Court practically decided to end the racially based segregation and to proclaim rights to every minority in the United States in their entirety (*Brown v. Board of Education*, 1954). This decision became one of the most important legal instruments in the effort against

segregation and minority rights in general, securing those rights by a very high standard as decisions and precedents of the US Supreme Court.

**c. International conventions:** The Universal Declaration of Human Rights (adopted in 1948 by the United Nations) provides in its Article 2 that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (UDHR, 1949, Art. 2). This provision forms a general framework of protection, which was enriched by subsequent multilateral conventions, the most important of which is perhaps the International Covenant on Civil and Political Rights (1966), specifically its Article 27, stating that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (ICCPR, 1966, art. 27). The article refers *explicitly* to the rights that members of the minorities have as individuals, and not as groups (Achour, 1994, p. 321). This theory, which is generally accepted, has passed through the stages of time and history as a precaution measure from the States, in order for them to isolate the extent of the rights on the one hand and *play safe* on the other, with respect to non-violence and positive application to any minority rights (Bossuyt, 1987, p. 494).

Furthermore, despite being a non-binding document, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities represents an important part of the international legal framework of minority rights. It specifies that "persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination" (UN Declaration, 1992). According to Prof. Roukounas (2006, p. 293), the Framework Convention for the Protection of National Minorities, together with the European Convention on Human Rights, constitutes the most advanced mechanism of protection, drafted and applied among those member states of the Council of Europe that have ratified it, and granting extensive rights and guarantees to the minorities.

## 4. POLITICAL REPRESENTATION

The political representation of minorities constitutes an important aspect of the right of representation and inclusiveness of the minorities in the political and institutional life of a given country. Nevertheless, states may apply two distinctive approaches on this matter. The first one is the approach of non-discrimination containing no exceptions (including positive discrimination), in which political and institutional representation claims that persons belonging to minorities may compete, in the same manner as all other persons, for any public position, and no disadvantage can be created because of this belonging (Ruci, 2023). Despite the fact that such a right does not necessarily imply the obligation of a state to offer reserved places within public administration, due to specific historical and social conditions, certain states have very distinctive regulations when it comes to the political representation of minorities. In this regard, we can mention *inter alia* the examples of Romania,[1] Slovenia,[2] and

[1] The Constitution of the Republic of Romania, Art. 66/2.

[2] The Constitution of the Republic of Slovenia, Art. 64.

Croatia,[3] which reserve for the ethnic minorities living in their territory a specific predesigned number of seats in the national parliament.

In this regard, the representatives of minority groups in the parliament can be (and often are) used as "kingmakers," in the sense that they provide the indispensable support to create the governing majority. It is obvious that in such cases their role and importance increase dramatically, and minorities enjoy a prominent position, which enables them to push forward their specific demands and agendas (Culic, 2016, p. 198).

## 5. THE TYRANNY OF THE MAJORITY

Various distinguished scholars, such as John Rawls and Ronald Dworkin, have problematized the influence that majority rule might receive from other influence groups, such as trade unions. As minorities are usually not part of these groups, there is always the risk of cutting out minorities' interests from the forms of future laws, administrative decisions, and their practical implementation (Dworkin, 1985).

Such reservations about the democratic process are not entirely unfounded. The fear of the "tyranny of the majority" is not simply a theoretical concept. The dominance of the will of the "many" has repeatedly proven to be abusive and detrimental to individual and collective freedoms. At this point, it is appropriate to distinguish two different levels regarding the meaning of the term 'majority principle' (Unger, 1996, p. 72). This is a distinction to which de Tocqueville aptly referred, analyzing the problem of democratic tyranny, by claiming: "I consider this principle to be impious and repulsive, that in matters of government the majority of a people has the right to do whatever it wants, and yet I place in the will of the majority the source of all powers" (Kendall, 2007, p. 24).

### *5.1. Historical cases*

The Jim Crow laws, adopted in the US in the second part of the 20th century, constitute a flagrant deviation from the protection of minority rights by sanctioning the "white supremacy," implementing segregation, and denying equal opportunities (American Experience, 2025). Theoretically, according to these laws, persons of African-American origin in the US enjoyed "equal but separate" rights. Taking a deeper look into the practical implementation of these documents, the facilities used by African-Americans were much inferior, and various discriminatory mechanisms were used against the members of the oppressed population, such as the test of literacy (when it came to voting rights). Therefore, the conferred rights were practically impossible to exercise and resulted in African-Americans having no rights guaranteed at all (American Experience, 2025).

### *5.2. Modern examples*

Hindu nationalist policies against Muslim minorities, according to Human Rights Watch, constitute a severe threat to the human rights of the Muslim minority in India. Prejudices against this group have been expressed by various state institutions, including the police, courts, and public administration, giving grounds to Hindu nationalist elements to openly and without any fear of deterrence harass individuals of the Muslim minority. According

[3] The Constitution of the Republic of Croatia, Art. 15

to Meenakshi Ganguly "the Bharatiya Janata Party's embrace of the Hindu majority at the expense of minorities has seeped into government institutions, undermining equal protection of the law without discrimination" (Human Rights Watch, 2021). In addition, "the Indian government has not only failed to protect Muslims and other minorities from attacks but is providing political patronage and cover for bigotry" (Human Rights Watch, 2021). It is therefore evident that the majority discrimination against minorities can be performed either through legal coverage or at least institutional silence. Both options consist of a combination of state power and influence of the majority groups in a more social dimension enhanced by the non-actions of that very same majority. Therefore, what is indispensable to the protection of minorities is a combination of due legal protection and the good will of independent and capable institutions which can resist undue pressure from the majorities.

## 6. INSTITUTIONAL DISCRIMINATION AGAINST MINORITIES

State institutions and policies can find and apply different forms or discrimination as per the application of their policies and procedures. Such forms can be synthetized as below:

**a. Legal barriers:** Specific legislation can sometimes serve as a barrier to the enjoyment of well-sanctioned rights when it mainly concerns certain specific groups of society. An actual example of that is the voter ID laws in the US, which make it compulsory for the voter to have a government issued photo ID when they vote. For many people, primarily members of the minorities in the US, this can be seen as a real obstacle in performing one of the main rights, but at the same time it represents the main obligation of the citizens, that is, the right to elect and the right to be elected. According to the League of Women Voters, "[i]n combination with the ineffectiveness of voter photo ID laws at preventing the rare instances of voter fraud, the more likely results of voter photo ID laws are voter suppression and reduced turnout among vulnerable populations." (Horine, 2023). Another form of discrimination is the "citizenship laws in Myanmar," which give citizenship only to specific groups linked to a national race. Therefore, other groups which do not belong to prescribed races – such as the Rohingyas, South Asians, etc. – cannot enjoy the right to citizenship (ICJ, 2019).

**b. Socio-economic inequality:** According to the American Psychological Association, "socioeconomic status (SES) encompasses not just income but also educational attainment, financial security, and subjective perceptions of social status and social class. Socioeconomic status can encompass quality of life attributes as well as the opportunities and privileges afforded to people within society." (APA, n. d.) This is a form of discrimination which deprives marginalized groups (which are principally minorities) from direct access to quality education, valuable resources, equal career opportunities, etc. (APA, n. d.).

**c. Cultural assimilation policies:** A recent debate in the French Senate and the general public has evolved regarding the use of the hijab and other religion-related clothing in sports competitions in France. New legislation is supposed to ban such use in all activities.

It can be evaluated that this law shall mainly affect women belonging to religious minorities and shall exclude them from participation in sports. According to Amnesty International, "under the guise of implementing the notion of 'secularism', these laws target and disproportionately impact the rights of Muslim women and girls who will be excluded from competing in all sports if they wear a hijab or any other religious clothing." (Amnesty International, 2025)

## 7. MINORITIES IN THE ALBANIAN REALITY

The respect of human rights in Albania and, more specifically, minority rights, took a new course after the fall of the communist regime in Albania and the restoration of democracy in 1991. Since then, different legal and political safeguards have been added in order to protect minorities and keep them integrated into Albanian society.

### *7.1. Majorities' decisions regarding the respect for human rights*

The first Albanian post-communist Constitution of 1998 in its Article 20 specifies that: "1. Persons who belong to national minorities exercise in full equality before the law the human rights and freedoms," as well as that "2. They have the right to freely express, without prohibition or compulsion, their ethnic, cultural, religious and linguistic belonging. They have the right to preserve and develop it, to study and to be taught in their mother tongue, as well as unite in organizations and associations for the protection of their interests and identity" (Constitution of the Republic of Albania, art. 20).

In addition, the Stability and Association Agreement between Albania and the European Union, which constitutes one of the most important legal documents in the process of Albanian European integration, specifies the importance of "considering the commitment of the Parties to increasing political and economic freedoms as the very basis of this Agreement, as well as their commitment to respect human rights and the rule of law, including the rights of persons belonging to national minorities, and democratic principles through a multi-party system with free and fair elections". (SAA, 2009)

Albania is a member-party of Council of Europe's Framework Convention for the Protection of National Minorities (hereinafter: FCPNM), in which extensive rights are given to minorities. The FCPNM also specific the duties conferred upon any state to protect and safeguard their rights. In its Article 3, the FCPNM specifies that "every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice," and that "persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others." (FCPNM, art. 3)

Alongside these international obligations, Albania has adopted a law regarding national minorities and their protection. This law recognizes nine different national minorities, namely, the Greek, Macedonian, Aromanian, Roma, Egyptian, Montenegrin, Bosnian, Serbian, and Bulgarian. Among other provisions, the law, in its Article 6, provides that every person belonging to a national minority has the right of self-declaration if he/she believes that they belong to a certain national minority. Thus, in accordance with Paragraph 1 of Article 1 of the abovementioned law, "[e]very person belonging to a national minority has the right to freely choose to be treated as such, without any disadvantage from this choice or exercise of the rights that are related to this election," whereas Paragraph 2 claims that "persons belonging to national minorities exercise their rights and enjoy the freedoms guaranteed by this law, individually and in community with others, throughout the territory of the Republic of Albania" (Law 96/2017).

Of course, in making such a declaration effective, persons belonging to national minorities should fulfil several objective criteria (ethnicity of parents as reflected in official documents)

and subjective criteria (logical personal feeling connected to mother tongue, family heritage, inherited culture, etc.).

### *7.2. Political representation of minorities*

Political representation of minorities in the Parliament of the Republic of Albania started with the first democratically elected parliament after the fall of communism in 1991 and continued over time (Debate parlamentare, 1991, p. 145). Actually, in the Albanian parliament there is at least one member who belongs to a political party that has as its main scope the protection of national minorities (*Partia Bashkimi per te Drejtat e njeriut*, or PBDNj) (Institute for Political Studies, 2011). Also, there are other members belonging to diverse minorities, but who are part of the other political parties. The leader of the PBDNj, Vangjel Dule, served for a certain period of time as the Vice Chairman of the Albanian Parliament, while also different governments of post-communist Albania have included in ministerial positions individuals and/or politicians belonging to national minorities (Telegraf, 2013).

### *7.3. Issues of minority representation*

Despite the notable progress of minority rights in Albania, there are still problems and malfunctioning issues regarding the implementation of rights and their full respect within the Albanian legislation and social reality.

Albania has done many good steps forward when it comes to the protection of human rights in general and minority rights in particular. Albania's accession to the most important human rights treaties, including the United Nations Charter of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Basic Freedoms, the Framework Convention on the Protection of National Minorities, etc., has secured an ensuring level of protection. Participating in those international conventions entails precise guarantees for individuals belonging to national minorities, as well as other duties for the state and public administration in general versus the effective protection of basic rights and freedoms.

Nevertheless, we can still witness issues and problems, as well as standards which have not yet been met. For example, in the decision of the European Court of Human Rights brought in the case *X and others v. Albania*, 2022, the Court found that there is still a concrete and direct discrimination regarding the Roma minority in a school in the city of Korca (*X and others v. Albania*, 2022). Despite the fact that the Roma population composes approximately 5% of the total city population, pupils belonging to the Roma minority represent more than 95% of the total number of pupils in the "Naim Frasheri" school. In the view of the Court, this reality appeared as a direct form of segregation, therefore constituting a serious violation of human rights.

Despite passing the aforementioned Law on the Protection of National Minorities, the Albanian government has not yet proceeded with necessary bylaws regarding the use of the mother tongue in the areas where persons belonging to national minorities compose more than 20% of the total population (Law 96/2017, Art 15). This creates ground for non-application of specific and very important rights, such as the right to education in the mother tongue, including the opening of schools or classes where lectures take place in the minority language and the right to use that language in relation to public administration, bilingual road signs, etc.

Another problem is the enjoyment of property rights, especially for those individuals belonging to the Greek national minority living in the south of Albania. Despite the fact that Albania has for more than 30 years had severe problems when it comes to property titles for all of its population, these problems appear sharper when we talk of minorities. Namely, the opinion of the Permanent Court of International Justice in the case "Greek minority schools in Albania" (1935) sanctions that the position of minorities should not deteriorate and that they shall need a dual protection, despite the fact that such deterioration has affected the population as a whole (PCIJ, *Minority Schools in Albania*, 1935).

When it comes to the obligations of Albania regarding its integration process in the European Union, the progress reports since the signature of the Stability and Association Agreement have mentioned that there are still problems with the respect of minority rights.

The reports affirm that in general Albania is well developing its legal framework, mainly under the guidelines of the FCPNM, but there are three elements that do need further settlement and implementation. These elements are:

- Despite the aforementioned non-discriminatory legislation, issues of participation in the public sector seem to have practical problems as regards their implementation. The Progress Report specifies that "the Civil Service Law provides for the participation of minorities in public administration, the armed forces and the police (…) However, minority representation remains limited" (Albania Progress Report, 2023). The leader of the Union of Human Rights Party officially stated in an interview for the BBC that there is a specific need to employ persons belonging to the national Greek minority within the State Police Forces (Dule, 2010).
- The institutional/administrative support for the minorities relying on the State Committee on Minorities does not seem to be adjusted to the requested level. According to the Progress Report, "the institutional capacity of the State Committee on Minorities remains weak. Its role as intermediary between the government and minority representatives requires further strengthening in order to ensure effective participation of minorities in decision-making" (Albania Progress Report, 2023).

It is therefore imperative that Albania should provide for the necessary enrichment of its legal framework, combined with a genuine will and desire for the proper application of the existing provisions. The concepts of minority rights require the everlasting need for attention and adoption, in terms of legislation, practice, and institutional acceptance.

## 8. CONCLUSION

The rule of majority is associated with a great deal of responsibilities when it comes to decision-making and the impact which these decisions have on the life and social inclusion of the minorities. In general, there are plenty of legal safeguards securing respect for minorities worldwide in the form of international and domestic legislation, practices and court decisions. Despite all of these, in many areas of the world, minorities still lack basic human rights, representation rights, and their protection from majority rule is not full and secure. Most of the European countries, mainly due to their long democratic traditions and/or the existence of advanced European legislation, have a more solid ground for protecting minorities and taking into consideration their rights and needs; additionally, more representation is secured in both decision-making bodies and public administration. When it comes to

Albania, many mechanisms of protection are enabled by its Constitution, laws, as well as the country's international obligations. Nevertheless, there is still room for improvement both in passing new laws and making the existing ones functional.

The debate as per now remains open-ended, as different perspectives emphasize different priorities, and democratic legitimacy through majority rule is trying to strike a balance between itself and a stronger protection for minority groups.

## LIST OF REFERENCES


Achour, B. Y. 1994. *Souveraineté étatique et protection internationale des minorités*. The Hague: RCADI.

Ackerman, B. 1980. *Social justice in the liberal state*. New Haven/London: Yale University Press.

Amnesty International. 2025. France: Hijab ban in all sports would violate human rights and target Muslim women and girls. Available at: https://www.amnesty.org/en/latest/news/2025/02/france-hijab-ban-in-all-sports-would-violate-human-rights-and-target-muslim-women-and-girls/#:~:text=%E2%80%9CUnder%20the%20guise%20of%20implementing,or%20any%20other%20religious%20clothing.%E2%80%9D (8. 4. 2025)

APA. n. d. *Ethnic and Racial Minorities & Socioeconomic Status*. Available at: https://www.apa.org/pi/ses/resources/publications/minorities (8. 4. 2025)

Bossuyt, O. 1987. *Guide to the "travaux preparatoires" of the International Convention on Civil and Political rights*. Dordrecht/Boston/Lancaster: Nijhoff.

Brighouse, H. & Fleurbaey, M. 2010. Democracy and proportionality. *The Journal of Political Philosophy*, 18(2), pp. 137–155. https://doi.org/10.1111/j.1467-9760.2008.00316.x

Capotorti, F. 1991. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. Geneva: United Nations Center for Human Rights, UN Doc, E/CN.4/Sub.2/384/Add.1-7.

Craig, E. 2016. Who are the Minorities? The role of the Right to Self-Identity within the European Minority Rights Framework. *Journal of Ethnopolitics and Minority Issues in Europe*, 15(2), pp. 6–30.

Culic I. 2016. Hungarian Society in Romania: Political Project and Practical Reality. In: Ramet S. P. & Valenta M. (eds.), *Ethnic Minorities and Politics in Post-Socialist Southeastern Europe*. Cambrige: Cambridge University Press, pp. 191–210. https://doi.org/10.1017/CBO9781316671290.012

De Tocqueville, A. 2003. *Democracy in America*. London: Penguin Classics.

*Debate parlamentare* 1991., Kuvendi i Shqiperise, QPZ, Tirana 2010.

Dule, V. 2010. Minority's concerns. Available at: http://www.bbc.co.uk/albanian/regionalnews/2010/08/100817_dule_ir.shtml (21. 2. 2025)

Dworkin, R. 1985. *A matter of principle*. Cambridge/Mass: Harvard University Press.

European Commission. *Albania 2023 Progress Report*. Available at: https://enlargement.ec.europa.eu/albania-report-2023_en (12. 4. 2025)

Horine, B. 2023. What's So Bad About Voter ID Laws? Available at: https://www.lwv.org/blog/whats-so-bad-about-voter-id-laws (8. 4. 2025)

Human Rights Watch. 2021. *India: Government Policies, Actions Target Minorities*. Available at: https://www.hrw.org/news/2021/02/19/india-government-policies-actions-target-minorities (8. 4. 2025).

ICJ. 2019. Myanmar's discriminatory citizenship laws can and must be immediately reformed. Available at: https://www.icj.org/myanmars-discriminatory-citizenship-laws-can-and-must-be-immediately-reformed/ (7. 4. 2025)
Institute for Political Studies. Available at: https://dekriminalizimi.isp.com.al/partia-bashkimi-per-te-drejtat-e-njeriut/ (11. 3. 2026)
Jim Crow Laws. "American experience." Available at: https://www.pbs.org/wgbh/american-experience/features/freedom-riders-jim-crow-laws/#:~:text=The%20laws%20affected%20almost%20every,of%20the%20enforced%20racial%20order (3. 4. 2025)
Kendall, W. 2007. *John Locke and the doctrine of majority-rule*. Kila, Montana: Kessinger Publishing.
Meka, E. & Kalemaj, I. 2018. *Gracka e votuesit*. Tirana: UET press.
Novak, S. 2014. Majority Rule. *Philosophy Compass*, 9, pp. 681–688. https://doi.org/10.1111/phc3.12164
Roukounas, E. 2006. *The International Protection of Human Rights*. Athens: Sakkoulas Publications.
Ruci, H. 2023. The Albanian Legal Guarantees for the Protection of National Minorities. *Regional Law Review*, 4, pp. 71–79. https://doi.org/10.56461/iup_rlrc.2023.4.ch5
Telegraf. 2013. Vangjel Dule, nënkryetar i Kuvendit. Tirana.
UHR. n. d. *A brief history of human rights*. Available at: https://www.humanrights.com/what-are-human-rights/brief-history/declaration-of-independence.html (2. 4. 2025)
Unger, R. M. 1996. *What should legal analysis become?* London: Verso.
UNHCR. n. d. OHCHR and minorities. Available at: https://www.ohchr.org/en/minorities/about-minorities-and-human-rights (2. 4. 2025)

### *Legal sources and case law*

Basic Law of the Federal Republic of Germany. 1949.
*Brown v. Board of Education*, 347 U.S. 483, 1954.
Constitution of the Republic of Albania. 1998.
Constitution of the Republic of Croatia. 1990.
Constitution of the Republic of Romania. 2003.
Constitution of the Republic of Slovenia. 1991.
Council of Europe. 1995. Framework Convention for the Protection of National Minorities, ETS No. 157.
Law No. 96/2017, On the Protection of National Minorities in the Republic of Albania.
Permanent Court of International Justice. (1935). Minority Schools in Albania (Advisory Opinion). PCIJ Series A/B No. 64.
European Court of Human Rights, *X and Others v Albania*, Applications nos 73548/17 and 45521/19.
Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, Official Journal of the European Union, L 107/166. (2009, April 28).
United Nations. 1948. Universal Declaration of Human Rights, UNGA Res 217 A(III).
United Nations. 1966. International Covenant on Civil and Political Rights, 999 UNTS 171.
United Nations General Assembly. 1992. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135.

Original scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch11

***Marin KERŠIĆ****

# CLASSIFYING CONSTITUTIONAL RIGHTS: EFFECTS ON THE JUDICIAL RESOLUTION OF CONFLICTS

*The objective of this paper is to analyse how different typologies of constitutional rights affect the resolution of conflicts between such rights in constitutional adjudication. It addresses the theoretical and practical complexity of rights conflicts by examining two influential models of classification: first, the model proposed by Luigi Ferrajoli, one of the most influential Italian legal philosophers, and second, the model developed by Juan Antonio García Amado, a well-known Spanish legal philosopher. The paper compares these typologies and examines their application to concrete judicial cases in order to assess how differing understandings of constitutional rights shape judicial reasoning and judicial outcomes. Through a comparative case analysis, the paper demonstrates that the classification of rights – particularly the classification of rights as, for example, "fundamental rights" or "social rights" – has significant implications for the methods and results of constitutional decision-making. The findings highlight the normative consequences of rights typologies and their role in structuring approaches to rights conflicts.*

***Keywords:*** constitutional rights, fundamental rights, normative conflicts, Luigi Ferrajoli, Juan Antonio García Amado.

## 1. INTRODUCTION

Contemporary constitutional courts are routinely confronted with cases in which the exercise of one fundamental right appears to infringe upon another. The freedom to express oneself may clash with the protection of personal honour or private life; the protection of health may stand in opposition to the right to entrepreneurial freedom; the right to strike may conflict with the right to health; formal equality may seem to contradict substantive equality, etc. In such situations, judges are faced with a normative conflict that does not have a clear solution, since the classical criteria for the resolution of antinomies – *lex superior derogat legi inferiori*, *lex posterior derogat legi priori* and *lex specialis derogat legi generali* – are usually not applicable. This is due to the fact that both the conflicting norms are on the same hierarchical level (both are constitutional norms), they were usually enacted at the same time (at the time

* Assistant Professor, Faculty of Law, University of Split, Department of Theory of Law and State, ORCID: https://orcid.org/0000-0002-0964-4625, e-mail: *marin.kersic@pravst.hr*

of the enactment of the constitution and its bill of rights) and no general-special relation can be convincingly established between them. How courts resolve such conflicts has profound implications for the protection of individual rights, but also for the understanding of the separation of powers.

The prevailing answer to the problem of the resolution of conflicts between constitutional rights is judicial balancing, a method whose theoretical foundations are most closely associated with the German legal philosopher Robert Alexy. Judicial balancing is not a purely theoretical construct developed by legal science – courts, both national (such as the German Federal Constitutional Court, for example) and supranational (such as the European Court of Human Rights, for example), use balancing as a method to resolve such conflicts (on the use of balancing, see, for example, Sardo, 2012, p. 85; Klatt & Meister, 2012, p. 4: Moreso, 2012, pp. 35–36, and Pirker, 2013, pp. 6–7). When balancing, courts assign "weight" to the competing rights, depending on the concrete circumstances of the case, and determine which of the rights should prevail in the concrete case (Alexy, 2002; Alexy, 2003, pp. 433–449; Alexy, 2014, pp. 51–66). While widely influential, balancing has attracted sustained criticism for allegedly expanding judicial discretion, weakening the normative force of rights, and introducing irreducible subjectivity into constitutional adjudication through the assignment of a contested notion of weight to the conflicting rights (among many criticisms of the Alexyan understanding of judicial balancing, see, for example, Brożek, 2012; Martínez Zorrilla, 2018; Ramião, 2018, and Ratti, 2009; for a summary of these and more criticisms, see Keršić, 2022, pp. 63–76).

This paper examines two alternative (non-balancing) approaches to the judicial resolution of conflicts between constitutional rights, those developed by Italian legal philosopher Luigi Ferrajoli and Spanish legal philosopher Juan Antonio García Amado (for a more detailed analysis of these and other approaches to the judicial resolution of conflicts between constitutional rights, see Keršić, 2022). Both methods offer alternative possible solutions to the problem of how conflicts between constitutional rights should be resolved? Both authors are legal positivists who reject judicial balancing – the dominant method for resolving such conflicts, associated primarily with Robert Alexy, a non-positivist – and propose structured interpretative alternatives. The paper analyses the theoretical foundations of each approach, applies them to a so-called comparative case, and critically compares their strengths and weaknesses. This is done in order to see how different typologies of constitutional rights affect the resolution of conflicts between them.

The first is guaranteeistic constitutionalism (*garantismo*) developed by Luigi Ferrajoli, which argues that most apparent conflicts between constitutional rights dissolve once rights are correctly classified according to the typology he proposes and that systematic interpretation – not balancing – should resolve such cases (Ferrajoli, 2011, pp. 15–53; Ferrajoli, 2012, pp. 791–817; Ferrajoli, 2013, pp. 111–137). The second is Juan Antonio García Amado's interpretative-subsumptive method, a rigorously formalised five-step procedure that reframes judicial reasoning in cases of conflicts between constitutional rights as a process of norm-interpretation and subsumption, entirely bypassing the language and logic of balancing (García Amado, 2009, pp. 297–322; García Amado, 2017, pp. 81–115).

Methodologically, the paper relies on conceptual analysis and comparative case analysis. The two approaches are first examined in their theoretical foundations, with particular attention to their respective typologies of constitutional rights, and then applied to the same judicial

case – "comparative case", which serves as a common reference point for the comparison. The paper proceeds as follows: Section 2 presents Ferrajoli's *garantismo*; Section 3 presents García Amado's interpretative-subsumptive method, and Section 4 offers conclusions.

## 2. LUIGI FERRAJOLI: GARANTISMO AND THE NON-CONFLICTIVIST APPROACH

This section presents Ferrajoli's *garantismo* in two steps. First, it outlines the theoretical context of his approach and his classification of constitutional rights. Second, it applies his framework to the "comparative case" in order to demonstrate how his typology shapes the resolution of conflicts.

### *2.1. Context and classification of rights*

The garantismo of Luigi Ferrajoli is examined in the paper for two main reasons. The first concerns the scope and lasting influence of his work, which stretches back to the 1960s. The second is the influence he has on legal discourse in Italy and in Spanish-speaking countries, especially in Latin America (see, for example, Atienza Rodríguez, 2008). His approach offers an alternative not merely to judicial balancing as a technique, but also to the broader legal and political philosophies behind it. The second reason lies in the substantial theoretical contribution that Ferrajoli has made to the subject through his distinctive understanding and classification of rights (for a more detailed summary of Ferrajoli's views on conflicts between rights, see Keršić 2022, pp. 235–263).

Ferrajoli's approach is marked by the idea that most, if not all, constitutional principles (in particular, the norms that protect fundamental rights) should be understood as having the structure of legal rules (and not that of legal principles) since they "imply the existence or impose introduction of rules consisting in prohibitions of injury or obligations of provisions that are their respective guarantees" (Ferrajoli, 2011, p. 21, translated by the author). On this basis, garantismo rejects three ideas: first, that there is a conceptual connection between law and morality; second, that the distinction between legal rules and legal principles is a strong or qualitative one (according to which legal rules and legal principles are two qualitatively different types of norms; for more on this distinction, see Pino, 2009, pp. 133–145); and third, the idea that balancing is a necessary operation in the application of legal principles (Ferrajoli, 2011). At its core, the regulatory ideal of garantismo is to ensure that the fundamental rights guaranteed by law are upheld within the constitutional state (Atienza Rodríguez, 2008, p. 214).

For Ferrajoli, a "right" is "any positive expectation (of services) or negative expectation (of non-infringement) ascribed to an actor by a legal norm" (Ferrajoli, 2001b, p. 1). Fundamental rights are, in turn, "all those rights to which 'all' human beings are universally entitled by virtue of having the status of persons, or of citizens, or of persons capable of acting" (Ferrajoli, 2001b, p. 1). The definition of fundamental rights laid out here is a theoretical, and not a dogmatic one: it does not presuppose that these rights are expressly enacted in constitutions or other sources of positive law within a legal system (Ferrajoli, 2001b, p. 1). Put more precisely, fundamental rights are "those rights that are ascribed by a legal system to all physical persons by virtue of their being so, or by virtue of their being citizen or by virtue of their being capable of acting" (Ferrajoli, 2001b, p. 2).

Ferrajoli suggests two classifications of fundamental rights (Keršić, 2022, pp. 246–247): one subjective and one objective. The subjective classification is based on the subjects who hold the right, while the objective classification is based on the type of conduct that the right concerns (Ferrajoli, 2001a, pp. 284–285). In the subjective classification, Ferrajoli employs two parameters to differentiate among the subjects of the right: citizenship and the capacity to act – which he identifies as the only two status distinctions that still limit the equality of people. These two parameters yield two further distinctions between fundamental rights: between personality rights and citizenship rights and between primary (substantial) rights and secondary rights (instrumental rights or rights of autonomy; Ferrajoli, 2001b, p. 4). Combining these two distinctions results in four types of fundamental rights: (1) human rights, defined as "the primary rights of persons, to which all human beings are entitled without distinction" (for example, the right to life); (2) public rights, defined as "those primary rights to which only citizens are entitled" (for example, the right to form associations); (3) civil rights, defined as "secondary rights ascribed to all human beings capable of acting" (e.g., the freedom of enterprise); and (4) political rights, defined as "those secondary rights that are reserved only to those citizens who are capable of acting" (e.g., voting rights) (Ferrajoli, 2011b, pp. 4–5; Ferrajoli 2011a, pp. 7–9, translated by the author). The first (subjective) typology of fundamental rights is illustrated in Table 1 (Keršić, 2022, p. 246):

**Table 1.**

| **Fundamental rights** | Personality rights | Citizenship rights |
|---|---|---|
| Primary (substantial) rights | Human rights | Public rights |
| Secondary (instrumental) rights | Civil rights | Political rights |

The second (objective) classification of fundamental rights divides rights into rights that consist of negative expectations (non-infringements) and rights that consist of positive expectations (prestations) (Ferrajoli, 2001a, pp. 284–285). *Primary rights*, as Ferrajoli elaborates, are rights that everyone has regardless of their capacity to act, and they include *rights to liberty* and *social rights*. Rights to liberty are "negative" or immunity rights in the sense that they require omission of interference (for example, the right to life or freedom of the press). On the other hand, social rights are "positive" rights in the sense that they require some prestation (for example, the right to health or the right to education). *Secondary rights*, to which all persons capable of acting are entitled, include *civil rights* (for example, freedom of enterprise) and *political rights* (for example, the right to vote). This can be illustrated in Table 2 (on these points, see Keršić, 2022, p. 247).

**Table 2.**

<table>
<tr><th>Fundamental rights</th><th colspan="2">Personality rights</th><th>Citizenship rights</th></tr>
<tr><td rowspan="2">Primary rights<br>(only expectations)</td><td rowspan="2">Rights to<br>liberty</td><td>liberty from</td><td rowspan="2">Social rights<br>(positive expectations)</td></tr>
<tr><td>liberty to</td></tr>
<tr><td>Secondary rights<br>(expectations and powers)</td><td colspan="2">Civil rights<br>(rights of private autonomy)</td><td>Political rights (rights of<br>political autonomy)</td></tr>
</table>

### *2.2. Theoretical framework and application*

In order to facilitate the comparison and draw conclusions, the same "comparative case" will be used as a reference point for both approaches (the approach of using "comparative" case is based on the approach in Keršić, 2022, pp. 6–7). The case in question is the Titanic case from 1992 (BverfGE 86, 1-14, Order of 25 March 1992, 1 BvR 514/90) of the German Federal Constitutional Court, in which a conflict arose between freedom of expression and personality rights. The facts of the case are as follows (for a summary of the case, see Alexy, 2014, pp. 56–57 and Eberle, 1997, pp. 871–875): a satirical magazine called Titanic referred to a paraplegic reserve officer on two occasions: first as a "born murderer" and subsequently as a "cripple". The officer, who had been injured in a car accident, had expressed his wish to continue serving in the army as a translator following his rejection by the military, a wish he made public in the widely circulated paper Bild am Sonntag. In response, the magazine featured him in its regular column "The Seven Most Embarrassing Personalities of the Month", accompanied by a photograph and the description "born murderer". When the officer brought legal proceedings against the magazine, Titanic published a rejoinder arguing that it was obscene that a "cripple" was determined to serve in the German army, whose purpose is to cripple or kill people, and that this was the reason why he was listed in "The Seven Most Embarrassing Personalities of the Month". The lower court ruled in the officer's favour and ordered Titanic to pay 12,000 DM in damages (an amount that would be broadly comparable in euros today, adjusted for inflation). Titanic then filed a constitutional complaint, prompting the German Federal Constitutional Court to engage in a "case specific balancing" between the magazine's freedom of expression, protected under Art. 5(1) of the Basic Law, and the officer's right of personality, protected under Art. 2(1), in conjunction with Art. 1(1) of the Basic Law for the Federal Republic of Germany.

To resolve the case under Ferrajoli's approach, the first step is to qualify the rights that appear to be in conflict (for a reconstruction of the application of the approach, see Keršić, 2022, pp. 255–257). Freedom of expression is a primary right – the liberty to act. As Ferrajoli argues, this freedom of expression (as a liberty to act) only seems to be in conflict with other rights. A conflict between freedom of expression and the personality right (understood as freedom from interference) is resolved, in his framework, not through balancing, but by reference to provisions that qualify certain exercises of freedom of expression – such as insult or defamation – as criminal offences and therefore as prohibited conduct. What appears to be a conflict between two rights is, on this account, not a genuine conflict at all, but rather a constitutionally prescribed limitation on freedom of expression. In the German legal system, this limitation of freedom of expression is established by Art. 5(2) of the Basic Law for the Federal Republic of Germany; in the Italian legal system, such a restriction is regulated in Art. 21(3) of the Constitution of the Italian Republic. Such restriction is present in other constitutions, such as the Constitution of the Republic of Serbia – Art. 46(2). The task of the judge, then, is to decide whether the expression in question falls within the categories prohibited by criminal law, which constitutionally limit freedom of expression while protecting personality rights. Ferrajoli speaks of "limits" of rights rather than their "conflicts". Since he conceives fundamental rights as universal, they must always, in his view, be understood as rules that are linked to corresponding duties. Freedom of expression thus translates into a rule prohibiting any restriction of free expression except in cases of offences expressly defined by law (Ferrajoli, 2011, pp. 39–40).

Correspondingly, the content of the right to honour, as a personality right, consists in the prohibition of expressions that harm another person's honour or reputation – a prohibition given concrete form in the norms of criminal law regulating insult and defamation. The problem is evident: language is inherently indeterminate, and the judge must decide, with regard to the circumstances of the case, whether the expressions "born murderer" and "cripple" can be qualified as legally prohibited insults and thus as instances in which the limitation on freedom of expression is justified. If this is the case, it would mean that at the same time the right to honour, as a personality right, is protected by the prohibition of such expressions. The decision is to be reached by systematic interpretation of the other norms of the legal system – norms from the criminal code regulating insult.

Applying Ferrajoli's approach and taking into account both the factual circumstances of the case and the reasoning of the German Federal Constitutional Court, the expression "born murderer" would not qualify as a formal insult, whereas the expression "cripple" would. The former would therefore be considered a permitted exercise of freedom of expression that does not infringe personality rights, while the latter would constitute a prohibited expression falling within the constitutional limitation on freedom of expression and, at the same time, an infringement of the officer's personality rights. In the concrete case, the consequence would be the imposition of a fine on Titanic magazine with regard to the expression "cripple", but not with regard to the expression "born murderer" (Keršić, 2022, p. 257).

## 3. JUAN ANTONIO GARCÍA AMADO: THE INTERPRETATIVE-SUBSUMPTIVE METHOD

This section follows the same structure as the previous one. It first outlines García Amado's theoretical framework and his classification of constitutional rights, before applying his interpretative-subsumptive method to the *Titanic* case.

### *3.1. Context and classification of rights*

The second alternative to judicial balancing presented in this paper is the approach of Juan Antonio García Amado (García Amado, 2014, p. 8). It was selected for two reasons. First, García Amado is one of the most prominent and outspoken critics of judicial balancing as a method. Second, he has developed a detailed, formalized "interpretative-subsumptive" method that consists of five steps that are logically formalized and can be applied to concrete legal cases in a relatively straightforward manner (Keršić, 2022, p. 264).

García Amado's views bear close resemblance to those of H. L. A. Hart: as a legal positivist, he subscribes to the separability thesis – the denial of any necessary conceptual connection between law and morality, as well as to the social sources thesis, according to which both the existence and the content of law are wholly determined by social facts. He also endorses the notion that judicial discretion is an irreducible feature of legal adjudication (Ortega García, 2017, p. 17).

García Amado distinguishes between four types of fundamental rights (García Amado, 2017, pp. 104-111): (1) *Inclusive or rule rights (R)* are rights whose object is the "natural activity" – a primary or "pre-normative" reality that exists independently of legal regulation. Since the activity itself precedes legal definition, the law does not define these rights normatively, but rather defines the limits of their exercise, for example freedom of expression. (2) *Exclusive or*

*exception rights (E)* are rights whose object of protection is normatively defined: this "area of protection" is protected against any interference, and interference with the scope of protection of the right is infringement of the right, for example the right to honour. (3) *Rights to a positive action by the state (A)* are rights that require specific action or performance from the state, such as the right to information in criminal proceedings. (4) *Right to an omission or abstention from the state (O)* are rights that impose a duty on the state to refrain from certain conduct; the prohibition of torture is an example of this type of right (for a more detailed reconstruction of García Amado's approach, see Keršić, 2022, pp. 264–287).

### *3.2. Theoretical framework and application*

The *Titanic* case, used here as a comparative case, is an instance of a conflict between an inclusive or rule right (R) and an exclusive or exception right (E) within García Amado's framework. Such a conflict is to be resolved by examining the facts of the concrete case and deciding whether they can be subsumed within the scope of the protection of exclusive or exception right (Keršić, 2022, p. 273). If the answer is affirmative, the court concludes that the inclusive or rule right has been exercised in an impermissible manner. As García Amado argues, exclusive or exception rights are absolute rights in the sense that, once the norm regulating them has been interpreted so as to delimit their scope, no infringement within that scope is permissible. Accordingly, when a statement is made that arguably violates another person's right to honour, the court will interpret the norm regulating the exclusive or exception right and decide whether the facts of the case fall within the protection of the norm expressing the exclusive or exception right (García Amado, 2017, pp. 106-107, Keršić, 2022, p. 273). To demonstrate this step-by-step through the interpretative-subsumptive method (Keršić, 2022, pp. 278–282):

I. The first element of the interpretative-subsumptive method proposed by García Amado consists in identifying the normative situation. In the *Titanic* case, the relevant normative situation consists of two constitutional provisions: Art. 5(1) of the German Constitution that guarantees freedom of expression and Art. 5(2) that sets out its limits. Together, these two constitutional provisions can be reformulated as the following statement: "Any expression that does not violate (among other things) the honour of persons is permitted" (García Amado, 2009, p. 299, translated by the author). In the *Titanic* case, the satirical magazine referred to a paraplegic reserve officer first as a "born murderer" and second, as a "cripple", raising the question of whether either expression constitutes a violation of the right to honour protected by Art. 5(2) of the German Constitution. As García Amado points out, it is not immediately clear whether these two expressions can be considered to violate the right to honour, as they are borderline cases that fall into the penumbra zone of the norm (García Amado, 2009, p. 299). The interpretative-subsumptive method begins with interpretative reasoning – delimitation of categories, which would here be satire (s) and insult (i) (García Amado, 2009, p. 300).

II. In the second step, a general interpretative statement is made for each of the categories. A general interpretative statement is made according to which satire does not violate honour, whereas insult does.

III. In the third step, particular interpretative statements are stated. The Court has first defined the characteristics ($n^x$) of the two categories (satire and insult).

IV. In the fourth step, a subsumptive statement is made from the premises of the first three steps. A concretizing interpretation is necessary to subsume the expressions (e) "born murderer" and "cripple" under the category of satire or insult (García Amado, 2009, p. 301). To

do this, various circumstances (c) (semantic, intentional, historical, sociological, etc.) are put forward in favour of one option or another (García Amado, 2009, p. 301). In the concrete case, the German Federal Constitutional Court qualified the expression "born murderer" as satire, while the expression "cripple" was qualified as an insult (García Amado, 2009, pp. 304–319; for more details, see García Amado, 2017, pp. 166–172).

V. The fifth and last step of the application of the interpretative-subsumptive method yields a normative conclusion. Depending on the qualifications made in the previous step – whether the expression is classified as satire or an insult – it will be permitted or prohibited (see Keršić, 2022, p. 281 and Keršić, 2024 for a more detailed analysis of the interpretative-subsumptive method).

## 4. CONCLUSIONS

This paper examined how different typologies of constitutional rights affect the judicial resolution of conflicts between such rights, using two non-balancing approaches as analytical lenses: Luigi Ferrajoli's guaranteeistic constitutionalism (*garantismo*) and Juan Antonio García Amado's interpretative-subsumptive method. Both methods were applied to the same comparative case – the *Titanic* case decided by the German Federal Constitutional Court – in order to assess their practical applicability and internal theoretical consistency.

The analysis demonstrates that the classification of rights is not merely a theoretical exercise but has significant normative consequences for judicial reasoning and its outcomes. Ferrajoli's typology, which distinguishes between rights to liberty and social rights on the objective axis, and between personality rights and citizenship rights on the subjective axis, leads to the conclusion that most apparent conflicts between constitutional rights are not genuine conflicts at all. What seems to be a conflict between freedom of expression and personality rights is, in the framework of Luigi Ferrajoli, better understood as a limitation expressly provided for in the constitutional text and elaborated through criminal law norms regulating insult and defamation. The task of the judge is therefore not to balance competing rights but to interpret systematically whether the expression in question falls within the legally defined limits of the right. Applied to the Titanic case, this approach results in the conclusion that the expression "born murderer" falls outside the statutory definition of insult and is therefore permitted, while the expression "cripple" constitutes an insult and is prohibited.

García Amado's typology, which distinguishes between inclusive or rule rights, exclusive or exception rights, rights to positive state action and rights to state omissions, leads to a similarly structured but more formally explicit procedure. By reconstructing judicial reasoning as a five-step process of interpretation and subsumption, García Amado avoids balancing. In the *Titanic* case, the conflict between freedom of expression as an inclusive right and the right to honour as an exclusive right is resolved by interpreting the norm protecting honour and deciding whether the facts of the case fall within its scope of protection. The result mirrors that of Ferrajoli's approach.

The two interpretation-based methods relocate the decision from the assignment of weights to the conflicting rights to the interpretative delimitation of the scope of the rights. Arguably, this is a move that enhances the legal predictability of adjudication. However, both approaches face shortcomings. Ferrajoli's approach depends on sufficiently precise criminal law norms that can serve as constitutional limits on rights, which may not always be the case. García Amado's method, while formally more explicit, ultimately cannot remove interpretative discretion

in the stage of subsumption, in which the judge must decide whether the facts of the case fall within a normative category whose boundaries themselves are contested. The indeterminacy of balancing that the two authors identify in Alexy's weight formula reappears in a different form in the interpretative step of subsumption.

Nevertheless, both approaches represent valuable contributions to the theory of constitutional adjudication, as they challenge the assumption that judicial balancing is a necessary method for the resolution of conflicts between rights. Their typologies are not merely classificatory models but normative frameworks that structure judicial reasoning. The choice between the approaches can be understood as a choice about the kind of adjudication a legal system wishes to pursue, and about the role and the level of activism that judges should play: judicial balancing favouring judicial activism, and the two methods analysed restricting it.

## LIST OF REFERENCES

### *Books, monographs and textbooks*


Alexy, R. 2002. *A Theory of Constitutional Rights*. Translated by Rivers, J. Oxford: Oxford University Press.

Ferrajoli, L. 2001a. *Diritti fondamentali*. Bari: Editori Laterza.

Ferrajoli, L. 2013. *La democrazia attraverso i diritti*. Lecce: Editori Laterza.

García Amado, J. A. 2017. *Decidir y argumentar sobre derechos*. Mexico City: Tirant lo Blanch.

Klatt, M. & Meister, M. 2012. *The Constitutional Structure of Proportionality*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199662463.001.0001

Pirker, B. 2013. *Proportionality Analysis and Models of Judicial Review*. Groningen: Europa Law Publishing.


### *Dissertations*


Keršić, M. 2022. *Legal Methods for Resolving Apparent Conflicts between Fundamental Rights*. PhD thesis. Genova: Faculty of Law, University of Genova. Available at: https://unige.iris.cineca.it/retrieve/874dbf9c-40a0-4d11-bb7a-14d201165c5d/phdunige_4617451.pdf.


### *Chapters in books/collections of papers*


García Amado, J. A. 2009. El juicio de ponderación y sus partes. Una crítica. In: Alexy, R. (ed.), *Derechos sociales y ponderación*. Madrid: Fundación Colloquio Jurídico Europeo, pp. 249–331.

Martínez Zorrilla, D. 2018. Some Thoughts About the Limits of Alexy's Conception of Principles and Balancing. In: Duarte, D. & Silva Sampaio, J. (eds.), *Proportionality in Law: An Analytical Perspective*. Dordrecht: Springer, pp. 171–192. https://doi.org/10.1007/978-3-319-89647-2_9

Ortega García, R. 2017. Nota introductioria. In: García Amado, J. A. (ed.), *Decidir y argumentar sobre derechos*. Mexico City: Tirant lo blanch, pp. 17–19.

Ramião, R. 2018. Some Fundamental Problems Concerning Alexy's Notion of Legal Principles. In: Duarte, D. & Silva Sampaio, J. (eds.), *Proportionality in Law: An Analytical Perspective*. Dordrecht: Springer, pp. 157–170. https://doi.org/10.1007/978-3-319-89647-2_8

Ratti, G. B. 2009. A Note on the Logical Form of Legal Principles. *Analisi e diritto*, pp. 273–290.

### *Scholarly Articles*

Alexy, R. 2003. On Balancing and Subsumption. A Structural Comparison. *Ratio Juris*, 16(4), pp. 433–449. https://doi.org/10.1046/j.0952-1917.2003.00244.x

Alexy, R. 2014. Constitutional Rights and Proportionality. *Revus*, 22, pp. 51–65. https://doi.org/10.4000/revus.2783

Atienza Rodríguez, M. 2008. Tesis sobre Ferrajoli. *Doxa. Cuadernos de Filosofía del Derecho*, 31, pp. 213–216. https://doi.org/10.14198/DOXA2008.31.11

Brożek, B. 2012. Legal Rules and Principles: A Theory Revisited. *I-lex. Scienze Giuridiche, Scienze Cognitive e Intelligenza artificiale*, 17, pp. 205–226.

Eberle, E. J. 1997. Public Discourse in Contemporary Germany. *Case Western Reserve Law Review*, 47(3), pp. 797–901.

Ferrajoli, L. 2001b. Fundamental rights. *International Journal for the Semiotics of Law*, 14, pp. 1–33. https://doi.org/10.1023/A:1011290509568

Ferrajoli, L. 2011. Constitucionalismo principialista y constitucionalismo garantista. *Doxa. Cuadernos de Filosofía del Derecho*, 34, pp. 15–53. https://doi.org/10.14198/DOXA2011.34.02

Ferrajoli, L. 2012. El constitucionalismo entre principios y reglas. *Doxa. Cuadernos de Filosofía del Derecho*, 35, pp. 791–817. https://doi.org/10.14198/DOXA2012.35.33

García Amado, J. A. 2014. ¿Conflictos entre derechos fundamentales? Sobre ponderaciones y otros trucos y a propósito de dos sentencias españolas. *Nuevos paradigmas de las ciencias sociales latinoamericanas*, 5(10), pp. 7–46.

Keršić, M. 2024. Alternatives to judicial balancing: interpretative-subsumptive method according to Juan Antonio García Amado. *Acta Universitatis Carolinae Iuridica*, 70(4), pp. 31–42. https://doi.org/10.14712/23366478.2024.158

Moreso, J. J. 2012. Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism. *Ratio Juris*, 25(1), pp. 31–46. https://doi.org/10.1111/j.1467-9337.2011.00501.x

Pino, G. 2009. Principi e argomentazione giuridica. *Ars Interpretandi. Annuario di ermeneutica giuridica*, pp. 131–158.

Sardo, A. 2012. Three theories of judicial balancing: a comparison. *Dignitas*, 53/54, pp. 60–95.

### *Legal sources and case law*

Basic Law for the Federal Republic of Germany. Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (31. 3. 2026).

BverfGE 86, 1-14, Order of 25 March 1992, 1 BvR 514/90. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/03/rs19920325_1bvr051490.html (31. 3. 2026).

Constitution of the Italian Republic. Available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (31. 3. 2026).

Constitution of the Republic of Serbia. Available at: https://www.rik.parlament.gov.rs/tekst/en/59/constitution-of-the-republic-of-serbia.php (31. 3. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch12

***Jelena Đ. LOPIČIĆ JANČIĆ****
***Ljubica M. VASIĆ*****

# ROLE OF PROTECTING POWERS IN WAR AND THEIR CONTRIBUTION TO SAFEGUARDING HUMAN RIGHTS OF VICTIMS

*The institution of the Protecting Power represents a cornerstone of contemporary international humanitarian law, serving to ensure the effective protection of individuals affected by armed conflicts. Its legal foundation is enshrined in the 1949 Geneva Conventions on the Protection of Victims of War, as well as in Additional Protocol I of 1977 to the 1949 Conventions. Widely recognized by the international community, the Protecting Power has become a central mechanism for monitoring the protection of human rights during times of war and armed conflict. It plays an important role in safeguarding the victims of war, facilitating independent and impartial oversight of the implementation of both treaty-based and customary rules of warfare. A notable innovation of the 1949 Geneva Conventions was the expansion of entities authorized to perform the function of a Protecting Power. Beyond neutral states, this role may also be entrusted to impartial humanitarian organizations, including the International Committee of the Red Cross. This extension has strengthened the protection of all categories of persons covered by the Conventions, enhancing supervisory capacity and reducing the discretionary powers of belligerent parties. The practical function of the Protecting Power contributes significantly to the humanization of armed conflict. By ensuring respect for the fundamental rights of the victims of war, it mitigates the suffering of those directly affected by hostilities and reinforces accountability among combatants. Furthermore, it exemplifies the international community's enduring commitment to uphold human dignity even in situations of extreme adversity. In sum, the institution of the Protecting Power remains an indispensable component of the contemporary humanitarian and legal framework. Its role in monitoring compliance, limiting abuses, and protecting vulnerable populations underscores its continued relevance and effectiveness as a mechanism for safeguarding human rights during war.*

***Keywords:*** Protecting Power, human rights, international humanitarian law, 1949 Geneva Conventions, victims of war.

* Full-Time Professor, Faculty of Diplomacy and Security, Belgrade, Serbia, ORCID: https://orcid.org/0009-0007-7865-7714, e-mail: *jelenalopicicjancic@gmail.com*

** Associate Professor, Belgrade Metropolitan University, Serbia, ORCID: https://orcid.org/0009-0009-6985-7890, e-mail: *vasic_ljubica@yahoo.com*

## 1. INTRODUCTION

Armed conflicts inevitably lead to the disruption or complete severance of diplomatic relations between belligerent states, creating significant legal and practical challenges in ensuring the protection of persons affected by hostilities. In such circumstances, international humanitarian law (IHL) has developed specific mechanisms aimed at safeguarding the interests of parties to the conflict and ensuring a minimum standard of protection for individuals, particularly prisoners of war, the wounded and sick, and civilians. One of the most important among these mechanisms is the institution of the Protecting Power.

The Protecting Power is traditionally understood as a neutral state entrusted with the task of representing the interests of one party to the conflict in relation to another, while at the same time supervising the implementation of applicable legal rules. Although this institution has a long historical development rooted in customary international law, it was formally codified and systematized in the Geneva Conventions of 1949 and further elaborated in subsequent international instruments. Despite its clear normative framework, the practical application of the Protecting Power system has been limited, particularly in contemporary armed conflicts, where the appointment of neutral states is often difficult or politically unfeasible.

The subject of this paper is the analysis of the development, legal regulation, and practical significance of the Protecting Power within the framework of IHL. Particular attention is devoted to examining the extent to which this institution contributes to the protection of individuals affected by armed conflict, as well as the limitations that arise in its practical implementation. In this context, it is necessary to clarify the relationship between IHL and international human rights law. While both legal regimes aim to protect the individual, they operate under different conditions and according to different principles.

While the title refers to the protection of human rights, it is necessary to clarify that the primary legal framework governing armed conflicts is IHL, which operates as lex specialis in relation to general human rights law. Nevertheless, the two regimes are complementary: while IHL directly regulates the conduct of hostilities and the protection of persons in wartime, international human rights law continues to apply, subject to permissible limitations and derogations in all circumstances. Accordingly, references to "human rights" in this paper are understood within the broader context of the protection afforded by IHL, unless explicitly stated otherwise.

The main research question addressed in this paper is whether the institution of the Protecting Power represents an effective mechanism for supervising the implementation of IHL and ensuring the protection of persons affected by armed conflicts. The working hypothesis is that, although the Protecting Power is normatively well-established and represents an important legal mechanism, its effectiveness is significantly limited in practice due to political constraints, the lack of neutral states, and the dependence on the consent of the parties to the conflict.

In order to answer this question, the paper first examines the historical development of the Protecting Power, followed by an analysis of its role during the two World Wars. It then considers its codification and development in the period between and after the wars, with particular emphasis on the Geneva Conventions of 1949 and the Additional Protocol I of 1977. Finally, the paper evaluates the contemporary relevance of this institution and its capacity to function as an effective mechanism of protection in modern armed conflicts.

## 2. HISTORICAL DEVELOPMENT OF THE INSTITUTION OF THE PROTECTING POWER

As a direct consequence of war or armed conflict, diplomatic and consular relations between belligerent parties are typically severed. In such circumstances, in order to safeguard their state interests as well as the rights and interests of their nationals located in the territory of the enemy state, the parties to the conflict may entrust this function to third states that do not participate in the conflict. In international legal theory and practice, such states are referred to as Protecting Powers. As a rule, these are neutral states, *i.e.* states that are not parties to the armed conflict, although international organizations may also perform certain related functions. International law does not impose a limitation regarding the number of states whose interests may be represented by a single Protecting Power (Lopičić & Lopičić Jančić, 2021, pp. 15–21).

Until the 19th century, this institution existed primarily within the framework of customary international law, without formal codification or universal treaty-based regulation. The absence of clear legal rules governing its status, powers, and procedures resulted in legal uncertainty and divergent interpretations in practice, particularly with regard to the scope of supervisory functions over compliance with the law of war (Dimitrijević *et al.*, 2006, pp. 344–361).

The modern development of the Protecting Power institution is commonly associated with the Franco-Prussian War (1870–1871) (Castleden, 1994, p. 466). During that conflict, the severance of diplomatic relations and the expulsion of consular personnel created a need for alternative mechanisms of representation. Neutral states assumed this role: the United Kingdom protected French interests in Germany, while the United States, Switzerland, and Russia acted on behalf of various German states in France (Levie, 1961, pp. 30–31). This practice contributed to the consolidation of the Protecting Power as a functional mechanism of indirect representation and protection of interests in wartime conditions. During the First Sino-Japanese War (1894–1895), both belligerent parties appointed the United States as the Protecting Power, resulting in a form of reciprocal representation whereby the same neutral state acted on behalf of each party within the territory of the other (Levie, 1961, p. 30). Similarly, during the Greco-Turkish War, Germany acted as Protecting Power for Turkey in the territory of Greece, while the United Kingdom, France, and Russia jointly represented Greek interests in the territory of Turkey, illustrating the possibility of collective Protecting Powers (Levie, 1961, p. 30). These examples demonstrate the increasing flexibility of the institution in practice.

These early cases indicate that the institution of the Protecting Power developed gradually through state practice prior to its codification in treaty law. By the end of the 19th century, it had evolved into a recognizable mechanism of neutral mediation and representation, although its effectiveness remained dependent on the political will of the parties to the conflict (Best, 1980, p. 52).

A turning point in the development and affirmation of the institution of the Protecting Power occurred during the First World War. The massive scale of suffering and violations of the human rights of war victims led to increased interest not only by the governments of the belligerent states but also by public opinion. The public demanded regular and reliable information about the situation of their nationals interned in enemy camps, particularly regarding their legal status, conditions of detention, etc. (Obradović, 1974, p. 66).

In this context, the role of Protecting Powers expanded, particularly in relation to monitoring detention conditions and facilitating communication. However, their effectiveness was often limited by restricted access, political pressures, and the lack of clearly defined legal authority (Forsythe, 2005, pp. 36–40). Consequently, their role, although significant, remained dependent on the consent and cooperation of the belligerent parties.

The functioning of the Protecting Power was also influenced by broader social and political perceptions. In some cases, public opinion in belligerent states viewed Protecting Powers with suspicion, perceiving them as indirectly favoring the opposing side, which could undermine their effectiveness (Forsythe, 2005, p. 39). At the same time, dominant social structures influenced perceptions of legitimacy and neutrality (Vasić, 2018, p. 14).

## 3. THE ROLE OF THE PROTECTING POWER DURING THE FIRST WORLD WAR

During the First World War, Protecting Powers sought to obtain direct and reliable information from the belligerent parties regarding the implementation of the provisions of the Hague Regulations of 1907 (Convention IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Arts. 4 and 14) as well as compliance with the rules of customary and treaty-based international law of war. Their role included monitoring detention conditions and facilitating communication between prisoners of war and their home states (Međunarodne konvencije o ratnom pravu i o sigurnosti, 1979, pp. 16–26).

Their activities were frequently constrained by practical and political obstacles, including restricted access to camps and differing interpretations of legal obligations. Therefore, while Protecting Powers contributed to improving certain aspects of humanitarian protection, their impact should not be overstated (Forsythe, 2005, pp. 40–45; Dinstein, 2019, pp. 138–140).

In parallel, the International Committee of the Red Cross established the Central Prisoners of War Agency, relying on the Hague Regulations of 1907. This institution played a crucial role in collecting and transmitting information on prisoners of war (Commentary III Geneva Convention Relative to the Treatment of Prisoners of War, 1960, p. 94)

The Agency developed an extensive registration system containing millions of records concerning prisoners of war and conducted visits to detention facilities in order to assess conditions of internment (Commentary III Geneva Convention Relative to the Treatment of Prisoners of War, 1960, pp. 104–105).

The case of Serbia during the First World War illustrates both the potential and the limitations of the Protecting Power system. Following attacks by Austria-Hungary and Bulgaria, Serbia relied on neutral intermediaries to protect its interests. Denmark and the Netherlands acted as Protecting Powers vis-à-vis Austria-Hungary and Bulgaria respectively (Lopičić & Lopičić Jančić, 2013, pp. 58–61).

Through diplomatic channels, Serbian authorities sought to secure protection for their nationals detained in enemy camps and to inform the international public about violations of the law of war. However, the effectiveness of these efforts was limited due to political constraints and pressure from stronger belligerent states, which significantly reduced the scope of interventions (Lopičić & Lopičić Jančić, 2013, pp. 58–61).

This example demonstrates a broader structural limitation of the Protecting Power system: although formally grounded in neutrality and legal function, its practical effectiveness

depends on political realities, which raises questions about its relevance in contemporary armed conflicts.

## 4. THE INTERNATIONAL LEGAL ASPECT OF THE PROTECTING POWER BETWEEN THE TWO WORLD WARS

The experiences of the First World War directly influenced the adoption of the Convention Relative to the Treatment of Prisoners of War of 27 July 1929. This Convention, *inter alia,* legally established the institution of the Protecting Power in Articles 86–88 (Međunarodne konvencije o ratnom pravu i o sigurnosti, 1979, pp. 353–354). Within the provisions concerning the organization of supervision, Article 86 regulates in detail the right of representatives or recognized delegates of the Protecting Power to visit all places of internment without exception, to have access to all premises used by prisoners of war, and to converse with them without witnesses, either directly or through an interpreter. Article 87 provides for the obligation of Protecting Powers, in the event of disagreement between belligerent parties concerning the application of the Convention, to offer their good offices for the peaceful settlement of the dispute. The normative formulation of this institution in the 1929 Convention is regarded as legally well-founded and functional, as confirmed by its incorporation into subsequent international humanitarian instruments. Article 88 provides the International Committee of the Red Cross with the legal basis for developing its humanitarian and supervisory functions (Commentary III Geneva Convention Relative to the Treatment of Prisoners of War, pp. 93-96). The legal formulation contained in the 1929 Convention proved to be enduring and served as the basis for later conventional solutions. By introducing this institution into positive law, its legal legitimacy was strengthened, including its importance for the criminal-law protection of prisoners of war. The incorporation of the Protecting Power into the 1929 Convention represented a significant step in the institutionalization of international legal protection of prisoners of war, with implications also for their criminal-law protection. This institution acquired particular practical significance during the Second World War.[1]

## 5. THE SIGNIFICANCE OF THE PROTECTING POWER DURING THE SECOND WORLD WAR

During the Second World War, grave violations of human rights were committed against the victims of war; the need for effective protection mechanisms was further reinforced (Levie, 1961, pp. 32–33). Due to the large number of participating states and the limited number of neutral countries, only a small number of states were able to assume the role of Protecting Power[2] (Erin, 1995, p. 140).

On the territory of Yugoslavia during the Second World War, German authorities failed to comply with the provisions of the 1929 Geneva Convention, despite being a party to it.

[1] It should be emphasized that the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929 did not contain provisions relating to Protecting Powers.

[2] Among the European neutral states, Switzerland, Sweden, Portugal, and Spain stood out in particular. Switzerland performed a function of a Protecting Power for 35 states, and Sweden acted in that capacity for 19 states, thereby giving this institution a significant operational dimension.

More than 300,000 members of the Yugoslav armed forces were taken prisoner, and numerous violations of the rules governing the treatment of prisoners of war were recorded, including inadequate conditions of accommodation, food, hygiene, and medical care, resulting in high mortality rates among detainees (Izveštaj Jugoslovenske državne komisije za utvrđivanje zločina okupatora i njihovih pomagača Međunarodnom vojnom sudu u Nirnbergu, 1947, p. 41).

At the same time, the International Committee of the Red Cross, on the basis of Article 88 of the 1929 Geneva Convention, obtained an explicit legal foundation for developing its humanitarian and supervisory functions, with the consent of the interested parties (Međunarodne konvencije o ratnom pravu i sigurnosti, 1979, p. 354).

During the Second World War, the Committee established more than 40 million prisoner index cards, carried out approximately 11,000 camp visits, and distributed around 450,000 tons of humanitarian relief parcels. Its activities encompassed not only the provision of material assistance but also monitoring compliance with conventional standards (Commentary III Geneva Convention Relative to the Treatment of Prisoners of War, 1960, pp. 104–105).

The experience of the Second World War clearly demonstrated a structural weakness of the Protecting Power system: its effectiveness depended largely on the cooperation of the detaining power. In situations where such cooperation was absent, as in several cases during the war, the protective function of the institution was significantly undermined. This limitation raises broader questions about the reliability of the mechanism in conditions of total war and contributes to ongoing debates regarding its relevance in contemporary armed conflicts.

## 6. INTERNATIONAL LEGAL REGULATION OF THE PROTECTING POWER AND THE PROTECTION OF HUMAN RIGHTS AFTER THE SECOND WORLD WAR

During the Second World War, grave violations of IHL were committed, including numerous war crimes against protected persons, as well as serious violations of fundamental human rights. These developments highlighted the inadequacy of existing mechanisms of supervision and accountability.

In this context, the Allied Powers adopted the St. James's Declaration in January 1942, expressing their determination to ensure the prosecution of those responsible for war crimes (Inter-Allied Information Committee, 1942.; Friedman, 1972, pp. 778–779). This Declaration is generally regarded as an early step toward the establishment of an international system of criminal responsibility, although its legal nature was primarily declaratory and political rather than binding.

Following the end of the war, whose scale of destruction and human casualties exceeded that of the First World War, two international *ad hoc* tribunals were established in Nuremberg and Tokyo (Röling, 1979, pp. 199–231). These tribunals marked a turning point in the development of international criminal law by affirming the principle of individual criminal responsibility for international crimes, including war crimes and crimes against humanity (Holder, 1972, pp. 315–318).

The International Military Tribunal for the Far East, seated in Tokyo, was established by decision of the Allied Powers to prosecute senior Japanese political and military leaders (Bassiouni, 1992, pp. 205–211; The Tokyo Judgment, 1977, pp. XI–XII). These developments, although not directly linked to the Protecting Power system, contributed to strengthening the broader framework of accountability within which IHL operates. Particular attention

should be given to the case of Mamoru Shigemitsu, who served as Japan's Minister of Foreign Affairs from April 1943 to April 1945. During his mandate, the Protecting Powers of the Allied states addressed several protests to the Japanese Ministry of Foreign Affairs concerning the inhumane treatment of prisoners of war, denial of the right to inspect camps, prevention of confidential interviews with prisoners, and failure to provide information regarding their identity and place of detention. The absence of responses to these representations gave rise to justified suspicion that the true situation of prisoners was being concealed (The Tokyo Judgment Volume I, 1977, pp. 457–458, 466; Schwarzenberger, 1968, pp. 499–502). This example illustrates the importance of the institution of the Protecting Powers within the system of IHL, but also the limitations of their action in circumstances in which the Axis Powers grossly ignored international legal obligations, including respect for the protective function of these states (Levie, 1993, pp. 141–150).

Within the framework of IHL, the Geneva Conventions of 1949 provide a comprehensive legal regulation of the Protecting Power system. It should be noted, however, that these Conventions primarily regulate the protection of persons in armed conflict within the framework of IHL, while the concept of "human rights" operates in a parallel but distinct legal regime. In situations of armed conflict, humanitarian law functions as *lex specialis*.

In the First and Second Geneva Conventions of 1949, the institution of the Protecting Power is regulated in Articles 8, 10, and 11 (Commentary to I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1952, pp. 86–131). Article 8, paragraph 1, stipulates that the Conventions shall be applied with the participation and under the supervision of the Protecting Powers, whose duty is to safeguard the interests of the parties to the conflict. At the same time, paragraph 2 of the same Article obliges the parties to the conflict to facilitate, to the fullest extent possible, the work of representatives or delegates of the Protecting Power (Commentary to II Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1960, pp. 60–77). This provision regulates in detail the rights and obligations of the Protecting Power, emphasizing its role in supervising the implementation of conventional norms and mediating between the belligerent parties. Historical experience, particularly during the Second World War, demonstrated the limited practical application of this institution due to the lack of a sufficient number of neutral states capable of assuming the function of Protecting Power.

Since most states were directly involved in the conflict, the possibility of appointing neutral intermediaries was significantly reduced, which affected the effectiveness of the system of protection for the wounded, the sick, as well as medical and religious personnel. Article 10 regulates the possibility of replacing the Protecting Power if the appointed state is unable to perform its function, while Article 11 provides that the Protecting Power may offer its good offices for the resolution of disputes between the parties to the conflict concerning the interpretation or application of the Conventions. These provisions aim to ensure continuity of supervision even in adverse conditions. Particular importance is attached to Article 9 of the First and Second Conventions, which recognizes the role of the International Committee of the Red Cross and other impartial humanitarian organizations. This represents an important development, as it allows for functional substitution of the Protecting Power in situations where no neutral state is available. At the same time, such substitution remains dependent on the consent of the parties, which may limit its practical effectiveness (Ženevske konvencije i Dopunski protokoli, 2009, pp. 1–45).

The Third Geneva Convention relative to the Treatment of Prisoners of War of 1949 also regulates in Articles 8, 10, and 11 the basic legal status of the Protecting Power in an identical manner to the First and Second Geneva Conventions of 1949 (Commentary to III Geneva Convention relative to the Treatment of Prisoners of War, 1960, pp. 92–127). However, its particular value is reflected in Article 126, which elaborates in detail the right of supervision. Representatives or delegates of the Protecting Power are authorized to visit all places where prisoners of war are held, including camps, prisons, and labor sites; to speak with prisoners without witnesses present; and to freely choose the places to be visited. The duration and frequency of visits may not be restricted, except exceptionally and temporarily for reasons of imperative military necessity. The same privileges are accorded to delegates of the International Committee of the Red Cross, subject to the approval of the detaining state. In this Convention as well, Article 9 provides for the possibility of action by impartial humanitarian organizations, thereby further strengthening the mechanism for substituting the traditional state-based Protecting Power. These provisions represent one of the most developed forms of supervisory authority within IHL (Oppenheim, 1952, pp. 374–375).

The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 retains the same normative structure with regard to the Protecting Power (Articles 9, 11, and 12), but significantly extends its scope to the civilian population, including persons in occupied territories and interned persons. Article 9 establishes that the Convention shall be applied with the participation and under the supervision of the Protecting Powers, while Article 11 provides for the possibility of substitution in case of inability to perform the function. Article 12 regulates the procedure of mediation and good offices in the event of disputes. Particularly significant are the provisions concerning the right to visit interned persons, whereby the institution of the Protecting Power is affirmed as a key guarantor of humane treatment of civilians (Commentary to IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1958, pp. 80–117). This expansion reflects the recognition that civilian populations require specific legal protection in armed conflicts.

In light of the foregoing, it is evident that the institution of the Protecting Power was conceived as a universal mechanism of supervision, mediation, and protection, applicable to all categories of protected persons: the wounded, the sick, shipwrecked persons, prisoners of war, and civilians. At the same time, by introducing the International Committee of the Red Cross and other impartial humanitarian organizations as possible substitutes for states in the role of Protecting Power, this mechanism underwent institutional modernization. In this manner, the problem of the lack of neutral states in contemporary armed conflicts was overcome, and greater effectiveness in the implementation of IHL was ensured.

The institution of the Protecting Power within the system of the 1949 Geneva Conventions represents one of the most significant instruments of control and guarantee of compliance with humanitarian standards in armed conflicts. Its normative uniformity across all four Conventions, together with its extension to impartial humanitarian organizations, reflects the intention of the drafters to ensure continuous, neutral, and effective supervision over the application of IHL and to further strengthen the legal and criminal-law protection of all persons covered by the protection regime.

The institution of the Protecting Power was originally systematized in the 1949 Geneva Conventions, and its significance, scope, and operational modalities were further confirmed and elaborated in Additional Protocol I to the Geneva Conventions of 8 June 1977.

Additional Protocol I reaffirms the obligation of the parties to the conflict to ensure an effective mechanism of supervision over compliance with the conventional and Protocol norms, particularly in situations where regular diplomatic channels do not function or have been severed due to armed conflict (Protocol I Arts. 2–5; Dinstein, 2019, pp. 138–140, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, pp. 57–89).

In this respect, Article 2 of the Protocol confirms the application of the Protecting Power system provided for in the Geneva Conventions, while Article 5 further elaborates the obligation of the parties to appoint and accept a Protecting Power without delay. This may be a neutral state or another state not party to the conflict, provided that it enjoys the confidence of the parties concerned. If the appointment of such a state is not possible, the Protocol provides for the possibility that the function of the Protecting Power be assumed by an impartial and effective organization, subject to the consent of the parties to the conflict. In practice, this role is most frequently undertaken by the International Committee of the Red Cross, thereby ensuring continuity of protection and supervision even in circumstances where political conditions do not permit the appointment of a neutral state. The normative framework of Article 5 of Additional Protocol I is of multiple significance. First, it establishes the obligation of continuous supervision over the implementation of the Geneva Conventions and the Protocol, even in conditions of complete severance of diplomatic relations. Second, it confirms the mediating and facilitating function of the Protecting Power in resolving disputed issues concerning the interpretation and application of IHL. Third, it introduces an element of functional flexibility, allowing impartial humanitarian organizations to act as substitutes for the traditional state-based Protecting Power, thereby overcoming practical difficulties in securing neutral supervision in contemporary conflicts (Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, pp. 71–75).

It should also be emphasized that Article 75 para. (4) of the Additional Protocol I to the Geneva Conventions provides for certain minimum guarantees for persons deprived of their liberty in international armed conflicts, irrespective of their formal status (Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, pp. 861–890). This provision is widely recognized in contemporary international legal doctrine and practice as a rule of customary international law, including by states that have not ratified the said Protocol, such as the United States (Dimitrijević *et al.*, 2006, pp. 353–354).

In this way, Additional Protocol I not only confirms the existing conventional system but also strengthens it normatively, transforming the institution of the Protecting Power into a central instrument guaranteeing the application of IHL in international armed conflicts. At the same time, this mechanism enables the protection of the wounded, the sick, prisoners of war, and the civilian population without encroaching upon the sovereignty or legal status of the belligerent parties, since the action of the Protecting Power is based on consent and neutrality rather than the imposition of authority (Krivokapić, 2023, pp. 288–289).

The institution of the Protecting Power represents one of the key mechanisms for monitoring the implementation of IHL in war and armed conflicts and thereby, to the greatest extent possible, preventing violations of the human rights of war victims. Its normative basis is contained in all four Geneva Conventions of 1949, which established a system of supervision over the implementation of the obligations provided for in the Conventions and later in Additional Protocol I of 1977 to the Geneva Conventions of 1949. Thus, this institution acquired

a universal character and became a generally accepted instrument for the protection of the human rights of war victims in contemporary international law.

## 7. CONCLUSION

The Protecting Power is traditionally defined as a neutral state or, in certain circumstances, an impartial organization designated by the parties to an armed conflict in order to represent and safeguard the interests of one belligerent party in relation to another. Its functions include supervision over the implementation of conventional provisions, mediation between the parties, monitoring the treatment of protected persons, and submitting observations in cases of violations of IHL. Within the system established by the Geneva Conventions of 1949, this institution occupies an important place in relation to all categories of protected persons: the wounded and sick, prisoners of war, and civilians.

From a normative perspective, the Protecting Power constitutes one of the central supervisory mechanisms of IHL. However, it is important to emphasize that its primary legal framework lies within IHL, which operates as *lex specialis* in situations of armed conflict. In that sense, the contribution of the Protecting Power to the protection of individuals should be understood primarily through the prism of humanitarian law, while its relationship to the broader concept of human rights remains indirect and contextual.

An important development compared to earlier codifications is the possibility that, in the absence of a neutral state, the functions of the Protecting Power may be assumed by impartial humanitarian organizations, most notably the International Committee of the Red Cross. This solution reflects an effort to adapt the traditional state-centered model to the realities of modern armed conflicts, where the number of neutral states is often limited. At the same time, it introduces a degree of functional flexibility into the system, allowing for the continuity of supervision even in complex political circumstances.

Nevertheless, despite its detailed normative regulation, the practical effectiveness of the Protecting Power system remains limited. Its functioning is largely dependent on the consent and cooperation of the parties to the conflict, as well as on broader political conditions. Historical experience, particularly during the World Wars, as well as developments in contemporary conflicts, demonstrate that in situations where such cooperation is lacking, the role of the Protecting Power may be significantly reduced or even rendered ineffective. In this regard, the institution reflects not only legal norms but also the influence of political and social structures that shape the conditions for their implementation (Vasić, 2018).

Accordingly, the initial hypothesis of this paper is confirmed: although the institution of the Protecting Power is normatively well-established and represents an important mechanism for supervising the implementation of IHL, its practical impact is constrained by structural and political limitations. It cannot, therefore, be regarded as a fully reliable or universally applicable mechanism of protection in all armed conflicts.

At the same time, its significance should not be underestimated. The Protecting Power remains an important legal instrument that embodies the idea of neutral supervision and humanitarian protection in armed conflict. In the broader development of international law, it represents an attempt to reconcile state sovereignty with the need to ensure a minimum standard of protection for individuals affected by war. Precisely in this balance lies its enduring value, as well as the challenge of its future application in increasingly complex forms of armed conflict.

## LIST OF REFERENCES


Bassiouni, C. 1992. *Crimes Against Humanity in International Criminal Law.* Dordrecht: Kluwer Academic Publisher. https://doi.org/10.1163/9789004642621

Best, G. 1980. *Humanity in Warfare*. London: Methuen. https://doi.org/10.7312/best91500

Castleden, R. 1994. *World history:* A Chronological Dictionary of Dates. London: Parragon.

Dimitrijević, V. *et al*. 2006. *Međunarodno pravo ljudskih prava,* Beograd: Beogradski centar za ljudska prava.

Dinstein, Y. 2019. *The Conduct of Hostilities under the Law of International Armed Conflict*. 3rd edn. Cambridge: Cambridge University Press.

Erin, M. E. 1995. Sovetskie voennoplennie v Germanii v gody vtoroi mirovoi voini. *Voprosi istorii,* No. 11-12, pp. 140–151.

Forsythe, D. P. 2005. *The Humanitarians: The International Committee of the Red Cross*. Cambridge: Cambridge University Press.

Friedman, L. 1972. *The law of war: A documentary history* (Vols. I–II). New York, NY: Random House.

Holder, E. W. & Brennan, A. G. 1972. *The International Legal System: Cases and Materials (with emphasis on the Australian perspective)*. Sydney: Butterworths.

Inter-Allied Information Committee. 1942. Punishment for War Crimes. Available at: https://nla.gov.au/nla.obj-648522001/view?partId=nla.obj-648522340#page/n2/mode/1up, (23. 4. 2026)

*Izveštaj Jugoslovenske državne komisije za utvrđivanje zločina okupatora i njihovih pomagača Međunarodnom vojnom sudu u Nirnbergu*. 1947. Belgrade.

Krivokapić, B. 2023. *Rat i pravo: teorija i praksa oružanih sukoba i međunarodno pravo*. Banja Luka: Udruženje pravnika Republike Srpske, Akademija nauka i umjetnosti Republike Srpske, Fakultet bezbednosti Univerziteta u Beogradu.

Levie, H. S. 1993. *Terrorism in War*. Newport: Naval War College Press.

Levie, H.S. 1961. Prisoners of War and the Protecting Power, *American Journal of International Law*, 55(2), pp. 374–397. https://doi.org/10.2307/2196124

Lopičić, Đ. & Lopičić Jančić, J. 2013. *Konzularni odnosi i konzularno pravo.* Beograd: Institut za međunarodnu politiku i privredu.

Lopičić, Đ. & Lopičić Jančić, J. 2021. *Diplomatija*. Beograd: Institut za savremenu istoriju.

*Međunarodne konvencije o ratnom pravu i sigurnosti.* 1979. Zagreb: Zavod za općenarodnu obranu i društvenu samozaštitu SRH.

Obradović, K. 1974. Ustanova sile zaštitnice u savremenom humanitarnom pravu. *Međunarodni problemi*, No. 1.

Oppenheim L. M. 1952. *International Law a Treatise Volume II. Disputes War and Neutrality*, London, New York, Toronto: Longmans.

Pictet, J. *et al.* (eds.). 1952. *Commentary to I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (Collection of the Geneva Conventions of 12 August 1949). Geneva. ICRC.

Pictet, J. *et al.* (eds.). 1958. *Commentary to IV Geneva Convention relative to the Protection of the Civilian Persons in Time of War,* (Collection of the Geneva Conventions of 12 August 1949). Geneva. ICRC.

Pictet, J. *et al.* (eds.). 1960. *Commentary to II Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (Collection of the Geneva Conventions of 12 August 1949). Geneva. ICRC.

Pictet, J. *et al.* (eds.). 1960. *Commentary to III Geneva Convention relative to the Treatment of Prisoners of War,* (Collection of the Geneva Conventions of 12 August 1949). Geneva. ICRC.
Röling, B. 1979. Aspects of the Criminal Responsibility for Violations of the Laws of War. In Cassese, A. (ed.), *The New Humanitarian Law of Armed Conflict*. Napoli: Editoriale Scientifica, pp. 8–26.
Röling, B. V. A. & Rüter, C. F. (eds.). 1977. *The Tokyo Judgment I.M.T.F.E (29 April 1946-12 November 1948), Volume I–II,* Amsterdam.
Sandoz, Y., Swinarski C. & Zimmerman B. 1987. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva ICRC, Martinus Nijhoff Publishers.
Schwarzenberger, G. 1968. *International Law. Vol. II: The Law of Armed Conflict*. London: Stevens & Sons.
Vasić, Lj. 2018. *Američki postvijetnamski muški identitet*. Kragujevac: FILUM
*Ženevske konvencije i Dopunski protokoli* 2009. Beograd: Crveni krst Srbije, MKCK, Ambasada Švajcarske.

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch13

***Melinda HENGL****

# THE LEGAL STATUS OF DEFENDANTS WITH A MENTAL DISORDER IN HUNGARY AND SERBIA

*This paper compares the legal status of mentally disordered defendants as a socially vulnerable group in Hungary and Serbia.*

*The paper discusses the major elements of the Hungarian regulatory environment (in particular, Act XC of 2017 on the Code of Criminal Procedure and Act CLIV of 1997 on Healthcare), regarding defendants with a mental disorder as patients suffering from an illness, and provides a comparison with the relevant Serbian regulatory background, drawing attention to the similarities and differences in the two regulatory environments.*

*The purpose of writing this paper is to provide an opportunity for the comparison of the Hungarian and Serbian regulation, thereby laying the foundation for a potential amendment to the current legislation.*

***Keywords:*** legal status, defendant with a mental disorder, Hungary, Serbia.

## 1. THE CONCEPTS OF SOLIDARITY AND LAW

The word 'solidarity' is originally of Latin origin, which is evidenced by the expression "obligatio in solidum," which meant a joint commitment made by a group of debtors under Roman law. It was also in this meaning that the French term *solidarité* became incorporated into the French Encyclopaedia of 1765 and, later, into the Napoleonic Civil Code of 1804. The expression was adopted by the German and the English language in the 1840s, and at that time it also started to be associated with political meanings. Following this, it also appeared in social sciences: for instance, it formed part of Durkheim's fundamental concepts. Over time, it has gradually acquired a broader meaning and also referred to the readiness rooted in morals and emotions to provide mutual assistance. The motto was introduced: "All for one, and one for all." Having become well-spread, it was translated back from European languages into Latin and thus appeared as part of the official social ethics of the Catholic Church (Laitinen & Pessi, 2021, p. 5). According to the definition given in the Hungarian Catholic encyclopaedia,

* Assistant Professor, University of Pécs, Faculty of Law, Department of Criminal and Civil Procedure, Hungary, ORCID: https://orcid.org/0000-0001-6366-9885, e-mail: *hengl.melinda@ajk.pte.hu*

the term 'solidarity' is derived from the Latin expression *solidarietas* (having the original meaning: solid and well-founded), and it may be interpreted as taking responsibility for and sharing in the fate of others (Hungarian Catholic Encyclopaedia). According to Explanatory dictionary of the Hungarian language, solidarity may be defined as: identifying oneself and standing together with others (Arcanum). The semantic range of "solidarity" covers: identifying with, commitment to, taking responsibility for, providing assistance to and standing together with another person or others (Lexiq). According to the Collection of foreign words, 'solidarity' means: commitment to mutual assistance (Collection of foreign words). In turn, the Dictionary of foreign words and phrases explains that the term 'solidarity' denotes a concept that expresses belonging together and compassion, implying that individuals mutually commit themselves to each other and are ready to assist each other if necessary (Dictionary of foreign words and phrases).

The term 'solidarity' may be defined in a descriptive or a prescriptive sense as well. In a descriptive (normative) sense, it expresses a certain kind of connectedness with others, which is manifested, at the level of society, in actions, motivations, and attitudes. According to American social philosopher Richard Rorty, a proponent of the prescriptive interpretation, the scope of the concept of solidarity covers all forms of prosocial acts and ideas. Some approaches make a distinction between solidarity and the normative category of justice. In the interpretation of German social philosopher Jürgen Habermas, solidarity is the reverse side of justice, as solidarity always exists within a given community and is, therefore, partial, while justice requires the disregard of such social connections and is always impartial (Laitinen & Pessi, 2021, p. 6). In Habermas's view, another difference that may be revealed between solidarity and justice is that the principle of solidarity has regard to both the wellbeing of others and the wellbeing of the whole community at the same time, while the principle of justice may be formally validated without reference to the wellbeing of others or the common good. In his opinion, solidarity is founded on realizing that every human being has to take responsibility for all the others as, being members of the same society, they all have a shared interest in preserving the wholeness of their living environment; thus, it is necessary for justice to be complemented by solidarity (Laitinen & Pessi, 2021, p. 19).

In my view, it is essential to emphasize that the concepts of justice and truth also bear relevance to law. The term 'law' may be defined in several ways, with some definitions also including the term 'justice', such as: "Law is the will for justice." (Radbruch, 2004, p. 154). A single correct definition of the concept of law does not exist, thus 'law' may be defined as, for instance: 1) the art of the good and equitable; 2) according to the most common formulation: the totality of such norms of conduct that are also supported by state force; 3) a collection of norms that govern human behaviour to enable social coexistence; 4) a prediction of how the courts will act; 5) the entirety of social regulations that prescribe behaviour enforceable in court (Jakab, 2024, p. 5). The Fundamental Law of Hungary states, in Article 25 (1), that courts shall administer justice, and lays down, at the very beginning of the National Avowal, that the members of the Hungarian nation hold (among other things) that the common goal of citizens and the State is to achieve the highest possible measure of justice. Also, pursuant to Section 11 of the Criminal Procedure Act (Act XC of 2017 on the Code of Criminal Procedure, hereinafter: HCPC): the task of the court shall be to administer justice. The HCPC emphasizes, in its very first sentence, that in proceedings conducted in order to establish criminal liability, the requirement to establish the truth must be kept in view.

In my view, with regard to the vulnerable groups of society, the practical implementation of the concepts of truth, justice, and solidarity is of utmost importance.

## 2. MENTALLY DISORDERED PERSONS AS A VULNERABLE GROUP OF SOCIETY

The conceptual sphere of vulnerability is rather complex and wide-ranging. Anybody may get into a situation where the solution to their problem does not depend on them (or only on them) and therefore, with regard to the given case, they become vulnerable and exposed to the situation or another person. Right from the very beginnings, human communities have always had and, even today, still have members (groups) that are unable to take care of themselves on their own or manage certain areas of their lives independently (Bolyky, 2022).

Pursuant to the definition provided by the Explanatory dictionary of the Hungarian language, "vulnerability" refers to the state, fact, or situation when somebody or something is at the mercy of some other person or thing so that they are completely in the power of that other person or thing and have to helplessly tolerate that the other treats them as they please according to their will (Arcanum). Synonyms for "vulnerable" include: defenceless, downcast, sensitive, subordinated, subjugated, and dependent (Synonyms).

Providing a criminal law definition of vulnerability is rather complicated. Among international documents, mainly conventions and directives on the protection of human rights contain references to the concept of vulnerability (Bolyky, 2022). The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976 (COE, 2026). Hungary acceded to the Covenant on 17 January 1974 (Hungarian Helsinki Committee, 2026). The International Covenant on Civil and Political Rights (Law-Decree No. 8 of 1976 on the promulgation of the International Covenant on Civil and Political Rights, adopted by Session XXI of the United Nations General Assembly on 16 December 1966) states in its Preamble: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, (…)". Serbia ratified the International Covenant on Civil and Political Rights on 12 March 2001 (OHCHR).

No definition is provided for 'vulnerability' or 'vulnerable person' in the Fundamental Law of Hungary, the Criminal Code of Hungary (Act C of 2012 on the Criminal Code, hereinafter: HCC) or the HCPC. Therefore, in the case of the Fundamental Law of Hungary, the criminal law concept of vulnerability may be deduced from the right to human dignity, namely: "Human dignity shall be inviolable. Every human being shall have the right to life and human dignity …" (Fundamental Law of Hungary, Article II). In the case of the HCC, although the humiliation of a vulnerable person is regulated as a separate statutory offence (HCC § 225), this section does not provide a definition for the concepts of vulnerability or vulnerable person; moreover, a single reference to "vulnerable situation" is made in the provisions about the aggravated forms of two statutory offences (human trafficking and forced labour, HCC § 192 (2) a), and child pornography, HCC § 204 (2) b)). Vulnerable persons appear in the HCPC in the context of the provision of special treatment (Bolyky, 2022). Section 81 (1) of the HCPC states the following: "where the aggrieved party or the witness is a natural person, he shall be considered a person requiring special treatment, provided that, considering his personal characteristics or the nature and circumstances of the criminal offence serving as the basis for the proceeding,

he is restricted in his ability a) to understand others or have himself understood by others, b) to exercise his rights or perform his obligations specified in this Act, or c) to participate in the criminal proceeding efficiently." Pursuant to Section 81 (2) of the HCPC: "(2) In particular, the following factors shall serve as grounds for providing special treatment: a) age of the person concerned, b) mental, physical and medical condition of the person concerned, c) the extremely violent nature of the act serving as the basis for the proceeding, and d) the relationship between the person concerned and another person participating in the criminal proceeding."

The Constitution of the Republic of Serbia does not contain a definition for the concepts of vulnerability or vulnerable person either; however, in this case, too, they may be deduced from the right to human dignity, namely: "Human dignity is inviolable and everyone shall be obliged to respect and protect it." (Constitution of the Republic of Serbia, Article 23) Neither does the Serbian Criminal Code contain such definitions (Criminal Code of 94/2024, hereinafter: SCC). The Serbian Criminal Procedure Code (Criminal Procedure Code of 62/2021, hereinafter: SCPC) contains provisions similar to the Hungarian rules on special treatment for the protection of vulnerable witnesses (SCPC, Articles 102-112).

With regard to vulnerable persons and groups, from a criminal law perspective (as is also evident from the above), emphasis is placed on those who appear in the role of victims. However, in my view, for a comprehensive discussion of the subject, it is also worth examining the other side, namely, the side of perpetrators. Section 81 (2) of the HCPC also lays down, among the grounds for providing special treatment, the mental condition of the person concerned, while Section 1 emphasizes the presumption of innocence, namely, that "[n]o one shall be considered guilty until the court finds him guilty by a final and binding conclusive decision." In relation to mental state, Section 16 of the HCC specifies mental disorder among the reasons for excluding or limiting liability to punishment. On the other hand, Section 542 (4) b) of the HCPC states that if any mental disorder excludes the defendant's liability to punishment, in his closing argument the prosecutor must motion for acquitting the defendant, and in the case of a decision acquitting the defendant, the court shall order compulsory psychiatric treatment of the defendant if the conditions for ordering compulsory psychiatric treatment of the defendant acquitted due to mental disorder are met (HCPC, § 566 (3)). Thus, in the case of a defendant suffering from a mental disorder, the court does not find the defendant guilty in a convicting judgment but basically regards the perpetrator as a "patient suffering from an illness" and in its acquitting judgment orders their (compulsory) psychiatric treatment. Patients constitute one of the most vulnerable groups of society, for example, because of the asymmetrical informational and legal situation occasioned by the operation of the institutional system of healthcare (Bedő, 2015, p. 48). In light of the foregoing, I propose an amendment to Section 81 (1) of the HCPC to extend the range of people requiring special treatment to also include defendants suffering from a mental disorder, with special regard to the possibility of applying certain measures in the scope of special treatment, for example, ensuring enhanced protection of their medical data (HCPC § 85 (1) d)).

In the following, I will address the legal status granted to defendants with a mental disorder and the rules laid down concerning perpetrators with a mental disorder in the relevant Hungarian and Serbian laws.

### *2.1. The legal status of defendants with a mental disorder in Hungary and Serbia*

The legal status of defendants comprises both their rights and obligations. The regulation of their rights is usually more detailed and more dominant than that of their obligations,

because the defendant is "defenceless" against the authorities, and the system of appropriate procedural safeguards is intended to counterbalance this genuinely or apparently unjust situation (Bérces, 2024, p. 425).

The HCPC provides for the rights and obligations of the defendant in the same single section (§39).

The HCPC enumerates the rights of defendants in general, without specifically regulating the rights of defendants with a mental disorder. Pursuant to Section 39 (1), the defendant has the following rights: 1) to be informed of the subject of the suspicion or the charge, as well as any changes to them, 2) to be afforded adequate time and circumstances for preparing their defence, 3) to be informed about their rights and obligations in the criminal proceeding, 4) to authorise a defence counsel, or move for the official appointment of a defence counsel (for their defence), 5) to consult their defence counsel without supervision, 6) to give or refuse to give testimony, 7) to present pieces of evidence, file motions and observations, and address the court by exercising their right to the last word, 8) to attend the trial and the sessions held relating to coercive measures affecting personal freedom and subject to judicial permission, and to ask questions as provided for in the Act, 9) to seek legal remedy, 10) to inspect the case documents of the proceeding, and 11) to initiate that a plea agreement be concluded or a measure or decision by a prosecutor be offered. In addition, they may file a request for legal aid, and they have the right to use their mother tongue during the criminal proceedings (HCPC § 39 (4)).

The detained defendant is entitled (HCPC § 39 (2)): 1) to be informed of the reason for their detention and any change to this reason, 2) to have the authority inform one person selected by them about their detention, 3) to establish and keep contact in person, without control, via post or by electronic means with their defence counsel (the consular representative of their state, in the case of a foreign citizen defendant), 4) to establish and keep supervised contact in person or controlled contact via post, or by electronic means, with the person selected by them, and 5) to keep contact with the person or authority specified in an international treaty promulgated by an Act in accordance with that international treaty. In addition, if the defendant is in detention, the authority must inform the defendant about their rights also in writing, including their rights specifically related to their detention, for instance, their right to file a motion for the termination of their detention (HCPC § 39 (5)).

The HCPC also contains special provisions applicable to defendants with a mental disorder, laying down that in the case of a defendant with a mental disorder: 1) the participation of a defence counsel in the criminal proceeding is mandatory (HCPC § 44 c)) (furthermore, it should be emphasized that Section 42 (1) of the HCPC states that, regarding any defendant, the defence counsel may exercise all the rights of the defendant that are not, by their nature, related to the person of the defendant exclusively), 2) the attendance of a prosecutor at the trial is mandatory (HCPC § 435 (3) c)), 3) the spouse or cohabitant of the defendant shall also be entitled to file an appeal against ordering, extending, or maintaining preliminary compulsory psychiatric treatment or for its termination (HCPC § 301 (3-4)), 4) in the judgment acquitting the defendant, the court may order confiscation, forfeiture of assets, rendering electronic data permanently inaccessible, or termination of hosting service provision (HCPC § 566 (5)), 5) a substitute private prosecuting party may not proceed if the defendant's liability is excluded due to their mental disorder (HCPC § 787 (3) b)), and 6) a motion for revision cannot be submitted where the criminal liability of the perpetrator is excluded due to their mental disorder (HCPC § 817/B (2) b)).

The HCPC provides for the obligations of the defendant only briefly, namely, the defendant is obliged to: 1) attend procedural acts, and 2) inform the proceeding court authority about their contact details (their home address, contact address, place of actual residence, service address, phone contact details and electronic mail address, or other electronic contact details) and any change in them within three working days following that change (HCPC § 39 (3)).

The SCPC deals with the rights and obligations of defendants in several articles. Pursuant to Article 68 of the SCPC, the defendant has the following rights: 1) to be informed about the charges against them (in the shortest possible time, in a language he/she understands), 2) not to say anything (or to refuse to answer certain questions) and to decide whether to admit or not to admit his guilt, 3) to defend himself (with the assistance of a defence counsel), 4) to have a defence counsel present during the interrogation, 5) to be tried in an impartial and fair manner and in a reasonable time, 6) to become acquainted with specific evidence before the interrogation, 7) to be given sufficient time and opportunity to prepare the defence, 8) to examine the documents contained in the case file, 9) to collect evidence, 10) to make a statement, to present evidence, and to question witnesses, 11) to apply for legal remedy, 12) to perform other actions under the Code, and 13) to be advised of their rights by the authority before their first interrogation.

Pursuant to Article 69 of the SCPC, a detained defendant has the following rights: 1) to be informed of the reason for their arrest (immediately and in a language they understand), 2) prior to being interrogated, to have a confidential conversation with his defence counsel (which can be supervised only visually), 3) to notify a person designated by them (a family member or some other person close to them) about the detention (in the case of a foreign citizen, to notify the consular representative), 4) the right to medical examination, and 5) the right to be interrogated within forty-eight (48) hours.

The SCPC also contains special rules applicable in the case of defendants with a mental disorder, such as, for example, mandatory defence by a defence counsel (Article 74 (7)).

Pursuant to Article 70 of the SCPC, the defendant is obliged to: 1) appear in court in response to a summons, and 2) inform the proceeding authority of their contact details (temporary or permanent residence) and any change in them or of their intention to change them.

In the light of the above, with regard to the legal status of defendants under the HCPC and the SCPC, it may be established in summary that there are significant similarities between the Hungarian and Serbian regulations.

Both set forth the rights of defendants in detail, the majority of which are the same in both criminal procedure acts. It may be highlighted as a difference that the HCPC specifically informs the defendant about his/her right to submit an application for legal aid, while in this context the SCPC emphasizes the presence of a defence counsel during the interrogation of the defendant as well as his/her right to an impartial and fair hearing within a reasonable time. Both requirements can also be found in the HCPC, but they are not specified among the rights of defendants, namely, the possibility of the presence of a defence counsel is regulated under the rights of the defence counsel (§ 42) while the right to a fair trial is laid down in the preamble.

Also, in the case of a defendant kept in detention, the rights granted to them are basically the same (in the context of their right to notify and contact someone), but it may be highlighted as a difference that the HCPC permits the defendant to contact more people, while the SCPC emphasizes the right to medical examination and also regulates the time of starting the interrogation. The HCPC also provides for the latter, however, not under the rights of defendants

but in the context of the interrogation of suspects (§ 385 (2)) and specifies a shorter period (of twenty-four hours).

Similarities may also be perceived in the special provisions applicable to defendants with a mental disorder.

The obligations of defendants are regulated with basically the same content in both the Hungarian and Serbian criminal procedure codes.

The structural composition of the SPCP may be considered a good solution in that it lays down the rights and obligations of the defendants in separate articles, as opposed to the organization of the HCPC, which contains the rules relating to the legal status of defendants in a single section. In my view, in the specification of rights and obligations their separation in a visually conspicuous manner (in separate articles) gives a better expression to the dual nature of legal status, namely, to the importance of the existence of two opposing elements (rights and obligations). In view of this, I propose, based on the model of the SPCP, setting forth the rights and obligations of defendants in separate sections (that follow each other and are separated from each other).

### *2.2. The legal status of persons with a mental disorder during preliminary compulsory psychiatric treatment and compulsory psychiatric treatment in Hungary*

As I have pointed out above with respect to the Hungarian regulation (HCPC § 566 (3)), it regards the defendant with a mental disorder as a "patient suffering from an illness" and the court orders their compulsory psychiatric treatment in its acquitting judgment. Moreover, in the case of a defendant with a mental disorder, the judge may deprive the person of his/her personal freedom already prior to the delivery of the binding and conclusive judgment by ordering his/her preliminary compulsory psychiatric treatment (HCPC § 301 (§)). Both preliminary compulsory psychiatric treatment and compulsory psychiatric treatment are to be executed in the Forensic Psychiatric and Mental Institution (hereinafter: IMEI), and in both cases the person concerned is regarded as a "patient suffering from an illness" (HCPC § 424 and § 326). This is also emphasized by the provisions of Act CCXL of 2013 (Act on the Execution of Punishments, Criminal Measures, Certain Coercive Measures and Confinement for Administrative Offences, hereinafter: HE), pursuant to which: "In the course of compulsory psychiatric treatment the patient shall receive professional care in accordance with the state of the art of medicine, in order to prevent any further deterioration of his or her condition and to restore his or her health to the fullest extent possible as soon as possible." (HE § 325 (4)) Moreover, it is also laid down under the duties and objectives of penal enforcement that the enforcement procedure must be established in such a way that "in addition to the protection of society, in the case of compulsory psychiatric treatment, it should provide appropriate treatment and care for the person subjected to the involuntary treatment." (HE § 1) At the same time, the Act also stipulates that the rules for the enforcement of compulsory psychiatric treatment shall also apply to the implementation of preliminary compulsory psychiatric treatment (HE § 424).

The rights and obligations of patients are regulated by the Act on Healthcare in Hungary (Act CLIV of 1997 on Health Care, hereinafter: HH). Pursuant to the HH, patients have the following rights: 1) the right to healthcare (HH §§ 6-9/A), 2) the right to human dignity (HH § 10), 3) the right to maintain communication with other persons (HH § 11), 4) the right to leave the medical institution (HH § 12), 5) the right to information (HH §§ 13–14), 6) the right to

self-determination (HH §§ 15–19), 7) the right to refuse treatment (HH §§ 20–23), 8) the right of access to medical records (HH § 24), and 9) the right to medical confidentiality (HH § 25).

Pursuant to Section 26 of the HH, the obligations of patients are the following: 1) when receiving healthcare services, the patient is required to abide by the relevant legislation and respect the operating procedure of the healthcare service provider, 2) the patient – his or her state of health permitting – is obliged to cooperate with the healthcare workers involved in his or her treatment, 3) the patient must pay the service fee prescribed by law. In addition, 4) the patient must respect the rights of other patients, and 5) the patient's exercise of their rights may not breach the legal rights of healthcare workers (HH § 27).

How are the rights of patients enforced during (preliminary) compulsory psychiatric treatment in Hungary? The HH lays down that healthcare service providers are required to inform patients in detail, both orally and in writing, about their rights at the time of their admission into the institution, and derogation from this rule is possible only in the case of the existence of a dangerous condition (and the information must be given upon its termination). As a main rule, general patients' rights laid down in the HH must also be respected during psychiatric treatments, but in the case of the existence of a dangerous condition every patients' right, with the exception of the right of access to medical records, may be restricted (to an extent and for the time necessary), with the proviso that the patient's right to human dignity may not be violated even in the case of the existence of a dangerous condition. Moreover, in the case of mental illnesses, it is also possible for the physician providing treatment not to inform the patient about some part of the data recorded during the treatment, for example, if becoming acquainted with those data might endanger their recovery. The HH allows the patient to be represented by an (authorized) patients' rights representative during judicial review, and if the patient has no representative, the court will appoint a guardian ad litem for him (Fridli, 2002, pp. 6–10). Compulsory psychiatric treatment is a form of mandatory psychiatric treatment that may only be carried out for a special reason in a special institution (exclusively in the IMEI). The IMEI forms part of the justice system, and the building itself is located on the premises of the penal institution of Budapest. It is led by the Director General and Chief Medical Officer, who is also a prison warden. The patients institutionalized here have committed a violent criminal act against a person or a criminal act endangering the public, but they lack mental capacity (due to their mental illness), therefore they are not punishable. As a general rule, the patients' rights granted by the HH and applicable to patients treated in a psychiatric institution also apply to patients institutionalized in the IMEI, but a derogation from these rights may be possible under other pieces of legislation; thus, in a given case, the life of those treated here may potentially be rather similar to the life of those serving their imprisonment and living under prison conditions (Fridli, 2002, pp. 30–35).

It is also worth briefly mentioning how the status of mentally disordered persons may develop after the verdict in Serbia. The Republic of Serbia's Law on Enforcement of Criminal Sanctions of 35/2019 (hereinafter: SE) regulates compulsory psychiatric treatment and confinement in a medical institution (SE, Articles 195–201) and compulsory outpatient psychiatric treatment (SE, Articles 202–204) among the security measures. In my opinion, of the two, compulsory psychiatric treatment and confinement in a medical institution is more similar to Hungarian compulsory psychiatric treatment (because in the latter, the person remains at large). Compulsory psychiatric treatment and confinement in a medical institution must be carried out in the Special Prison Hospital, and in exceptional cases in another healthcare institution (SE, Article 195). The medical institution is obliged to report at minimum once a

year to the court on the health status of the person under treatment and to notify the court of completed treatment (SE, Articles 198–199). The person under this measure has the same rights and obligations as a person serving a prison sentence, unless the needs of the treatment require otherwise (SE, Article 196).

## 3. CLOSING REMARKS

In the paper I have discussed the legal status (rights and obligations) of defendants with a mental disorder (as one of the vulnerable groups of society), approaching it from the aspect of the concepts of solidarity, law, justice, and vulnerability, based on the applicable Hungarian and Serbian legal regulations. Upon the analysis I have come to the conclusion that the Hungarian and Serbian regulations (besides minor differences) reveal significant similarities regarding the topic examined.

I have placed emphasis on presenting the legal status of persons with a mental disorder during their preliminary compulsory psychiatric treatment and their compulsory psychiatric treatment in Hungary so that it can serve as a basis for comparison for other countries in the future. I have also formulated proposals aimed at amending the HCPC: concerning the visual display of the rights and obligations of defendants and the extension of the circle of persons requiring special treatment to include defendants with a mental disorder.

## LIST OF REFERENCES

### *Books*

Fridli J. (ed.) 2002. *Pszichiátria és betegjogok (Psychiatry and patients' rights*). Budapest: Társaság a szabadságjogokért.

### *Collections of papers*

Bérces, V. 2024. A terhelt jogállása jogalkotói és jogalkalmazói szempontból. Hazai megoldások és nemzetközi elvárások [The legal status of the defendant from the perspective of legislation and law enforcement. Hungarian solutions and international standards]. In: *„Ad imaginem et similitudinem nostram". A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának Könyvei.* Tanulmányok (51). Budapest: Pázmány Press, pp. 425–446.

Jakab, A. 2024. A jog fogalma [The concept of law]. In: Jakab, A. *et al.* (eds.) *Internetes Jogtudományi Enciklopédia (Jogbölcselet rovat)*, pp. 1–23. Available at: https://ijoten.hu/uploads/a-jog-fogalma.pdf (5. 1. 2026)

Radbruch, G. 2004. Öt perc jogfilozófia [Five-minute legal philosophy]. In: Szabó, M. (ed.), *Fejezetek a jogbölcseleti gondolkodás történetéből.* Miskolc: Bíbor Kiadó, pp. 154–155.

### *Articles*

Arcanum (A Magyar nyelv értelmező szótára) [Explanatory dictionary of the Hungarian language]. Available at: https://www.arcanum.com/hu/online-kiadvanyok (11. 1. 2026)

Bedő, R. 2015. A kiszolgáltatott helyzetben lévő személyek nem bírósági típusú alapjogvédelme, különös tekintettel a betegjogokra [Non-judicial human rights protection granted

to persons in a vulnerable situation, with special regard to patients' rights]. *Közjogi Szemle*, 2015(3), pp. 48–55.
Bolyky, O. 2022. A kiszolgáltatottság fogalmának jogi értelmezése, különös tekintettel az idős korú áldozatokra [The legal interpretation of the concept of vulnerability, with special regard to elderly victims]. *Ügyészek Lapja*, 2022(1-2). Available at: https://ugyeszeklapja.hu/?p=3780 (2. 2. 2026)
COE – Council of Europe: The International Covenant on Civil and Political Rights. 2026. Available at: https://www.coe.int/hu/web/compass/the-international-covenant-on-civil-and-political-rights (3. 3. 2026)
Idegen szavak gyűjteménye [Collection of foreign words]. Available at: https://idegen-szavak.hu/szolidarit%C3%A1s (6. 2. 2026)
Idegen szavak szótára [Dictionary of foreign words and phrases]. Available at: https://idegen-szavak-szotara.hu/szolidarit%C3%A1s-jelent%C3%A9se (6. 2. 2026)
Laitinen, A. & Pessi, A. B. 2021. *Szolidaritás járvány idején* [Solidarity during an epidemic]. Available at: https://regio.tk.hu/wp-content/uploads/regio-2021-2-arto-05-23.pdf (6. 2. 2026)
Lexiq. Available at: https://lexiq.hu/szolidaritas (11. 3. 2026)
Magyar Helsinki Bizottság: Jelentéseink az ENSZ Emberi Jogi Bizottsága számára. 2026 [Hungarian Helsinki Committee: Reports to the UN Human Rights Committee 2026]. Available at: https://helsinki.hu/polgari-es-politikai-jogok-nemzetkozi-egyezsegokmanya-iccpr/ (12. 3. 2026)
Magyar Katolikus Lexikon [Hungarian Catholic encyclopaedia]. Available at: https://lexikon.katolikus.hu/S/Szolidarit%C3%A1s.html (6. 3. 2026)
OHCHR – United Nations Human Rights Treaty Bodies. 2026. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=154&Lang=EN#:~:text=Table_content:%20header:%20%7C%20COUNTRY%20%7C%20COUNTRY%20%7C,Denunciation(n)%20Date:%2012%20Mar%202001%20(d)%20%7C (12. 3. 2026)
Szinonimák [Synonyms]. Available at: https://szinonimak.hu/kiszolg%C3%A1ltatott-szinonima (12. 3. 2026)

### *Legal sources*

*Hungary*

Magyarország Alaptörvénye (2011. április 25.) (Fundamental Law of Hungary). Available at: https://net.jogtar.hu/jogszabaly?docid=a1100425.atv (10. 3. 2026)
1997. évi CLIV. törvény az egészségügyről (Act CLIV of 1997 on Health Care) (HH). Available at: https://net.jogtar.hu/jogszabaly?docid=99700154.tv (13. 3. 2026)
2012. évi C. törvény a Büntető Törvénykönyvről (Act C of 2012 on the Criminal Code) (HCC). Available at: https://net.jogtar.hu/jogszabaly?docid=A1200100.TV (11. 3. 2026)
2017. évi XC. törvény a büntetőeljárásról (Act XC of 2017 on the Code of Criminal Procedure) (HCPC). Available at: https://net.jogtar.hu/jogszabaly?docid=a1700090.tv (11. 3. 2026)
2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról) (Act CCXL of 2013 on the execution of punishments, measures, certain coercive measures and confinement for infractions) (HE). Available at: https://net.jogtar.hu/jogszabaly?docid=A1300240.tv (11. 3. 2026)

1976. évi 8. törvényerejű rendelet az Egyesült Nemzetek Közgyűlése XXI. ülésszakán, 1966. december 16-án elfogadott Polgári és Politikai Jogok Nemzetközi Egyezségokmánya kihirdetéséről (Law-Decree No. 8 of 1976 on the promulgation of the International Covenant on Civil and Political Rights adopted by Session XXI of the United Nations General Assembly on 16 December 1966). Available at: https://net.jogtar.hu/jogszabaly?docid=97600008.tvr (12. 3. 2026)

*Serbia*

A Szerb Köztársaság Alkotmánya (Constitution of the Republic of Serbia). Available at: https://www.skupstinavojvodine.gov.rs/Strana.aspx?s=ustav&j=HU (12. 3. 2026)

Criminal Code of 94/2024 (SCC). Available at: https://unijasprs.org.rs/wp-content/uploads/2024/12/Zakon-o-izmenama-i-dopunama-Zakona-o-Krivicnog-zakonika-_Sl.-glasnik-RS_-br.-94_2024.pdf (30. 4. 2026)

Criminal Procedure Code of 62/2021 (SCPC). Available at: https://pravno-informacioni-sistem.rs/eli/rep/sgrs/skupstina/zakon/2011/72/1/reg (30. 4.2026)

The Republic of Serbia's Law on Enforcement of Criminal Sanctions of 35/2019 (SE). Available at: https://pravno-informacioni-sistem.rs/eli/rep/sgrs/skupstina/zakon/2014/55/2/reg (30. 4. 2026)

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch14

***Rebeka KOTLO****
***Ivan TOMIĆ*****

# MILITANT DEMOCRACY AND HUMAN RIGHTS: THEORETICAL FRAMEWORK AND PRACTICAL IMPLICATIONS

*This article examines the concept of militant democracy, a particular form of democratic order that actively defends itself against political actors and ideologies aiming to destroy democracy by using democratic institutions. The study focuses on the complex interrelationship between militant democracy and fundamental human rights and freedoms in the context of safeguarding the democratic order. Since militant democracy inherently involves the possibility of restricting certain rights to prevent antidemocratic actions, this article examines the normative justifiability of such limitations. The theoretical analysis traces the evolution of the concept of militant democracy through the works of key political and legal theorists, with special emphasis on Karl Loewenstein and Hans Kelsen. Alongside a conceptual approach, the authors analyse the application and acceptability of the instruments of militant democracy through the practice of competent judicial bodies. The findings reveal that there is no single position on the acceptability of militant democracy in legal theory whereas certain measures of militant democracy, especially the ban on political parties that advocate undemocratic goals, are recognized and accepted in legal practice as legitimate means for preserving democratic institutions.*

***Keywords:*** militant democracy, human rights, limitation of human rights, legal theory, legal practice.

## 1. INTRODUCTION

New forms of threats have once again revived the debate on the concept and mechanisms of a democracy capable of defending itself. Such a system is most commonly referred to as militant democracy. Although various instruments of militant democracy can be identified in ancient states, the modern concept was developed by Karl Loewenstein as a means of defending democracy against the growing threat of Nazism.

Although militant democracy emerged as a reaction against the totalitarian ideologies of fascism and communism, this concept remains relevant today for the protection of democracy

* PhD, Full Professor, Faculty of Law, University „Džemal Bijedić" Mostar, Bosnia and Herzegovina, ORCID: https://orcid.org/0000-0003-4030-8088, e-mail: *rebeka.kotlo@unmo.ba*

** PhD, Assistant Professor, Faculty of Law, University of Mostar, Bosnia and Herzegovina, ORCID: https://orcid.org/0000-0003-2058-5272, e-mail: *ivan.tomic@pf.sum.ba*

against contemporary threats such as populist movements and religious fundamentalism, and it is sometimes also used as a means of protecting the state against terrorism.

The paper is thematically divided into two parts. The first part presents the theoretical framework of militant democracy, with particular reference to the views of Karl Loewenstein and Hans Kelsen as two different theoretical approaches. The second part of the paper analyses the practical application of militant democracy in Germany and Turkey, and in the case law of the European Court of Human Rights, in order to examine the acceptability of militant democracy measures in the practice of relevant judicial bodies. The analysis is conducted through doctrinal legal research using normative and casuistic methods.

## 2. MILITANT DEMOCRACY—THEORETICAL FRAMEWORK

Democracy as a form of political organisation has traditionally been defined by the principles of popular sovereignty and equality of citizens. These two fundamental principles are often interpreted in absolute terms so that any limitations imposed upon them are viewed as a contrary to the very essence of democracy. Accordingly, democracy has long been understood as requiring equal opportunities for all political ideas, regardless of their content. However, the tragic experiences of totalitarian regimes have led to a re-evaluation of the concept. Is democracy merely a procedural framework or does it also embody certain immutable values? Should all citizens enjoy equal rights to political participation regardless of the substance of their actions? Is democracy entitled to defend itself against those who seek to undermine or destroy democracy? Finally, is a value-neutral, relativistic conception of democracy "one of the gravest threats to democracy"? (Sajó, 2019, p. 187) The theory of militant democracy provides a clear response to these dilemmas. It holds that democracy is based on certain absolute values, the protection of which it must ensure by acting against those who aim to destroy them, since they seek thereby to destroy democracy itself.

The concept of militant democracy is far from unambiguous. The ambiguity largely stems from different views on the scope of militant democracy. While the classic definition of militant democracy envisaged a democratic order that actively defends itself against the enemies of democracy within the state, the new threats facing modern democracies have contributed to a broader understanding of the concept, extending its scope so as to include external threats. This primarily refers to the increasing danger terrorism poses to the democratic order although in literature there is no consensus as to whether counter terrorism measures are part of militant democracy (Beširević, 2023, p. 662). Militant democracy measures are generally directed against actions aimed at destroying democracy rather than against individual subjects. However, Müller (2019, p. 25) believes that such measures may also be directed at individuals when their conduct over time demonstrates a clear intention to destroy democracy.

Militant democracy is sometimes narrowly understood as the prohibition of radical political movements seeking to dismantle the democratic institutions. However, the banning of political parties is only one measure in the arsenal of militant democracy. Additional mechanisms include a wide range of other measures, such as entrenched constitutional provisions (the so-called "eternity clause"), restrictions on access to public office for citizens who seek to destroy the democratic order, measures aimed at countering religious fundamentalists or even populist political movements.

In addition to the lack of consensus regarding the content and scope of militant democracy, as Beširević (2013a, p. 15) states, there is also notable terminological heterogeneity, with the concept being described using terms such defensive democracy, democracy capable of self-defence, vigilant democracy and value-based democracy.

Militant democracy can be defined as "democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime" (Müller, 2012, p. 1253). According to Tyulkina (2015, p. 14) there are three characteristics which make democracy militant: pre-emption, specific enemy and abuse of rights and privileges which democracy gives to its enemies. Several problems arise from the very definition of the concept. The fundamental problem facing militant democracy in its theoretical justification relates to the principle of equality as a core element of the democratic political system (Dimitrijević, 2013, p. 32). If democracy is based on the will of the majority, why would it be justified to prevent the realization of that will through measures of militant democracy, even if it meant replacing democracy with another form of political system. Another problem arises from the nature and timing of militant democracy measures. Such measures may appear undemocratic *a priori*, as they involve restricting political freedoms such as the freedom of political action, expression and representation of different ideas for the sake of preserving the democratic order, most often by excluding certain political actors from the political arena and by limiting fundamental human rights and freedoms.

Apart from the fact that such measures seem *prima facie* undemocratic, they are taken preventively before any concrete act of democratic subversion occurs. This preventive logic raises concerns about potential misuse, particularly given that the authority to invoke such measures is often within the competence of the currently ruling political elites. As Müller (2016, p. 260) states, "if left entirely to executives or parliaments, militant democracy might turn into a convenient means for parties to outlaw their competitors or to score cheap points with the electorate against unpopular minorities." Invernizzi Accetti & Zuckerman (2016, p. 195) warn that the application of militant democracy measures is inherently arbitrary and may have dangerous consequences insofar as it risks expanding to a broad and indeterminate set of alleged enemies of democracy in the absence of principled criteria. Instead, they advocate, "democratic regimes ought to insure themselves against the so-called paradox of democracy by relying exclusively on the means of constitutional and criminal law, without entering into the terrain of militant democracy."

Most scholars who address militant democracy focus on both its theoretical justification and the potential risk associated with the application of militant democracy measures. Even proponents of militant democracy urge caution in using these measures, justifying their application as a last resort where there is a clear and present threat. For instance, when considering the potential application of militant democracy measures against populist movements, Kaltwasser (2019, p. 89) warns of their possible counterproductive effects—such measures may be perceived as illegitimate by part of the electorate, thereby strengthening electoral support for such movements. By contrast, Schupman (2024, p. 70) cautions against an overly restrictive approach. He argues, "limiting them solely to immediate existential threats, there is an increased risk that, by the time militant measures can be deployed legitimately, they will no longer be capable of halting an antidemocratic party's rise to power." In an effort to strike a balance between militant democracy and fundamental human rights, some scholars

advocate a graduated approach: "to give much leeway to extremist actors at the periphery of the system but to also impose increasingly severe restrictions as they approach the centre of decision-making" (Rummens, 2019, p. 131).

It seems the essence of the problem is perhaps best captured in the enduring question *Quis custodiet ipsos custudes*? Two influential theorists, Karl Loewenstein and Hans Kelsen, have sought to answer this question. They offered different answers considering their understanding of the essence of democracy.

### *2.1. Karl Loewenstein*

Although the historical roots of militant democracy can be indirectly traced back to ancient times (Podunavac, 2013), the term itself is most closely associated with political scientist and legal scholar Karl Loewenstein who is often considered the father of militant democracy. During the rise of Nazism, Loewenstein served as a professor of constitutional law at the University of Munich. After Hitler came to power, Loewenstein lost his professorship, because "constitutional theory and law cannot be taught by a Non Aryan in the National Socialist State" (Rensmann, 2011, p. 980). After emigrating to the United States, Loewenstein published two articles in the renowned *American Political Science Review* in which he outlined the fundamental threats facing democracies (Rijpkema, 2018, p. 26).

Analysing the rise of fascism in Europe, Loewenstein (1937a, p. 423) argues, "its success is based on its perfect adjustment to democracy. Democracy and democratic tolerance have been used for their own destruction." Drawing lessons from the collapse of the Weimar Republic, Loewenstein (1937a, p. 424) warns: "Until very recently, democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city." While the principle of legality is fundamental to democracy, Loewenstein (1937a, p. 424) criticised "the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules."

Loewenstein advocated the adoption of legislative measures to combat fascism. Although he was aware that no ideology can be suppressed by legislative measures alone, Loewenstein (1937a, p. 432) tried to address this normative gap in his theory by claiming that fascism is not an ideology "but only a political technique under ideological pretences. There is no historical evidence that a political technique is irresistible if recognized and fought as such." Loewenstein was aware of the tension between democracy as a political order and measures of militant democracy. However, he believed that democracy must "live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles" (Loewenstein, 1937a, p. 424).

Loewenstein did not directly address the distinction between procedural and substantive democracy. However, it is clear that he was an advocate of the idea of substantive democracy "as a procedure that serves certain fundamental values that cannot be called into question under any circumstances, even if it is the will of the majority" (Jovanović, 2013, p. 193). Loewenstein refers to the absolute values of democracy in the fight against fascism. Such a position is in direct contradiction to the theory of procedural democracy, according to which no position possesses absolute value *a priori*, but all are equally valuable and enjoy equal protection. In this sense, no one could refer to certain substantive values that constitute the core of democracy in order to exclude from the political arena those who seek to destroy them. Loewenstein argued

that democracy could not be blind to its enemies in the name of respecting the rights of every citizen, regardless of their intention to destroy democracy. Democracy must become militant when the very core of democracy is attacked. Therefore, democracy must be redefined so that, at least during a transitional period, it implies "the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom" (Loewenstein, 1937b, p. 658).

Loewenstein's concept of militant democracy has been criticized as an outdated concept, given that Loewenstein's primary concern was the suppression of fascism as a special emotional technique that threatened to dominate the masses and destroy democracy through legal means. Loewenstein was aware of the dangers of abuse of the measures of militant democracy, which are reflected in restrictions of the fundamental rights of citizens. However, guided by tragic experiences, Loewenstein (1937b, p. 658) concludes that "to neglect the experience of democracies deceased would be tantamount to surrender for democracies living." This conclusion remains highly relevant today, perhaps even more than ever.

### *2.2. Hans Kelsen*

Kelsen is often overlooked or mentioned only sporadically in discussions of militant democracy. Scholars who have researched his contribution to this issue often cite Kelsen's following statement as a starting point: "One must remain faithful to one's flag, even when the ship is sinking; when entering the abyss one can only take the hope that the ideal of freedom is indestructible and that the deeper it sinks the more passionately it will be revived" (Kelsen, 2006, p. 237).

Kelsen made a significant contribution to the development of legal theory, but also to the theory of democracy. A unifying feature of both fields lies in Kelsen's effort to construct pure models—a pure theory of law and correspondingly a pure theory of democracy. In this context, his often-cited position on loyalty to one flag, the flag of democracy, can also be better understood. Kelsen firmly rejects the idea that democracy can become militant when threatened by its enemies: "Whether democracy should not defend itself, even against the people who no longer want it, even against a majority which is united in nothing other than its will to destroy democracy. To ask the question is to answer it in the negative. A democracy that seeks to act against the will of the majority, that has even tried to act by force, has ceased to be a democracy" (Kelsen, 2006, p. 237).

Therefore, Kelsen equated the use of measures of militant democracy with the cessation of democracy. This position is consistent with his commitment to a procedural democracy. For Kelsen, democracy does not rest on the existence of absolute truths or absolute political values. Democracy implies relativism in the sense that every political idea, every political opinion, even those aimed at destroying democracy, deserve an equal chance "to be articulated and to compete freely for people's minds and hearts" (Kelsen, 2000, p. 108). Consequently, Kelsen is often characterized as a democratic fundamentalist for maintaining "an uncompromising focus on one single element of the democratic idea, its tolerance, to the end, even when the survival of democracy is at stake" (Rijpkema, 2018, p. 34). As Schupmann (2024, p. 77) states, a fundamental weakness of this approach is equating legality and legitimacy, resulting in "any political goal at all is legitimate if pursued through formal democratic legal procedures, whatever its substantive implication."

## 3. THE PRACTICAL IMPLEMENTATION OF MILITANT DEMOCRACY MEASURES

While there are differing theoretical views on the justification, scope and usefulness of militant democracy, the practice of modern states and relevant judicial bodies leads to the conclusion that militant democracy is, directly or indirectly, incorporated into most constitutional systems and supported in judicial practice. According to Tyulkina (2015, p. 41), it is "hard to find a modern constitution completely lacking militant democracy provisions, even where there is no precise reference to the militant character of a state." In the remainder of this article, the authors focus on some of the most important cases involving the application of militant democracy in the practice of national and international judicial bodies in order to test the initial hypothesis that militant democracy measures are accepted in practice despite different theoretical views on the legitimacy of such measures.

### *3.1. Militant democracy in the practice of the Federal Constitutional Court of Germany*

Germany is commonly viewed as the cradle of militant democracy. The first practical application of militant democracy measures, in the form of the banning of political parties, took place in this country. Shortly after the adoption of the Basic Law, the Federal Constitutional Court was called upon to apply Article 21, which provides the possibility of declaring political parties unconstitutional if they "seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany" (*Grundgesetz für die Bundesrepublik Deutschland*, 1949). The application of this provision resulted in declaration of the unconstitutionality of the Socialist Reich Party and the Communist Party of Germany.

The SRP was a party that openly expressed its neo-Nazi character through various forms of public action. In this case,1 the Federal Constitutional Court focused its analysis on the role of political parties in democracy as well as on the party's leadership and internal organization, programme and activities of its leaders. Having regard to the special significance of political parties as agents of the expression of the popular will, their exclusion from political life is justified only when they seek to undermine the supreme fundamental values of the free democratic constitutional state. The Court also considered the party's internal organization, which closely resembled that of Hitler's Nazi party, as well as the fact that many SRP leaders had been members of organizations closely associated with Hitler's regime. Ultimately, the Court concluded that both the party programme and the activities of its leadership demonstrated opposition to the existing constitutional system with the aim of reviving the Nazi-type state. The Court therefore held that the SRP unconstitutional. In addition, it prohibited the establishment of replacement organizations, revoked the mandates of SRP representatives and ordered the confiscation of party assets.

Unlike the *SRP* case, in which the Federal Constitutional Court did not hesitate nor did the decision provoke significant public opposition, primarily "due to the fact that the memories of the Nazi regime were still fresh in people's minds" (Tyulkina, 2015, p. 75), the Court acted much more cautiously in the Communist Party case. It took several years to deliver a decision in this case, which remains the longest decision in the Court's history, at 308 pages (Tyulkina, 2015, p. 75). As in the *SRP* case, the Court examined the historical development

[1] SRP-Verbot, 1952.

of communism, the conduct of the party leaders and the party's organizational structure, ultimately concluding that the activities of the Communist Party were directed at undermining and abolishing the constitutional order (Communist Party of Germany Case, BVerfG, 17.8.1956. - 1 BvB 2/51). Tyulkina (2015, pp. 76-77) highlights several additional elements that underscore the importance of this decision. First, based on the Court's reasoning, it can be argued that a party ban does not require proof of the existence of an immediate or concrete danger, rather, it is sufficient to demonstrate a probability that the party will pursue unconstitutional goals in the foreseeable future. Second, considering the relationship of Article 21 of the Constitution to other provisions, the Court effectively elevated militant democracy to the status of a fundamental constitutional value. This jurisprudence demonstrates that the Federal Constitutional Court has resolutely stood in defence of substantive democracy, rejecting a purely procedural understanding that excludes the existence of fundamental constitutional values in a democratic political order.

Although it might have been expected that the Communist Party case would serve as a precedent for further bans of extremist political parties, this did not happen. When ruling on the constitutionality of the National Democratic Party, which had been linked to a series of racially motivated attacks and hate crimes, the Federal Constitutional Court discontinued the proceedings on procedural grounds (Tyulkina, 2015, p. 80). Stanić (2019, p. 50) argues that the Court's reluctance to ban political parties stems from the fact that "the mentioned bans were not of great and lasting benefit." Germany is once again facing the challenge of political extremism, particularly in relation to the AfD, a political party that enjoys considerable public support. At present, domestic courts have prohibited the intelligence service from referring to the party as an extremist group. It remains to be seen what the final legal outcome will be.

Beyond measures targeting political parties, militant democracy in Germany has also been applied to individual citizens through the adoption of the Radicals Decree. As Pantelić & Radojević (2021, p. 465) note, this act "required candidates for public service to demonstrate loyalty to the free democratic order." The decree provided a legal basis for screening citizens' loyalty prior to entering public service with the aim of preventing the infiltration of individuals deemed hostile to the constitutional order. Its implementation affected millions of citizens with more than 1,000 individuals being denied access to public service. These measures were applied to a wide spectrum of citizens, from schoolteachers and train drivers to postal employees, primarily based on their membership or activities related to the Communist Party.

### *3.2. Militant democracy in Turkey*

The banning of political parties as a measure of militant democracy has been used only rarely in most jurisdictions. However, this general conclusion does not hold in the case of Turkey. The Constitutional Court of Turkey has banned 24 political parties. Most of these bans were imposed for violating territorial integrity or for breaching the principle of secularism, which has constitutional rank in Turkey. The application of this principle in practice extended beyond political parties advocating introduction of religious elements into the state structure and encompassed issues such as the wearing of headscarves in public institutions (Tyulkina, 2015, p. 169).

The prohibition of political parties in Turkey has not been limited to marginal actors but has also affected parties enjoying significant public support. One of the most prominent is the *Refah* case. The Refah Party won more than one fifth of the votes in the national elections and

subsequently formed a coalition government. After assuming power, this political party sought to introduce elements of Islamic law both as ordinary law and as law applicable to the Muslim community. Such initiatives were considered to violate the principle of secularism, a position upheld by the Constitutional Court of Turkey. The Court emphasized that "secularism is one of the indispensable conditions of democracy […] The rules of sharia were incompatible with the democratic regime. The principle of secularism prevented the State from manifesting a preference for a particular religion or belief and constituted the foundation of freedom of conscience and equality between citizens before the law" (*Refah Partisi and Others v Turkey*, 2001, para. 25). Tyulkina (2015, p. 175) criticizes this decision, highlighting its problematic nature, particularly given that it relied primarily on statements and activities of party leaders rather than on the party's programme. Marinković (2013, p. 163) interprets this approach as a methodological shift, whereby the Court undertook an empirical analysis of party leaders' statements in order to assess comprehensively whether a pressing social need for the ban existed.

Unlike in the *Refah* case, the Constitutional Court did not ban the AK political party despite allegations that it had violated the principle of secularism by attempting to lift the headscarf ban (Decision of the Constitutional Court of Turkey E.2008/1 (SPK), K.2008/2). The party ultimately avoided dissolution, although it is noteworthy that an absolute majority of judges voted in favour of banning it (Tyulkina, 2015, p. 176).

Beyond political parties, the militant protection of secularism in Turkey has also extended to individuals. In the well-known case of Leyla Sahin, a student was denied access to lectures and examinations for wearing a headscarf and was subjected to disciplinary measures. The Constitutional Court has previously addressed similar issues, adopting the position that "students had to be permitted to work and pursue their education together in a calm, tolerant and mutually supportive atmosphere without being deflected from that goal by signs of religious affiliation. […] irrespective of whether the Islamic headscarf was a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that State education must be neutral" (*Leyla Şahin v Turkey*, para. 39).

### *3.3. Militant democracy in the case law of the European Court of Human Rights*

In its case law, the European Court of Human Rights has repeatedly examined the compatibility of various measures of militant democracy with the rights and freedoms guaranteed by the Convention. Beširević (2013b) distinguishes between four groups of cases: those concerning freedom of expression and the prohibition of hate speech, the prohibition of political parties, the restriction of electoral rights and a group of religious cases related to the alleged violation of the principle of secularism.

In Vogt v Germany, the applicant, a teacher, had been dismissed because of her political activities and membership in the German Communist Party. The Court accepted that the measure pursued a legitimate aim and found that "a democratic State has the right to require civil servants to be loyal to the constitutional principles on which that State is founded" (*Vogt v. Germany*, para. 50). It nevertheless found a violation of the Convention because the dismissal did not constitute a measure that was necessary in a democratic society. The Court attached particular importance to the fact that the Federal Constitutional Court had not banned the party in question and that the applicant's activities had been lawful.

With regard to cases concerning the dissolution of political parties, the Court's case law may be divided into two groups. In the first group, the Court relied directly on Article 17 of the Convention, which prohibits the abuse of rights, to declare the application inadmissible. For example, in the case concerning the German Communist Party, the Commission found the application inadmissible by referring to Article 17 of the Convention, considering that the party's organization and activities constituted an abuse of Convention rights (*German Communist Party and Others v. Germany*, Application no. 250/57, Commission Decision, 20 July 1957).

The second group includes cases in which the Court examined the prohibition of political parties on the merits, primarily under Articles 10 and 11 of the Convention. The first case in this group is the *United Communist Party of Turkey and Others v Turkey*. The domestic courts had dissolved the party because of its very name and the promotion of separatism and the division of the Turkish nation. However, after analysing the party's programme, the Court held that "there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population" (*United Communist Party of Turkey and Others v. Turkey*, para. 57). The Court concluded that "a measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society" (*United Communist Party of Turkey and Others v. Turkey*, para. 61).

In the aforementioned *Refah* case, the Court further clarified that it is not only the official party programme that must be examined, but also the statements and conduct of its leaders. This approach was confirmed in the *Batasuna* case, which concerned the banning of a political party for supporting a terrorist organisation. The Court held that the dissolution of a party for failing to condemn terrorism is not incompatible with the Convention. The Court emphasized "politician's conduct usually includes not only his or her actions or speeches but also, in some circumstances, omissions or a lack of response*, which can constitute acts indicating that politician's stance and be just as telling as any overtly supportive action*" (emphasis added) (*Herri Batasuna and Batasuna v. Spain*, para. 88).

The strongest judicial endorsement of the preventive dimension of militant democracy appears in the *Refah* case where the Court stated that "a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent" (*Refah Partisi (The Welfare Party) and Others v. Turkey*, para. 102). In this judgment, the Court for the first time articulated three criteria for assessing the necessity of the prohibition of a political party: whether there was plausible evidence that the risk to democracy was sufficiently imminent; whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a democratic society (*Refah Partisi (The Welfare Party) and Others v. Turkey*, para. 104).

Examining whether the ban on the Refah Party was justified, the Court supported the Chamber's position that "sharia is incompatible with the fundamental principles of democracy" (*Refah Partisi (The Welfare Party) and Others v. Turkey* , para. 123). Beširević (2012, p.

255) strongly criticizes this Court's decision, arguing that it follows from the judgment that "the Court's vision of democratic society is hardly compatible with society which does not originate from Christian principles and values. Therefore, it may fairly be concluded that the big loser in Refah was democracy itself."

Case law demonstrates that the Court has been ready to uphold restrictions on the human rights of individuals in the name of defending democracy. For example, in the *Ždanoka* case, the Court upheld measures adopted by domestic authorities barring individuals who had actively participated in the Communist Party from standing for election (*Ždanoka v. Latvia*, Application no. 58278/00, Judgment ECHR, 16 March 2006). However, such a restriction must be individualized, whereby the legitimacy of applying measures to defend democracy decreases over time (*Adamsons v. Latvia*, Application no. 3669/03, Judgment ECHR, 24 June 2008). The Court attaches particular importance to the existence of a time limit and the possibility of reviewing such a measure (*Paksas v. Lithuania*, Application no. 34932/04, Judgment ECHR, 6 January 2011).

Ultimately, the Court has also upheld the application of measures of militant democracy through restrictions of individual rights in order to protect the principles of secularism. In the Leyla Sahin case, the Court concluded that respect for the principles of secularism "may be considered necessary to protect the democratic system in Turkey" (*Leyla Şahin v Turkey*, 2005, para. 114). The Court went further by linking the wearing of headscarves to "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts" (*Leyla Şahin v Turkey*, para. 115). This reasoning has been widely criticized in the literature. The crux of the criticism boils down to the conclusion that the application of militant democracy in order to preserve the principle of secularism "affects only one religious group: Muslims" (Tyulkina, 2015, p. 198).

## 4. CONCLUSION

The concept of militant democracy was developed in the first half of the twentieth century as an immediate response to the collapse of democratic states. Totalitarian movements exploited emotionalism as a particular political technique in order to mobilize broad public support for the legal dismantling of the democratic order. However, the idea of militant democracy remains relevant today, as democratic states face new challenges which, although often less openly than in the past, aim to undermine democratic institutions.

An analysis of the theoretical framework of militant democracy demonstrates that there is no single position regarding the justification of this concept. Even today, there are those who, like Karl Loewenstein, argue that democracy should not be blinded by legalistic formalism, but should adopt active measures against those who seek to undermine democracy, even at the cost of temporarily restricting fundamental rights and freedoms. On the other hand, significant and well-founded criticisms of this concept have also been advanced. Since democracy may employ *prima facie* undemocratic means to protect itself, the question raised by Hans Kelsen remains relevant: does a political system cease to be democratic if it resorts to such measures?

In contrast to theoretical debates, the judicial practice indicates considerable support for the application of militant democracy as a fundamental constitutional value. In practice, militant democracy is most frequently used to justify the banning of political parties, and such measures have not been limited solely to marginal groups but have in certain cases affected

even governing political parties. Furthermore, militant democracy has been invoked as a basis for justifying restrictions on electoral rights, as well as on certain manifestations of religious belief. The latter appears particularly problematic and, according to the views of a significant number of scholars, extends beyond the traditional framework of militant democracy.

Although certain controversial cases exist in judicial practice, it appears that the concept of militant democracy has no viable alternative. Democratic systems must be resilient against attempts at their destruction, whether such attempts originate from within or from outside, and whether they are collective or individual in nature. The question of the limits and criteria for the application of militant democracy, as well as the potential for its abuse, therefore, remains open. However, this is a distinct issue from the question of whether a democracy remains democratic if it adopts a militant character.

## LIST OF REFERENCES

### *Books and articles*


Beširević, V. 2012. A Short Guide to Militant Democracy: Some Remarks on the Strasbourg Jurisprudence. In: Benedek, W. *et al.* (eds.), *European Yearbook of Human Rights*. Bremerhaven: NW Verlag, Intersentia, pp. 243–258.

Beširević, V. 2013a. Predgovor. In: Beširević, V. (ed.), *Militantna demokratija: nekada i sada*. Beograd: Pravni fakultet Univerzitet Union, Službeni glasnik, pp. 9–29.

Beširević, V. 2013b. Ubiti pticu rugalicu? Militantna demokratija u jurisprudenciji Evropskog suda za ljudska prava. In: Beširević, V. (ed.), *Militantna demokratija: nekada i sada*. Beograd: Pravni fakultet Univerzitet Union, Službeni glasnik, pp. 87–122.

Beširević, V. 2023. Militant democracy: a friend or enemy of democratic backsliding?. In: Tushnet, M. & Kochenov, D. (eds.), *Research Handbook on the Politics of Constitutional Law*. Cheltenham: Edward Elgar Publishing, pp. 658–673. https://doi.org/10.4337/9781839101649.00045

Dimitrijević, N. 2013. Militantna demokratija, konstitucionalna demokratija i osnovna prava: da li su prijatelji demokratije neprijatelji slobode?. In: Beširević, V. (ed.), *Militantna demokratija: nekada i sada*. Beograd: Pravni fakultet Univerzitet Union, Službeni glasnik, pp. 31–60.

Invernizzi Accetti, C. & Zuckerman, I. 2017. What's Wrong with Militant Democracy?. *Political Studies*, 65(1), pp. 182–199. https://doi.org/10.1177/0032321715614849

Jovanović, M. A. 2013. Ima li „borbena demokratija" alternativu? Pogled iz perspektive tranzicionog društva. In: Beširević, V. (ed.), *Militantna demokratija: nekada i sada*. Beograd: Pravni fakultet Univerzitet Union, Službeni glasnik, pp. 185-206.

Kaltwasser, C. R. 2019. Militant Democracy Versus Populism. In: Malkopoulou, A. & Kirshner, A. S. (eds.), M*ilitant Democracy and Its Critics: Populism, Parties, Extremism*. Edinburgh: Edinburgh University Press Ltd, pp. 72–92. https://doi.org/10.1515/9781474445627-007

Kelsen, H. 2000. On the Essence and Value of Democracy. In: Jacobson, A. J. & Schlink, B. (eds.), *Weimar: A Jurisprudence of Crisis*. Berkeley / Los Angeles: University of California Press, pp. 67–109.

Kelsen, H. 2006. V*erteidigung der Demokratie: Abhandlungen zur Demokratietheorie*. Tübingen: Mohr Siebeck.

Loewenstein, K. 1937a. Militant Democracy and Fundamental Rights I. *The American Political Science Review*, 31(3), pp. 417–432. https://doi.org/10.2307/1948164
Loewenstein, K. 1937b. Militant Democracy and Fundamental Rights II. *The American Political Science Review*, 31(4), pp. 638–658. https://doi.org/10.2307/1948103
Marinković, T. 2013. Koliko je militantna "militantna demokratija"?: Primer zabrane političkih partija u uporednom pravu. In: Beširević, V. (ed.), *Militantna demokratija: nekada i sada*. Beograd: Pravni fakultet Univerzitet Union, Službeni glasnik, pp. 123–184.
Müller, J. W. 2012. Militant Democracy. In: Rosenfeld, M. & Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, pp. 1253–1269. https://doi.org/10.1093/oxfordhb/9780199578610.013.0062
Müller, J. W. 2016. Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy. *Annual Review of Political Science*, 19, pp. 249–265. https://doi.org/10.1146/annurev-polisci-043014-124054
Müller, J. W. 2019. Individual Militant Democracy. In: Malkopoulou, A. & Kirshner, A. S. (eds.), M*ilitant Democracy and Its Critics: Populism, Parties, Extremism*. Edinburgh: Edinburgh University Press Ltd, pp. 13–37. https://doi.org/10.1515/9781474445627-004
Pantelić, N. & Radojević, M. 2021. (Zlo)upotreba mera militantne demokratije-lojalnost državnih službenika i ograničenje političkog udruživanja. In: *Primena prava i pravna sigurnost, Zbornik radova 34. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović*. Beograd: Kopaonička škola prirodnog prava – Slobodan Perović, pp. 461–477.
Podunavac, M. 2013. Borbena demokratija: konstrukcija neprijatelja demokratije u istorijskim i savremenim političkim društvima. In: Beširević, V. (ed.), *Militantna demokratija: nekada i sada*. Beograd: Pravni fakultet Univerzitet Union, Službeni glasnik, pp. 61–85.
Rensmann, T. 2011. Munich Alumni and the Evolution of International Human Rights Law. *European Journal of International Law*, 22(4), pp. 973–991. https://doi.org/10.1093/ejil/chr073
Rijpkema, B. 2018. *Militant Democracy: The Limits of Democratic Tolerance*. London: Routledge. https://doi.org/10.4324/9780429427374
Rummens, S. 2019. Resolving the Paradox of Tolerance. In: Malkopoulou, A. & Kirshner, A. S. (eds.), M*ilitant Democracy and Its Critics: Populism, Parties, Extremism*. Edinburgh: Edinburgh University Press Ltd, pp. 112–132. https://doi.org/10.1515/9781474445627-009
Sajó, A. 2019. Militant Constitutionalism. In: Malkopoulou, A. & Kirshner, A. S. (eds.), M*ilitant Democracy and Its Critics: Populism, Parties, Extremism*. Edinburgh: Edinburgh University Press Ltd, pp. 187–206. https://doi.org/10.1515/9781474445627-013
Schupmann, B. A. 2024. *Democracy despite Itself*. Oxford: Oxford University Press. https://doi.org/10.1093/9780191975950.001.0001
Stanić, M.B. 2019. Međuzavisnost ustavnog poretka i političkih stranaka na tri primera iz Nemačke – povodom 70 godina Osnovnog zakona. *Strani pravni život*, 63(2), pp. 45–55. https://doi.org/10.5937/spz63-22232
Tyulkina, S. 2015. M*ilitant Democracy: Undemocratic political parties and beyond*. London: Routledge. https://doi.org/10.4324/9781315767819

***Legal sources and case law***

*Adamsons v. Latvia*, Application no. 3669/03, Judgment ECHR, 24 June 2008.
Communist Party of Germany Case, BVerfG, 17.8.1956. BVerfGE 5, 85 (1 BvB 2/51).

Decision of the Constitutional Court of Turkey E.2008/1 (SPK), K.2008/2.
*German Communist Party and Others v. Germany*, Application no. 250/57, Commission Decision, 20 July 1957.
Grundgesetz für die Bundesrepublik Deutschland, 1949.
*Herri Batasuna and Batasuna v. Spain*, Application nos. 25803/04 and 25817/04, Judgment ECHR, 30 June 2009.
*Leyla Şahin v. Turkey*, Application no. 44774/98, Judgment ECHR, 10 November 2005.
*Paksas v. Lithuania*, Application no. 34932/04, Judgment ECHR, 6 January 2011.
*Refah Partisi (The Welfare Party) and Others v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98 And 41344/98, Judgment ECHR, 13 February 2003.
*United Communist Party of Turkey and Others v. Turkey*, Application no. 19392/92, Judgment ECHR, 30 January 1998.
*Vogt v. Germany*, Application no. 17851/91, Judgment ECHR, 26 September 1995.
*Ždanoka v Latvia*, Application no. 58278/00, Judgment ECHR, 16 March 2006.

Original scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch15

***Davor TRLIN****

# THE GLOBAL RETREAT FROM UNIVERSAL SUFFRAGE: CONSTITUTIONAL AND LEGAL TECHNIQUES FOR EXCLUDING CITIZENS FROM POLITICAL RIGHTS IN THE 21ST CENTURY

*In the 21st century, a global, often subtle and piecemeal retreat from the principle of universal suffrage has been taking place. This article examines the constitutional and legislative techniques through which (nominally) democratic states restrict or deprive certain citizens of the right to vote and/or stand for election. The main techniques include: expanding grounds for disenfranchisement (criminal convictions, especially corruption, terrorism, organized crime, and "moral" offenses); introducing competency-based voting or candidacy tests (knowledge of the constitution, language proficiency, "economic citizenship"); disqualifications linked to unpaid taxes or public debt; restrictions targeting dual citizens; group-based exclusions (e.g., residents of overseas territories, internal migrants, homeless persons); de facto disenfranchisement through increasingly burdensome water registration and identification procedures; new forms of political censorship and candidacy ban justified as "protection of democracy" (the so-called "militant democracy 2.0"). The author argues that, while the scale of these measures remains limited compared to the 19th century property or gender-based suffrage restrictions, there is a clear return to the logic of "common-sense" limitation of democracy by political and judicial elites. This process is typically framed as "defending democracy against its enemies", allowing regression to be legitimized and the language of progress and security justifies it. The article draws on a comparative analysis of legislative changes and case law in over 30 countries between 2000 and 2025, with particular attention to Europe, Latin America, the United States, India, and selected states of Africa and Southeast Asia. The selection of over 30 countries was made using a comparative case study methodology, prioritizing states that represent diverse legal traditions and varying degrees of democratic backsliding to illustrate the global reach of these restrictive techniques.*

***Keywords:*** universal suffrage, democracy backsliding, militant democracy, competence-based disenfranchisement, electoral disqualifications, de-democratization, exclusionary constitutionalism.

* PhD, Assistant Professor at the International Burch University Sarajevo, Bosnia and Herzegovina, ORCID: https://orcid.org/0000-0001-6118-9757, e-mail: *davor.trlin@ibu.edu.ba*

## 1. INTRODUCTION

At the beginning of the 21st century, universal suffrage, one of the greatest achievements of modern democracy, is experiencing a subtle but noticeable erosion. Although at first glance it seems that the principle of "one man, one vote" has been unquestionably adopted in most countries of the world, many countries introduce new or expand old mechanisms that deprive certain categories of citizens of their political rights or make it difficult for them to exercise their political rights. This trend is not as spectacular as a return to means-testing or racial segregation, but it is taking place gradually, through apparently technical, administrative or "security" changes.

The topicality of the subject stems from the broader phenomenon of democratic backsliding – the gradual weakening of democratic institutions and norms – which has been documented in the V-Dem reports (Democracy Report, 2024), Freedom House (Freedom House, 2025) and by other organizations since the beginning of the 2010s (IDEA, 2025). Levitsky and Ziblatt (2018) argue that protecting democracy requires defending voting rights, as restricting voting rights is a key method used to undermine democracy. They focus on how elected leaders undermine institutions by manipulating electoral processes, limiting opposition, and violating democratic norms. Suffrage is not formally abolished, but it can be restricted indirectly through institutional rules (Bormeo, 2016, p. 13.). Yascha Mounk (2018) analyzes in detail the tension between the democratic will of the majority and liberal institutions. In this context, he also discusses the idea of the so-called "epistocracy" (rule by politically "more competent" voters), which implies limiting or weighting the right to vote. This does not necessarily mean the formal abolition of suffrage but can lead to the exclusion of certain groups from the political process (e.g., opposition voters, minorities, or diasporas). According to Müller (2016), when populists come to power, they often try to delegitimize political opponents, change electoral rules in their favor, and redefine the political community.

## 2. THEORETICAL AND HISTORICAL FRAMEWORK

Universal suffrage means that every adult citizen, without discrimination based on sex, race, property, education, or other status, has the right to vote and the right to be elected. This principle developed gradually: from property tests and gender exclusion in the 19th century, through the abolition of racial restrictions in the USA (Voting Rights Act, 1965) and the introduction of women's suffrage (by the 1940s–1950s in most of Europe), to the widespread affirmation of universal suffrage in the second half of the 20th century.

In the second half of the 20th century, universal suffrage became an internationally accepted standard, confirmed in key documents such as the International Covenant on Civil and Political Rights (Article 25) and Protocol 1 of the European Convention on Human Rights (Article 3). However, in the 21st century, there is an intellectual and theoretical re-examination of that principle, where more subtle criteria aimed at the "quality" of voters are introduced instead of open restrictions.

One of the most influential proponents of such an approach is American political philosopher Jason Brennan. In his seminal article "The Right to a Competent Electorate" Brennan directly argues that unlimited universal suffrage is unjust because it violates the right of citizens to competent government. He gives three key arguments. Citizens have a right

to competent government, i.e., that political power is exercised by competent people in a competent manner (Brennan, 2011, pp. 700–701). Universal suffrage allows incompetent, uninformed, or irrational voters to influence policy, which is analogous to allowing incompetent jurors or doctors to make decisions about the life and death of others (Brennan, 2011, pp. 702–704). Instead, a moderate epistocracy limits voting rights strictly to citizens who demonstrate sufficient political competence through knowledge tests, while ensuring the rest of the citizenry retains all other civil rights. (Brennan, 2011, pp. 704–710, 720–724). Brennan presents this proposal as a moral improvement of democracy, not its abolition: "To satisfy this right, universal suffrage in most cases must be replaced by a moderate epistocracy, in which suffrage is restricted to citizens of sufficient political competence." (Brennan, 2011, p. 701) These ideas are expanded in his book *Against Democracy* (Princeton University Press, 2016), where Brennan further argues that democracy with universal suffrage leads to poor outcomes due to widespread misinformation and cognitive biases among citizens. He proposes various epistocratic models, including:

- restricted suffrage (limited voting rights only for those who pass a knowledge test),
- weighted voting (weighted votes according to competence),
- epistocratic veto (the competent can block bad decisions of the masses).

These proposals illustrate a modern variant of restrictive logic: competence (knowledge, rationality) becomes the new "census," and the system is justified by empirical evidence of the average uninformedness of voters (e.g., political knowledge surveys) and instrumental reasons (better policy outcomes). Although Brennan's views remain controversial and marginal in mainstream political theory, they have become a point of reference in debates about democratic decline, voter literacy tests, and similar "corrections" of democracy in the 21st century.

Brennan's epistocratic model fundamentally conflicts with international human rights standards, such as Article 25 of the International Covenant on Civil and Political Rights, which mandates that suffrage must be granted without unreasonable or discriminatory restrictions. From a constitutional perspective, introducing competence-based filters transforms the right to vote from an inherent democratic guarantee into a conditional privilege, thereby undermining the essential principle of political equality upheld by the European Court of Human Rights.

The 21st century witnesses a return of restrictive logic, but in a "modernized" form: instead of the open exclusion based on class or gender, the criteria of "competence," "responsibility," and "loyalty" to the state are introduced. These measures are presented as "common-sense" corrections to democracy, not as its narrowing.

## 3. NORMATIVE AND CONCEPTUAL ANALYSIS

Is it a defense of democracy or a regression to the 19th century? The concept of militant democracy is evolving into a "2.0" version – more focused on protection against populism and disinformation than against totalitarianism. To distinguish this from classical militant democracy, which acted as an existential shield against totalitarianism through party bans, Militant Democracy 2.0 functions as a regulatory scalpel. It targets individual eligibility – using criminal records, tax status, or "competence" to filter the political community under the guise of protecting democratic integrity. This shifts the focus from defending the existence of democracy to managing the composition of its participants. Exclusion is legitimized by the language of security and progress, which creates a tension between equality, popular

sovereignty, and the protection of the constitutional order. The courts play an ambivalent role – sometimes restrained, sometimes activist in support of restrictions.

The modern understanding of the right to vote does not only derive from the constitutions and legislation of individual states, but also from international legal standards developed through international treaties and the practice of international courts. In modern international law, the right to vote is considered one of the fundamental political rights and a key element of the democratic order. It is normatively confirmed in numerous international documents, such as Article 25 of the International Covenant on Civil and Political Rights, adopted by the United Nations, which guarantees the right of every citizen to take part in the conduct of public affairs and to vote and be elected at periodic and free elections.

In the European legal space, Article 3 of the First Protocol to the European Convention on Human Rights, which guarantees the right to free elections, plays a particularly important role. The interpretation of this provision has been developed through the practice of the European Court of Human Rights, whose judgments have a significant impact on the national electoral systems of the Council of Europe member states. Through its practice, this court has developed a standard according to which states have a certain freedom to regulate the right to vote, but such restrictions must be proportionate and must not undermine the very essence of the right to political participation.

One of the most famous examples of the judicial review of restrictions on the right to vote is the case of Hirst v. United Kingdom (No. 2) (ECtHR Application no. 74025/01), in which the European Court of Human Rights in 2005 found that a general and automatic ban on voting for all prisoners in the United Kingdom was incompatible with the European Convention. The Court emphasized that states may restrict the right to vote for certain categories of persons, but such restrictions must be individualized and proportionate to a legitimate aim. The Court ruled that a general ban on British prisoners from exercising their right to vote was contrary to the European Convention on Human Rights. The Court did not state that all prisoners should be given the right to vote. Instead, it ruled that if the right to vote was to be abolished, then the measure must be compatible with Article 3 of Protocol No. 1, placing the burden on the United Kingdom to justify a departure from the principle of universal suffrage.

Similar issues have arisen in other cases before this Court, such as Scoppola v. Italy (No. 3) (ECtHR Application no. 126/05), in which the Court considered the proportionality of the loss of political rights as a consequence of a criminal conviction in Italy. These judgments confirm that international courts have an important role to play in defining the limits of permissible restrictions on the right to vote. The European Court of Human Rights upheld the judgment in the Hirst case and emphasized that a general, automatic, and indiscriminate deprivation of the right to vote for all prisoners, regardless of the length of their sentence, the gravity of the offense, and the individual circumstances, was incompatible with Article 3 of Protocol No. 1. The applicant argued that any decision to deprive prisoners of their right to vote, which was not taken by a court, was inherently disproportionate because it applied generally and automatically, and that only a judge could justify such a measure by examining the individual case. The Court rejected this view and concluded that disproportionality was not necessarily linked to the decision-maker, but that the proportionality of a penalty could also be ensured by the legislature by specifying precisely the conditions under which the right to vote was deprived. The Court found that the Italian system was not disproportionate because the ban on holding public office (and thus the deprivation of the right to vote) applied only to

persons convicted of certain criminal offenses and to those sentenced to a certain length of imprisonment. The duration of the deprivation of the right to vote in Italy depended on the gravity of the offense and the sentence imposed, which shows that the legislator wanted to adapt the measure to the specific circumstances of the case, taking into account the gravity of the offense and the conduct of the convict. Unlike the British law in the Hirst case, which deprived all prisoners of their right to vote without any distinction, the Italian legislation was not of a general, automatic, and non-discriminatory nature. The Court also took into account the possibility of rehabilitation, by which convicted persons could regain their right to vote, and ultimately concluded that the Italian system did not violate Article 3 of Protocol No. 1.

In addition to the European human rights system, other international mechanisms contribute to the development of standards in this area. For example, the United Nations Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights and, through its general comments, emphasizes that restrictions on the right to vote must be based on objective and reasonable criteria.

Despite the existence of these international standards, states continue to apply various legal and administrative mechanisms that can limit the political participation of certain categories of citizens. This is precisely why comparative constitutional law literature devotes significant attention to the analysis of various techniques of narrowing the right to vote, which can appear in various forms – from criminal disqualifications to administrative obstacles to the exercise of the right to vote. The following subsections analyze the most important contemporary forms of such restrictions from a comparative perspective.

## 4. COMPARATIVE ANALYSIS – EXAMPLES FROM PRACTICE

Although universal suffrage is now one of the fundamental principles of modern democracy, mechanisms that limit or narrow access to the electorate still exist in various political systems. These mechanisms can be formal, through legal and constitutional provisions, but also informal, through administrative procedures that make it difficult to exercise the right to vote. The comparative literature emphasizes that democratization processes often simultaneously involve redefining the boundaries of political membership, that is, determining who constitutes the electorate and under what conditions citizens can participate in the political process (Bateman, 2018, pp. 4–7).

The research employs a comparative legal and functional method, selecting jurisdictions based on the "most different cases" principle to demonstrate how similar exclusionary techniques – such as criminal and competence-based disqualifications – are being applied across diverse constitutional traditions. The analysis proceeds by identifying common patterns of autocratic legalism and militant democracy 2.0, allowing for comparative conclusions to be drawn regarding the global erosion of the "one man, one vote" principle.". By synthesizing case law from over 30 countries, the study moves from specific legal doctrines to a broader normative critique of the contemporary retreat from universal suffrage.

### *4.1. Expansion of grounds for the loss of voting rights due to criminal offenses*

This institute implies that persons convicted of certain criminal offenses lose their right to vote while serving their sentence, and in some legal systems even after its completion (López-Guerra, 2014, pp. 21–24).

The most famous example is the United States, where some state laws provide for the loss of voting rights for persons convicted of serious crimes. In some states, such a ban could historically last after the sentence was served, while in other states it ends after release from prison. Such models are often cited as an example of the significant impact of criminal sanctions on the political participation of citizens (Beckman, 2026, pp. 52–55). In the United States, the legal basis for felony disenfranchisement is rooted in the Supreme Court's decision in *Richardson v. Ramirez* (1974), which interpreted the 14th Amendment as allowing states to exclude citizens from voting based on "participation in rebellion, or other crime."

Similar restrictions exist in some European countries. For example, prisoners serving prison sentences in the United Kingdom are not allowed to vote while in countries such as Russia and Poland the court can impose the loss of political rights as an additional punishment (Glenn, 2024, pp. 102–105).

### *4.2. Introduction of competency or ability tests*

Another form of suffrage restriction involves the idea of introducing competency or ability tests as a requirement for political participation. Historically, literacy and political knowledge tests were used in the United States during the 19th and 20th centuries, particularly in the Southern states, to restrict the voting rights of certain social groups.

Although such practices have now been formally abandoned, contemporary political theory occasionally discusses the possibility of differentiating political rights based on the level of political knowledge or competence of voters (Brennan, 2016, pp. 15–18). In some political debates in countries such as Brazil and the Philippines, proposals to introduce certain forms of testing of political knowledge or civic competence have emerged, although such measures are generally not institutionalized.

### *4.3. Disqualifications related to financial debts*

A third form of disenfranchisement concerns disqualifications related to financial debts to the state. In some legal systems, unpaid taxes, fines, or other financial obligations can constitute grounds for restricting political rights. Such mechanisms are often justified by fiscal responsibility arguments, but they can also have a significant impact on the political participation of citizens with lower financial status (Cottrell-Sundevall & Kristjánsdóttir, 2024, pp. 96–101).

Examples of such practices can be found in some states in the United States, notably Florida, where the reinstatement of voting rights after serving a sentence may be conditional on the payment of all financial obligations to the state. Similar models exist in some Latin American countries, including Peru and Chile, where certain court judgments or public debt may affect the right to run for office or political participation (Glenn, 2024, pp. 141–143).

### *4.4. Restrictions related to dual citizenship*

Restrictions associated with dual citizenship represent another form of the narrowing of political rights. In some countries, citizens who hold the citizenship of another country may be restricted in exercising certain political rights, especially when it comes to candidacy for high public offices (Glenn, 2024, pp. 134–136).

Such provisions exist, among others, in countries such as Ukraine and Kazakhstan, where persons with dual citizenship cannot perform certain public functions. Similar questions have arisen in political discussions in countries such as Hungary and Serbia, especially in the

context of discussions about political loyalty and the influence of foreign countries on national political processes.

### *4.5. Group exclusions and special categories of citizens*

A particular form of disenfranchisement is the exclusion of certain social groups from the political process. Such exclusions can be formal or informal. Examples include people with mental disabilities, the homeless, or residents of certain territories who face administrative obstacles in the voter registration process (López-Guerra, 2014, pp, 73–76).

For example, residents of overseas territories of France, the United Kingdom and the Netherlands have specific forms of political representation that differ from those in their home countries. Also, in some European countries, such as Germany, the Czech Republic, and Romania, persons who are legally incapacitated may lose their right to vote, although such provisions have been subject to reform in recent years.

### *4.6. De facto disenfranchisement through administrative barriers*

One of the most widespread contemporary forms of narrowing the right to vote is the so-called de facto disenfranchisement through administrative obstacles. These obstacles do not imply a formal ban on voting but create procedural conditions that hinder or discourage citizens' participation in elections (Beckman, 2026, pp. 112–118).

Such measures include complex voter registration procedures, strict identification requirements, or changes to polling places. These practices have particularly been the subject of political and legal debate in the United States, where voter ID laws have been introduced in several states, including Texas, Georgia, and Wisconsin.

### *4.7. New forms of political censorship and banning of candidacy ("militant democracy 2.0")*

Modern political systems also use legal instruments to disqualify political actors who are considered a threat to constitutional order. In Brazil, for example, a law known as the Lei da Ficha Limpa prohibits politicians who have been convicted of certain crimes from running for office. The implementation of Lei Complementar nº 135/2010 (Lei da Ficha Limpa) in Brazil was upheld by the Supreme Federal Court (STF) in 2012, establishing that the restriction of eligibility based on prior criminal convictions is a legitimate tool for protecting the "probity and morality" of the democratic process.

Similar mechanisms exist in Spain, where political parties linked to terrorism are banned – in this country the banning of political entities is governed by the Organic Law 6/2002 on Political Parties (Ley de Partidos), which was notably applied by the Supreme Court and the Constitutional Court to outlaw parties like Batasuna due to their structural links with a terrorist organization – and in Germany, where the constitutional order provides for the possibility of banning political parties that act against the democratic constitutional system (Bateman, 2018, pp. 210–214).

## 5. CONCLUSION

In the 21st century, we are witnessing a subtle but persistent and globally widespread departure from the principle of universal suffrage – one of the greatest civilizational achievements

of modern democracy. Although universal suffrage is formally retained in most countries, the reality shows a gradual narrowing of the electorate through a variety of constitutional, legislative, and administrative techniques. These measures – from the extension of criminal disqualifications (especially in the USA, where in 2024/2025 around 4 million people remained excluded due to criminal convictions), through financial conditions and restrictions on dual citizenship, to de facto exclusion through increasingly complex registration and identification procedures – are often presented as necessary measures of security, fiscal responsibility, or the protection of democracy from itself ("militant democracy 2.0").

This logic reflects a shift toward the securitization of citizenship, where political membership is no longer an inherent right, but a conditional status earned through "competence" or loyalty. By utilizing the rhetoric of "protecting democracy," political elites redefine the community to exclude marginalized groups, effectively transforming inclusive universalism into a "managed" and exclusionary form of participation. This trend is neither accidental nor marginal; it is taking place in the context of a broader democratic backsliding which has been ongoing for 25 years. By utilizing the rhetoric of "protecting democracy," political elites redefine the community to exclude marginalized groups, effectively transforming inclusive universalism into a "managed" and exclusionary form of participation. This trend is neither accidental nor marginal; it is taking place in the context of a broader democratic backsliding which has been ongoing for 25 years. This logic is fundamentally linked to democratic backsliding, as political elites utilize the rhetoric of "protecting democracy" and "national security" to justify the exclusion of the marginalized groups that may challenge the populist or illiberal status quo. Consequently, these restrictive techniques serve as a tool for redefining the political community, moving away from inclusive universalism toward a more exclusionary and "managed" form of democratic participation.

Freedom of expression is declining in a record number of countries (44 in 2024), and global indices of representation and inclusive participation are reaching their lowest levels in two decades. These restrictions most often affect vulnerable and politically marginalized groups – convicts, minorities, diaspora, poorer strata, homeless, residents of remote territories – which indirectly changes the composition of the electorate in favor of political elites or majority groups.

Although contemporary exclusionary techniques are far less extensive and open-ended than those of the 19$^{th}$ century (property testing, racial or gender exclusion), they share the same logic: the idea that democracy is not self-sufficient and that it needs to be "corrected" in the name of competence, loyalty, security, or quality of decisions. Such an approach, supported by theoretical works such as Brennan's intercessory epistocracy, allows the regression toward a more restrictive understanding of political law to be legitimized with a progressive and security vocabulary.

The consequences of this process are serious and multifaceted: weakening democratic legitimacy, deepening polarization, declining trust in electoral processes, declining turnout, and – in the long term – the erosion of the very concept of equal political membership. If the trend continues, there is a real danger that, instead of being the inviolable minimum of democracy, universal suffrage will become merely an ideal that we are increasingly approaching only on paper.

Therefore, urgent action is needed at several levels:

- strengthening international oversight (ECtHR, UN HRC, V-Dem, IDEA, Freedom House) and more consistent sanctioning of disproportionate restrictions,
- revision and narrowing of criminal disqualifications to strictly proportional and individualized measures,
- caution and resistance to all forms of "competence" filters and epistocratic experiments,
- removing administrative obstacles that disproportionately affect vulnerable groups,
- support for reforms that expand, not narrow, access to voting rights (e.g., facilitated diaspora voting, automatic registration).

Only by continuously resisting the subtle erosion of universal suffrage and by strengthening institutional and social mechanisms for the protection of political equality can we prevent the 21st century from entering history as a century of the silent but systematic dismantling – instead of consolidating – of democracy. Further research should monitor not only normative changes but also their real effects on turnout, representativeness, and long-term stability of democratic systems.

## LIST OF REFERENCES

### *Books, articles and journals*


Bateman, D. 2018. *Disenfranchising Democracy: Constructing the Electorate and the United States, the United Kingdom, and France*. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108556323

Beckman, J. A. 2026. *Voter Suppression and Disenfranchisement: Examining the Facts*. New York: Bloomsbury Academic.

Bormeo, N. 2016. On Democratic Backsliding. *Journal of Democracy*, 27(1), pp. 5–19. https://doi.org/10.1353/jod.2016.0012

Brennan, J. 2016. *Against Democracy*. Princeton: Princeton University Press.

Brennan, J. 2011. The Right to a Competent Electorate. *The Philosophical Quarterly*, 61(245), pp. 700–724. https://doi.org/10.1111/j.1467-9213.2011.699.x

Cottrell-Sundevall, F. & Kristjánsdóttir, R. 2024. *Suffrage, Capital, and Welfare: Conditional Citizenship and Historical Perspective*. Cham: Palgrave Macmillan. https://doi.org/10.1007/978-3-031-69864-4

Glenn, R. A. 2024. *Voting Rights in America: A Reference Handbook*. Santa Barbara: Bloomsbury Academic.

Levitsky, S. & Ziblatt, D. 2018. *How Democracies Die*. Harvard: Harvard University Press.

López-Guerra, C. 2014. *Democracy and Disenfranchisement: The Morality of Electoral Exclusions*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198705789.001.0001

Mounk, Y. 2018. *The People vs. Democracy*. Harvard: Harvard University Press. https://doi.org/10.4159/9780674984776

Müller, J. W. 2016. *What Is Populism?*. Philadelphia: University of Pennsylvania Press. https://doi.org/10.9783/9780812293784


### *Judgments, verdicts and other court decisions*


*Hirst v. United Kingdom* (no. 2), Application no. 74025/01, the judgment of 6 October 2005.

*Richardson v. Ramirez* (1974), 418 U.S. 24 (1974).
*Scoppola v. Italy* (no .3), Application no. 126/05, the judgment of 22 May 2012.

***Reports***

Democracy Report 2024, 25 Years of Autocratization – Democracy Trumped. Available at: https://www.v-dem.net/documents/60/V-dem-dr__2025_lowres.pdf (30. 3. 2026).
Freedom and the World 2025, Freedom House. Available at: https://freedomhouse.org/sites/default/files/2025-02/FITW_World_2025_Feb.2025.pdf (30. 3. 2026).
The Global State of Democracy 2025, Democracy on the Move. Available at: https://www.idea.int/publications/catalogue/html/global-state-democracy-2025-democracy-move (30. 3. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch16

***Fernanda FLORENTINO FERNANDEZ JANKOV****

# PLATFORM GOVERNANCE AND THE DUTY TO ACT RESPONSIBLY WITHIN SYSTEMS-BASED REGULATION

*The regulation of digital platforms is undergoing a significant transformation. Traditional regulatory models relied primarily on intermediary liability rules and reactive enforcement mechanisms, focusing on the removal of unlawful content after notification. More recent legislative frameworks, however, increasingly adopt systems-based approaches that require platforms to identify and manage systemic risks generated within their communication environments. This article offers a comparative analysis of three influential regulatory models: the United States' intermediary immunity regime, the European Union's Digital Services Act, and Canada's proposed Online Harms Act. While these frameworks differ significantly in structure and regulatory ambition, they collectively illustrate a broader shift in platform governance—from ex post liability toward proactive risk management and structured internal decision-making.*

*The article argues that this transformation reshapes the institutional role of digital platforms. Rather than functioning solely as intermediaries responding to unlawful content, platforms are increasingly required to interpret regulatory standards, assess systemic risks, and implement mitigation measures within their own governance systems. As a result, regulatory scrutiny increasingly focuses not only on individual moderation decisions but also on the adequacy of the internal structures through which platforms observe, assess, and mitigate risks. Understanding this emerging regulatory architecture is therefore essential for evaluating accountability and the protection of fundamental rights in the evolving governance of digital communication systems.*

***Keywords:*** platform governance, intermediary liability, Digital Services Act, algorithmic governance, risk-based regulation.

## 1. INTRODUCTION

The governance of harmful online content has undergone a significant transformation over the past decade. What began as a debate centred on intermediary liability and voluntary content moderation has gradually evolved into a broader reconsideration of the regulatory

* PhD, TEP (Trust and Estate Practitioner, STEP Switzerland), is a legal scholar affiliated with the Faculty of Law of the University of São Paulo (USP) and an attorney licensed to practice law in Brazil and Portugal, ORCID: https://orcid.org/0009-0007-9737-4293, email: *fernanda.jankov@usp.br*

responsibilities of digital platforms. Early regulatory approaches focused primarily on reactive mechanisms—such as notice-and-takedown procedures or the *post hoc* removal of unlawful content. Contemporary regulatory frameworks, however, increasingly impose proactive and systemic obligations on major online services, requiring them to anticipate and mitigate risks associated with the dissemination of harmful material.

In the United States, the regulatory landscape remains anchored in Section 230 of the Communications Decency Act (1996) and the strong constitutional protection afforded to speech under the First Amendment of the U.S. Constitution. This model preserves a relatively clear institutional distinction between public adjudication and private moderation. Platforms retain broad discretion to manage user-generated content through their own community standards, while courts remain the primary institutions responsible for applying and enforcing legal norms governing speech.

By contrast, the European Union has developed a more structured regulatory approach to digital platform governance. The Digital Services Act (2022) introduces layered due diligence obligations for online intermediaries, including systemic risk assessments and mitigation duties applicable to very large online platforms. Although public authorities retain supervisory powers through national Digital Services Coordinators (Digital Services Act, 2022. Arts. 49–51) and the European Commission (Digital Services Act, 2022. Arts. 56–60), the regulatory architecture increasingly requires platforms to internalise compliance and risk-management mechanisms within their organizational and technical infrastructures.

More recently, Canada's proposed Online Harms Act (Bill C-63), introduced in 2024 but not enacted prior to parliamentary dissolution, advanced a systems-based regulatory model centred on a statutory "duty to act responsibly"[1]. The proposed framework would have required regulated services to assess, mitigate, and prevent the circulation of harmful content through structured internal governance mechanisms extending beyond traditional notice-and-removal practices. Even in its unenacted form, the proposal illustrates an emerging legislative trend toward embedding public policy objectives directly within platform operations.

These developments reflect what Balkin (2018. p. 1149) has described as the rise of "algorithmic governance", in which digital infrastructures increasingly shape the conditions of public discourse. Regulation no longer operates solely as an external constraint imposed by the state upon private actors. Instead, contemporary legislative frameworks increasingly require platforms to integrate risk assessment, norm interpretation, and enforcement processes into their internal governance architectures.

From a broader theoretical perspective, this regulatory evolution can also be understood through the lens of sociological theories of risk governance. In Niklas Luhmann's social systems theory (Luhmann, 2005), modern societies increasingly attribute potential harms not merely to external dangers but to decisions embedded within institutional structures operating under conditions of complexity. Regulatory frameworks that require platforms to assess and mitigate systemic risks therefore reflect a wider transformation in the management of uncertainty: responsibility becomes progressively linked to the design and operation of decision-making infrastructures rather than solely to the *ex post* adjudication of unlawful acts.

This article examines whether such regulatory developments represent incremental refinements of intermediary liability regimes or a more substantive transformation in the

[1] Requiring operators of regulated services to implement measures to mitigate risks of exposure to harmful content.

allocation of regulatory functions. When platforms are required to identify risks, interpret statutory categories of harm, impose restrictions, and operate internal complaint mechanisms, they perform functions that bear structural similarities to processes traditionally associated with the implementation of legal norms. The purpose of this study is not to suggest a displacement of public authority, but rather to analyse how contemporary regulatory design reshapes the operational dynamics through which digital governance is exercised.

Through a comparative analysis of the United States, the European Union, and Canada, this paper explores how different jurisdictions conceptualise the relationship between freedom of expression, systemic accountability, and platform responsibility. By situating the Canadian proposal alongside established American and European regulatory models, the study seeks to clarify how systems-based frameworks reconfigure the practical implementation of public norms within digital constitutional democracies.

To frame this inquiry more precisely, this article advances the hypothesis that contemporary systems-based platform regulation represents more than a refinement of traditional intermediary liability regimes. Rather, it constitutes a structural reallocation of regulatory functions, whereby private platforms are increasingly required to internalise public governance responsibilities through risk assessment, mitigation duties, and institutionalised internal decision-making processes. The comparative analysis developed in this study examines how this transformation manifests differently across the United States, the European Union, and Canada.

At the same time, when regulatory frameworks require platforms to interpret statutory categories of harm, assess systemic risks, and implement mitigation measures within their internal systems, the quality of the decision-making processes through which those obligations are operationalised becomes a matter of normative significance. Questions concerning coherence, transparency, and accountability therefore emerge as central concerns. In this context, examining the governance structures through which platforms observe, evaluate, and respond to systemic risks becomes essential for understanding how contemporary regulatory models seek to balance platform responsibility, freedom of expression, and democratic oversight in the evolving architecture of digital governance.

## 2. MODELS OF PLATFORM GOVERNANCE IN CONTEMPORARY REGULATION

### *2.1. The American Model: Immunity, Editorial Discretion and Institutional Separation*

The regulatory framework governing online platforms in the United States is built upon a combination of statutory intermediary immunity under Section 230 of the Communications Decency Act (CDA) and the strong constitutional protection of speech under the First Amendment. In institutional terms, this arrangement sustains a relatively clear separation between the public adjudication of legal norms by courts and the private moderation practices carried out by digital platforms.

Section 230(c)(1) provides that no provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another content provider (Communications Decency Act, 1996, § 230(c)(1)). In the United States, where judicial

precedent plays a central role in shaping the interpretation of statutory frameworks, courts have consistently construed this provision broadly, shielding platforms from liability arising from third-party content. The seminal decision in *Zeran v. America Online, Inc*. established that Section 230 bars claims that would treat an intermediary as the publisher of user-generated material (*Zeran v. America Online, Inc*., 129 F.3d 327 (4th Cir. 1997)). Subsequent case law has reinforced this expansive interpretation, extending immunity to a wide range of civil claims, including negligence and failure-to-remove allegations (see, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119 (9th Cir. 2003); *Fair Housing Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); *Force v. Facebook, Inc*., 934 F.3d 53 (2d Cir. 2019)). The rationale underlying this interpretation has been the preservation of an open and innovative digital environment, free from excessive litigation burdens.

At the same time, Section 230(c)(2) allows platforms to engage in voluntary content moderation in good faith. This combination of immunity and discretionary moderation authority has shaped what is often described as a "market self-regulation" model.[2] Platforms retain broad autonomy to define community standards and to remove or restrict content according to private policies, while courts remain the primary institutions authorised to determine the legality of speech under constitutional and statutory standards.

Recent litigation has tested the contours of this arrangement. In *Moody v. NetChoice, LLC*, the United States Supreme Court addressed state-level attempts to regulate platform moderation practices (*Moody v. NetChoice, LLC*, 603 U.S. (2024)). Although the decision did not fundamentally alter Section 230 immunity, it underscored the constitutional sensitivity surrounding compelled hosting, editorial discretion, and the role of private platforms in structuring public discourse. As the Court observed, "the First Amendment protects the right of a private speaker to exercise editorial control over the speech it disseminates" (*Moody v. NetChoice*, LLC, 603 U.S. (2024) (slip op.)). The case illustrates the ongoing tension between legislative efforts to impose obligations on platforms and the constitutional commitment to freedom of expression.[3]

Scholarly analysis has increasingly described this environment as one of algorithmic governance—or, in Balkin's formulation, the emergence of an "algorithmic society" in which digital infrastructures shape the conditions of speech through design, ranking, and moderation practices (Balkin, 2018, pp. 1149–1210; Klonick, 2018, pp. 1598–1670). Nevertheless, under the American model, the authority to apply binding legal norms remains institutionally anchored in courts.[4] Platforms may structure speech environments and exercise significant practical

[2] For influential analyses describing the emergence of private governance of online speech, see Balkin, 2018, pp. 1149–1210; Klonick, 2018, pp. 1598–1670.

[3] The central role of judicial precedent in shaping the interpretation of statutory and constitutional norms is a defining feature of the American common law system. In the context of intermediary liability and platform governance, courts have played a particularly significant role in construing the scope of Section 230 and the constitutional protections applicable to private moderation practices. For scholars and practitioners trained in civil law traditions, the operative contours of the regulatory framework therefore emerge not only from statutory provisions but also from the cumulative development of case law.

[4] In the United States, the interpretation and application of statutory and constitutional norms governing online speech have largely developed through judicial decisions. Courts have played a central role in defining the scope of intermediary immunity under Section 230 of the Communications Decency Act and

influence over the visibility and distribution of speech, but they are not formally charged with the proactive implementation of statutory duties to assess systemic risks or prevent harm prior to circulation. Their role remains framed primarily as an exercise of private editorial discretion rather than as a statutory obligation to operationalise public norms. This institutional configuration preserves a clearer conceptual boundary between adjudication by public authorities and moderation by private actors and stands in contrast to emerging European regulatory frameworks that increasingly assign platforms ex ante responsibilities for assessing and mitigating systemic risks associated with online communication.[5]

### *2.2. The European Union: Systemic Risk with Public Oversight*

In contrast to the American model, the European Union has progressively developed a more structured regulatory approach to digital platform governance. Earlier frameworks, most notably the E-Commerce Directive (2000), relied primarily on conditional liability exemptions for intermediary service providers combined with notice-and-takedown mechanisms for the removal of unlawful content. This framework established the foundational "safe harbour" regime for hosting services while prohibiting general monitoring obligations (E-Commerce Directive, 2000). Recent legislative developments, however, reflect a shift toward systemic accountability.

The Digital Services Act (2022) represents the most comprehensive articulation of this model. Rather than merely clarifying intermediary liability, the DSA introduces a system of graduated due diligence obligations that vary according to the nature, size, and societal impact of digital services. In particular, Very Large Online Platforms (VLOPs)—defined as platforms reaching at least 45 million average monthly active recipients of the service in the European Union—are subject to enhanced responsibilities. These include systemic risk assessments, risk mitigation measures, independent audits, and extensive transparency obligations, reflecting the regulation's emphasis on the proactive governance of systemic risks associated with online communication (Digital Services Act, 2022. Arts. 33–37).

In this regard, Articles 34 and 35 of the Digital Services Act establish a structured obligation requiring Very Large Online Platforms to identify and assess systemic risks related to the dissemination of illegal content, the protection of fundamental rights, civic discourse, and public security, and to implement reasonable, proportionate, and effective mitigation measures in response. These obligations move beyond the traditional reactive model of unlawful content removal. Instead, they require platforms to evaluate how the design and operation of their services—including recommender systems, algorithmic ranking mechanisms, and internal governance structures—may contribute to harmful societal outcomes (Digital Services Act, 2022. Arts. 34–35; see also Recital 79).

At the same time, the Digital Services Act (DSA) preserves a robust framework of public oversight. National Digital Services Coordinators and, in certain circumstances, the European

in determining the constitutional limits of speech regulation. See, e.g., *Zeran v. America Online, Inc*., 129 F.3d 327 (4th Cir. 1997); *Moody v. NetChoice, LLC*, 603 U.S. (2024). The centrality of judicial precedent in shaping the operative content of legal norms reflects a defining methodological feature of the common law tradition.

[5] For analyses describing the private governance of online speech in the United States and the contrasting emergence of systemic risk regulation in the European Union, see Balkin, 2018, pp. 1149–1210; Klonick, 2018, pp. 1598–1670. On the European approach introducing ex ante systemic risk obligations for very large online platforms, see Digital Services Act, 2022, Arts. 34–35.

Commission retain supervisory and enforcement authority over platform compliance (Digital Services Act, 2022, Arts. 66–74). Platforms designated as very large online platforms (VLOPs) must publish periodic transparency reports, provide access to platform data for vetted researchers, and comply with formal orders issued by competent authorities regarding illegal content or information requests (Digital Services Act, 2022, Arts. 9–10, 15 and 40). The regulation therefore embeds systemic risk management within platform operations while maintaining institutional control within public regulatory bodies.

This architecture reflects a calibrated regulatory design. Platforms are not granted autonomous authority to determine the meaning or application of legal norms independently of state institutions. Rather, they are required to implement structured compliance mechanisms under detailed legislative guidance and subject to external supervision. The DSA does not prescribe fixed timeframes for removal in the same manner as Germany's earlier Network Enforcement Act (NetzDG), nor does it impose a general monitoring obligation (Digital Services Act, 2022, Art. 8).[6] Instead, it emphasizes proportionality, procedural safeguards, and the protection of fundamental rights within the internal decision-making processes of platforms.

Nevertheless, the European framework signals an important evolution. By mandating systemic risk assessments and governance structures, the DSA requires platforms to internalise regulatory objectives within their operational architectures. VLOPs must identify and assess systemic risks arising from the functioning and use of their services and implement reasonable and proportionate mitigation measures addressing those risks (Digital Services Act, 2022, Arts. 34–35). Decisions concerning content prioritization, recommender systems, and enforcement practices therefore increasingly occur within private infrastructures, even where they remain subject to public oversight.

Compared to the United States, the European model narrows the gap between platform moderation and public regulatory objectives. However, it stops short of fully relocating the application of legal norms to private actors. The institutional centre of adjudication remains anchored in public authorities: enforcement powers, investigations, and sanctions remain within the competence of Digital Services Coordinators and, for VLOPs, the European Commission (Digital Services Act, 2022, Arts. 51–52). Platforms therefore operate within a clearly articulated supervisory framework rather than exercising independent regulatory authority.

In practical terms, these obligations may require very large online platforms to establish recurring internal risk-assessment processes, review how recommender systems and ranking mechanisms may contribute to the amplification of harmful content, document mitigation measures adopted in response, strengthen internal complaint and reporting channels, and maintain compliance structures capable of responding to regulatory audits or information requests. The practical significance of the DSA lies in integrating substantive obligations and institutionalised governance procedures into the operational structures of platforms.

The result is a hybrid configuration: private implementation of public obligations under structured regulatory control. This approach provides an intermediate reference point for evaluating more ambitious systems-based proposals, such as Canada's Online Harms Act. It illustrates how regulatory design can progressively embed compliance and risk-management

[6] On the contrasting German approach, see Network Enforcement Act (NetzDG) and its requirement that platforms assess reported content and remove or block illegal content within short timeframes. See also Max Planck Institute for the Study of Crime, Security and Law, *NetzDG and Human Rights*.

functions within platform operations while preserving institutional accountability through public oversight mechanisms, an issue examined in the following section.

### *2.3. Canada's Proposed Online Harms Act: Systems-Based Duty and Structured Internal Governance*

Canada's proposed Online Harms Act (Bill C-63), introduced in 2024 but not enacted prior to parliamentary dissolution, represents one of the clearest attempts to articulate a systems-based approach to digital platform regulation. Even in its unenacted form, the proposal illustrates a regulatory design that moves beyond reactive content removal and toward proactive governance obligations embedded within platform infrastructures (Bill C-63, 2024).

At the centre of the proposed framework was a statutory "duty to act responsibly" (Bill C-63, 2024. p. 7). Rather than focusing solely on notice-and-removal mechanisms, the bill would have required regulated services to identify, assess, and mitigate the risk of exposure to harmful content on their platforms (Bill C-63, 2024, pp. 55–56). The regulatory emphasis therefore shifted from individual items of unlawful content to systemic risk management. Platforms would have been required to establish internal processes designed to prevent the amplification and circulation of categories of harmful material, including hate speech, incitement to violence, non-consensual intimate image distribution, and certain forms of large-scale disinformation (Bill C-63, 2024, Part 1, pp. 12–20).

In regulatory terms, systems-based risk management refers to an approach in which legal obligations are directed not only at individual instances of illegal content but also at the structural features of platform design and operation that shape the distribution and amplification of content online. Instead of adjudicating content item by item, platforms are required to assess systemic characteristics of their services—such as recommendation algorithms, amplification mechanisms, and moderation infrastructures—and to implement mitigation measures aimed at reducing the likelihood that harmful material will circulate at scale (Stephenson & Rinceanu, 2024, pp. 245–260).

This design reflects a structural evolution in regulatory technique. Instead of positioning platforms merely as intermediaries responding to complaints, the proposal required them to operationalise legislative objectives through structured governance mechanisms. Risk assessment, mitigation strategies, transparency obligations, and internal complaint procedures were conceived as integrated components of platform compliance architecture (Stephenson & Rinceanu, 2024, pp. 245–260).[7]

In operational terms, the proposed framework would likely have required regulated services to establish internal safety governance systems, develop recurring risk-assessment procedures, implement mitigation protocols for harmful content categories, maintain complaint and review mechanisms, and preserve documentary records demonstrating compliance with the statutory duty to act responsibly. Its significance lies in translating legislative objectives into ongoing internal governance responsibilities within platform infrastructures.

Importantly, the proposed Act did not eliminate public oversight. It envisaged the creation of a Digital Safety Commission of Canada with supervisory and enforcement authority, thereby maintaining an institutional role for public regulators (Bill C-63, 2024, Part 1, pp. 81–136). Nevertheless, the practical implementation of statutory standards would have occurred within platform systems themselves. Corporate compliance bodies and content

[7] For broader analysis of systems-based regulatory models, see also: Balkin, 2018, pp. 1149–1210.

moderation teams would have been tasked with interpreting statutory categories of harm, determining operational thresholds for intervention, and applying enforcement measures such as removal, restriction, or demotion of content.

In this respect, the Canadian proposal illustrates a more pronounced embedding of public regulatory objectives within private infrastructures than either the American or the European model. While the United States preserves a strong separation between public adjudication and private moderation, and the European Union combines systemic obligations with robust supervisory oversight, the Canadian framework more directly structured platforms as proactive risk managers operating under statutory mandate.

The significance of this model lies not in the transfer of formal adjudicative authority to private actors, but in the reconfiguration of where and how norm implementation occurs. Under a systems-based duty, the first instance of assessment—whether particular content falls within legislatively defined categories of harm and whether mitigation measures are required—would take place within platform governance systems before any intervention by courts or regulators. Public institutions would retain supervisory and review functions, yet the operational application of statutory standards would be embedded within private decision-making architectures.

Even though Bill C-63 was not enacted, its design signals an emerging regulatory trajectory. It reflects a growing willingness among legislators to require platforms to internalise harm prevention as a structural obligation rather than as a reactive response. This systems-based approach raises important analytical questions about accountability, procedural safeguards, and the balance between proactive governance and freedom of expression. These questions become particularly salient when comparing the Canadian proposal to the American emphasis on editorial discretion and the European model of supervised systemic compliance (Stephenson & Rinceanu, 2024, pp. 245–260, see also: Balkin, 2018, pp. 1149–1210). Understanding this regulatory shift requires examining the conceptual foundations of systems-based governance and the role of risk management in contemporary regulatory theory.

## 3. THE DUTY TO ACT RESPONSIBLY AND RISK GOVERNANCE IN PLATFORM REGULATION

### *3.1. Systems-Based Regulation and the Management of Harm*

The emergence of systems-based regulatory frameworks reflects a broader transformation in how contemporary legal systems address complex technological risks. Rather than relying exclusively on *ex post* enforcement mechanisms, modern governance increasingly emphasizes anticipatory risk management, requiring regulated actors to identify, evaluate, and mitigate potential harms before they fully materialize (Black, 2005, pp. 510–546).

As the comparative analysis developed in the previous section has shown, the regulatory models examined here—particularly those of the European Union and the Canadian proposal—reflect an emerging shift toward systemic risk management in platform governance (Digital Services Act, 2022, Arts. 34–35; Bill C-63, 2024). These frameworks do not rely solely on the removal of unlawful content after its circulation. Instead, they impose obligations requiring platforms to evaluate systemic risks associated with the functioning of their

infrastructures and to implement preventive governance mechanisms designed to mitigate such risks (Stephenson & Rinceanu, 2024, pp. 245–260).

This shift reflects a broader regulatory logic in which attention moves from isolated violations toward the structural conditions that enable harmful communication dynamics. In this model, regulatory intervention no longer focuses exclusively on the legality of individual pieces of content. Rather, it increasingly addresses the systemic environments in which digital communication occurs, and the institutional responsibilities associated with managing the risks generated by those environments.

Such developments can be more clearly understood through the analytical perspective offered by systems theory, particularly the work of Niklas Luhmann, who conceptualises risk as an intrinsic feature of decision-making in complex social systems (Luhmann, 2005). In Luhmann's framework, risk differs from danger: while danger refers to harm originating from external factors beyond the control of decision-makers, risk refers to harm that can be attributed to decisions taken within institutional structures (Luhmann, 2005). Modern institutions therefore operate under conditions of increasing complexity, where decisions must be taken despite limited knowledge about their potential consequences. When an institution selects one course of action among several possible alternatives, it simultaneously assumes responsibility for the risks generated by that decision (Luhmann, 2005).

Digital platforms operate within precisely such environments. Their infrastructures facilitate large-scale communication processes in which information circulates rapidly across interconnected networks and unpredictable patterns of interaction emerge (Balkin, 2018, pp. 1149–1210). Under these conditions, harmful outcomes cannot be fully prevented through traditional legal adjudication alone. Instead, regulatory frameworks increasingly require platforms to develop governance mechanisms capable of identifying patterns of risk and mitigating their potential effects (Digital Services Act, 2022, Arts. 34–35).

These developments suggest the gradual emergence of a regulatory model in which the management of digital harms increasingly occurs through proactive risk-management obligations embedded within platform infrastructures. Rather than relying solely on reactive enforcement after harm has occurred, systems-based regulation requires platforms to anticipate potential harms and adopt governance processes designed to mitigate foreseeable risks generated by their own communication environments (Stephenson & Rinceanu, 2024, pp. 245–260).

From this perspective, contemporary platform regulation seeks not to eliminate all harmful outcomes—an impossible objective in complex communication systems—but to ensure that platforms assume institutional responsibility for managing the risks generated by their infrastructures. Proactive risk management therefore becomes a central component of modern regulatory approaches to digital platforms, shifting regulatory attention from the adjudication of individual pieces of content toward the governance of the infrastructures through which digital communication occurs (Luhmann, 2005).

### *3.2. Decision-Making Structures in Platform Governance*

The regulatory shift toward systemic risk management also entails a transformation in the institutional role of digital platforms. When platforms are required to identify risks, interpret regulatory obligations, and implement mitigation measures affecting the circulation of information, they necessarily engage in forms of structured decision-making within their governance systems (Stephenson & Rinceanu, 2024, pp. 245–260).

Although these decision-making processes remain formally situated within private organizational infrastructures, they increasingly involve the interpretation of regulatory standards, the evaluation of potentially harmful communication dynamics, and the adoption of measures that may affect the visibility, distribution, or removal of content. In this respect, platform governance increasingly operates at the intersection of private organizational management and the implementation of public regulatory objectives (Balkin, 2018, pp. 1149–1210). In this sense, platforms operate within regulatory environments in which the implementation of legal norms is partially mediated through internal governance mechanisms.

Within these frameworks, platforms increasingly function as institutional actors responsible for the management of systemic communication risks. Their governance architectures may include internal review procedures, risk-assessment protocols, algorithmic moderation systems, and complaint or appeal mechanisms through which enforcement decisions can be examined and potentially revised (Digital Services Act, 2022, Arts. 14, 16–17, 20, 34–35). From the perspective of systems theory, such governance mechanisms can be understood as organizational decision structures through which institutions process uncertainty and attribute responsibility for the risks generated by their own operations (Luhmann, 2005).

The emergence of these structures reflects the broader regulatory strategy discussed throughout this article. Rather than relying exclusively on external enforcement by courts or administrative authorities, contemporary regulatory frameworks increasingly require platforms themselves to develop institutional capacities for risk observation, evaluation, and mitigation within their own infrastructures (Bill C-63, 2024).

This development does not imply that platforms replace public authorities or assume the role of judicial institutions. However, it does indicate that regulatory design increasingly situates certain forms of decision-making within platform governance systems themselves. These processes therefore constitute a form of institutionally structured decision-making embedded within digital infrastructures, through which regulatory objectives are operationalised in practice (Luhmann, 2005). These internal governance processes therefore contribute to the practical redistribution of decision-making authority in digital communication environments, even where formal jurisdiction remains located within public institutions (Digital Services Act, 2022, Arts. 14, 16–17, 20, 34–35). As digital communication environments continue to evolve, these internal governance processes are likely to play an increasingly significant role in shaping how regulatory norms are implemented in practice.

For this reason, examining how platforms organize and exercise these decision-making functions becomes an important element in understanding contemporary models of digital governance. At the same time, the increasing reliance on internal governance mechanisms raises questions regarding the forms of oversight that may apply to these decisions. Where platforms interpret regulatory obligations and adopt mitigation measures under statutory frameworks, courts may be called upon to review whether these processes satisfy the legal standards established by regulation and whether the "duty to act responsibly" in the management of systemic risks has been fulfilled (Digital Services Act, 2022, Arts. 45–51).

## 4. CONCLUSION

The comparative analysis of the United States, the European Union, and Canada reveals a significant transformation in the regulatory architecture governing digital platforms. While the

American model continues to emphasize intermediary immunity and the protection of editorial discretion, and the European framework embeds systemic obligations within a robust supervisory structure, more recent systems-based proposals such as Canada's Online Harms Act reflect a growing legislative commitment to proactive risk management and structured internal governance.

This transformation does not amount to a formal transfer of adjudicative authority to private actors. Courts and regulatory bodies remain central to the institutional framework of digital governance, and public oversight continues to provide the foundation for regulatory legitimacy. Yet the operational site at which public norms are implemented increasingly lies within platform infrastructures themselves. Platforms are required not only to remove unlawful content when notified, but also to identify systemic risks, interpret legislative standards, and implement mitigation measures through internal governance processes embedded within their own decision-making systems.

Recognizing the functional resemblance between such processes and traditional forms of norm application does not collapse the distinction between public and private authority. Rather, it clarifies how contemporary regulatory design reshapes the practical dynamics of governance in digital constitutional democracies. As systems-based obligations become more prominent, the focus of regulatory oversight gradually shifts from isolated enforcement decisions toward the adequacy of the institutional structures through which platforms observe, assess, and mitigate systemic risks within their communication environments.

From this perspective, accountability increasingly depends on the standards used to evaluate whether platforms have fulfilled their statutory duty to act responsibly. Regulatory and judicial scrutiny is therefore likely to focus less on individual moderation outcomes and more on whether platforms have implemented coherent risk-assessment processes, developed appropriate mitigation strategies, and maintained governance architectures capable of identifying and responding to emerging harms. In systems-theoretical terms, risk arises not simply from uncertainty but from decisions taken within institutional structures operating under conditions of complexity. Where platforms are required to manage systemic risks generated by their own infrastructures, the responsibility attached to those decisions becomes a central concern of regulatory design.

Future regulatory debates will therefore turn on how best to preserve accountability and fundamental rights while embedding proactive responsibilities within private communication infrastructures. The challenge is not merely to allocate liability after harm has occurred, but to articulate legal and institutional standards capable of guiding and evaluating the structured discretion exercised by platforms under statutory mandates of systemic risk management. In this sense, the evolution of digital governance illustrates a broader transformation in regulatory thought: the task of law increasingly lies not only in adjudicating individual violations but also in shaping the institutional conditions through which complex communication systems generate, observe, and respond to risk. Sustained comparative analysis will remain essential to understanding how constitutional principles, regulatory institutions, and private infrastructures interact in the ongoing development of governance in the algorithmic society.

## LIST OF REFERENCES

### *Books and Articles*

Balkin, J.M. 2018. Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation. *UC Davis Law Review*, 51, pp. 1149–1210.

Black, J. 2005. The Emergence of Risk-Based Regulation and the New Public Risk Management. *Public Law*, Autumn 2005, pp. 510–546.
Klonick, K. 2018. The New Governors: The People, Rules, and Processes Governing Online Speech. *Harvard Law Review*, 131(6), pp. 1598–1670.
Luhmann, N. 2005. *Risk: A Sociological Theory*. With a new introduction by N. Stehr and G. Bechmann. London/New York: Routledge.
Stephenson, R. & Rinceanu, J. 2024. Differential Diagnosis in Online Regulation: Reframing Canada's "Systems-Based" Approach. *eucrim – The European Criminal Law Associations Forum*, 3, pp. 245–260. https://doi.org/10.30709/eucrim-2024-007

***Reports and Online Sources***

Rinceanu, J. n.d. *NetzDG and Human Rights*. Max Planck Institute for the Study of Crime, Security and Law. Available at: https://csl.mpg.de/en/projects/netzdg-and-human-rights (24. 4. 2026).
Rinceanu, J. & Stephenson, R. n.d. *Rethinking Digital Media Regulation*. Max Planck Institute for the Study of Crime, Security and Law. Available at: https://csl.mpg.de/en/projects/rethinking-digital-media-regulation (24. 4. 2026).

***Legislation***

Canada. 2024. *Bill C-63: An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and related Acts*, 1st Sess., 44th Parl. (first reading 26 February 2024).
European Union. 2022. *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act).*
Germany. 2017. *Network Enforcement Act (NetzDG).*
United States. 1996. *Communications Decency Act, 47 U.S.C. § 230.*

***Cases***

*Blumenthal v. Drudge,* 992 F. Supp. 44 (D.D.C. 1998).
*Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119 (9th Cir. 2003).
*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).
*Force v. Facebook, Inc.,* 934 F.3d 53 (2d Cir. 2019).
*Jones v. Dirty World Entertainment Recordings LLC,* 755 F.3d 398 (6th Cir. 2014).
*Moody v. NetChoice, LLC* (2024) Supreme Court of the United States.
*NetChoice, LLC v. Moody* (2022) 34 F.4th 1196 (11th Cir.).
*Zeran v. America Online, Inc.* (1997) 129 F.3d 327 (4th Cir.).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch17

*Helga ŠPADINA**

# AUTOMATED PERFORMANCE MANAGEMENT AND DECISION MAKING IN THE EU LABOR RELATIONS

*The digitalization of labour is fundamentally reshaping the employment, transitioning from traditional, human-centric performance management toward decentralized work governed by algorithmic supervision. This shift is characterized by the rise of precarious, data-driven arrangements—such as zero-hour and short-term contracts—that catalyse a significant re-regulation of labour relations. Drawing on OECD (2025) data, this paper analyses the rapid adoption of AI-driven monitoring and evaluation tools across global markets, noting significant impact on managerial autonomy versus worker protection.*

*While employers favour these technologies for efficiency and productivity gains, the automation of high-stakes decisions—such as performance appraisals and contract terminations—introduces profound psychological risks, including the "robotization" of labour and the erosion of worker dignity. The paper critically examines the exacerbation of historical power asymmetries and the contentious nature of "informed consent" in subordinate employment.*

*Centrally, the study evaluates the European Union's legislative response, specifically the Platform Work Directive (EU) 2024/2831 and the AI Act (Regulation 2024/1689). These frameworks introduce critical safeguards, including the rebuttable presumption of employment, „human-in-the-loop" mandates, and the prohibition of invasive biometric and emotion-inference monitoring. By synthesizing these legal developments, the paper argues for human-centric regulatory approach to ensure that technological innovation does not dismantle the fundamental rights and social architecture of the world of work, while in the same promoting and supporting innovation and further digital development.*

***Keywords**:* artificial intelligence, automated decisions, GDPR, employment.

## 1. INTRODUCTION

Since the formalization of labour relations and their subsequent regulation, labour law has undergone a continuous evolution in response to shifting political, socio-economic, and

* Associate Professor, Department of Labour and Social Law and Social Work, Faculty of Law Osijek, Croatia, ORCID: https://orcid.org/0000-0002-5826-176X, e-mail: *hspadina@pravos.hr*

ideological environments. Historically, this regulatory landscape has functioned primarily *ex post*, adapting to industrial changes only after their societal impacts became manifest. In recent years, the introduction and integration of artificial intelligence (AI) have precipitated a profound transformation in the nature of work. This systemic shift—characterized here as "digital labour revolution" or "digivolution"—represents a radical departure from the traditional labour paradigms established by the International Labour Organization (ILO), marking a transition from analogue industrial models to a data-driven digital reality.

AI-driven systems are now extensively deployed across the employment lifecycle, including recruitment, task allocation, and workflow management. Automated performance management has evolved from rudimentary screening and psychometric testing to sophisticated, real-time productivity monitoring and algorithmic performance evaluation. Crucially, the increasing reliance on AI for performance assessment introduces the possibility of fully automated decision-making regarding labour rewards or, more contentiously, the unilateral termination of employment contracts.

While digitalization offers significant advantages—including enhanced operational efficiency, remote work flexibility, and improved work-life balance—these benefits must be balanced against the inherent risks to worker labour protection. Although the utility of digital tools is substantial, it does not obviate the need for rigorous legal oversight within existing international, regional, and national frameworks. Labour regulation traditionally suffers from a "regulatory lag", struggling to respond rather than to prevent statutory protections of workers in circumstances of rapid technological advancement. To mitigate these challenges, the European Union has pioneered a regulatory response, primarily through the General Data Protection Regulation (GDPR), the EU AI Act, and the Platform Work Directive, the latter of which specifically addresses the nuances of algorithmic management and automated dismissal.

The structure of this paper is as follows: Part II explores the flexibilization of employment, contrasting employer and worker perspectives on innovative AI management tools. Part III analyses the specific EU legal mechanisms governing the termination of employment via automated decision-making. Part IV outlines the landmark case law in the area of automated performance management and decision making. Part V identifies critical gaps in the current framework and highlights areas of concern regarding automated contract termination that demand urgent judicial, legislative, and corporate attention.

## 2. TRANSITION FROM IN-PERSON WORK TO IMPERSONAL WORK

The digitalization of labour is fundamentally reshaping the traditional employment paradigm, shifting from presence-based management and human-centric office cultures toward decentralized workforces governed by algorithmic supervision and output-oriented metrics. This transition is characterized by the replacement of traditional employment contracts in favour of precarious, data-driven, and fragmented arrangements, such as zero-hour contracts, external contractor arrangement or short-term contracts. The integration of artificial intelligence and platform- work has catalysed a significant *re-regulation* of labour relations, necessitated by the profound transformation of core work features. We are currently witnessing a significant shift in labour regulation as a direct consequence of integrating artificial intelligence and platform work into daily professional performance. This technological paradigm shift

necessitates a comprehensive re-evaluation of labour relations, accounting for the novel role of AI in executing tasks previously reserved for humans. This evolution has introduced entirely new legal dimensions—such as mandated human oversight of digital tools, innovative models of algorithmic supervision, and automated work assignment systems—that challenge existing labour law frameworks. Furthermore, fundamental aspects of labour law, including working time, occupational health and safety, and the predictability of assignments, have been transformed by these technologies. Consequently, legislative reforms are imperative to effectively capture these transformations and ensure adequate protection for workers in an increasingly automated landscape.

Employers generally favour AI-driven monitoring and evaluation tools for their efficiency and productivity increase. An OECD survey conducted in 2024, involving over 6,000 mid-level managers across France, Germany, Italy, Japan, Spain, and the United States, focused on algorithmic management tools designed for worker instruction, monitoring, and evaluation (OECD, 2025, p. 19). The study revealed significant geographic disparities in adoption:

- The United States: Exhibits the highest integration, with 90% of firms utilizing algorithmic management, specifically in monitoring and evaluation. Notably, 55% of U.S. firms monitor the content and tone of communications (calls, emails, and conversations).
- Europe: Shows an average adoption rate of 79%, with a primary focus on instructional tools (69%) and basic monitoring, such as time tracking (33%). Surveillance of communication content remains low at 6%.
- Japan: Reports the lowest adoption rate at 40%, primarily utilizing monitoring tools (31%), with only 8% engaging in communication content analysis.

Managers report that these tools improve decision-making quality (60%), citing increased information availability, faster processing, and greater managerial autonomy as drivers for productivity gains. However, significant concerns remain regarding accountability for erroneous algorithmic decisions (28%), the opacity of algorithmic logic (27%), and the potential for inadequate protection of workers' physical and mental health (27%) (OECD, 2025, p. 19).

When employers negotiate AI solutions with third-party vendors, the primary objectives are typically profit maximization and the elimination of operational bottlenecks. This focus often ignores the divergent concerns of the workforce, potentially placing employees in a precarious position. Consequently, the digital revolution necessitates robust labour law safeguards. AI tools must be developed through a human-centric lens that prioritizes worker rights.

Historically, workers have occupied the subordinate position in labour relations—a disparity that persists even in regions with the most developed and the most dynamic collective bargaining traditions, such as Northern Europe. Digitalization threatens to exacerbate power imbalance and weaker position of workers compared to employers. Newman (2017, p. 693) posits that big data is actively deployed to depress wages through hiring practices, restructured merit-based raises, and the strategic "disorganization" of workplaces to erode employee bargaining power.

The workforce claims that constant surveillance risks "robotizing" employees, heightening information asymmetries and further enhancing the power balance toward employers (Bernhardt, Kresge & Suleiman, 2021, p. 15; Fernandez Macias, 2023, p. 17).

Such environments can diminish job satisfaction and compromise health and safety standards. (Gonzalez Vazquez *et al*., 2024, p. 28; Hertel-Fernandez, 2024, p. 63; Holubová, 2022,

p. 39; Hunt & Pickard, 2022; Thorn Jensen, Oosterwijk & Nørgaard, 2024, pp. 18, 67; Lee *et al*., 2015). When monitoring extends into private time through legally ambiguous methods, worker bargaining power is significantly diminished (Mateescu & Nguyen, 2019, p. 28; Möhlmann *et al*., 2021, p. 25; Enqvist, 2023, p. 520).

Information asymmetries (Rosenblat & Stark, 2016, p. 15; Cox, Anttila & Oosterwijk, 2024, p. 26; Agosti *et al*., 2023, p. 43) in algorithmic labour on the workers' side have further amplified the historical power imbalance between employer and employee.

Furthermore, the concept of "consent" is highly contentious within the context of subordinate digitalized employment. Given the inherent power imbalance, it is questionable whether workers can provide meaningful consent to data tracking and other digital monitoring practices when they are employed as platform workers. In order for workers' consent to be meaningful, it needs to be unambiguous, specific, free and informed. Non-negotiable nature of consent in digital work renders it a purely formalistic precondition for employment relation. If the worker rejects to consent to data tracking and other digital monitoring practices, he/she will not be engaged as platform worker. Given the size of platform labour market, and the fact that labour offer exceeds labour needs, the platform work transcends the traditional boundaries of time and space. In digitalized work, consent thus becomes contentious simply because the worker has to consent as otherwise, he/she will be substituted by another platform worker within minutes.

## 3. EUROPEAN UNION REGULATION ON THE USE OF ARTIFICIAL INTELLIGENCE IN LABOR RELATIONS

To address the risks of extreme labour flexibilization and the erosion of worker benefits for an estimated 28 million platform workers in the EU, the European Union has adopted Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (further: Platform Work Directive). The main goals of the Platform Directive are threefold: introducing measures to facilitate the determination of the correct employment status of persons performing platform work, establishing rules to improve the protection of persons performing platform work with regard to the processing of their personal data by increasing the transparency, fairness, human oversight, safety and accountability of relevant algorithmic management procedures in platform work and improving the transparency of platform work in cross-border situations (Art. 1 of the Directive).

In the Preamble, Directive refers to Principle No 5 of the European Pillar of Social Rights providing that, regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training…and that employment relationships that lead to precarious working conditions are to be prevented, including by prohibiting the abuse of atypical contracts (p. 3 of the Preamble of Platform Directive). It further refers to Principle No 7 of the Pillar on the right of workers to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship and stating that, prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice and the right to access to effective and impartial dispute resolution and, in the case of unjustified dismissal, a right to redress, including adequate compensation (p. 3 of the Preamble of Platform Directive). Finally, it refers to Principle No 10 of the Pillar on the right of workers

to a high level of protection of their health and safety at work and the right to have their personal data protected in the employment context (p. 3 of the Preamble of Platform Directive).

The Directive introduces a rebuttable presumption of employment. Under this provision, if a platform utilizes AI for task control or supervision—in accordance with national laws and collective agreements—the worker is legally presumed to be an employee. Crucially, the burden of proof shifts to the platform, which must demonstrate the absence of an employment relationship to challenge this classification.

The Directive includes certain level of social protection, primarily through provisions protecting platform workers from algorithmic discrimination (Art. 10, p. 3), safety and health protection (Art. 12), right to redress (Art. 18), protection from adverse treatment or consequences (Art. 22), protection from dismissal (Art. 23), and promotion of collective bargaining (Art. 25).

A cornerstone of the Directive is the requirement for human-in-the-loop oversight. Crucial employment decisions related to the livelihood of worker and his/her family, such as the suspension or termination of contracts, should not be executed solely by algorithms and must undergo human review. This alignment seeks to maintain human agency in key employment decisions. Adams-Prassl *et al.* (2023, p. 143) argue that addressing the regulatory gap in human agency requires a multi-layered approach in several phases of the labour relation—and follows the Directive's loop—adding that more than one loop is required should we wish to protect workers from possible detrimental consequences of digitalized decisions of employers. Thus, the authors claim that we need to get involved "*before the loop*: *involving information and consultation rights*; *in the loop through prohibition of fully automated terminations*, *after the loop through the right to a meaningful review of decisions* and *above the loop through mandatory algorithmic impact assessments*." The implementation of a quadruple-layer safeguard framework is essential to ensuring the non-discriminatory application of labour rights within the digitalized work. The establishment of information and consultation rights constitutes a fundamental procedural prerequisite for an equitable employment environment. Complementing this, a strict prohibition on fully automated terminations is essential to ensure that disciplinary actions are not dictated solely by quantitative metrics; rather, mandatory human oversight must be integrated to facilitate an evaluation of all relevant qualitative factors (Adams-Prassl *et al*., 2023, p. 143). Furthermore, the provision of a meaningful review mechanism offers a critical layer of protection, enabling workers to contest algorithmic outputs. Within this framework of review, employers should incorporate a formal right of rebuttal, thereby ensuring that automated decisions are subject to rigorous scrutiny and adversarial challenge. Finally, the systematic implementation of algorithmic impact assessments is essential to mitigate discriminatory biases that may remain undetected by preceding safeguard layers. These assessments function as a critical ex-post mechanism, ensuring that technological oversight does not inadvertently perpetuate systemic inequality. Proposed quadruple-layered regulatory architecture is indispensable for securing substantive employment protections and upholding the fundamental rights of workers within the digital economy (Adams-Prassl *et al*., 2023, p. 143).

The Directive reinforces transparency by requiring platforms to disclose the mechanics of automated monitoring and decision-making systems, including criteria for task allocation and remuneration. Workers are granted a right to explanation, allowing them to receive written justifications for automated decisions and the right to contest them.

Regarding data privacy, the Directive imposes more stringent safeguards than the General Data Protection Regulation (GDPR). It prohibits the processing of sensitive data via automated

systems, including emotional or psychological states, private conversations, trade union activities, and protected characteristics such as race, religion, or political affiliation. Furthermore, the Directive acknowledges the inherent power imbalance in labour relations by stipulating that consent is generally no longer considered a valid legal basis for data processing in platform work due to the power imbalance between the platform and the worker.

Article 22 of the GDPR grants individuals the right not to be subject to decisions based solely on automated processing. While Article 22 contains exceptions for contractual necessity and explicit consent, these often assume *an equality of arms* that is largely absent in digitalised labour by the mere fact that the labour demand exceeds the labour offer, as it expands geographically across the entire world. The Directive and the EU Artificial Intelligence Act (Regulation 2024/1689) provide more robust safeguards, such as mandatory human oversight and the right to contest decisions.

The EU Artificial Intelligence Act (Regulation 2024/1689) is the world's first comprehensive and sophisticated legal framework for AI, categorising systems by risk levels. The Act prohibits unacceptable AI risks, such as social scoring and biometric categorisation in workplaces. The most critical high-risk AI systems (to become enforceable in summer this year) are those for recruitment, performance monitoring, task allocation and termination of employment contract. The Act clearly states that key employment decisions about recruitment and termination cannot be made solely by an algorithm.

Further, transparency is a prominent feature implying that workers must be notified when high-risk AI is being used to monitor or evaluate them. Training datasets must be high-quality and tested to minimise discriminatory outcomes. Systems must automatically record events (logs) to ensure results can be traced and audited.

## 4. LANDMARK CASE LAW IN AUTOMATED PERFORMANCE MANAGEMENT

In recent years, the evolution of automated performance management has frequently outpaced regulatory efforts, leading to the adoption of post-factum legislation that primarily serves to formalize pre-existing labour relations. Consequently, judicial intervention has become indispensable; courts in various jurisdictions have recognised that their case law is fundamental to supporting subsequent legislative reforms. By interpreting novel workplace scenarios—particularly those involving algorithmic oversight of performance management—courts have effectively expanded the traditional scope of labour law.

The following four landmark judgments illustrate this judicial proactive role across distinct jurisdictions:

**Uber & Ola Cabs v. Worker Info Exchange (2023) (Amsterdam Court of Appeal)**

The Court ordered the platforms to provide "meaningful information" about the logic behind their automated decisions, such as task allocation and dynamic pay. Significantly, the Court rejected Uber's claim that human reviews made their system "not fully automated", labelling such manual intervention as a "symbolic act" that did not provide real human oversight. This decision represents a critical jurisprudential development; the court provided an exhaustive conceptualisation of meaningful information and the requisite standards for human oversight in the exercise of managerial prerogative.

**Deliveroo v Independent Workers Union of Great Britain (2023) (UK Supreme Court)**

The Court found that Deliveroo drivers were not workers because they had a genuine "substitution clause" (the right to send someone else to do the job), which undermined the requirement for personal service. This highlights the legal gaps employers still use to avoid traditional labour regulations. By scrutinizing the "worker" designation in platform-based labour, this ruling highlights that the power of substitution fundamentally de-personalizes the labour performed. As a result, the court concluded that such services lack the essential characteristics of a traditional labour relationship.

**Uber BV v Aslam (2021) (UK Supreme Court)**

The Court dismissed Uber's complex contractual wording as "fiction", ruling that drivers were workers because the app exercised "significant control" over them. Crucially, the Court highlighted that Uber's automated passenger rating system and the penalisation of drivers (by logging them out for declining fares) were forms of performance management that proved a subordinate relationship. This judgment is of particular importance, as it asserts the primacy of factual reality over contractual form. The court established that the automated management of platform workers constitutes a form of supervision that cannot be disguised by misleading contractual frameworks designed to evade traditional labour protections.

**Filcam CGIL v Deliveroo Italia (2020) (Bologna Labour Court)**

The court found that Deliveroo's "Frank" algorithm was discriminatory because it lowered the "reliability score" of drivers who failed to log in, regardless of whether the absence was due to illness, childcare, or a protected right like a strike. It proved that an algorithm's "blindness" to the reason for an action can lead to legal outcomes that are contrary to labour law. This court ruling clearly demonstrates that human oversight (human agency or human management) of workers' performance could and should not be replaced by the algorithm due to the absence of ability on the part of the digital tool to consider inability to work in the context of labour law and. perhaps even more importantly, in the context of individual worker who, for legally justified reasons—such as sick leave or child care obligations—should not get demoted, excluded from work platform, or, in the most serious case, dismissed. The inability of digital performance management tool to capture legal nuances and personal circumstances of a worker and to connect them to the applicable legal provisions, confirms the need to preserve human agency. Managerial decisions on performance management conducted purely on the basis of log- in times and screen times contravene the purpose of meaningful labour, and thus, the main purpose of labour law regulation.

## 5. AUTOMATED PERFORMANCE MANAGEMENT AND DECISION MAKING IN LABOR LAW

Algorithmic management represent a novelty in the world of labour where computer-programmed applications, rather than human managers, supervise, evaluate, and terminate workers. This approach is subject to legal regulation—starting with the EU acquis, while also expanding to other parts of the world—to ensure human accountability.

### *5.1. Human oversight and review of performance management and evaluation of workers*

In order to develop effective mitigating measures for protecting the fundamental rights and dignity of workers, it is essential to analyse the underlying development drivers of digitalised

performance monitoring and evaluation. The Already cited OECD surveys revealed that employers primarily adopt AI to enhance productivity and reduce the time traditionally allocated to performance appraisals (OECD, 2025). While reallocating their time toward strategic growth or market expansion, the resulting automation of performance management introduces significant psychological and social risks (OECD, 2025).

A critical paradox emerges: by automating performance evaluation, employers often eliminate the singular aspect of the employment relationship where workers experience professional dignity—the human exchange of praise, constructive feedback, and mutual recognition of good work and work ethic. This shift suggests either a profound misunderstanding of the psychological dimensions of labour or a systemic disregard for worker's motivation. When human agency is removed from performance evaluation, the work risks losing its perceived meaning, as employee motivation is intrinsically linked to the experience of being valued by another human being for the efforts invested in subordinate work.

In addition, employers seem to have a serious issue with distrust in the work ethic of workers, so they engage and actively seek invasive monitoring applications that survey screen time, private remote-working environments, emotional states, health metrics, and real-time geographic locations. This climate of suspicion represents a profound threat to the stability of employment relationships, as trust is the foundational element of any functional labour dynamic.

By marginalising human agency, we risk dismantling the essential "relationship" component of regulated labour relations. In labour law, regulation is predicated on a complex web of interpersonal and collective interactions—between workers and employers, trade unions, colleagues, and third-party stakeholders. In the field of labour law, interpersonal and collective interactions are crucial for the functioning of labour market. Some of these interactions are formalised—such as a tripartite social partnership where the government, employers, and workers' representatives (trade unions) collaborate to negotiate terms and maintain social peace, while others are not formalized, but nonetheless, are equally important. The resulting "erosion of the personal relationship" fundamentally alters the dynamics between the individual and the corporation, leading to a "deeper shift away from a sense of care and responsibility" (Kellogg, Valentine & Christin, 2020, p. 45). Such a trajectory could permanently destabilize the world of work, as employees—when afforded the opportunity—will inevitably disengage from environments where their autonomy and dignity are compromised.

This aversion stems from the fact that workers, whenever feasible, will actively avoid employment within organizations that robotize and dehumanize their labour. If personal circumstances and human contingencies are reduced to mere "non-productivity" metrics—subject to automated financial penalties, disciplinary measures, or dismissal—the traditional protections of labour law are rendered obsolete. In such a scenario, the legal framework governing the employment relationship faces an existential threat, as it becomes an ineffective bystander to an entirely algorithmic and transactional system.

Labour regulations have a strong social component, the result of a long historical evolution aimed at balancing economic interests with human rights and professional dignity. To now suggest that the employment relationship should be reduced to a purely productivity-driven, profit-centric transaction—stripped of compassion, care, and dignity—represents a regression that threatens to dismantle the carefully constructed architecture of modern labour law.

Furthermore, such a shift jeopardises the very dignity of the workforce, whose well-being is the ultimate engine of productivity. As noted by Adams-Prassl *et al.* (2023), "taking managerial

decisions without human agency risks alienation and violations of workers' individual dignity", whereas "human agency is central to flexibility and empathy". By removing the human element, we risk replacing a nuanced legal and social framework with a sterile, mechanical system that is fundamentally incompatible with the human-centric values of contemporary labour law.

### *5.2. Prohibition on high-risk practices*

The latest legal regulation of automated performance management in the EU had to prohibit certain practices that are considered high-risk for the livelihood of workers, such as automated decisions in the area of suspension and termination of employment contracts, and a meaningful human review for significant decisions like hiring, firing, or disciplinary measures. In order to prevent such practices, there is a need for substantive legal protection, meaning that employers must honestly reveal that the automated decision had no human oversight. Employers can claim that the automated decision did have a human oversight—either by the HR department or the executive officers representing the employer—but in reality, it can easily be the case that the automated decision was unsupervised, and this will be very difficult to prove in a possible out-of-court settlement or court proceeding. Therefore, mandatory audits should be required for all companies dealing with automated performance management; workers and trade unions should be a part of those audits in order to ensure a reliable procedure that is in line with EU law and the protection of fundamental labour rights of workers. Internal impact assessments should be conducted regularly to assess the impact of automated decisions.

Further, high-risk practices that are invasive to privacy and unnecessary for the employment relationship or work performance, like constant biometric or emotion inference monitoring, or monitoring of private premises of workers, recording conversations in private time, and similar practices should be prohibited while algorithmic applications should automatically delete all data collected outside of working time and all data that is considered illegal to collect.

When considering the regulation of automated performance management, we need to bear in mind that regulation should encourage further innovation or, at a minimum, avoid impeding developmental progress through excessive administrative burdens on enterprises. Clear guidance for tool developers should not discourage the development of new and innovative practices in the area of artificial intelligence at work. The pursuit of operational does not inherently contravene the protection of workers' fundamental labour and human rights.

### *5.3. Explainability and transparency*

In the context of automated performance management, it is imperative that organisations adhere to a framework of monitoring transparency and human-centric governance. Prior to the deployment of AI systems that monitor performance, employers must fulfil a mandate of formal notification to both employees and their representative bodies. This disclosure should comprehensively detail the underlying logic of the algorithms, the specific categories of data collected, and the evaluative parameters utilised to assess worker productivity.

Furthermore, the principle of human-in-the-loop oversight is essential for high-risk employment outcomes. Any final determination regarding the termination of a contract or significant disciplinary action must be decided by a human rather than an automated system. This human intermediary—whether from management or human resources—needs

to possess the capacity to interpret algorithmic outputs and provide a reasoned explanation to the affected individual.

To ensure accountability, organisations employing algorithmic management must establish a redress mechanism. These procedures should allow workers to challenge automated or semi-automated decisions, ensuring a right to a substantive human review of the underlying circumstances.

### *5.4. Trade unions' role*

The role of trade unions and collective representative bodies is paramount within the framework of national labour legislation, particularly regarding the mandatory oversight of employment terminations for vulnerable or disadvantaged workers. In this context, trade unions function as a regulatory oversight mechanism, safeguarding employee interests against management decisions that significantly impact worker livelihoods. The efficacy of trade unions' involvement is contingent upon their ability to provide meaningful intervention in automated decision-making processes. If trade union involvement and consultation functions merely as a procedural formality rather than a substantive check on the legality of algorithmic decisions, it risks becoming an additional administrative burden that fails to enhance worker protections. Furthermore, the institutional strength and bargaining power of trade unions are critical determinants in the rectification of adverse automated performance management decisions. In countries where trade unions are an equal and strong social partner, they are better positioned to challenge and mitigate the risks of algorithmic error affecting labour relations. Conversely, in countries where trade unions are fragmented or weak, the ability to contest automated decisions is significantly diminished.

Established unions with legitimacy are more likely to be integrated into labour governance. Mutual respect and social dialogue between employers and trade unions remains the primary precondition for ensuring that automated systems comply with international labour legal standards and uphold fundamental workers' rights.

## 6. CONCLUSION

The digitalisation of performance management represents a major shift in labour relations and applicable labour law that fundamentally reconfigures the employment relationship and poses completely new challenges to labour law. The transition from human (employers') supervision to algorithmic management is characterised by decentralised, output -oriented metrics. While data from the OECD (2025) underscores the efficiency gains for employers and enhanced managerial autonomy by digital tools, the paper highlights the possibility of an erosion of worker dignity, privacy, and psychological well-being.

The research indicates that the "robotisation" of the workforce and the invasive surveillance of both professional and private spheres have rendered traditional notions of "informed consent" largely illusory within the subordinate employment context. By reducing workers' contribution to pure productivity metrics, algorithmic systems risk obsoleting the functions of labour law.

However, the emerging European regulatory landscape—specifically through Directive (EU) 2024/2831 on Platform Work and the AI Act (Regulation 2024/1689)—offers a sophisticated legal framework. By institutionalising the "rebuttable presumption of employment",

establishing "human-in-the-loop" obligation for high-risk decisions like suspension and termination of employment contract, and prohibiting invasive biometric and emotion-inference monitoring, the EU is pioneering a human-centric model of digital governance of performance.

In conclusion, the survival of the labour relationship in the digital age depends on the successful harmonisation of technological innovation with the fundamental rights of workers. Regulatory frameworks must move beyond formalistic requirements to ensure substantive human involvement, where such involvement is crucial to prevent the commodification of labour and performance management based purely on efficiency metrics, in breach of labour law standards.

## LIST OF REFERENCES


Adams-Prassl, J. *et al*. 2023. Regulating algorithmic management: A blueprint. *European Labour Law Journal*, 14(2), pp. 124–151. https://doi.org/10.1177/20319525231167299

Agosti, C. *et al*. 2023. *Exercising workers' rights in algorithmic management systems: Lessons learned from the Glovo-Foodinho digital labour platform case.* Brussels: European Trade Union Institute. https://dx.doi.org/10.2139/ssrn.4606803

Bernhardt, A., Kresge, L. & Suleiman, R. 2021. *Data and Algorithms at Work: The Case for Worker Technology Rights.* Berkeley: Center for Labor Research and Education, University of California.

Cox, T., Anttila, J. & Oosterwijk, G. 2024. *Algorithmic management in traditional workplaces: Case studies on the impact of algorithmic technologies in seven sectors in the Nordics.* Brussels: FEPS.

Enqvist, L. 2023. 'Human oversight' in the EU artificial intelligence act: what, when and by whom?. *Law, Innovation and Technology*, 15(2), pp. 508–535. https://doi.org/10.1080/17579961.2023.2245683

Fernandez Macias, E. *et al*. 2023. *The platformisation of work*. Luxembourg: Publications Office of the European Union.

Gonzalez Vazquez, I. *et al*. 2024. *Digitalisation and workers wellbeing: The impact of digital technologies on work-related psychosocial risks. JRC Working Papers Series on Labour, Education and Technology 3*. Seville: Joint Research Centre.

Hertel-Fernandez, A. 2024. *Estimating the prevalence of automated management and surveillance technologies at work and their impact on workers' well-being.* Washington, D.C.: Washington Center for Equitable Growth.

Holubová, B. 2022. *Algorithmic Management: awareness, risks and responses of the social partners.* Berlin: Friedrich-Ebert-Stiftung.

Hunt, T. & Pickard, H. 2022. Harder, better, faster, stronger? Work intensity and 'good work' in the UK. *Industrial Relations Journal*, 53(3), pp. 189–206.

Kellogg, K. C, Valentine, M.A. & Christin, A. 2020. Algorithms at Work: The New Contested Terrain of Control. *The Academy of Management Annals*, 14(1), pp. 366–410. https://doi.org/10.5465/annals.2018.0174

Mateescu, A. & Nguyen, A. 2019. *Workplace Monitoring & Surveillance.* New York: Data & Society Research Institute. https://doi.org/10.69985/GDCP8027

Möhlmann, M. *et al*. 2021. Algorithmic Management of Work on Online Labor Platforms: When Matching Meets Control. *MIS Quarterly*, 45(4), pp. 1999–2022. https://doi.org/10.25300/MISQ/2021/15333

Newman, N. 2017. Reengineering Workplace Bargaining: How Big Data Drives Lower Wages and How Reframing Labor Law Can Restore Information Equality in the Workplace. *University of Cincinnati Law Review*, 85(3), pp. 693–760.

Rosenblat, A. & Stark, L. 2016. Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers. *International Journal of Communication*, 10, pp. 3758–3784.

Thorn Jensen, M., Oosterwijk, G. & Sonne Nørgaard, A. 2024. *Computer in Command: Consequences of Algorithmic Management for Workers.* Brussels: Foundation for European Progressive Studies (FEPS).

***Reports***

OECD. 2025. *Algorithmic Management in the Workplace: New Evidence from the OECD Employer Survey. Artificial Intelligence Papers No. 31.* Paris: OECD Publishing.

Original scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch18

*Ajna JODANOVIĆ**
*Almir BERIDAN***

# EU APPROACHES TO REDUCING SECURITY RISKS IN CRISIS THROUGH DIGITAL TOOLS: THE CASE OF THE LIFEGRID PROJECT

*Contemporary crises, including natural disasters and technological incidents, require integrated approaches to managing risks to population safety. Vulnerable groups and social care institutions are particularly exposed, making preparedness and resilience essential for protecting human life and ensuring continuity of services. This paper examines European Union approaches to crisis management through the LifeGRID project as a case study. It analyses how digital tools, early warning systems, and coordinated governance mechanisms support situational awareness, risk assessment, and emergency response, particularly in nursing homes and social welfare institutions. The paper also considers the legal and governance framework shaping the use of such tools, including data protection, fundamental rights, and accountability requirements. In addition, it highlights broader challenges related to digital exclusion, cybersecurity vulnerabilities, and fragmentation across Member States. The findings suggest that while digital tools enhance crisis response and coordination, their effectiveness depends on their integration within coherent legal frameworks, inclusive design, and robust institutional cooperation.*

***Keywords:*** EU law, security risks, crisis management, digital tools, civil protection, community resilience, vulnerable populations, early warning systems, LifeGRID project.

## 1. INTRODUCTION

Contemporary crises and emergency situations, including natural disasters, technological incidents, and complex security threats, increasingly challenge societies' capacity to ensure the safety and security of their populations. The growing frequency and complexity of such events, often characterized by interconnected and cascading risks, require a shift from traditional reactive approaches towards more integrated and resilience-oriented models of crisis management. In this context, particular attention must be given to vulnerable population groups, especially individuals dependent on social and healthcare services.

* PhD, Associate Professor of International Law and European Union Law, Sarajevo School of Science and Technology, Bosnia and Herzegovina, ORCID: https://orcid.org/0000-0002-0146-411X, e-mail: *ajna.jodanovic@ssst.edu.ba*

** MA, DDRCCA President and Project Manager, Bosnia and Herzegovina and Germany, ORCID: https://orcid.org/0009-0002-1754-8905, e-mail: *almir.beridan@gmail.com*

Within the European Union, crisis management has evolved into a coordinated, multi-level system that integrates policy frameworks, operational mechanisms, and technological solutions. Digital transformation plays a key role in this process, enabling improved situational awareness, real-time communication, and more effective coordination among stakeholders across all phases of the disaster management cycle.

The aim of this paper is to analyse the European Union model for reducing security and safety risks in crisis through the use of digital tools. The analysis combines theoretical and institutional perspectives with a case study of the LifeGRID project, focusing on the integration of digital technologies, community engagement, and institutional coordination in strengthening disaster preparedness and resilience.

A particular contribution of this paper lies in its combined theoretical and practical perspective. In addition to analysing existing frameworks and models, the paper incorporates practical insights derived from the direct involvement of one of the authors in the implementation of the LifeGRID project. This approach enables a more comprehensive understanding of current practices and highlights potential models for addressing identified challenges in crisis management.

Methodologically, the paper is based on a review of relevant literature and policy documents, complemented by a qualitative analysis of the LifeGRID project. The paper is structured as follows: it first outlines the theoretical and EU policy framework, then examines the role of digital tools in crisis management, and finally presents the LifeGRID case study, including its structure, tools, governance model, and practical impact.

## 2. EU FRAMEWORK & THEORY

This section establishes the conceptual and institutional framework for analysing the role of digital tools in reducing security risks in crisis. It begins by outlining the key theoretical concepts underpinning contemporary risk and crisis management, with particular emphasis on risk, resilience, and the disaster management cycle. Building upon this theoretical foundation, the section then examines the European Union's approach to crisis management, focusing on its policy instruments, operational mechanisms, and coordination structures. Particular attention is given to the role of digital transformation, data governance, and interoperability in enhancing resilience, improving situational awareness, and enabling more effective and coordinated responses to complex and evolving crisis scenarios.

### *2.1. Theoretical Background*

The concept of risk is a fundamental analytical category in the field of crisis and emergency management. According to the International Organization for Standardization (ISO), risk is defined as the effect of uncertainty on objectives (ISO, 2018, p. 1). A central concept in contemporary risk and crisis management theory is resilience. In international policy and academic discourse, resilience is generally understood as the capacity of a system, community, or society exposed to hazards to resist, absorb, accommodate, adapt to, and recover from their effects in a timely and efficient manner, while preserving essential structures and functions (UNDRR, 2015, p. 12). This understanding extends beyond the notion of recovery alone and includes the ability to adapt to evolving risk conditions and to transform in response to complex and uncertain environments. Such an approach is particularly relevant in the context

of contemporary crisis scenarios, where interconnected risks and cascading effects require flexible and adaptive response mechanisms.

Within this conceptual framework, crisis management is generally understood as a set of coordinated activities aimed at preventing, preparing for, responding to, and recovering from events that threaten the safety and security of populations (Alexander, 2002). It encompasses institutional arrangements, organizational processes, and operational measures designed to reduce the impact of crises and ensure the continuity of essential societal functions. Contemporary approaches to crisis management place increasing emphasis on proactive planning, inter-institutional coordination, and the integration of technological solutions into decision-making processes. The disaster management cycle provides a structured framework for addressing crises through four interrelated phases: mitigation, preparedness, response, and recovery. Mitigation includes measures aimed at reducing the likelihood or impact of hazards, such as risk assessments and risk reduction strategies. Preparedness involves planning, training, and the establishment of early warning systems to ensure an effective response. The response phase encompasses immediate actions taken during a crisis to protect lives and property, while recovery focuses on restoring normal conditions and strengthening future resilience through lessons learned. This phase-based approach is widely recognised in disaster management literature and practice, where the management of hazards is typically organized around mitigation, preparedness, response, and recovery activities (UNDRR, 2015; Coppola, 2011, pp. 9–10).

Within this framework, the concept of community resilience has gained particular importance. It can be understood as the capacity of local populations, institutions, and systems to anticipate, withstand, and recover from adverse events while maintaining essential functions (Cutter, Burton & Emrich, 2010, pp. 1–2). Community resilience is shaped by factors such as social cohesion, institutional preparedness, access to timely and reliable information, and the availability and accessibility of resources. In the context of vulnerable groups and social care institutions, resilience is closely linked to the level of staff preparedness, the existence of clearly defined procedures, and the degree of integration into broader emergency management systems.

In recent years, digital technologies have assumed an increasingly important role in strengthening resilience and enhancing risk management processes. They contribute to improved situational awareness, enable real-time communication, and support more informed and timely decision-making across all phases of the disaster management cycle. As such, digital tools represent a key enabling factor in the development of integrated and adaptive crisis management systems (UNDRR, 2015).

The presented theoretical framework indicates a clear shift from traditional, reactive approaches to crisis management towards more integrated, adaptive, and resilience-oriented models. The growing complexity of contemporary risks, characterised by interdependencies and cascading effects, requires not only effective institutional coordination but also the strategic use of digital technologies and the active involvement of communities. In this context, resilience emerges as a key concept linking risk management, crisis response, and long-term recovery, emphasising the importance of preparedness, flexibility, and continuous adaptation. Strengthening community resilience, together with enhancing digital capacities, is therefore essential for improving overall security and safety in modern crisis environments.

### *2.2. EU Security and Crisis Management Framework*

The European Union has developed a comprehensive and multi-layered framework for crisis management aimed at enhancing the safety and security of its population through coordinated action, shared resources, and the integration of digital technologies. As outlined by the European Commission (European Commission, 2020b), this framework is grounded in a combination of policy instruments, operational mechanisms, and strategic initiatives designed to strengthen preparedness, response, and recovery capacities across Member States.

This section is structured in three parts: first, it examines the legal basis of EU action in crisis management; second, it analyses the legal framework governing digital tools, particularly data protection; and third, it explores the institutional and operational mechanisms through which these frameworks are implemented.

#### *2.2.1. Legal Basis of EU Crisis Management*

The legal basis for the European Union's action in the field of crisis management is rooted in the Treaty framework, which establishes a system of shared and supporting competences between the Union and its Member States. Unlike policy-driven areas where the Union exercises extensive harmonisation powers, crisis management—particularly in the field of civil protection—remains primarily within the competence of the Member States, with the Union playing a complementary and coordinating role.

A central provision in this regard is Article 196 of the Treaty on the Functioning of the European Union (TFEU), which explicitly provides the legal basis for Union action in civil protection. This provision empowers the Union to support and complement the efforts of Member States in preventing, preparing for, and responding to natural or man-made disasters. Importantly, Article 196 TFEU does not confer autonomous operational competences upon the Union but rather establishes a framework for coordination, cooperation, and capacity-building. This reflects the broader constitutional principle of subsidiarity, according to which the Union may act only insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States alone.

In addition to civil protection, other Treaty provisions contribute to the legal framework governing crisis management. Article 168 TFEU, which concerns public health, requires that a high level of human health protection be ensured in all Union policies and activities. This provision is particularly relevant in crisis involving health risks, including pandemics and emergencies affecting vulnerable populations. While Article 168 TFEU limits the extent of harmonisation in the field of public health, it nevertheless provides a legal basis for coordination, support measures, and the adoption of incentive-based actions at the Union level.

Furthermore, Article 114 TFEU, which enables the approximation of laws for the establishment and functioning of the internal market, has indirect relevance in the context of crisis management, particularly with regard to the regulation of digital infrastructures, data flows, and communication systems. Given the increasing reliance on digital tools in crisis response, this provision serves as an important legal basis for ensuring interoperability and the smooth functioning of cross-border systems within the Union.

Building upon these Treaty provisions, the EU has adopted binding secondary legislation that operationalises its role in crisis management. The most significant instrument in this regard is Decision No 1313/2013/EU on a Union Civil Protection Mechanism. This Decision establishes a comprehensive framework for disaster risk management, encompassing prevention, preparedness, and response. It facilitates cooperation among Member States, enables the pooling and deployment of resources, and supports coordinated assistance in crisis.

The Union Civil Protection Mechanism reflects a hybrid model of governance, combining elements of coordination, support, and operational facilitation. While the primary responsibility for disaster response remains with the Member States, the Mechanism enhances collective capacity by providing a structured system for information exchange, risk assessment, and resource mobilisation. Its legal design thus embodies a balance between national sovereignty and supranational coordination, consistent with the constitutional architecture of the Union.

At the same time, the legal framework governing EU crisis management reveals certain structural limitations. The Union's competences in this field remain largely supportive, which may constrain its ability to act independently in large-scale or rapidly evolving crises. Moreover, the fragmentation of legal bases across different policy areas—such as civil protection, public health, and the internal market—may complicate the development of fully integrated responses. These limitations underscore the importance of effective coordination mechanisms and highlight the need for continuous adaptation of the legal framework in response to emerging risks.

In addition to the general legal basis outlined above, the use of digital tools in crisis management is subject to specific regulatory frameworks, particularly EU data protection law.

The deployment of digital instruments such as the *Pflegeregister Wesermarsch* entails significant legal implications, particularly in relation to the processing of highly sensitive personal data, including health-related information. Within the European Union, such processing is governed by the General Data Protection Regulation (GDPR), which establishes a comprehensive and directly applicable legal framework aimed at safeguarding fundamental rights, notably the right to the protection of personal data as guaranteed under Article 8 of the Charter of Fundamental Rights of the European Union.

In the context of crisis and disaster management, the processing of personal data must comply with the foundational principles set out in Article 5 GDPR, including lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, and integrity and confidentiality. The *Pflegeregister* involves the structured collection and processing of data relating to individuals' health status, care dependency, and reliance on electrically powered medical devices. Such information clearly falls within the scope of "special categories of personal data" pursuant to Article 9(1) GDPR, thereby triggering enhanced legal protection and stricter conditions for lawful processing.

As a general rule, the processing of such data is prohibited unless one of the exceptions under Article 9(2) GDPR applies. In emergency and crisis scenarios, several legal bases may be invoked. Article 9(2)(c) permits processing where necessary to protect the vital interests of the data subject or another natural person, particularly in situations where the data subject is incapable of giving consent. In addition, Article 9(2)(i) allows processing for reasons of public interest in the area of public health, including the management of serious cross-border threats to health. These provisions must be read in conjunction with Article 6(1)(e) GDPR, which provides a lawful basis where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority.

However, reliance on these legal bases does not relieve data controllers of their obligation to implement appropriate and proportionate safeguards. Pursuant to Articles 24, 25, and 32 GDPR, controllers must ensure data protection by design and by default, as well as adopt adequate technical and organisational measures to guarantee a level of security appropriate to the risks involved. In the context of disaster management tools such as the *Pflegeregister*, this includes strict access controls, role-based authorisation, encryption, secure storage infrastructures, and clearly defined governance mechanisms regulating access to and use of personal data. The voluntary nature of registration contributes to transparency and trust, yet it does not in itself constitute a sufficient legal basis for processing under EU law.

From a broader constitutional perspective, the use of digital tools in crisis management necessitates a careful balancing between competing legal and societal imperatives. On the one hand, the effective protection of life and health requires rapid access to accurate and comprehensive data, enabling targeted and timely interventions. On the other hand, the processing of sensitive personal data entails significant risks for individual rights, particularly the rights to privacy and data protection. This tension must be resolved in accordance with the principle of proportionality, a fundamental principle of EU law, which requires that any interference with fundamental rights be necessary, appropriate, and proportionate to the legitimate objective pursued.

Critically, while the GDPR provides a sufficiently flexible legal framework to accommodate emergency situations, its application in practice may give rise to challenges, particularly in time-sensitive scenarios where the need for immediate action may conflict with procedural safeguards and accountability requirements. This raises broader questions regarding the operationalisation of data protection principles in crisis contexts, including the extent to which existing legal frameworks adequately reconcile the demands of rapid decision-making with the protection of fundamental rights.

Accordingly, digital tools such as the *Pflegeregister* represent both an opportunity and a legal challenge: they significantly enhance situational awareness, enable more efficient allocation of resources, and improve the protection of vulnerable populations, yet their legitimacy ultimately depends on strict compliance with EU data protection law and the effective implementation of safeguards. This underscores the necessity of embedding data protection considerations at the core of crisis management systems, ensuring that technological innovation remains aligned with the constitutional and normative foundations of the European Union.

Overall, the EU legal framework for crisis management is characterised by a multi-layered structure that combines Treaty-based competences with binding secondary legislation, as well as specific regulatory regimes governing digital tools, such as data protection law.

Building upon this legal foundation, the following subsection examines the institutional and operational mechanisms through which these legal principles are implemented in practice.

### *2.2.2. Institutional and Operational Framework*

A central role in shaping EU crisis management policies is played by the European Commission, which acts as a key coordinating and executive body within the limits of the competences conferred by the Treaties. In this capacity, the Commission develops strategic frameworks and supports their implementation through a combination of legislative initiatives, financial instruments, and coordination mechanisms.

While policy documents, such as the European Commission's communication Shaping Europe's Digital Future (European Commission, 2020b), provide strategic orientation, their

legal significance remains primarily programmatic. Accordingly, their role must be understood in conjunction with binding legal instruments and operational mechanisms that structure crisis response within the Union.

At the operational level, the core instrument of EU crisis response is the Union Civil Protection Mechanism, established by Decision No 1313/2013/EU (European Parliament and Council, 2013). The Mechanism provides a structured framework for cooperation among Member States in the fields of disaster prevention, preparedness, and response. Its primary function is to facilitate coordinated assistance, enable the pooling and deployment of resources, and support rapid intervention in the event of natural or man-made disasters. Importantly, the Mechanism does not replace national competences but operates on the basis of coordination and support, reflecting the principle of subsidiarity.

The operational effectiveness of the Mechanism is ensured through the Emergency Response Coordination Centre (ERCC), which functions as the central hub for real-time monitoring, information exchange, and coordination of response activities (European Commission, 2023). The ERCC enhances situational awareness by integrating data from multiple sources and supports decision-making by enabling the rapid dissemination of information among Member States and EU institutions. In this regard, it represents a critical interface between legal frameworks and operational practice.

In addition to operational instruments, the EU has developed high-level coordination arrangements such as the Integrated Political Crisis Response (IPCR). The IPCR framework facilitates political coordination at the Union level, particularly in large-scale or complex crises requiring cross-sectoral responses. It enables the consolidation of situational reports, analytical inputs, and communication channels, thereby ensuring that decision-makers have access to timely and coherent information. This mechanism reflects the need for integrated governance structures capable of addressing the multi-dimensional nature of contemporary crises (Council of the European Union, 2022).

A defining feature of the EU crisis management framework is its increasing reliance on data, interoperability, and digital infrastructure. Effective crisis response depends on the ability to collect, process, and share information in real time across different institutions and jurisdictions. The EU actively promotes interoperability across Member States, enabling seamless data exchange and coordinated action, as reflected in its data and digital policy frameworks (European Commission, 2020a; European Commission, 2020b). Digital platforms and information systems thus play a central role in enhancing situational awareness, facilitating communication, and supporting evidence-based decision-making.

However, the growing reliance on digital technologies also raises structural and legal challenges. Differences in national data governance regimes, technological capacities, and institutional practices may hinder effective interoperability and limit the efficiency of cross-border coordination. Moreover, the integration of digital tools into crisis management processes must be reconciled with legal requirements relating to data protection, security, and accountability. These challenges highlight the need for a coherent and legally grounded approach to digitalisation within the EU crisis management framework.

Overall, the institutional and operational architecture of EU crisis management reflects a transition towards more integrated, data-driven, and coordinated systems. By combining legal instruments, institutional mechanisms, and digital technologies, the EU seeks to enhance both immediate response capacities and long-term resilience. Nevertheless, the effectiveness

of this framework ultimately depends on the extent to which coordination mechanisms, technological systems, and legal safeguards are aligned in practice.

Against this legal backdrop, the following subsection analyses how these principles are operationalised within the EU's institutional and coordination framework.

## 3. DIGITAL TOOLS AND INTEGRATED CRISIS MANAGEMENT APPROACH

Digital technologies have become a central component of contemporary crisis management systems, enabling more effective, coordinated, and adaptive responses to increasingly complex security and safety risks. Within the European Union framework, digital tools are not treated as isolated technical solutions but as integral elements of a broader, system-oriented approach to risk reduction, resilience building, and crisis response (European Commission, 2020b). In addition, EU-funded research and innovation initiatives have further highlighted the role of digital solutions in improving coordination, operational efficiency, and decision-making in crisis (European Commission, 2020c).

Digital tools in crisis management encompass a wide range of technologies, including early warning systems, real-time communication platforms, data management systems, and decision-support tools. Their primary function is to enhance situational awareness, facilitate the timely exchange of information, and support evidence-based decision-making across all phases of the disaster management cycle, in line with international disaster risk reduction frameworks (UNDRR, 2015). Recent studies indicate that digital transformation enables advanced capabilities such as real-time monitoring, data analysis, and integrated decision-support systems, which contribute to improving the efficiency and responsiveness of crisis management processes (Fischer-Preßler, Bonaretti & Bunker, 2024).

A key advantage of digital tools lies in their capacity to support the integration of different actors within the crisis management system. Through interoperable platforms and shared data environments, they enable cooperation between public authorities, emergency services, healthcare providers, and the population. This interconnected approach is particularly important in complex crisis scenarios, where multiple risks and cascading effects require coordinated and multi-sectoral responses. However, achieving effective interoperability remains a significant challenge, particularly in cross-border contexts, where differences in data standards, governance structures, and technological capacities may hinder seamless information exchange (Migliorini *et al.*, 2019). The European Union has addressed these challenges through policies promoting data sharing and interoperability, which aim to ensure efficient coordination and information flow across institutional and territorial boundaries (European Commission, 2020a).

The integration of digital tools into the disaster management cycle further strengthens their strategic value. In the mitigation and preparedness phases, digital technologies support risk assessment, hazard mapping, and early warning systems, allowing authorities and communities to anticipate and prepare for potential threats. During the response phase, real-time data and communication tools enable rapid decision-making, efficient resource allocation, and coordinated emergency operations. In the recovery phase, digital systems facilitate damage assessment, data analysis, and the monitoring of recovery processes, contributing to the improvement of future resilience and preparedness measures (UNDRR, 2015; Reuter & Kaufhold, 2018, pp. 41–45).

In addition to their operational functions, digital tools play a crucial role in empowering communities and enhancing their resilience. By providing access to timely and reliable information, they enable individuals to make informed decisions and actively participate in their own safety and preparedness. Digital platforms, including social media and interactive information systems, support public awareness, self-preparedness, and communication between authorities and citizens, particularly during crisis (Houston *et al*., 2015, pp. 3–6). This shift towards more inclusive and participatory crisis management reflects a broader transformation from centralised, top-down approaches to more integrated and community-oriented models, as emphasized in international disaster risk reduction frameworks (UNDRR, 2015). Furthermore, recent studies indicate that the digitalisation of public services can contribute to improved coordination, information sharing, and institutional responsiveness in complex crisis contexts (OECD, 2020; Dincă, Bărbuță & Dincă, 2025).

Within the European Union, the strategic use of digital technologies is closely linked to broader policy objectives related to digital transformation, data governance, and resilience. The development of interoperable systems, data-sharing mechanisms, and digital infrastructures forms the basis for more efficient and coordinated crisis management. EU initiatives in this field also emphasise the importance of integrated communication systems and cross-border coordination, which are essential for managing large-scale and transnational crises (European Commission, 2020a). This approach supports the transition towards adaptive and data-driven crisis management models, capable of responding to rapidly evolving and interconnected risks.

In this context, digital tools act as a connecting element between theoretical frameworks and practical implementation. They operationalise key concepts such as resilience, coordination, and adaptability by translating them into concrete mechanisms and procedures. The following section examines how these principles are applied in practice through the example of the LifeGRID project, which represents an innovative model for integrating digital technologies, community engagement, and institutional coordination in disaster risk reduction.

## 4. CASE STUDY: LIFEGRID PROJECT – ENHANCING DISASTER PREPAREDNESS AND RESILIENCE IN WESERMARSCH

This section presents a case study of the LifeGRID project, examining its role in enhancing disaster preparedness and community resilience in the Wesermarsch district. The analysis is structured to reflect both the conceptual foundations and the practical implementation of the project within the broader context of EU crisis management approaches. It begins by outlining the concept and scope of the LifeGRID project, followed by an examination of the local context and underlying rationale for its development. The subsequent sections analyse the project's key objectives and organisational structure, with particular attention to its division into work packages.

Further analysis focuses on the main digital tools and operational innovations developed within the project, including their practical applications and impact on disaster management processes. In addition, the governance model and stakeholder collaboration framework are examined in order to highlight the institutional dimension of the project.

The section concludes with an assessment of the expected results and long-term impact of the LifeGRID project, followed by a synthesis of key findings in the concluding part of the case study.

### *4.1. Concept and Scope of the LifeGRID Project*

The LifeGRID project represents an initiative aimed at improving disaster preparedness and resilience in the Wesermarsch district of Lower Saxony, Germany (Landkreis Wesermarsch, 2026b). Funded under the SifoLIFE programme, the project focuses on the needs of care-dependent populations, including elderly individuals and those reliant on electrically powered medical devices, by developing integrated solutions for emergency management in the context of flooding and power outages.

The project adopts an interdisciplinary approach, combining community engagement, digital tools, and disaster management systems. Its objective is to develop solutions that can support both local resilience and potential transferability to other regions facing similar risk profiles (LifeGRID, 2026).

This case study analyses the LifeGRID project's objectives, tools, and organisational structure, with particular emphasis on its contribution to disaster risk reduction and the strengthening of community resilience within the broader framework of EU crisis management approaches.

### *4.2. Project Context and Rationale*

The Wesermarsch district is exposed to multiple disaster risks due to its geographical characteristics. Situated in northwestern Germany, between the North Sea and the Weser River, the area is particularly vulnerable to flooding caused by storm surges, heavy precipitation, and river overflow. Although the region is protected by an extensive system of dikes and flood control infrastructure, recent developments related to climate change and the increasing frequency of extreme weather events raise concerns regarding the long-term adequacy of these protective measures.

In addition to its geographical exposure, the district is characterised by a rapidly ageing population, a significant proportion of which depends on electrically powered medical devices. These include ventilators, dialysis machines, and oxygen concentrators, all of which require a stable electricity supply. In the event of power outages associated with flooding or severe weather conditions, individuals reliant on such devices face heightened health risks, including potentially life-threatening complications. These vulnerabilities are further exacerbated by limitations of the existing infrastructure in ensuring the continuity of medical care during emergency situations.

Within this context, the LifeGRID project is designed to address identified structural and operational gaps in disaster preparedness and response. The project focuses on the integration of technological solutions, emergency power systems, and targeted support for care-dependent populations. Its approach is based on the development of an integrated disaster management framework that combines preparedness measures, response capacities, and community-based resilience strategies. In particular, the project seeks to strengthen coordination among emergency services, healthcare providers, and the population, thereby contributing to improved disaster response and recovery capacities at the local level (Landkreis Wesermarsch, 2023).

### *4.3. Key Objectives of the LifeGRID Project*

The LifeGRID project is structured around a set of interrelated objectives aimed at strengthening disaster preparedness and enhancing community resilience in the Wesermarsch district.

These objectives reflect both the specific vulnerabilities of the region and the broader principles of integrated crisis management. The key objectives of the project include:

1. The development and testing of evacuation and care concepts tailored to the needs of care-dependent individuals, with particular attention to those reliant on electrically powered medical devices.
2. The establishment of decentralised care units ("care islands") equipped with emergency power systems, intended to ensure the continuity of healthcare services during crisis.
3. The strengthening of community resilience through awareness-raising activities, training programmes, and the provision of emergency preparedness kits.
4. The improvement of data availability and situational awareness through the implementation of digital tools, such as the *Pflegeregister Wesermarsch*.
5. The enhancement of communication and coordination among local authorities, healthcare providers, and emergency services, with the aim of improving the efficiency of crisis response.
6. The promotion of transferability and scalability of the project's solutions, enabling their potential application in other regions facing similar risk conditions (Landkreis Wesermarsch, 2023).

### *4.4. Organisational Structure and Work Packages of the LifeGRID Project*

The LifeGRID project is organised into six interrelated work packages (WPs), each addressing a specific dimension of disaster preparedness and resilience. This structured approach reflects an integrated model of crisis management, combining community engagement, healthcare preparedness, technological solutions, and institutional coordination. The division into work packages enables a systematic implementation of project activities while ensuring coherence between operational, social, and technological components (Landkreis Wesermarsch, 2023).

WP1: Population Resilience

This work package focuses on strengthening the preparedness of the general population through awareness-raising and capacity-building activities. It includes community-based programmes aimed at improving self-help capabilities, such as self-preparedness workshops, first aid training, and the distribution of emergency kits to households.

WP2: Resilience in Care Services

This component addresses the specific needs of care services, including both institutional and home-based care. It involves the training of caregivers, the development of emergency care plans, and the implementation of the Pflegeregister Wesermarsch, a digital tool designed to support the prioritisation of care-dependent individuals during crisis.

WP3: Disaster Management Resilience

This work package is oriented towards strengthening disaster management systems and operational capacities. It includes the provision of emergency power systems, the establishment

of evacuation centres, and the development of coordinated response strategies, with an emphasis on efficiency and rapid deployment during emergencies.

WP4: Monitoring and Evaluation

This component ensures the systematic assessment of project activities and outcomes. It includes resilience assessments, feedback mechanisms, and the development of monitoring tools aimed at supporting continuous improvement in disaster preparedness and response systems.

WP5: Dissemination and Knowledge Transfer

This work package focuses on the communication and transfer of project results and best practices. Key activities include the development of an interactive digital brochure, the organisation of workshops, and the publication of project findings, with the aim of facilitating replication in other regions.

WP6: Project Management and Coordination

This component is responsible for the overall coordination, monitoring, and administrative management of the project. It supports communication among stakeholders and ensures the effective implementation of project activities in accordance with defined timelines and resource allocations.

### *4.5. Key Tools and Innovative Approaches in Disaster Management*

The LifeGRID project incorporates a range of digital tools and operational innovations aimed at enhancing disaster preparedness, response capacity, and community resilience in the Wesermarsch district. These tools address different dimensions of crisis management, including situational awareness, coordination, and the protection of vulnerable populations. The following sections analyse the most significant components of this approach.

a) Pflegeregister Wesermarsch (Care Register)

The Pflegeregister Wesermarsch represents a centralised digital system designed to identify and monitor care-dependent individuals who may be particularly vulnerable during crisis. As a key component of the LifeGRID project, the register supports more efficient and targeted disaster response by providing emergency services with access to relevant real-time data (Pflegeregister Wesermarsch, 2026).

The system enables voluntary registration through an online platform, where individuals or their caregivers can provide essential information, including medical conditions, care needs, and dependence on electrically powered medical devices. This data allows emergency responders to assess vulnerability levels and prioritize interventions accordingly (Pflegeregister Wesermarsch, 2026).

In evacuation scenarios, the register facilitates the prioritization of individuals with the highest level of care dependency, thereby reducing health risks and improving the effectiveness of response operations. At the same time, the system is designed in compliance with

data protection standards, ensuring secure handling of sensitive personal information and restricted access for authorised personnel only.

The integration of the *Pflegeregister* with local disaster management systems further enhances situational awareness and enables more informed decision-making during emergencies. Beyond immediate response, the tool contributes to long-term resilience by ensuring that care-dependent populations are systematically included in disaster preparedness planning (Pflegeregister Wesermarsch, 2026).

b) Interactive Digital Brochure

The interactive digital brochure developed within the LifeGRID project functions as a centralised, web-based platform for disseminating disaster preparedness information.1 It is designed to improve public awareness and facilitate access to relevant guidance in crisis (LifeGRID, 2026).

The platform provides real-time updates on evolving hazards, including flood warnings and evacuation orders, and enables direct communication between local authorities and the population. In addition, it incorporates interactive maps, search functions, and tailored preparedness checklists, allowing users to access location-specific information and adapt preparedness measures to their individual needs (LifeGRID, 2026).

A key feature of the platform is its accessibility and adaptability across multiple devices, ensuring that information remains available during emergencies. The inclusion of multimedia content and accessibility functions further enhances user engagement and inclusiveness.

From a broader perspective, the digital brochure contributes to strengthening community resilience by promoting self-preparedness and facilitating a more active role of citizens in disaster risk reduction. Its use of analytics also supports continuous improvement of the platform and its content.

c) Evacuation Centres as an Operational Innovation

In addition to digital tools, the LifeGRID project introduces an innovative approach to evacuation planning through the establishment of specialised evacuation centres.2 These centres are designed to provide temporary accommodation, medical support, and essential services for affected populations during emergencies (Berufsbildende Schulen Wesermarsch, 2026; Stadt Elsfleth, 2026).

Strategically located within existing infrastructure, such as educational institutions, the centres are equipped with sleeping areas, sanitary facilities, and medical units. Particular attention is given to vulnerable groups, including elderly individuals, children, and persons with disabilities, through the provision of specialised care areas and adapted facilities.

[1] This tool is currently under development as part of the project objectives within the Lifegrid project. The tender procedure is currently ongoing, and upon its completion, work will begin on the development of the tool, which will be in use starting from November 1, 2026.

[2] The methodology for the establishment and operation of evacuation centres is defined in internal project documentation that is not publicly available. Consequently, detailed operational procedures cannot be independently verified through accessible sources. Available public information primarily relates to the designated locations of evacuation centres within the Wesermarsch district. These locations are associated with existing public infrastructure adapted for emergency use.

A critical component of these centres is the integration of emergency power systems, ensuring the continued operation of medical devices and communication systems during power outages. In addition, the presence of medical and psychological support services contributes to addressing both physical and mental health needs during crisis.

The centres are also integrated into local communication systems, enabling real-time information sharing and coordination with emergency services. This contributes to more efficient management of evacuation processes and improves overall response effectiveness (Landkreis Wesermarsch, 2023).

### *4.5.1. Synthesis of Tools and Innovations*

Taken together, the tools and approaches developed within the LifeGRID project illustrate an integrated model of disaster management that combines digital technologies, community engagement, and operational preparedness. The Pflegeregister enhances targeted response and protection of vulnerable populations, the digital brochure strengthens public awareness and communication, while the evacuation centres provide critical physical infrastructure for emergency response.

This combination of digital and organisational innovations contributes not only to improved short-term response capacities but also to the development of long-term resilience at the community level. The LifeGRID model therefore represents a transferable approach that may be applicable to other regions facing similar risk conditions (LifeGRID, 2026).

### *4.5.2. Practical Applications and Impact of LifeGRID Tools and Approaches*

The tools and strategies developed within the LifeGRID project demonstrate significant practical applications for disaster management and contribute to strengthening community resilience at the local level. Their impact can be observed across several interrelated dimensions, including individual preparedness, continuity of care, operational efficiency, and community-level resilience.

First, the project contributes to the empowerment of individuals by promoting active participation in disaster preparedness. Through training programmes, awareness-raising activities, the distribution of emergency kits, and access to digital tools such as the interactive brochure, residents are better equipped to anticipate and respond to crisis. This reflects a shift from a purely institutional approach towards a more participatory model of risk management.

Second, the project enhances the resilience of care systems by addressing the specific needs of vulnerable populations. The implementation of the Pflegeregister, together with the establishment of decentralized care units, supports the continuity of medical and social care during emergencies. This is particularly relevant for individuals dependent on electrically powered medical devices, for whom disruptions in service may have critical consequences.

Third, the integration of digital tools contributes to more efficient and coordinated disaster response. The availability of real-time data and improved communication channels enables emergency services to prioritise interventions, allocate resources more effectively, and coordinate evacuation procedures with greater precision. This enhances the overall responsiveness of the disaster management system.

Finally, the combined effect of these measures contributes to strengthening community resilience. By integrating technological solutions with community engagement and institutional coordination, the LifeGRID project supports the development of adaptive capacities

at the local level. This integrated approach aligns with contemporary disaster risk reduction frameworks, which emphasise the importance of collaboration, preparedness, and the inclusion of vulnerable groups in crisis management processes (Landkreis Wesermarsch, 2023; LifeGRID, 2026).

### *4.6. Legal and Fundamental Rights Considerations*

The deployment of digital tools within the LifeGRID project must be assessed in light of the protection of fundamental rights as guaranteed under the Charter of Fundamental Rights of the European Union. In particular, the processing of personal data engages the rights enshrined in Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter, both of which constitute core elements of the EU's constitutional framework.

The use of digital registries, such as the Pflegeregister, entails the collection and processing of sensitive personal data, thereby constituting an interference with these rights. Such interference may be justified where it pursues a legitimate objective of general interest—most notably the protection of life and health in emergency situations—and complies with the principle of proportionality. This requires that the measures adopted are suitable to achieve the intended objective, necessary in the absence of less restrictive alternatives, and proportionate stricto sensu, ensuring that the benefits of the measure outweigh its impact on fundamental rights. In this context, the existence of adequate safeguards—such as data minimisation, restricted access, and secure processing—is essential to ensure compliance with EU law.

Beyond data protection considerations, the implementation of digital tools in crisis management raises important issues of liability and accountability. The LifeGRID framework involves a multiplicity of actors, including local authorities, civil protection services, healthcare providers, and digital system operators, resulting in a complex governance structure in which the allocation of legal responsibility may not always be clearly defined.

From a legal perspective, challenges may arise in situations involving inaccurate, incomplete, or delayed data, which may adversely affect decision-making processes and the effectiveness of emergency response measures. Such scenarios raise questions concerning the attribution of responsibility between data controllers, system administrators, and competent public authorities, particularly where adverse outcomes result from reliance on digital systems.

Ensuring accountability in this context requires the establishment of clear and transparent governance frameworks, including the precise delineation of roles and responsibilities, the implementation of audit and monitoring mechanisms, and the availability of effective oversight structures. These elements are essential not only for compliance with legal standards but also for maintaining public trust in the use of digital technologies in high-risk and time-sensitive environments.

Ultimately, the integration of digital tools into crisis management systems, as exemplified by the LifeGRID project, highlights the need to balance operational effectiveness with the protection of fundamental rights. While such tools significantly enhance situational awareness and response capacity, their long-term legitimacy depends on their alignment with EU constitutional principles, particularly the protection of fundamental rights, legal certainty, and accountability.

Beyond legal and fundamental rights considerations, the deployment of digital tools in crisis management also raises broader systemic and technological risks. One important

concern relates to digital exclusion. Not all individuals, particularly elderly populations or those in rural or socio-economically disadvantaged areas, have equal access to digital technologies or the skills required to use them effectively. This may limit the reach and effectiveness of tools such as digital registries and online communication platforms, thereby creating disparities in access to emergency support.

Furthermore, the increasing reliance on digital systems introduces potential cybersecurity vulnerabilities. Crisis management platforms that process sensitive personal data may become targets for cyberattacks, data breaches, or system disruptions, which could compromise both data integrity and the effectiveness of emergency response measures. Ensuring robust cybersecurity frameworks is therefore essential for maintaining the reliability and resilience of such systems.

At the EU level, additional challenges arise from the fragmentation of legal, institutional, and technological frameworks across Member States. Differences in data governance practices, digital infrastructure, and administrative capacities may hinder interoperability and limit the effectiveness of cross-border coordination. This fragmentation poses a particular challenge for the development of fully integrated and harmonised crisis management systems within the Union.

These risks highlight that, while digital tools offer significant advantages in enhancing crisis response and resilience, their implementation must be accompanied by careful consideration of inclusiveness, security, and cross-border coherence.

### *4.7. Governance and Stakeholder Collaboration in the LifeGRID Project*

The LifeGRID project is characterised by a multi-level governance structure involving a diverse set of stakeholders from the public, academic, and civil society sectors. This collaborative framework enables the integration of different forms of expertise and supports a coordinated approach to disaster preparedness and response.

The project is coordinated by Landkreis Wesermarsch, which acts as the central organising authority responsible for overall project management and strategic direction. It operates in cooperation with key institutional partners, including Jade Hochschule, the Deutsches Rotes Kreuz, and other regional organisations, each contributing specialized knowledge and operational capacities (Landkreis Wesermarsch, 2026a).

The governance structure is designed to facilitate coordination across institutional boundaries and to ensure the effective implementation of project activities. This includes the alignment of objectives, the sharing of information, and the joint development of solutions tailored to local risk conditions.

Stakeholder engagement plays a central role in the project's implementation. By involving local communities, emergency services, healthcare providers, and academic institutions, the LifeGRID project promotes a multi-sectoral and interdisciplinary approach to disaster management. Such an approach is consistent with contemporary models of crisis governance, which emphasise collaboration, knowledge exchange, and the inclusion of multiple actors in decision-making processes (LifeGRID, 2026)

### *4.8. Expected Results and Long-Term Impact*

The LifeGRID project is expected to generate both short-term and long-term effects on disaster preparedness and community resilience in the Wesermarsch district. In the short term, the implementation of project measures is anticipated to improve operational capacities,

particularly in relation to evacuation planning, coordination among stakeholders, and the availability of emergency power solutions. These improvements contribute to a more structured and responsive disaster management system (Landkreis Wesermarsch, 2023).

In the long term, the project is expected to support the development of more resilient community structures by strengthening the integration of vulnerable populations into disaster preparedness frameworks and improving the continuity of care during crisis. In addition, the solutions developed within the project—particularly those based on digital tools and integrated coordination mechanisms—have the potential to be adapted and transferred to other regions facing similar risk conditions (LifeGRID, 2026).

### *4.9. Conclusion of the Case Study*

The LifeGRID project illustrates an integrated approach to disaster preparedness and community resilience in the Wesermarsch district. By combining technological solutions, targeted support for care-dependent populations, and community-based preparedness measures, the project addresses multiple dimensions of contemporary crisis management.

The analysis of its tools, organisational structure, and governance model indicates that the project contributes to improving coordination, situational awareness, and the inclusion of vulnerable groups in disaster response systems. In this context, LifeGRID can be understood as an example of a locally implemented, yet potentially transferable model aligned with broader European approaches to disaster risk reduction.

## 5. CONCLUSION

This paper has examined the role of digital tools within the European Union's approach to reducing security and safety risks in crisis, with particular emphasis on their contribution to disaster preparedness and community resilience. The analysis has shown that contemporary EU crisis management is increasingly shaped by the interaction between technological innovation, legal frameworks, and multi-level governance structures.

From a legal standpoint, the deployment of digital tools takes place within a clearly defined, albeit fragmented, normative framework. Treaty provisions, in particular those relating to civil protection, public health, and the internal market, establish the basis for Union action, while secondary legislation and regulatory regimes—most notably the General Data Protection Regulation and the Charter of Fundamental Rights—set the substantive limits within which such tools may operate. This framework does not merely enable digitalisation but conditions it, requiring that efficiency gains in crisis response be balanced against the protection of fundamental rights and adherence to principles such as proportionality and legal certainty.

The LifeGRID project illustrates how these dynamics unfold in practice. Its integrated approach—combining digital registries, communication platforms, and organisational measures—demonstrates the potential of data-driven systems to improve situational awareness, prioritise vulnerable populations, and enhance coordination among stakeholders. At the same time, the case study underscores that the effectiveness of such tools depends less on technology alone than on their embedding within coherent governance structures and clearly defined operational frameworks.

At a more critical level, the analysis has highlighted a set of risks that accompany the increasing reliance on digital infrastructures in crisis management. These include challenges

related to the processing of sensitive personal data, the allocation of responsibility in complex multi-actor environments, and the need to ensure accountability and oversight. In addition, structural issues—such as unequal access to digital technologies, exposure to cybersecurity threats, and the persistent fragmentation of legal and institutional frameworks across Member States—may constrain both the inclusiveness and the overall effectiveness of digital crisis management systems.

Taken together, these findings suggest that digital tools should not be understood as standalone solutions, but as components of a broader socio-technical system in which legal, institutional, and technological elements are closely intertwined. Their successful implementation therefore requires not only innovation, but also careful design, regulatory alignment, and sustained coordination across different levels of governance.

In this context, the LifeGRID project may be seen as a useful point of reference for future initiatives, while also illustrating the conditions under which such models can function effectively and legitimately. Further research should examine how similar approaches perform across different national settings, particularly in relation to scalability, interoperability, and the long-term integration of legal safeguards in increasingly digitalised crisis management environments.

## LIST OF REFERENCES

### *Literature*


Alexander, D.E. 2002. *Principles of Emergency Planning and Management*. Oxford: Oxford University Press.

Coppola, D.P. 2011. *Introduction to International Disaster Management*. Oxford: Butterworth-Heinemann. https://doi.org/10.1016/C2009-0-64027-7

Cutter, S.L., Burton, C.G. & Emrich, C.T. 2010. Disaster resilience indicators for benchmarking baseline conditions. *Journal of Homeland Security and Emergency Management*, 7(1). https://doi.org/10.2202/1547-7355.1732

Dincă, G., Bărbuță, M. & Dincă, D. 2025. Crisis as a catalyst: Difference-in-differences evidence on digital public service transformation in the European Union. *Administrative Sciences*, 15(10). https://doi.org/10.3390/admsci15100393

Fischer-Preßler, D., Bonaretti, D. & Bunker, D. 2024. Digital transformation in disaster management: A literature review. *The Journal of Strategic Information Systems*, 33(4), Article 101865. https://doi.org/10.1016/j.jsis.2024.101865

Houston, J.B. *et al.* 2015. Social media and disasters: A functional framework for social media use in disaster planning, response, and research. *Disasters*, 39(1), pp. 1–22. https://doi.org/10.1111/disa.12092

Migliorini, M. *et al.* 2019. Data interoperability for disaster risk reduction in Europe. *Disaster Prevention and Management: An International Journal*, 28(6), pp. 804–816. https://doi.org/10.1108/DPM-09-2019-0291

Reuter, C. & Kaufhold, M.-A. 2018. Fifteen years of social media in emergencies: A retrospective review and future directions for crisis informatics. *Journal of Contingencies and Crisis Management*, 26(1), pp. 41–57. https://doi.org/10.1111/1468-5973.12196

### *Legal sources*


European Commission. 2020a. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European strategy for data*, COM(2020) 66 final. Brussels: European Union.

European Commission. 2020b. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Shaping Europe's digital future*, COM(2020) 67 final. Brussels: European Union.

European Parliament and Council. 2013. Decision No 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism. Official Journal of the European Union, L 347, pp. 924–947.

European Parliament and Council. 2016. Regulation (EU) 2016/679 (General Data Protection Regulation). Official Journal of the European Union, L 119, pp. 1–88.

European Union. 2012a. Consolidated version of the Treaty on European Union. *Official Journal of the European Union*, C 326, pp. 13–45.

European Union. 2012b. Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union*, C 326.

European Union. 2012c. Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*, C 326, pp. 391–407.

International Organization for Standardization. 2018. *ISO 31000: Risk management – Guidelines*. Geneva: ISO.

United Nations Office for Disaster Risk Reduction. 2015. *Sendai Framework for Disaster Risk Reduction 2015–2030*. Geneva: UNDRR. Available at: https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf.


### *Reports and Online Sources*


Berufsbildende Schulen Wesermarsch. 2026. *Berufsbildende Schulen Wesermarsch*. Available at: https://bbs-wesermarsch.de/ (30. 3. 2026).

Council of the European Union. 2022. *Integrated Political Crisis Response (IPCR) arrangements*. Brussels: European Union. Available at: https://www.consilium.europa.eu/en/policies/ipcr-response-to-crises/ (20. 3. 2026).

European Commission. 2020c. *DRIVER+ project: Driving innovation in crisis management for European resilience*. Available at: https://cordis.europa.eu/project/id/607798/reporting (22. 3. 2026).

European Commission. 2023. *Emergency Response Coordination Centre (ERCC)*. Available at: https://civil-protection-humanitarian-aid.ec.europa.eu/what/civil-protection/emergency-response-coordination-centre-ercc_en (19. 3. 2026).

Landkreis Wesermarsch. 2023. *Strategiekonzept SifoLIFE: Umsetzungsphase*. Available at: https://wesermarsch.de/wp-content/uploads/2023/07/Strategiekonzept_SifoLIFE_Umsetzungsphase_Homepage.pdf (19. 3. 2026).

Landkreis Wesermarsch. 2026a. *Kooperationsprojekt LifeGRID*. Available at: https://wesermarsch.de/services/brandbevoelkerungsschutz/kooperationsprojekt-lifegrid/ (15. 3. 2026).

Landkreis Wesermarsch. 2026b. *Landkreis Wesermarsch official website*. Available at: https://wesermarsch.de/ (15. 3. 2026).

LifeGRID. 2026. *LifeGRID project website*. Available at: https://www.lifegrid.de/ (15. 3. 2026).

OECD. 2020. *The territorial impact of COVID-19: Managing the crisis across levels of government*. Paris: OECD Publishing. Available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/04/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government_9cfcb95f/d3e314e1-en.pdf (25. 3. 2026).
Pflegeregister Wesermarsch. 2026. *Pflegeregister Wesermarsch*. Available at: https://www.pflegeregister-wesermarsch.de/ (22 .3. 2026).
Stadt Elsfleth. 2026. *Stadthalle Elsfleth*. Available at: https://www.elsfleth.de/ansprechpartner-buergerservice/stadthalle/ (30. 3. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch19

***Ena GOTOVUŠA****

# VIDEOCONFERENCE HEARINGS IN CRIMINAL PROCEEDINGS: A EUROPEAN LEGAL PERSPECTIVE

*The use of videoconferencing in criminal proceedings has become increasingly common, particularly in cases involving cross-border elements. What was once considered an exceptional procedural tool is now more frequently used to facilitate cooperation between judicial authorities, reduce delays, and address practical difficulties related to distance, costs, and time constraints. This paper examines videoconference hearings in criminal proceedings within the European legal framework, focusing on the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 EU MLA Convention), the Directive on the European Investigation Order, and Regulation (EU) 2023/2844 on the Digitalisation of Judicial Cooperation.*

*The paper provides an overview of the legal bases and main objectives of these instruments with regard to the use of videoconferencing for hearings, questioning of suspects, witnesses, and experts, as well as other procedural acts. It explores how videoconferencing is positioned as a tool for improving the efficiency of criminal proceedings while supporting judicial cooperation between states.*

*At the same time, the paper addresses the importance of ensuring that the use of videoconference hearings does not undermine fundamental procedural guarantees, including the rights of the defence and the right to a fair trial.*

***Keywords:*** videoconference hearings, criminal proceedings, European Union, judicial cooperation in criminal matters, digitalisation of justice.

## 1. INTRODUCTION: FROM EXCEPTIONAL MEASURE TO STRUCTURAL TOOL

The use of videoconferencing in cross-border criminal proceedings is not a new instrument within the European legal framework. Its origins lie in the traditional instruments of mutual

* PhD, Assistant Professor, University of Sarajevo, Faculty of Law, Chair of Criminal Law, ORICD: https://orcid.org/0009-0007-2808-9763, email: *e.gotovusa@pfsa.unsa.ba*

legal assistance in criminal matters, developed within the framework of the Council of Europe (CoE), and later in the European Union (EU) legal order through the adoption of legal instruments based on the principle of mutual recognition of judicial decisions in criminal matters among EU Member States (MS). The EU had already promoted the use of videoconferencing long before the outbreak of the COVID-19 pandemic, recognising it as an efficient tool to facilitate and accelerate cross-border proceedings among MSs (Council of the European Union, Videoconferencing as a Part of European e-Justice: The Essentials of Videoconferencing in Cross-Border Court Proceedings, 2009; Council of the European Union, Guide on Videoconferencing in Cross-Border Proceedings, 2013). The outbreak of the COVID-19 pandemic significantly accelerated the digitalisation of justice system not only at the EU level (European Commission, 2020, Digitalisation of justice in the EU – A toolbox of opportunities, COM(2020) 710 final) but also within the national justice systems of the MS (Novokmet, Tomičić & Vidaković, 2025, p. 103; Žukovaitė, 2024, p. 78; Sanders, 2020, p. 1). In this context, the use of videoconferencing for the hearing of suspects, accused persons, witnesses, and experts became significantly more widespread, as the pandemic acted as a catalyst for its broader use in criminal proceedings. Today, the digitalisation of justice is a central feature of judicial cooperation in criminal matters both within the EU and within the framework of the CoE (European e-Justice Strategy 2024–2028; Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 227, Valletta, 2025, hereinafter: Third Additional Protocol to the ECMA).

In the light of these developments, the paper examines the European legal framework governing the use of videoconferencing in cross-border criminal proceedings. The analysis focuses exclusively on cross-border video hearings in criminal matters among MSs (all of whom are also members of the CoE) and does not address the use of videoconferencing in domestic proceedings. Particular attention is given to the interaction and areas of overlap between two parallel systems of cross-border judicial cooperation in criminal matters: the traditional system based on mutual legal assistance and the more recent EU system based on the principle of mutual recognition of judicial decisions. The analysis examines recent developments in the regulation of videoconferencing, in particular the Third Additional Protocol to the ECMA, ongoing initiatives for the modernisation of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, regarding the European Investigation Order in criminal matters (hereinafter: EIO Directive), and Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation. It further assesses the implications of videoconferencing for the rights of the defence and the right to a fair trial under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the Charter), based on the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

The paper applies the normative method by analysing and interpreting the relevant treaty law, EU legislative instruments and soft law documents governing cross-border judicial cooperation, alongside a comparative examination of the relationship between the CoE mutual legal assistance framework and the EU system of mutual recognition. The case law of the ECtHR and the CJEU is examined to assess the compatibility of videoconferencing with the right to a fair trial.

The analysis departs from two central hypotheses. First, that videoconferencing has undergone a fundamental normative transformation from an exceptional procedural measure into

a structural mechanism of cross-border judicial cooperation in criminal matters. Second, that significant divergences in the interpretation and application of the applicable legal framework persist, particularly regarding procedural safeguards and the principle of immediacy, which require legislative rather than judicial resolution.

## 2. VIDEOCONFERENCING IN INSTRUMENTS OF MUTUAL LEGAL ASSISTANCE

In the context of mutual legal assistance in criminal matters, the development of provisions on videoconferencing has taken place within two parallel normative frameworks: legal instruments adopted within the CoE and those developed within the EU. The European Convention on Mutual Assistance in Criminal Matters (CoE, ETS No. 30, Strasbourg, 1959, hereinafter: ECMA), often referred to as the "Mother Convention" (Militello & Mangiaracina, 2009, p. 174), served as the legal basis and principal model for EU legal instruments in this field, most notably the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12 July 2000, hereinafter: EUCMACM). The EUCMACM represents both the first EU legal instrument in the field of mutual legal assistance in criminal matters, adopted after the Treaty on European Union (TEU) entered into force, and probably the last instrument within the EU legal order based on the principle of mutual legal assistance, which was subsequently replaced by the principle of mutual recognition (Militello & Mangiaracina, 2009, p. 175).

According to the Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 379, 29 Dec. 2000, hereinafter: Explanatory Report to the EUCMACM), the Convention was not designed to establish a completely new regime of mutual legal assistance among the Member States, but rather to develop and modernise the existing framework based on the ECMA and the 1990 Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders (CISA)[1] (Craig & De Búrca, 2011, p. 938; Mitsilegas, 2009, p. 14). Its objective was to expand the scope and circumstances in which mutual legal assistance could be requested and to facilitate its practical application in order to improve efficiency, while taking into account political changes as well as social and technological developments.

The close relationship between these instruments is evident in the regulation of videoconference hearings. The adoption of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CoE, CETS No. 182, Strasbourg, 2001, hereinafter: Second Additional Protocol to the ECMA), only one year after the EUCMACM, confirms this strong normative and chronological connection between these two parallel

[1] By the Treaty of Amsterdam, more specifically Protocol No. 2, the Schengen acquis was integrated into the EU legal framework, and its preservation and further development with a view to achieving an Area of Freedom, Security and Justice (AFSJ) without internal borders for EU citizens was subsequently confirmed by the Treaty of Lisbon, Protocol No. 19. See Protocol (No. 2) integrating the Schengen acquis into the framework of the European Union, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 Nov. 1997, pp. 93–96; Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, pp. 290–292.

systems, while also revealing certain substantive differences in their respective provisions on videoconference hearings.

The EUCMACM introduced videoconferencing as a procedural mechanism for the taking of evidence in cross-border criminal proceedings among MSs, in particular for the hearing of witnesses and experts and, subject to specific conditions, accused persons. Videoconferencing may be requested where the person to be heard is present in the territory of another MS, and it is not desirable or possible for that person to appear in person before the competent authorities of the requesting State (Art. 10 para. 1). As explained in the Explanatory Report to EUCMACM, such requests require that the person concerned be heard as a witness or expert, and that their personal attendance before the judicial authority of the requesting MS be either undesirable or not possible. Attendance may be considered undesirable, for instance, in cases involving very young or elderly witnesses or persons in poor health, whereas attendance may be considered not possible, for example, where appearing in the requesting MS would expose the person concerned to serious danger (Explanatory Report to EUCMACM, p. 15). In this way, the EUCMACM provides an alternative to the in-person appearance of witnesses and experts while preserving the established framework of mutual legal assistance.

The requested MS is obliged to agree to the hearing by videoconference provided that the use of videoconferencing is not contrary to the fundamental principles of its law and that it possesses the technical means necessary to conduct the hearing. Where the requested MS does not have access to the necessary technical means, the requesting MS may provide them on the basis of mutual agreement (Art. 10, para. 2).

The EUCMACM establishes a clear division of responsibilities between the requesting and requested MS. A judicial authority of the requested MS must be present during the hearing and is responsible for ensuring both identification of the person to be heard and respect for the fundamental principles of the law of the requested MS. If the judicial authority of the requested MS considers that the fundamental principles of its law are being infringed during the hearing, it must immediately take the necessary measures to ensure that the hearing continues in accordance with those principles (Art. 10, para. 5, subpara. a).

At the same time, the hearing is conducted directly by, or under the direction of, the judicial authority of the requesting MS and in accordance with its own law (Art. 10, para. 5, subpara. c). This arrangement combines the principles *locus regit actum* and *forum regit actum*, since the execution of the request remains subject to the law of the requested MS, while the taking of evidence is governed by the procedural law of the requesting MS. This approach serves a dual purpose: 1) the need to avoid infringing the fundamental principles of the law of the requested State, and 2) the need to obtain evidence in accordance with the law of the requesting State in order to ensure its admissibility in the criminal proceedings conducted there (Gotovuša, 2025, p. 56).

The EUCMACM provides a number of protective measures for the persons to be heard. If necessary, at the request of the requesting MS or of the person to be heard, the requested MS must ensure that the person concerned is assisted by an interpreter. The person to be heard may also claim the right not to testify if such a right exists under the law of either the requesting or the requested MS. Appropriate protective measures may also be agreed upon between the competent authorities of the requesting and requested MS, if necessary (Art. 10, para. 5, subparas. b, d, e).

It should be noted that MSs may, at their discretion and subject to agreement between the competent judicial authorities, apply the provisions on videoconferencing to hearings involving an accused person. In such cases, the decision to hold the videoconference and the manner in which it is conducted must be agreed upon between the MSs concerned, in accordance with their national law and relevant international legal instruments, including the ECHR. However, the EUCMACM contains no reference to the Charter, as the Charter had not yet been adopted at the time of the Convention's drafting and therefore did not form part of the applicable EU fundamental rights framework. Prior to the Charter's entry into force, the protection of fundamental rights in the context of cooperation in criminal matters among member states was ensured primarily through the obligation enshrined in Article K.2 TEU, which required MSs to act in compliance with the provisions of the ECHR (Hendry, 1993, p. 307). With the entry into force of the Treaty of Lisbon, the Charter acquired the status of primary EU law (Art. 6 para. 1 TEU), substantially strengthening the protection of fundamental rights in the field of judicial cooperation in criminal matters among MS. In line with these guarantees, the consent of the accused person constitutes a *conditio sine qua non* for the holding of a videoconference hearing (Art. 10 para. 9).

The solutions adopted in the Second Additional Protocol to the ECMA concerning the hearing of witnesses, experts, and accused persons by videoconference largely mirror Article 10 of the EUCMACM (CoE, Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 182, Strasbourg, 2001, hereinafter: Explanatory Report to the Second Additional Protocol to the ECMA, paras. 70–81). One important distinction should be noted nevertheless. Whereas the EUCMACM covers only hearings by videoconference involving an accused person, subject to his or her consent, the Second Additional Protocol to the ECMA expressly extends this possibility to suspects, thereby ensuring that persons at the investigative stage are not excluded on the basis of their formal procedural status (Explanatory Report to the Second Additional Protocol to the ECMA, paras. 82–83). The consent requirement and opt-out mechanism are preserved in identical terms (Explanatory Report to the Second Additional Protocol to the ECMA, para. 85).

The regime established by the EUCMACM and the Second Additional Protocol to the ECMA is characterised by three key features: 1) the requirement that the in-person attendance of a witness or expert be either undesirable or impossible; 2) the consent of the accused person or suspect as a *sine qua non* for the conduct of such a hearing; and 3) the opt-out mechanism enabling MSs to formally exclude videoconference hearings of accused persons or suspects from mutual legal assistance (Vermeulen, 2006, p. 90). As the following section will show, recent developments, most notably the Third Additional Protocol to the ECMA, point to a gradual shift away from the view of videoconferencing as an exceptional measure towards recognising its structural role in cross-border criminal proceedings.

### *2.1. Expanding the Scope: The Third Additional Protocol to the ECMA*

The Third Additional Protocol to the ECMA was opened for signature by the CoE in September 2025 and is the most recent and comprehensive effort to modernise the mutual legal assistance framework established by the 1959 Convention.[2] Its adoption was motivated

[2] Pursuant to Article 10, para. 2, the Protocol shall enter into force on the first day of the month following the expiration of the period of three months after three Signatories have expressed their consent to be bound by it. As of the time of writing, the Protocol has been signed by 17 States. See Council of Europe Treaty Office.

by the structural limitations of the existing framework, against the backdrop of the dynamics of contemporary cross-border crime, the widespread digitalisation of communication, and growing reliance on technical surveillance measures in cross-border investigations.

With regard to videoconference hearings, Article 2 of the Third Additional Protocol, which replaces Article 9 of the Second Additional Protocol, introduces significant changes to the existing regime. Most notably, the grounds on which videoconferencing may be requested have been considerably broadened and are no longer limited to the narrow circumstances in which the in-person attendance of a witness or an expert was deemed undesirable or impossible under the previous regime. Videoconferencing is thus repositioned from a secondary or exceptional option into an equally valid, and where appropriate preferable, means of taking evidence, particularly in cases involving great distances, travel costs, security concerns, or limitations on the mobility of witnesses or experts (CoE, Explanatory Report to the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 227, Valletta, 2025, hereinafter: Explanatory Report to the Third Additional Protocol to the ECMA, para. 20). In keeping with this approach, the Third Additional Protocol specifically emphasises that the decision to use videoconferencing must be based on an individual assessment of each case and accompanied by mandatory provision of appropriate safeguards, including the right of defence. It should be noted in this regard that the reference to "fundamental principles of law" in Article 2 (a clarification already established under the Second Additional Protocol) does not permit a requested State to refuse the execution of a videoconference request solely on the ground that such hearings are not provided for under its national law or that one or more detailed conditions for a hearing by videoconference would not be met under its national law (Explanatory Report to the Third Additional Protocol to the ECMA, para. 21; Explanatory Report to the Second Additional Protocol to the ECMA, para. 76).

Another important addition is introduced by the new paragraph 10 of Article 2, which allows Contracting States, through special bilateral or multilateral agreements, to replace or supplement the rules of the 1959 ECMA with regard to the conduct of hearings by videoconference. This gives Contracting States the flexibility to agree, in accordance with their national legislation, on different modalities for conducting such hearings, provided that such arrangements apply exclusively to proceedings conducted within the territories of the States concerned. In this context, the concept of 'competent authorities' is not to be interpreted restrictively, and it does not exclusively encompass central authorities,[3] but it may also include other bodies and agencies which, under national law, are competent to organise videoconference hearings and authorised to conclude such agreements. By way of illustration, the drafters contemplate a situation in which the requested State may, with the consent of the requesting State, waive the obligation to ensure the presence of its judicial authority during the hearing (an obligation previously considered mandatory for the purposes of identifying the person to be heard and ensuring compliance with national legal standards). Such a waiver would be

Available at https://www.coe.int/en-GB/web/conventions/full-list2?module=signatures-by-treaty&treaty-num=227 (25. 2. 2026).

[3] The 1959 ECMA does not use the term 'central authority', which has nonetheless become established in practice as a functional designation for the authority to which requests are addressed under Article 15 – most commonly the Ministry of Justice. The determination of which authorities qualify as "judicial authorities" is left to each signatory State, which is required to specify this by declaration to the Secretary General of the Council of Europe. See CoE, 1959. Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30). Available at: https://treaties.fcdo.gov.uk/data/Library2/pdf/1992-TS0024.pdf (25. 2. 2026).

permissible where the witness or expert voluntarily consents to provide evidence and there are no particular concerns regarding the protection of their rights. This arrangement is intended to reduce the burden on the courts of the requested State, which would no longer be required to ensure judicial presence at every videoconference hearing (Explanatory Report to the Third Additional Protocol to the ECMA, para. 23).

Concerning the hearing of suspects and accused persons, the Third Additional Protocol retains the normative approach of the Second Additional Protocol, under which such hearings are conditional upon the express consent of the person concerned and the prior approval of the competent judicial authorities of both States, while the opt-out mechanism is also preserved.

The significance of the Third Additional Protocol extends beyond the CoE framework. Its relevance to the modernisation of cross-border judicial cooperation in criminal matters (including reforms to the videoconferencing regime) has been recognised at the EU level, confirming the close and ongoing interplay between the two parallel systems. The European Commission has submitted a Proposal for a Council Decision authorising MSs to sign the Third Additional Protocol in the interest of the European Union[4] (European Commission, 2025, COM(2025) 510 final), underscoring the Protocol's relevance to the EU's own judicial cooperation framework. The Proposal identifies several reasons why the swift entry into force of the Protocol is in the EU's interest: 1) it will better equip judicial and other competent authorities to request and provide evidence necessary for criminal investigations; 2) it will ensure that evidence-gathering measures are applied in a manner consistent with fundamental rights, including criminal procedural rights, the right to privacy, and the right to data protection; and 3) it is fully consistent with the objectives set out in ProtectEU, the European Internal Security Strategy of 2025 (European Commission, 2025, COM(2025) 148 final), thereby complementing existing EU and international legal instruments in the fight against serious and organised transnational crime.

The relationship between the CoE and EU legal frameworks in the field of videoconferencing is not restricted to the mutual legal assistance area. As will be seen in the following sections, it extends to the EU's mutual recognition framework, in particular the EIO Directive and Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation. These instruments mark a significant shift in the role of videoconferencing in cross-border criminal proceedings, from an exceptional measure of last resort to a standard procedural mechanism.

## 3. VIDEOCONFERENCING IN THE EU MUTUAL RECOGNITION FRAMEWORK

The principle of mutual recognition, declared the "cornerstone" of judicial cooperation in criminal matters at the 1999 Tampere European Council (Tampere European Council,

[4] As of the time of writing, the Proposal for a Council Decision authorising Member States to sign the Third Additional Protocol in the interest of the European Union has not yet been adopted by the Council. The proposal was submitted by the European Commission on 11 September 2025 (COM(2025) 510 final) and remains under discussion at the level of the Working Party on Cooperation in Criminal Matters (COPEN). A revised draft by the Presidency was circulated in October 2025, and a non-paper from the Commission services was submitted in January 2026, with further COPEN meetings scheduled through March 2026. See Council of the European Union, Working Party on Cooperation in Criminal Matters (COPEN). Available at: https://www.consilium.europa.eu/en/meetings/mpo/2026/2/wp-on-judicial-cooperation-in-criminal-matters-copen-(362965)/ (25. 2. 2026).

Presidency conclusions, 1999, para. 33) and subsequently formalised as a legally binding principle following the entry into force of the Treaty of Lisbon (Art. 82 (1) TFEU) (Satzger, 2019, p. 47), replaced mutual legal assistance as the primary mechanism for cross-border cooperation in criminal matters among MSs. In essence, mutual recognition operates on the premise that differences in how MSs regulate a given matter do not preclude the acceptance of each other's judicial decisions as legally equivalent (European Commission, 2000, COM(2000) 495 final, para. 3.1; Mitsilegas, 2009, pp. 118–120). The distinctive feature of mutual recognition, as compared to mutual legal assistance, lies in the direct recognition and enforcement of judicial decisions across MSs on the basis of equivalence and mutual trust, without the need for intermediate executive measures (Armada & Weyembergh, 2017, p. 116). It is within this framework that the regulation of videoconferencing under the EIO Directive and Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation will be examined in the following sections.

### *3.1. Videoconferencing Under the EIO Directive and Its Modernisation*

The 2014 EIO Directive is one of the central EU legal instruments governing the cross-border gathering of evidence in criminal matters among Member States, replacing – for the MSs that have adopted it – corresponding provisions of the mutual legal assistance framework previously established by the ECMA, CISA, and EUCMACM (Art. 34 para. 1, EIO Directive).[5] Its provisions on videoconference hearings (Art. 24) are largely derived from Article 10 of the EUCMACM. The procedural architecture of Article 24 is therefore consistent with the mutual legal assistance framework: the hearing is conducted by or under the direction of the issuing State's authority in accordance with its own law, while the executing State's authority must be present throughout the hearing, verify the identity of the person to be heard, and ensure compliance with the fundamental principles of its own legal order (Art. 24, para. 5, subparas. a and c, EIO Directive).

One of the key novelties of the EIO Directive is its broadened personal scope, the categories of persons who may be heard by videoconference. Whereas the EUCMACM limited videoconference hearings to witnesses and experts, with the possibility of hearing accused persons left to the discretion of Member States and conditional upon the consent of the person concerned, the EIO Directive extends to suspects from the outset, without treating their inclusion as a discretionary or exceptional matter. This represents a normative step that reflects the Directive's broader ambition to provide a comprehensive and coherent framework for cross-border evidence gathering, covering all the relevant procedural status of a person, irrespective of their formal status in the proceedings. In doing so, the Directive aligns the videoconferencing framework with the realities of criminal investigations, in which the procedural status of a person may evolve over the course of the proceedings.

With regard to the conditions for requesting videoconferencing, the EIO Directive introduces a fundamental change from the EUCMACM framework. Under Article 10(1) of the

[5] The question of which specific provisions of the ECMA, CISA, and EUCMACM are replaced by the EIO Directive remains unresolved. The Eurojust/EJN implementation note acknowledged that no detailed list of the "corresponding provisions" had yet been drawn up, expressed doubt as to whether such a list could in fact be compiled given the interpretive difficulties involved, and raised the further question of which institution would be competent to prepare it. See Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters – State of play of the implementation process, information by Eurojust and the EJN, Council of the European Union, 9936/17 JAI 571 COPEN 188 EUROJUST 85 EJN 41, 13 June 2017.

EUCMACM, videoconferencing could only be requested where it was "not desirable or possible" for the person to appear in person, a subsidiarity requirement positioning videoconferencing as a measure of last resort. Under Article 24(1) of the EIO Directive, by contrast, the issuing authority may issue an EIO for a videoconference hearing whenever the person to be heard is located in the territory of the executing State and is required to be heard by the issuing State's authorities. The issuing authority is not required to demonstrate that in-person attendance is impracticable – it needs only to satisfy the general proportionality and necessity requirements applicable to all EIOs (Art. 6 para. 1, EIO Directive). This confirms the transformation of videoconferencing from an exceptional measure into a standard procedural option within the mutual recognition framework. This convergence is further evidenced by the Third Additional Protocol to the ECMA, which, by replacing the "not possible, or desirable, or practical, or economic" condition with the considerably broader standard of "where appropriate," indicates a change of the CoE framework towards the approach adopted under the EIO Directive, further illustrating the strong connection between the two parallel systems.

Equally significant is the change in the obligation to execute. Under the EUCMACM, the requested State "shall agree" to a videoconference hearing subject to two conditions: that the use of videoconferencing is not contrary to the fundamental principles of its law, and that it possesses the necessary technical means (Art. 10 para. 2). Under the EIO Directive, the executing State is obliged to recognise and execute the EIO, and may refuse only on the limited grounds listed in Article 11(1), together with two additional grounds specific to videoconference hearings under Article 24(2): the absence of consent of the suspected or accused person, and conflict with the fundamental principles of the executing State's law. The broad sovereignty-based grounds available under the mutual legal assistance framework (including national security, essential interests of the State, and similar discretionary public policy exceptions) do not form part of the EIO's exhaustive list of refusal grounds. This represents a shift in the burden of justification: whereas under the mutual legal assistance framework the requested State retained broad discretion to decline cooperation on general sovereignty-based grounds, under the EIO the executing State must justify non-execution by invoking a specific enumerated ground.

Despite these differences, the *forum regit actum* principle, already established under the EUCMACM, is fully preserved in the EIO framework. Article 24 (5) (c) of the EIO Directive, in line with Article 10(5)(c) of the EUCMACM, provides that the hearing shall be conducted directly by, or under the direction of, the issuing authority in accordance with its own law. This continuity between the two instruments confirms that, even within the mutual recognition paradigm, the procedural sovereignty of the executing State is not entirely displaced. The executing State's competent authority retains its role as a guarantor of fundamental rights compliance throughout the hearing and is required to intervene immediately if the fundamental principles of its legal order are being infringed (Art. 24, para. 5, subpara. a), EIO Directive).

This normative connection and the significance of the EIO's videoconferencing regime have been recently confirmed by the CJEU. In its judgment in *Bissilli* (C-325/24, 18 December 2025), the CJEU confirmed that an EIO may be issued for a videoconference hearing of an accused person held in custody in the executing State, and that the executing authority's possibilities for refusing such a request are narrowly limited by the exhaustive list of grounds in Article 24 (2). The CJEU further clarified that while executing States may adopt general guidelines for applying the refusal ground in Art. 24 (2) (b), such guidelines cannot replace an

individual examination of the specific circumstances of each case (Wahl, 2026). The Court's ruling reinforces the Directive's objective of making videoconferencing a reliable and predictable tool within the EU's mutual recognition framework.

Despite these developments, the practical application of Article 24 continues to be hampered by significant difficulties, as documented by the Final Report on the Tenth Round of Mutual Evaluations on the implementation of the EIO Directive (Council doc. ST-15834/1/24 REV 1).

The first problem concerns the execution of EIOs for videoconference hearings of the accused for evidentiary purposes at the trial stage. Several MSs refuse to execute such EIOs on the basis of the principle of immediacy, even where the accused has given consent. This position is difficult to reconcile with the ECtHR case-law, which has consistently held that videoconference participation does not in itself conflict with the ECHR, provided the measure pursues a legitimate aim and the arrangements governing its conduct are compatible with the requirements of due process.

The second, and more fundamental, problem concerns the scope of Article 24 itself, on which MSs remain deeply divided. A substantial number of MSs issue and execute EIOs to ensure that the accused, located in another MS, may participate remotely throughout the main trial, considering this an effective alternative to the European Arrest Warrant (EAW) and a means of preventing trials in absentia. Other MSs firmly reject this practice, maintaining that ensuring the accused's participation throughout the trial goes beyond the scope of the EIO Directive, as it does not constitute an "investigative measure" aimed at "obtaining evidence" within the meaning of Article 1. The CJEU's judgment in *FP and Others* (C-760/22, 2024, § 32) confirmed that videoconference participation at the accused's express request does not conflict with the right to be present at trial under Directive 2016/343, but it did not resolve the question of whether such participation falls within the scope of the EIO Directive. It was only through the subsequent *Bissilli* judgment that partial clarification was provided, though the question has yet to be definitively resolved through legislation (Wahl, 2026).

The third problem concerns the legal qualification of the grounds for refusal. Executing authorities have in a number of cases invoked Article 11 (1) (f), the general fundamental rights ground, when the more appropriate ground would be Article 24 (2) (b), fundamental principles of the executing State's legal order. These two grounds are legally distinct and failing to distinguish between them produces legally unsound refusal decisions, with potentially significant consequences for the coherence of the EIO regime.

The fourth issue is the controversial practice of "direct videoconferences" – hearings conducted by directly contacting persons located in another MS, with the consent of the person concerned and without issuing an EIO. Some MSs regard this as a legitimate proportionate option. Others consider it incompatible with the EIO framework and an infringement of the sovereignty of the State where the person is located. This practice remains unresolved and requires legislative clarification.

Finally, practical operational difficulties have been identified, including delays caused by EIOs being transmitted too close to the proposed hearing date, and technical incompatibility between the videoconferencing systems used by issuing and executing authorities across MS. In this regard, the Commission has been invited to examine the feasibility of a secure and interoperable EU-wide videoconferencing system for cross-border hearings.

Taken together, these findings illustrate that the EIOs videoconferencing regime, despite the progress made compared to the mutual legal assistance framework, continues to face significant differences in interpretation and application among MSs, which the text of the EIO Directive alone has not been able to resolve. It is in this context that the Commission's Call for Evidence (Ref. Ares(2026)56130) announces a legislative proposal pursuing two objectives: targeted amendments to close the gaps identified by mutual evaluations, and establishing common rules on the remote participation of suspects, accused persons, and victims in court hearings by videoconference from another MS (a considerably more ambitious objective given the diversity of national legal frameworks, and a matter currently unregulated at the EU level). This initiative further confirms the ongoing consolidation of videoconferencing as a standard procedural mechanism in cross-border criminal proceedings within the EU.

### *3.2. Embedding Videoconferencing: Regulation (EU) 2023/2844*

The EU framework on videoconferencing in criminal matters extends beyond the EIO Directive. Regulation (EU) 2023/2844 represents a distinct development in this field. The Regulation operates horizontally, establishing common rules on digital communication, electronic exchanges, and the use of other means of distance communication technology applicable to cross-border judicial cooperation procedures falling within its scope. In this sense, it functions as a general digital framework supplementing, rather than replacing, sector-specific instruments in criminal matters (Pingen & Wahl, 2024; Ho-Dac, 2024).

In criminal matters, the Regulation applies only to the cross-border procedures exhaustively listed in Annex II.[6] Its significance lies not in creating an autonomous regime for cross-border criminal videoconference hearings, but rather in that it embeds such hearings within a wider digital judicial architecture at the EU level. To that end, the Regulation addresses two important shortcomings in preceding instruments. First, it provides a common legal basis for the use of videoconferencing and other means of distance communication technology in the procedures listed in Annex II. Second, it introduces common procedural safeguards in situations where preceding instruments had allowed the use of videoconferencing without defining the conditions governing its operation or its relationship to fair trial guarantees (Žukovaitė, 2024, pp. 91–92).

Two aspects are particularly significant. One is the Regulation's introduction of the first EU-level definition of videoconferencing as audio-visual communication technology allowing the simultaneous transmission of image and sound in both directions (Art. 2 (6)). This definition is important not merely from a technical perspective, but also because it constitutes an attempt to preserve, in a digital form, procedural values such as immediacy and orality, which have traditionally been raised as objections to remote participation (Žukovaitė, 2024, p. 92). No less significant are the Regulation's more detailed provisions on consent. As a rule, participation by videoconference requires the free and unambiguous consent of the person concerned, which may only be given after that person has had the opportunity to consult a lawyer in accordance with Directive 2013/48/EU and has been informed of the relevant procedural rights (Art. 6 (2)). In addition, Member States must ensure access to the necessary technical infrastructure, the

[6] The criminal law instruments listed in Annex II include the European Arrest Warrant framework, Framework Decision 2008/909/JHA on enforcement of custodial sentences, Framework Decisions 2008/947/JHA and 2009/829/JHA on mutual recognition of probation and supervision decisions, Directive 2011/99/EU on the European protection order, and Regulation (EU) 2018/1805 on freezing and confiscation orders.

confidentiality of communication between the person concerned and their lawyer before and during the hearing, and an effective remedy in the event of a breach of the guarantees laid down in the Regulation (Art. 6 (5)) (Pingen & Wahl, 2024).

The Regulation further provides that the use of videoconferencing or other means of distance communication technology may not be refused solely on the ground that the national law of the relevant MS does not explicitly regulate such technology. In such cases, the most appropriate national rules are to apply *mutatis mutandis* (Rec. 33). This solution is important because it reduces the extent to which shortcomings in national procedural law may obstruct digital cooperation and thereby enhances the practical availability of videoconferencing in cross-border proceedings falling within the Regulation's scope.

At the same time, the Regulation does not establish a comprehensive framework for all forms of videoconferencing in criminal proceedings. Recital 43 confirms that it has a complementary function, as its rules on videoconferencing do not apply to hearings for the taking of evidence or to trial hearings capable of resulting in a decision on the guilt or innocence of a suspect or accused person, which remain governed by the relevant sector-specific instruments, notably the EIO Directive, the EUCMACM, and Council Framework Decision 2002/465/JHA on joint investigation teams. As Ho-Dac (2024) observes, the Regulation forms part of the broader digitalisation and unification of the European judicial area.

## 4. VIDEOCONFERENCING AND THE RIGHT TO A FAIR TRIAL: JURISPRUDENTIAL FOUNDATIONS

Whether videoconferencing is consistent with the right to a fair trial has been addressed by both the ECtHR and the CJEU. Both courts share the view that videoconferencing is not inherently incompatible with fair trial guarantees, provided that adequate procedural safeguards are in place. Their approaches diverge, however, in the cross-border context, where the requirements of mutual recognition must be reconciled with the procedural standards of the executing State.

The ECtHR set out its approach in Marcello Viola v. Italy, where the Court held that videoconference participation does not in itself violate the ECHR, provided three cumulative conditions are met: the measure must pursue a legitimate aim; its modalities must be compatible with the requirements of due process; and the proceedings, taken as a whole, must remain fair (App. no. 45106/04, 2006, §§ 63–67). *Zagaria v. Italy* confirmed this point by finding a violation in a case in which a prison officer overheard privileged communications during a video link, establishing that even a single documented breach suffices to undermine the fairness of the proceedings (App. no. 58295/00, 2007, §§ 35–36). The Grand Chamber further developed this analysis in *Sakhnovskiy v. Russia*, establishing that confidential communication between the accused and defence counsel constitutes the basic requirement of a fair trial that must be guaranteed in practice – not merely prescribed in law (App. no. 21272/03, 2010, §§ 97–98).

However, it is important to distinguish between the treaty law of cross-border judicial cooperation and the autonomous fair trial standard under Article 6 ECHR. Although the CoE mutual legal assistance instruments make the videoconference hearing of a suspect or accused person conditional upon that person's consent, this does not mean that consent has been incorporated by the ECtHR as an independent requirement of Article 6. The ECtHR assesses consistency primarily by reference to effective participation, confidential communication with counsel, and the overall fairness of the proceedings. Consent is therefore best understood as an

important procedural safeguard in the specific cross-border mutual legal assistance context, rather than as an autonomous condition derived from Article 6 ECHR.

The move from the ECHR framework to the EU legal order represents a continuation rather than a departure: the EU builds on the fair trial standards developed by the ECtHR. Under Article 52 (3) of the Charter, Articles 47 and 48 must be given the same meaning and scope as the corresponding provisions of the ECHR, ensuring that the fair trial standards developed by the ECtHR remain the baseline against which the CJEU evaluates the procedural implications of videoconferencing in criminal matters.

In this context, the CJEU first ruled on this issue in FP and Others, holding that Article 8 (1) of Directive 2016/343, which guarantees the accused the right to be present at trial, does not prevent an accused person from participating by videoconference at their express request, on condition that they can follow the proceedings without technical impediment, and effective and confidential communication with their lawyer is ensured (C-760/22, 2024, §§ 28–29, 31–32). The CJEU's reasoning was based on the fact that the Directive sets only minimum standards, leaving MSs free to determine the modalities of the right to be present at trial. On that basis, videoconferencing at the accused's own initiative does not as such conflict with EU law (Pingen, 2024). This ruling, however, did not address the cross-border dimension of the question.

This gap, however, remains problematic. As *Bissilli* (C-325/24, 2025) confirmed, executing authorities must conduct a case-by-case assessment before invoking the fundamental principles ground under Article 24 (2) (b) of the EIO Directive, and may not apply general policies based solely on domestic procedural traditions. Yet the principle of immediacy, which is central to the Germanic legal tradition, remains a source of divergence. Neither court has directly addressed whether videoconferencing satisfies this principle as understood in continental procedural law. This unresolved divergence ultimately calls for legislative resolution rather than case-by-case judicial interpretation. The Commission's forthcoming modernisation initiative is expected to address this question (Wahl, 2026).

## 5. CONCLUSION

The analysis presented in this article confirms that videoconferencing has undergone a fundamental transformation: from an exceptional procedural measure into a structural element of cross-border judicial cooperation in criminal matters within the European legal framework. This shift is visible across both parallel systems examined – the mutual legal assistance framework rooted in the ECMA and its Additional Protocols, and the EU mutual recognition framework built around the EIO Directive and Regulation (EU) 2023/2844, which is further supported by the convergent jurisprudence of both the ECtHR and the CJEU.

The two legal systems have evolved in parallel, each influencing and being influenced by the other. The Third Additional Protocol to the ECMA adopts a comparable standard to that of the EIO Directive regarding the conditions for requesting videoconference hearings. Regulation (EU) 2023/2844 embeds videoconferencing within a common digital infrastructure applicable across a broad range of cross-border criminal procedures. The CJEU, in *FP and Others* and *Bissilli*, draws directly on ECtHR standards while progressively narrowing the discretion of executing states to obstruct cross-border videoconference hearings.

Yet significant divergences remain, particularly regarding the scope of Article 24 of the EIO Directive and the compatibility of videoconferencing with the principle of immediacy

as understood in continental procedural law. These are questions that case-by-case judicial interpretation alone cannot resolve. The Commission's forthcoming modernisation initiative offers an opportunity to address them. A comprehensive legislative response is needed, one that completes the normative architecture that the instruments examined in this article have only partially established, and that definitively consolidates the role of videoconferencing as a standard procedural mechanism in cross-border criminal proceedings within the EU.

## LIST OF REFERENCES


Armada, I. & Weyembergh, A. 2017. The mutual recognition principle and EU criminal law. In: Fletcher, M., Herlin-Karnell, E. & Matera, C. (eds.), *The European Union as an Area of Freedom, Security and Justice*. Abingdon: Routledge, pp. 111–136.

Council of the European Union, General Secretariat. 2013. *Guide on Videoconferencing in Cross-Border Proceedings*. Brussels. Available at: https://www.consilium.europa.eu/media/30606/qc3012963enc.pdf (22. 2. 2026).

Council of the European Union. 2009. *Videoconferencing as a Part of European e-Justice: The Essentials of Videoconferencing in Cross-Border Court Proceedings*. Luxembourg: Publications Office of the European Union.

Craig, P. & De Búrca, G. 2011. *EU Law: Text, Cases, and Materials*. 5th ed. Oxford: Oxford University Press.

Gotovuša, E. 2025. *Prikupljanje i prihvatljivost dokaza u krivičnom procesnom pravu Europske unije*. PhD thesis. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet.

Hendry, I. D. 1993. The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs. *German Yearbook of International Law*, 36, pp. 295–327.

Ho-Dac, M. 2024. *Digitalisation of justice systems in the European Union: Towards a European judicial area 2.0*. EAPIL Blog. Available at: https://eapil.org/2024/02/06/digitalisation-of-justice-systems-in-the-european-union-towards-a-european-judicial-area-2-0/ (10. 3. 2026)

Militello, V. & Mangiaracina, A. 2009. The Future of Mutual Assistance Conventions in the European Union. In: Fijnaut, C.J.C.F. & Ouwerkerk, J. (eds.), *The Future of Police and Judicial Cooperation in the EU*. Leiden: Brill | Nijhoff, pp. 169–187. https://doi.org/10.1163/ej.9789004182042.i-414.63

Mitsilegas, V. 2009. *EU Criminal Law*. Oxford: Hart.

Novokmet, A., Tomičić, Z. & Vidaković, I. 2025. Remote Hearings and the Principle of Immediacy – A Croatian Perspective. *European Journal of Crime, Criminal Law and Criminal Justice*, 33(1–2), pp. 102–132. https://doi.org/10.1163/15718174-bja10071

Pingen, A. 2024. ECJ ruled on right to trial participation via videoconference. *eucrim*. Available at: https://eucrim.eu/news/ecj-ruled-on-right-to-trial-participation-via-videoconference/ (10. 3. 2026)

Pingen, A. & Wahl, T. 2024. New legal framework on digitalisation of judicial cooperation. *eucrim*. Available at: https://eucrim.eu/news/new-legal-framework-on-digitalisation-of-judicial-cooperation/ (10. 3. 2026)

Sanders, A. 2020. Video-Hearings in Europe before, during and after the COVID-19 Pandemic. *International Journal for Court Administration*, 12(2), Article 3, pp. 1–21. https://doi.org/10.36745/ijca.379

Satzger, H. 2019. Is mutual recognition a viable general path for cooperation? *New Journal of European Criminal Law*, 10(1), pp. 44–56. https://doi.org/10.1177/2032284419836516
Vermeulen, G. 2006. EU Conventions Enhancing and Updating Traditional Mechanisms for Judicial Cooperation in Criminal Matters. *Revue Internationale de Droit Pénal*, 77(1–2), pp. 59–95. https://doi.org/10.3917/ridp.771.0059
Wahl, T. 2026. ECJ: EIO can be issued instead of EAW. *eucrim*. Available at: https://eucrim.eu/news/ecj-eio-can-be-issued-instead-of-eaw (10. 3. 2026)
Žukovaitė, I. 2024. Remote Criminal Proceedings in EU Law from the Perspective of Strengthening the Rights of the Accused. *Baltic Journal of Law & Politics*, 17(2), pp. 77–100. https://doi.org/10.2478/bjlp-2024-00016

### *Legal sources and case law*

*Bissilli*, Case C-325/24, Judgment of the Court (Third Chamber) of 18 December 2025, ECLI:EU:C:2025:989
Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10. 2012.
Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters /* COM/2000/0495 final */, 26 July 2000.
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ProtectEU: a European Internal Security Strategy, COM(2025) 148 final.
Consolidated version of the Treaty on European Union (TEU). OJ C 202, 7 June 2016, pp. 1–55.
Consolidated version of the Treaty on the Functioning of the European Union (TFEU). OJ C 202, 7 June 2016, pp. 47–200.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ECHR), ETS No. 005, Rome, 04 Nov. 1950.
Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (CISA). OJ L 239, 22 Sept. 2000, pp. 19–62.
Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (EUCMACM). OJ C 197, 12 July 2000, pp. 1–23.
Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams. OJ L 162, 20 June 2002, pp. 1–3.
Council of the European Union. 2024. Final Report on the Tenth Round of Mutual Evaluations on the practical implementation and operation of Council Framework Decision 2014/41/EU on the European Investigation Order. Council doc. ST-15834/1/24 REV 1.
Directive (EU) 2016/343 of the European Parliament and of the Council 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. OJ L 65, 11 March 2016, pp. 1–11.
Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings. OJ L 294, 6 November 2013, pp. 1–12.
Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters – State of play of the implementation process, information by Eurojust and the EJN, Council of the European Union, 9936/17 JAI 571 COPEN 188 EUROJUST 85 EJN 41, 13 June 2017.

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO Directive). OJ L 130, 1 May 2014, pp. 1–36.
European Commission. 2020. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Digitalisation of justice in the EU – A toolbox of opportunities, COM(2020) 710 final, 2 December 2020.
European Commission. 2026. Call for Evidence – Revision of the European Investigation Order Directive and common rules on remote participation in criminal proceedings. Ref. Ares(2026)56130.
European Convention on Mutual Assistance in Criminal Matters (ECMA), ETS No. 30, Strasbourg, 20 April 1959.
European e-Justice Strategy 2024–2028, Council of the European Union, document ST/15509/2023/INIT. OJ C 437, 16 January 2025. ELI: http://data.europa.eu/eli/C/2025/437/oj.
Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (Text approved by the Council on 30 November 2000), OJ C 379, 29 December 2000, 7-29.
Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 8 November 2001, ETS No. 182.
Explanatory Report to the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Valletta, 19 September 2025, CETS No. 227.
*FP and Others*, Case C-760/22, Judgment of the Court (First Chamber) of 4 July 2024, ECLI:EU:C:2024:574
*Marcello Viola v. Italy*, App. no. 45106/04, ECtHR, 5 October 2006, ECLI:CE:ECHR: 2006: 1005JUD004510604
Proposal for a COUNCIL DECISION authorising Member States to sign, in the interest of the European Union, the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters COM/2025/510 final, 17 September 2025.
Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation. OJ L, 27 December 2023.
*Sakhnovskiy v. Russia* (Grand Chamber), App. no. 21272/03, ECtHR, 2 November 2010, ECLI:CE:ECHR:2010:1102JUD002127203
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 182, Strasbourg, 8 November 2001.
Tampere European Council 15 and 16 October 1999, Presidency conclusions. Available at: https://www.europarl.europa.eu/summits/tam_en.htm.
Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 227, Valletta, 19 September 2025.
*Zagaria v. Italy*, App. no. 58295/00, ECtHR, 27 November 2007, ECLI:CE:ECHR:2007: 1127JUD005829500

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch20

***Zsolt BUJTAR****

# LESSONS FROM THE FIRST CBDC INTRODUCTIONS

*To date, four jurisdictions have introduced a Central Bank Digital Currency (CBDC). It is essential for countries considering or implementing the introduction of Central Bank Digital Currency (CBDC) to give due consideration to the advantages and disadvantages of previous introductions. The author examines the introduction and the experiences of the first few years of the Central Bank Digital Currency (CBDC) in circulation in the Bahamas, Nigeria, Jamaica, and the Eastern Caribbean Currency Union (ECCU). In the event of a larger-scale introduction, such as that of the digital euro, it is imperative that the mistakes made by these four jurisdictions are avoided. Furthermore, the author recommends that the best practices be given due consideration, provided that they are applicable in other legal frameworks.*

***Keywords:*** retail CBDC, Sand Dollar, eNaira, DCash, JAM-DEX.

## 1. INTRODUCTION

Central Bank Digital Currencies are the subject of increasingly widespread research and debate worldwide. The early CBDC rollouts that have taken place to date can provide numerous lessons for major national economies, including the European Union. In this analysis, the author first examines the economic and social reasons behind the creation of Central Bank Digital Currencies, before turning specifically to the economic and social reasons for each rollout. Finally, the author draws conclusions from the reasons behind the failed rollouts, with the aim of identifying how these problems can be prevented in the case of major national economies such as the EU, the US, China, and India – by learning from past mistakes.

## 2. POSSIBLE FORMS OF CBDC

According to the widely accepted definition, Central Bank Digital Currency (CBDC) is central bank money in digital form that differs from its traditional form as reserves and account balances (Bank for International Settlements, 2020). It follows clearly from this definition,

* Assistant Professor, University of Pécs, Faculty of Law, Department of Financial and Business Law, ORCID: https://orcid.org/0009-0000-0756-9337, e-mail: *bujtar.zsolt@ajk.pte.hu*

established by the BIS and the seven largest central banks, that, like fiat money, CBDC may be capable of performing monetary functions whilst simultaneously integrating modern technology (such as DLT), along with its advantages (speed, transparency, widespread accessibility).

Examining possible types of CBDC, four criteria (form of appearance, form of settlement, method of issuance, user base) yield two sub-types each (Bujtar, 2021, pp. 24–26), defining a total of eight distinct forms of CBDC (Bossu *et al*., 2020, pp. 9–10).

Central Bank Digital Currency can be created either as a physical form of money (a token) or in the form of a claim (an account). Examples of account-based CBDCs include the digital dollar (The Digital Dollar Project, 2020), of token-based CBDCs the digital euro (The European Union Blockchain Observatory & Forum, 2021), whilst the Chinese digital yuan – Digital Currency Electronic Payment (DCEP) (Pan, 2020) – is partly token-based and partly account-based.

Two types can also be distinguished based on the form of settlement: the centralised and the decentralised form. Decentralised, non-central bank-settled Central Bank Digital Currency, typically blockchain-based, primarily carries cybersecurity risks. Blockchain-based CBDCs can also be implemented in a centralised form, which requires the development and operation of a suitably secure infrastructure, under central bank ownership and control. The centralised form is the realistic alternative of the two: in order to maintain control over money issuance (Radović, 2023, p. 36) and thus monetary policy (Bujtar, 2021, pp. 24–26).

With regard to issuance, the two distinguishable types are single-tier, or direct central bank issuance, and two-tier CBDC, the latter of which is created by the central bank recognising the claim issued by financial intermediaries as its own liability. In the case of two-tier CBDCs, however, a clear legal guarantee is required for the central bank to assume full liability, so that confidence in the financial system is also established with regard to the new currency (Friedman & Schwartz, 1987, p. 295).

The fourth approach to CBDC, based on the user base, involves the possibility of issuing either a general-purpose or retail CBDC, or a restricted, wholesale-type CBDC based on the members of the central bank's digital real-time gross settlement system (RTGS). General use goes beyond the current central bank settlement system (RTGS) and can ensure access to the new digital currency for those previously excluded from financial services (Bujtar, 2021, pp. 24–26).

## 3. EARLY EXPERIMENT – FINLAND

Surprisingly, the first CBDC was launched as early as 1993 in Finland as part of the Avant smart card project. The issuer was not the central bank, but a private company called Toimiraha (King, 2020), which, however, was wholly owned by the Bank of Finland during its first three years of operation (Dowd, 2024).

The number of cardholders reached 500,000 by 1995, but due to a lack of widespread use, the project was discontinued in 2006. The aim of the launch was to create a token-based CBDC that would replace the circulation of coins and small-denomination banknotes (Dowd, 2024). The application could be topped up with a maximum of 2,000 Finnish marks, and the top-up fee was 2 Finnish marks. The greater functionality of competing debit cards and the high top-up fee deterred end-users from using it, and the CBDC failed to gain widespread acceptance at payment terminals (King, 2020). In addition to the results of its own research project,

the Danish central bank also took into account the lessons from the Finnish failure when, despite low cash usage and the lack of significant added value, it rejected the introduction of a CBDC in June 2022 (Danmarks Nationalbank, 2022).

The reason for the failed launch, despite the advanced technology, was a lack of proper preparation and marketing – as Alexi Grym, the Finnish central bank's digital advisor, put it "[t]he thing with Finland is we are very good at technology but very bad at marketing" (King, 2020). According to the author, it is worth highlighting here that low cash usage does not automatically mean acceptance and use of a CBDC; furthermore, it is important to note that end-users' cost-sensitivity reinforces the continued existence of alternative payment systems (cards, cash) over the CBDC.

## 4. THE FIRST CBDC – THE BAHAMIAN SAND DOLLAR

The Bahamian Sand Dollar was officially launched in October 2000 (Anthony, 2025). The Exuma pilot programme was launched in October 2019 (CBB, 2019) and continued under the name Abaco in the first half of 2020, after Hurricane Dorian caused such severe damage to the Abaco archipelago in 2019 that the total value of the damage reached a quarter of the previous year's GDP (Boussidan, 2021). It was precisely this natural disaster, alongside the scattered nature of the archipelago, that prompted the creation of the Bahamian CBDC, independent of internet access.

According to the official website, the introduction of the Sand Dollar had four main objectives (Sanddollar, 2026): to increase the efficiency of the payment system by enabling safer and faster transfers; to ensure non-discriminatory access regardless of age, immigration or citizenship status; to increase financial inclusion by providing access to a wider range of financial services across the Bahamas; and to strengthen the fight against money laundering and banknote counterfeiting associated with cash use by reducing the use of cash.

The Bahamas' Central Bank Digital Currency was a digital form of the national currency pegged to the US dollar (1:1), which could be topped up to the value of $500 per month via an app and allowed for transactions of up to $1,500 per month. Tier-two users, meanwhile, could top up their wallets with up to USD 8,000 and conduct transactions totalling USD 10,000 per month, whilst utilising a higher-level security system (Boussidan, 2021). Sand Dollar, as a CBDC, was operated by crypto wallet providers (front-end services) whilst the central bank performed the back-end functions (Sanddollar, 2026).

The above objectives were partially achieved, with a significant proportion of the population – 30% – having the app by 2024; however, the CBDC in circulation did not even reach 1% of the amount of cash in circulation by 2024 (Anthony, 2025, pp. 4–5). Therefore, the appropriate metric for measuring the success of the CBDC's introduction is not the number of CBDC wallets, but the turnover they generate and its proportion relative to cash turnover and the turnover of cash substitutes. In April 2023, the Central Bank of the Bahamas launched a statistical report detailing the number of CBDC wallet providers and users, as well as the number of wallets, but this report was discontinued within a year (Anthony, 2025, p. 6).

Examining the reasons for the failure of the launch to date, it can be concluded that, despite the need for offline operation, it has not succeeded in providing any significant new functions compared to bank cards; furthermore, only a limited number of wallet providers were available and, with four exceptions, they did not advertise the CBDC on their websites (Anthony, 2025,

p. 4). The Bahamas' financial authorities attempted to encourage the circulation of CBDC through special incentives, but even so, based on the data available to date, the launch cannot be considered a success. The author considers it important to highlight that if the digital national currency is pegged to a strong national currency, such as the US dollar in this case, it is difficult in itself to find an attractive alternative to it; the growing popularity of stablecoins (Radović, 2023, p. 24) may pose a further challenge.

## 5. THE FIRST AFRICAN CBDC IS NIGERIA'S eNAIRA

According to a circular sent by the Central Bank of Nigeria to stakeholders on 25 October 2021, the eNaira was established under the Central Bank Act of Nigeria 2007 and the Banking and Other Financial Institutions Act 2020, pursuant to the authority granted to the Central Bank under Section 19 of the Central Bank Act of 2007 (Central Bank of Nigeria, 2021, p. 4). The eNaira is the digital form of the Nigerian national currency, the Naira, issued with the full backing of the Central Bank of Nigeria and having the same value as the Naira (Central Bank of Nigeria, 2021, p. 4). The eNaira complements the Naira with the aim of serving as a less costly, more efficient, and universally accepted and reliable means of payment. Further objectives include enhancing the effectiveness of monetary policy, ensuring a more efficient delivery of government social benefits to the intended recipients, and channelling remittances from citizens working abroad into formal channels. As an issuer of retail CBDCs, it was the first to issue eNaira as an account-based CBDC.

However, the launch was not met with widespread acceptance, as the wallet could initially only be used in conjunction with a bank account number; subsequently, the National Identification Number (NIN) was introduced, which no longer requires the use of a bank account and enables a truly inclusive CBDC usage (Central Bank of Nigeria, 2021, p. 8). eNaira has established a four-tier wallet structure, under which the central bank's wallet (eNaira Stock Wallet) holds the CBDC, and individual banks then store the CBDC received from the central bank in their own wallets (eNaira Treasury Wallet), holding the eNaira thus in their possession, which they can transfer on a branch-by-branch basis to the wallets of their individual bank branches (eNaira Branch Wallet). Non-financial service providers have such wallets (eNaira Merchant Super Wallet) that only accept credits and debits during the financial settlement of the products and services they sell. Finally, the eNaira Speed Wallet is used to process end-user transactions where eNaira is used; within this, the regulations distinguish between four different tiers (Tier 0–3) of customers authorised to use eNaira (Central Bank of Nigeria, 2021, pp. 9–10). The CBDC, i.e., the eNaira, will be convertible into other CBDCs (Central Bank of Nigeria, 2021, p. 4), which presupposes adequate technical interoperability with other CBDCs as well as with the eNaira itself.

Based on the above, technically, a well-structured account-based retail CBDC could well have met the criteria for successful implementation by bringing economy into the formal sector and making the delivery of social transfers and remittances from workers abroad more efficient. The mistake made by Nigeria's financial leadership was that the initial incentives – simpler identification, discounts – were followed in December 2022 by significant restrictions on cash withdrawals for both households and businesses (100,000 Naira – equivalent to USD 225 – for the former and 500,000 Naira – equivalent to USD 1,123 – for the latter) (Central Bank of Nigeria, 2022). Protests against these measures began, with demonstrators demanding the

restoration of access to fiat currency. It is clear that a forced cashless society cannot be achieved even with the help of a CBDC (Anthony, 2023). In 2021, 38% of the adult population in Nigeria lacked access to banking services (Ree, 2021), yet 50% of the population were already using cryptocurrencies by 2022 (Anthony, 2022). Remittances were significant in 2019, totalling USD 24 billion with fees of 1–5% (Ree, 2021) whilst the much cheaper eNaira was nevertheless used by less than 0.5% of the population in 2022 (Anthony, 2023).

## 6. DCASH IS THE ECCU'S CBDC

The Eastern Caribbean Central Bank tested DCash, developed by BiTT, in 2021, which was followed by the launch of DCash 2.0 in November 2023. During the pilot phase, it was tested in seven of the eight member states of the Eastern Caribbean Currency Union (Anguilla, Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines), with the number of users reaching 600,000 (Gutierrez & Marz, 2022). However, in January 2022, the DCash Platform announced a widespread service outage, which, according to the ECCB, did not affect DCash holdings. In November 2023, DCash 2.0, building on the DCash pilot, enabled the instant settlement of G2P (government to person) and P2G (person to government) transactions in addition to P2P, P2B and B2B transactions. The aim of the CBDC within the ECCU is to support economic activity, expand the range of available payment system applications and streamline financial transactions, as well as to reduce the use of cash and the costs associated with it, and to encourage further digital payment innovations (Johnson, 2025). The launch of DCash 2.0 did not lead to a breakthrough by March 2025, as the volume of CBDC had fallen from 0.4 million ECCU dollars during the initial pilot phase to 0.2 million ECCU dollars by 31 March 2025 (ECCB Annual Report 2025) (ECCB, 2025, p. 65). The DCash project cited a lack of user education, shortcomings in the demonstration of use cases, and low merchant participation as the reasons for the failure (Noll, 2024).

## 7. THE JAMAICAN CBDC, JAM-DEX

The Bank of Jamaica received authorisation to issue a CBDC on 13 June 2022. Section 12(1) of the Bank of Jamaica Act of 2020 was amended, following a unanimous decision by the Jamaican Senate on 13 June 2022 (McIntosh, 2022). The CBDC (which is not blockchain-based) utilising DCS3 technology was developed exclusively for the issuance and use of the CBDC by Bitt (Ecurrency, 2020), a technology company based in Barbados. The CBDC issued by the Bank of Jamaica was launched following the central bank's 2020 regulatory sandbox (Bank of Jamaica, 2020). The aim of introducing the CBDC was to increase financial inclusion by introducing a new, efficient, and secure means of payment that is freely convertible into the national currency and, like cash, is suitable not only for paying for goods and services but also for storing value for businesses and individuals (Bank of Jamaica, 2020). Financial service providers can thereby improve their cash management services and reduce associated costs (Bank of Jamaica, 2020). By introducing a CBDC, the Bank of Jamaica can accelerate both the identification of the required money supply and the actual issuance of that supply whilst simultaneously significantly reducing the costs of putting money into circulation and promoting the digitalisation of the financial system (Haynes, 2020).

JAM-DEX is the first CBDC to utilise DSC technology, which was selected by the Bank of Jamaica from among 40 different bidders (Bank of Jamaica, 2020). The technology is not blockchain-based, yet it is capable of providing a secure solution from the data protection perspective, even in the era of quantum computers (Ecurrency, 2026). DSC technology enables instant and final transactions whilst maintaining low energy consumption (equivalent to a standard computer). DSC technology ensures user data protection without the central bank having access to users' data (Ecurrency, 2026). Another distinctive feature of JAM-DEX is that transfers of digital bearer instrument tokens take place via the Jamaican RTGS system (Noll, 2024). (A digital bearer instrument represents a transferrable claim on the issuer, which operates similarly to an asset-backed stablecoin.) (Garratt & Shin, 2023, p. 2). This DSC technology enables offline transactions, as the credit or balance is only verified by the party acquiring the CBDC at a later stage, when a debit is made from that wallet.

Despite the above technological innovations, the launch of JAM-DEX cannot be considered a success in terms of usage. Following its launch in 2021, even after two annual incentives, no breakthrough was achieved in either the volume of CBDC issued or its usage. The amount of CBDC issued reached 250 million Jamaican dollars in May 2022 and stagnated over the following year and a half, whilst the fiat currency rose from 200 billion Jamaican dollars to 255 billion Jamaican dollars (Anthony, 2025). Several factors lie behind the low level of interest: firstly, a lack of adequate education; secondly, a lack of interest among merchants; and thirdly, a lack of commitment from commercial banks. The last was evident in the fact that whilst merchants would have expected POS terminals to integrate JAM-DEX payments, commercial banks were in no hurry to make ATMs compatible with JAM-DEX.

Based on the above, it is clear that well-designed technology alone is not sufficient for the successful introduction of a CBDC. This requires winning over a wide range of intermediaries, as well as convincing the public; in the latter case, incentives are not sufficient tools.

## 8. GENERAL SUMMARY OF THE INTRODUCTION OF FIRST CBDCs

In summary, based on the above, it can be concluded that all four CBDCs discussed aimed to increase access to financial services, reduce the use of cash, and ensure offline functionality in the event of potential network issues. The central banks concerned typically introduced the CBDC following a pilot programme or as part of a longer-term financial digitalisation programme.

Despite all this, widespread use has not yet been achieved in any of the four jurisdictions. CBDCs cannot be regarded as a digital form of fiat currency, but rather as an experiment supported by various incentives, albeit one that has so far met with limited success. Due to a lack of adequate financial education, coupled with a lack of interest from financial intermediaries, end-users, and accepting merchants, CBDC usage has extended to only a few per cent of the total money supply.

Examining the three Caribbean CBDCs, a study by the Digital Euro Association (Guiterrez & Marz, 2022) highlighted several common lessons: thus, the basic functions are less competitive on their own, and in the future, the real added value may lie in cross-border transfers and programmable payment functions. The example of DCash, in the case of subcontractors, clearly illustrates the risk that a significant operational disruption could undermine the trust that is being built.

A study by the Federal Reserve Bank of Kansas City (Noll, 2024), analysing central bank explanations for low adoption, concluded that the primary goal of transitioning from a cash-based economy to a digital economy failed for three reasons: the underlying technology does not influence the success of the introduction; consumers and end-users alike could not be convinced of the added value of the CBDC; and finally, for a successful introduction, the CBDC should be presented to all stakeholders (consumers, merchants, financial intermediaries) and accepted and operated in collaboration with them.

The author considers it necessary to add the following to the above. A CBDC does not sell itself; it needs a unique value proposition to stand out amongst the many electronic payment instruments and methods. Forced introduction and the accelerated phasing out of cash are not suitable means of increasing widespread use – as the example of the eNaira has shown – and are, in fact, counterproductive. In addition to the two major end-user groups – the general public and businesses – it is also necessary to secure the interest of wallet providers and financial intermediaries. Data protection and anonymous usage have been well-established, but this is not sufficient, as electronic payment methods can also guarantee this. In addition to financial incentives, it is necessary to channel financial transactions on a mass scale into CBDC form, as well as to consider the possibility of interest payments.

For a successful introduction (Anthony, 2025, p. 8), it is necessary that the measurement of the introduction's effectiveness should provide an accurate picture of the necessary points of intervention. Thus, when introducing a CBDC, it is necessary to measure the various stages of conversion, identifying who is open to the CBDC, who downloads the application, and who uses it regularly. According to the author, government incentives should therefore extend not only to the downloading of the application, but to all three key stages of the rollout and thus to the entire adaptation and conversion process.

## LIST OF REFERENCES


Anthony, N. 2022. *Nigeria Restricts Cash to Push Central Bank Digital Currency*. Washington D.C.: Cato Institute. Available at: https://www.cato.org/blog/central-bank-digital-currency-war-cash

Anthony, N. 2023. *Nigerians' Rejection of Their CBDC Is a Cautionary Tale for Other Countries*. Washington D.C.: Cato Institute. Available at: https://www.cato.org/commentary/nigerians-rejection-their-cbdc-cautionary-tale-other-countries

Anthony, N. 2025. CBDC Lessons from the Caribbean: Analyzing Central Bank Digital Currency Adoption in Jamaica and The Bahamas. *CATO Briefing Paper*, No. 189. Available at: https://www.cato.org/briefing-paper/cbdc-lessons-caribbean

Bank for International Settlements. 2020. *Central bank digital currencies: Foundational principles and core features*. Report No 1. in a series of collaborations from a group of central banks. Available at: https://www.bis.org/publ/othp33.htm (1. 2. 2026).

Bank of Jamaica. 2020. *BOJ opens door to central bank digital currency.* Available at: https://www.boj.org.jm/uploads/news/boj_cbdc_press_release.pdf (2. 2. 2026).

Bossu, W. *et al.* 2020. Legal aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations. *IMF Working paper*, WP/20/254. Available at. https://www.imf.org/-/media/files/publications/wp/2020/english/wpiea2020254-print-pdf.pdf (2. 2. 2026).

Boussidan, S. 2021. The Sand Dollar: Digital Currency of the Bahamas. *Global Finance Magazine.* Available at: https://gfmag.com/supplement/sand-dollar-bahamas-digital-currency/ (16. 3. 2026).

Bujtár, Z. 2021. A digitális jegybankpénz bevezetésének kihívásai Magyarországon és az Európai Unióban. In: Kis Kelemen, B. & Mohay, Á. (szerk.), *A technológiai fejlődés jogi kihívásai: Kézikönyv a jogalkotás és jogalkalmazás számára*. Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar (PTE ÁJK), pp. 20–37. [The challenges of introducing central bank digital currency in Hungary and the European Union. In: Kis Kelemen, B. & Mohay, Á. (eds.), *Legal Challenges of Technological Development: A Handbook for Legislation and Law Enforcement*. Pécs: Faculty of Law, University of Pécs (PTE ÁJK)].

Central Bank of Nigeria – Banking Supervision Department. 2022. *Naira Redesign Policy – Revised Cash Withdrawal Limits*. Available at: https://unizik.edu.ng/wp-content/uploads/2022/12/ReNairaRedesignPolicyRevisedWithdrawal.pdf (1. 2. 2026).

Central Bank of Nigeria. 2021. *Circular to all Stakeholders, Regulatory Guidelines for all stakeholders ENAIRA*. Available at: https://www.policyvault.africa/wp-content/uploads/policy/NGA1485.pdf

Central Bank of the Bahamas. 2019. *Project Sand Dollar: The Bahamas Payments System Modernisation Initiative*. Available at: https://www.centralbankbahamas.com/publications/main-publications/project-sanddollar-a-bahamian-payments-system-modernization-initiative

Danmarks Nationalbank. 2022. *New types of digital money.* Available at: https://www.nationalbanken.dk/media/z12aimyo/analysis-no-8-new-types-of-digital-money.pdf (12. 3. 2026).

Dowd, K. 2024. So far, Central Bank Digital Currencies have failed. *Economic Affairs*, 44(1), pp. 71–94. https://doi.org/10.1111/ecaf.12621

ECCB 2025. *2024–2025 Annual Report*. Available at: https://www.eccb-centralbank.org/viewPDF/documents/2025-07-02-13-05-37-ECCB-2024-2025-Annual-ReportR.pdf

Ecurrency. 2020. Available at: https://www.ecurrency.net/post/cbdc-dsc3 (2. 2. 2026).

Ecurrency. 2026. Available at: https://www.ecurrency.net/ (2. 2. 2026).

Friedman, M. & Schwartz, A. J. 1987. Has government any role in money? In: Schwartz, A. J. (ed.), *Money in Historical Perspective*. University of Chicago Press, pp. 289–314.

Garratt, R. & Shin, H. S. 2023. Stablecoins versus tokenised deposits: implications for the singleness of money. *BIS Bulletin*, No. 73, pp. 1–7. Available at: https://www.bis.org/publ/bisbull73.pdf (10. 3 .2026).

Gutierrez, J. & Marz, M. 2022. *CBDCs go live – Bahamas, ECCU and Nigeria.* Available at: https://digital-euro-association.de/blog/cbdcs-go-live (2. 2. 2026)

Haynes, N. 2020. *A Primer On BoJ's Central Bank Digital Currency.* Kingston: Bank of Jamaica. Available at: https://boj.org.jm/a-primer-on-bojs-central-bank-digital-currency/

Johnson, K. A. 2025. *DCASH: Towards A Digitally Inclusive Future.* Available at: https://www.eccb-centralbank.org/blogs/dcash-towards-a-digitally-inclusive-future (2. 2. 2026)

King, R. 2020. *Podcast: Bank of Finland's Aleksi Grym on a 1990s digital currency.* Available at: https://www.centralbanking.com/fintech/4732356/podcast-bank-of-finlands-aleksi-grym-on-a-1990s-digital-currency (12. 3. 2026).

McIntosh, D. 2022. *Senate approves central bank digital currency.* Available at: https://jis.gov.jm/senate-approves-central-bank-digital-currency/ (1. 2. 2026)

Noll, F. 2024. *Observations from the Retail CBDCs of the Caribbean*. Kansas City: Federal Reserve Bank of Kansas City. Available at: https://www.kansascityfed.org/research/payments-system-research-briefings/observations-from-the-retail-cbdcs-of-the-caribbean/

Pan, D. 2020. *CoinDesk 50: How the People's Bank of China Became a CBDC Leader*. Available at: https://www.coindesk.com/tech/2020/05/11/coindesk-50-how-the-peoples-bank-of-china-became-a-cbdc-leader (11. 2. 2026).

Radović, M. 2023. The Influence of European Integration on the Development of Monetary Law. In: Golubović, S. & Dimitrijević, M. (eds.), *Central Bank Digital Currencies: The Influence of the Digital Euro Project on the Development of the Digital Serbian Dinar*. Niš: Faculty of Law, University of Niš, pp. 21–39. Available at http://www.prafak.ni.ac.rs/files/centar_pub/zbornik-radova-monela-the-influence-of-european-integration-on-the-development-of-monetary-law-2023.pdf (11. 2. 2025).

Ree, J. 2021. *Five Observations on Nigeria's Central Bank Digital Currency*. Washington D.C.: IMF African Department. Available at: https://www.imf.org/en/news/articles/2021/11/15/na111621-five-observations-on-nigerias-central-bank-digital-currency (3. 2. 2026).

Sanddollar. 2026. Available at: https://www.sanddollar.bs/

The Digital Dollar Project. 2020. *Exploring a US CBDC*. Available at: https://www.banking.senate.gov/imo/media/doc/Giancarlo%20Testimony%20Addendum%206-30-202.pdf (1. 2. 2026)

The European Union Blockchain Observatory & Forum. 2021. *Central Bank Digital Currencies and a Euro for the Future*. Available at: https://blockchain-observatory.ec.europa.eu/publications/central-bank-digital-currencies-and-euro-future_en (1. 2. 2026).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch21

***Maja PROSO****

# MANUFACTURER LIABILITY FOR CYBERSECURITY DEFECTS IN DIGITAL PRODUCTS

*The proliferation of new digital products on the internal market has evoked the need for a change in product liability rules, with focus on the perils connected with cybersecurity defects of digital products. These vulnerabilities present a significant risk of financial loss, including the potential for digital products to cause damage. The European Union has responded to those risks with a legal overhaul to hold manufacturers accountable for digital product security, centred on two key regulations. The first one is Directive (EU) 2024/2853 on liability for defective products which explicitly expands the definition of the "product" to include software and other digital products, establishing that a product is defective if it fails to meet the required safety level, with cybersecurity requirements becoming an explicit criterion for assessing defectiveness and manufacturer liability. Regulation (EU) 2024/2847 on horizontal cybersecurity requirements for products with digital elements, as a complementary act, sets mandatory cybersecurity standards for all digital products across the European Union. A digital product's compliance with Regulation (EU) 2024/2847 will be essential when assessing its safety and whether it is defective under the new Product Liability Directive. The aim of this paper, therefore, is to analyse how the new legal framework impacts the manufacturer's liability for cybersecurity defects in a digital product. The central thesis of this paper is that the manufacturer's legal position under the new regulation framework has evolved into a state of continuous liability for a defective digital product.*

***Keywords*:** cybersecurity defects, digital products, defective products, manufacturer liability, EU cybersecurity regulation.

## 1. INTRODUCTION

Driven by digitalization, the global economy has moved beyond its industrial roots toward a technology-based structure (Zhao, Wallis & Singh, 2015, p. 734). According to the OECD (2019, p. 6), capitalizing on this shift requires coherent, cross-cutting strategies that balance innovation with risk management. The new Directive (EU) 2024/2853 on liability for defective products (hereinafter: PLD) replaces the outdated 1985 legislation (hereinafter: Directive

* Prof. dr. sc., Faculty of Law, University of Split, Croatia, ORCID: https://orcid.org/0009-0004-6055-1493, e-mail: *maja.proso@pravst.hr*

85/374/EEC) to align the legal framework with the challenges of digital transformation, the circular economy, and global markets. The PLD imposes stricter standards and an increased level of liability on economic operators within the European Union (hereinafter: EU). To respond to rapid digital developments, the PLD redefines the notion of the product as well as the notion of defect to be more inclusive. This expansion serves to ensure that the digital elements of contemporary business are covered under the new liability rules. Regulation (EU) 2024/2847 (hereinafter: CRA), simultaneously creates unified European rules for the cybersecurity of digital products. The CRA aligns with the European Union's overarching ambition to foster a Europe fit for the digital age (2019),[1] ensuring that the ongoing digital transformation delivers secure and tangible benefits to both private citizens and the commercial sector (Car & Luca, 2022, p. 2). Effective as of late 2024, with full enforcement beginning in December 2027, the CRA sets rigorous standards for the design and production phases while clearly outlining the manufacturers' legal responsibilities. Manufacturers are, therefore, required to integrate appropriate security measures into their products based on potential risks and, crucially, they must provide regular updates and maintain that security throughout the entire period during which the product is in use (Schoo, 2024, p. 245). Under the new framework, compliance with the CRA serves as the benchmark for product defectiveness under the PLD. Any failure by the manufacturer regarding cybersecurity or software updates that results in harm to the user is now effectively considered a defect, triggering liability and the right to compensation (Chiara, 2025, p. 479). The global WannaCry ransomware attack serves as a landmark example of the catastrophic risks posed by insecure products. By infecting over 200,000 Windows-based devices across 150 nations, this incident showed how cyber vulnerabilities can adversely impact digitally based society (Eckhardt & Kotovskaia, 2023, p. 149). To integrate modern digital devices, the definition of a product in the new PLD has been broadened to encompass both software and its associated services. Furthermore, the traditional, rigid *ex ante* evaluation of product defects, which previously only considered the product's state at the point of sale, has now been relaxed. This shift acknowledges the manufacturer's ongoing responsibility and control over the product through updates and remote management even after it has entered the market (Wagner, 2024, p. 188).

Accordingly, the aim of the paper is to analyse how the new legal framework impacts the manufacturer's liability for cybersecurity defects in a digital product. This article proceeds from the assumption that the manufacturer's legal position under the new regulation has evolved into a state of continuous responsibility for ensuring the safety of digital products. Following the introductory section, the second section critically explores the new rules on manufacturer's liability for defectiveness in digital products under the new PLD. The third section explores manufacturer's legal position under the requirements introduced by the newly enacted CRA mandates. Finally, the conclusion synthesizes the key findings of the conducted research.

## 2. NEW RULES ON MANUFACTURER'S LIABILITY FOR DEFECTIVE DIGITAL PRODUCTS UNDER THE PLD

The revision of the PLD marks a fundamental shift in how digital harm is addressed, particularly through the classification of software as a product, a move strongly supported

[1] A digital strategy launched in 2019 by the European Union to empower people and businesses with a new generation of technologies, while all the time helping it to achieve its target of a climate-neutral Europe by 2050.

by consumer advocates. Their arguments highlighted the fact that the change ensures that strict liability applies to digital products that cause physical or psychological harm (Micklitz, 2023, pp. 1–13).

### *2.1. What Constitutes a Product under the PLD*

The updated PLD significantly broadens the legal interpretation of what constitutes a product[2] (Li & Faure, 2024, p. 154). The scope of the PLD has recently been extended to all forms of digital content, from software and AI systems to manufacturing files and digital services that are essential for the functionality of connected physical devices (PLD, Article 4(1) and (4), in conjunction with Recitals 12, 13, 15, and 16). By modernizing the definition of a product, the PLD effectively bridges the gap between traditional tangible goods and the complexities of the various digital products. In contrast to conventional physical goods, software, for example, is inherently versatile and has a wide range of functions that defy simple classification. It can manifest either as an embedded component, such as the code powering autonomous vehicle systems, or as a standalone application that functions locally on a device without the need for constant internet access (Li & Schütte, 2023, p. 580). A product is defective if it does not provide the safety which a person is entitled to expect or which is required under Union or national law (PLD, Article 7(1)). Some authors, however, point out the practical challenges of applying the consumer expectation standard regarding product safety (Wagner, 2024, p. 193). When assessing the defectiveness of a product, relevant circumstances that must be taken into account include the presentation of the product and its characteristics (such as its labelling, design, technical specifications, composition and packaging), the instructions for assembly, installation, use and maintenance and the expected and foreseeable use of the product. Relevant factors in assessing defectiveness include, as well, the effect on the product of any ability to continue to learn after its deployment, the interaction with other products (the reasonably foreseeable effect of other products on the product at issue, including the effect of interconnections), the time when the product was placed on the market or put into service or, where the manufacturer retains control over the product, the moment after that time. Other relevant factors include safety regulations and relevant safety requirements, cybersecurity requirements relevant to safety, official interventions (such as product recalls or other relevant actions by competent authorities or economic operators relating to product safety), the specific needs of the group of users for whom the product is intended, and the objective of preventing damage(PLD, Article 7(2)). A product is not considered defective merely because a better product, including updates or upgrades to a product, is already placed on the market or put into service or is subsequently placed on the market or put into service (PLD, Article 7(3)).

### *2.2. The Circle of Liable Economic Operators under the PLD*

According to the updated provisions of the PLD (PLD, Article 8), the liability for defective products is established hierarchically, and the circle of liable economic operators is expanded.

[2] In *VI v KRONE-Verlag* case, the CJEU rejected the idea that inaccurate health advice in a newspaper constitutes a "defective product" under Directive 85/374/EEC. The case concerned a physical newspaper that published inaccurate health advice regarding a herbal treatment, which subsequently caused physical injury to a reader. The CJEU reasoned that the defect must be inherent to the physical characteristics of the product itself (such as the paper or ink) rather than the intellectual content or service provided within it. (*VI v KRONE-Verlag Gesellschaft mbH & Co. KG*, 2021, paras. 34-36).

The goal is to safeguard victims by ensuring they can still receive compensation even if the manufacturer cannot be held accountable. The liability system ensures that the injured party still has a realistic opportunity to obtain compensation (Rimkutė, 2025, p. 81). Economic operators that can be held liable for damage connected to product defectiveness are a manufacturer of a product or component, a provider of a related service, an authorised representative, an importer, a fulfilment service provider or a distributor (PLD, Article 4(15)). Primary liability rests with the manufacturer, which includes not only entities that manufacture physical items but also those who develop software or digital manufacturing files.[3] By redefining the notion of manufacturer to include software developers, the PLD ensures that software developers can be held accountable for digital product defects. If the manufacturer is established outside the EU, liability extends to the importer or the authorised representative, and in certain cases, to the fulfilment service provider. Furthermore, any person who presents itself as a manufacturer by affixing their name or trademark to the product is also considered a liable person, as is any person who carries out a substantial modification to the product outside the original manufacturer's control.[4] Finally, the subsidiary liability of the distributor exists in cases where the original manufacturer or importer cannot be identified. The rules set out in PLD Article 8(3) also apply to online platforms when they help consumers buy from traders, even if the platform itself isn't a traditional commercial business. However, this only applies if the platform meets the specific criteria set out in Regulation 2022/2065.[5] Some authors also point to an unintended consequence of this expansion. For instance, as online platforms become liable for defective goods, rising insurance costs to mitigate these risks could drive up overall prices for products and services (Veldt, 2023, p. 28).

### *2.3. Burden of Proof and the Obligation to Disclose Evidence*

Under the revised PLD, the manufacturer faces liability for damages caused by defects in digital products, including software, AI, and related services. The injured party is not required to prove negligence or fault on the part of the manufacturer, but only the existence of the defect, the damage, and the causal link between them. One of the most debated features of the proposed PLD is the introduction of a rebuttable presumption of defectiveness. According to the views of some, the adoption of probabilistic standards of proof over the traditional requirement for absolute certainty allows the PLD to lower the evidentiary threshold for victims, ensuring that the complexity of modern software does not become a legal barrier to compensation (Koch *et al.*, 2022, pp. 5–14). In contrast, industry representatives warned that such shifts in the burden of proof could inadvertently hamper European digital innovation (The Impact of the Product Liability Directive on Europe's Digital Innovation, 2023). The PLD

[3] According to the definition in PLD, Article 4(10) a manufacturer is any natural or legal person who develops, manufactures or produces a product, has a product designed or manufactured, markets that product under their own name or trademark or develops software or digital manufacturing files.

[4] According to the provision of Article 4(5) PLD a manufacturer maintains control if they execute or authorize the integration of components to the product, software patches, and product modifications. Additionally, it includes any scenario where the manufacturer possesses the capability to deliver software updates, either directly or through a third-party provider.

[5] Specifically, Digital Services Act Article 6(3) clarifies that the exemption from liability does not apply if the online platform presents the interface in a way that leads a consumer to believe the information, product, or service is provided by the platform itself (or by a trader under its authority/control), rather than by a third party.

Article 10 regulates mechanisms that significantly complicate the manufacturer's legal position. Consequently, one of the most debated features of the proposed PLD was the introduction of a rebuttable presumption of defectiveness. Industry representatives often warned that such shifts in the burden of proof could inadvertently hamper European digital innovation (The Impact of the Product Liability Directive on Europe's Digital Innovation, 2023). However, the PLD now stipulates three specific cases where the court is entitled to presume that the product is defective or that a causal link between defectiveness and damage exists. The first case is a situation when the manufacturer fails to comply with a court order for the disclosure of evidence available to them. The court is also entitled to presume that the product is defective or that a causal link exists if the injured party can prove that the product does not comply with mandatory safety requirements (under the EU or national law). The same rule applies when the defectiveness is demonstrated by an obvious malfunction. The PLD Article 10(4) is particularly significant, as it provides that in cases of high technical or scientific complexity, the court may presume defectiveness if the injured party proves it is likely that the product contributed to the damage, or if the injured party faces excessive difficulties in proving the defectiveness of the product or the causal link between its defectiveness and the damage, or both, thereby *de facto* shifting the burden of proof to the contrary onto the manufacturer. The manufacturer's new obligation of disclosure of evidence under the PLD Article 9 is a paradigm shift that places manufacturers in a more demanding legal position than under the old 1985 liability regime. Now, if the claimant shows a plausible case, the manufacturer is obliged to disclose all relevant evidence that is at the manufacturer's disposal. The PLD Article 9(6) specifically empowers courts to demand that all evidence be presented in an easily accessible and understandable manner. This could force the manufacturer to use their own resources to simplify and explain the evidence against them. If a manufacturer refuses to disclose a document, it triggers the aforementioned presumption of the product's defectiveness, in accordance with the provision of the PLD Article 10(2)(a). Consequently, manufacturers may now face substantial legal and administrative expenses due to the obligation to present evidence transparently. The new PLD still provides for specific exoneration grounds in which an economic operator (manufacturer included) is exempted from liability. According to the PLD Article 11, manufacturers and other liable economic operators can be exempt from liability if they successfully substantiate specific defensive grounds. Under Article 11(1), manufacturers or importers are exempt if they prove they did not place the product on the market (point a), or if distributors did not make the product available (point b). The same applies if the operator demonstrates that the defect likely did not exist at the time of distribution (point c), resulted from adherence to mandatory legal regulations (point d), or if the scientific and technical knowledge at the time made the defect undiscoverable (point e). Additionally, component manufacturers are protected if the defect stems from the final product's design (point f), while those who modify a product are not held responsible if the damage was caused by a part they didn't change (point g). Crucially, Article 11(2) of the PDL narrows these protections for the digital products. It stipulates that if the defect of the product occurs after its distribution, but still involves elements under the manufacturer's control, the manufacturer will not be exempt. This specifically includes defects linked to related services (point a), software updates or upgrades (point b), or a failure to deliver safety-critical updates (point c). Furthermore, this exemption is revoked if the defect arises from a substantial modification of the product (point d), effectively requiring manufacturers to remain accountable throughout the product's digital and operational life cycle.

### *2.4. The Development Risk Defence*

Ever since the development risk defence was introduced (ex-Art. 7(e) Directive 85/374/EEC, now Article 11(1)-point e PLD), it has been a hot topic of debate (Hacker, 2022, p. 28). Essentially, the development risk defence means it would be unjust to punish an operator for legal compliance or for failing to address defects that were undetectable and beyond their control (Howells, 2007, p. 403). This suggests that the timeframe for evaluating digital products is not strictly limited to the point at which they are first introduced to the market. One of the most significant challenges in adapting product liability rules to the digital age concerns the development risk defence. This legal provision exempts producers from liability if they can demonstrate that the defect was undiscoverable in light of the scientific and technical knowledge available at the time the product was released. The development risk defence was established forty years ago (Izquierdo Grau, 2025, p. 197). The Court of Justice of the European Union (hereinafter: CJEU) clarified in its ruling that the "state of knowledge" required for the development risk defence to be effective should be measured by an objective standard, meaning what matters is whether the relevant information was objectively accessible at the relevant time (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, 1997, para. 29). Proponents of the development risk defence argued that it was an essential element in providing incentives for the development of high-tech and innovative products and reducing insurance costs, while opponents claimed that the defence would diminish the impact of Directive 85/374/EEC (Fairgrieve & Goldberg, 2020, pp. 479–480). The PLD in Recital 39 maintains the CJEU view on the objective standard of accessible scientific and technical knowledge, mandating that in order to ensure an equitable distribution of risk, manufacturers may be granted an exemption from liability if they can demonstrate that a product's defect was impossible to identify while under their control. Crucially, this defence is not based on what the specific manufacturer actually knew, but rather on the highest standard of objective, accessible scientific and technical knowledge available. Under the new PLD, Article 18, Member States are permitted to maintain or establish national laws that hold economic operators liable for defective products even when the defect was scientifically or technically undiscoverable at the time of release. To maintain existing liability rules, Member States must submit the relevant legal texts to the Commission by December 9, 2026. Furthermore, Member States may introduce new or amended measures of this type, provided they are restricted to specific product categories, motivated by clear public interest objectives, and remain proportionate to those goals. Any proposed new measures must be submitted to the Commission with a detailed justification; following notification, the Member State must observe a six-month period allowing the Commission to issue an opinion and other Member States to provide observations before the measure can be officially adopted. It is evident that, just as in the former PLD 1985, the legislator has chosen not to fully harmonize this aspect, leaving it to each Member State's discretion. The Republic of Croatia has incorporated the development risk defence into its legislation, meaning that manufacturers in Croatia can be exempted from liability if they prove that the defect could not have been foreseen given the scientific and technical knowledge at the time.[6] This

[6] The provision of Art. 7, point (e) has been fully transposed into Art. 1078, para. 1, subpara. 5 of the Civil Obligations Act, *Official Gazette* No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023.

means that the development risk defence in Croatia currently applies to all product categories, including medicines and food. The burden of proof rests solely on the manufacturer. Given that the new PLD requires transposition by December 2026, the Minister of Justice, Public Administration, and Digital Transformation of the Republic of Croatia presented proposed amendments to the Civil Obligations Act in January 2026. The development risk defence is specifically contained in amended Article 1078 (1) point 5, which stipulates that an economic operator shall be exempt from liability if they prove that the objective state of scientific and technical knowledge at the time the product was placed on the market or put into service, or during the period in which the product was under the manufacturer's control, did not allow the defect to be discovered. This means that Croatia has chosen to keep the development risk defence, yet there is an important change connected with the digital nature of products. The defence now covers the time the product was placed on the market "or during the period in which the product was under the manufacturer's control." The provision, therefore, significantly extends the manufacturer's liability period to include the duration of time a product remains under manufacturer's control, such as, for example, through ongoing software updates for smart devices.

The PLD significantly reshapes the regulation of digital products by making the cybersecurity aspects of products with digital elements a component of product safety,[7] as defined in Article 3(1) CRA, a central liability factor for economic operators.[8] As digital transformation advances exponentially, the protection of data and digital infrastructure has become a priority. In this sense, while digital advancements have brought many previously unknown vulnerabilities, they have also served as the primary impetus for modernization of cybersecurity frameworks (Bouhafs, 2025, p. 122). Some authors, however, point out that the new PLD unjustifiably excludes commercial property from the scope of recoverable damages, as well as the ambiguities surrounding the status of open-source software and the practical challenges of applying the consumer expectation standard regarding product safety (Wagner, 2024, pp. 181–193).

## 3. MANUFACTURER'S LIABILITY UNDER THE CRA

The CRA, as previously stated, aims to support the cybersecurity of digital products. The CRA establishes clear rules for placing digital products safely on the market, mandating essential standards for their design, development, and production, as well as obligations of manufacturers and other economic operators. Its provisions apply to any device or software connected to

[7] The General Product Safety Regulation, Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC OJ L 135, 23.5.2023 (hereinafter: GPSR) acts as a regulatory backstop for any risks that the Cyber Resilience Act (CRA) doesn't specifically cover. While the CRA focuses strictly on protecting digital products from hackers and data breaches, the GPSR remains in charge of general safety issues unless a more specific EU law already applies.

[8] Under CRA, Article 3(12): Economic operator is the manufacturer, the authorised representative, the importer, the distributor, or other natural or legal person who is subject to obligations in relation to the manufacture of products with digital elements or to the making available of products with digital elements on the market in accordance with CRA.

other devices or networks, but it excludes open-source software and products already covered by specific regulations, such as medical devices, motor vehicles, and aviation systems.[9] Because they oversee the initial conception, design, and development phases, manufacturers are typically best positioned to ensure a product's security from its inception (Zirnstein, 2022, p. 710). The path to the final version of the CRA was defined by intense negotiations between the European Parliament, the Council, and stakeholders.[10] A primary point of contention centred on the broad definition of a product,[11] specifically regarding its impact on Open-Source Software and the broader implications for technological development and internet freedom (Colonna, 2025, p. 10). Under Article 3(13) of the CRA, a manufacturer is defined as the entity whose name or logo appears on a digital product. Whether they developed the software themselves or outsourced the development, and whether they charge for the software or give it away, they remain the primary party responsible for cybersecurity compliance. Manufacturers are strictly mandated to address all vulnerability management protocols and ensure their products are distributed free of known exploitable flaws. However, for other essential requirements, the CRA grants manufacturers a degree of autonomy, allowing them to assess and determine which specific standards are applicable based on the unique nature and category of their product (Burri & Zihlmann, 2023, p. 30).

### *3.1. Mandatory Cybersecurity Standards*

The CRA mandates that manufacturers take full lifecycle responsibility for the cybersecurity of products with digital elements. This begins with security by design, requiring a documented risk assessment that informs the entire development process and accounts for third-party or open-source components through rigorous due diligence. The concept of

[9] Under Article 2(2) CRA, several categories of products are explicitly excluded from its scope because they are already governed by *lex specialis*. These include medical devices under Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, OJ L 117, 5.5.2017 and Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on in vitro diagnostic medical devices and repealing Directive 98/79/EC and Commission Decision 2010/227/EU, motor vehicles covered by Regulation (EU) 2019/2144, OJ L 117, 5.5.2017, civil aviation systems under Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, OJ L 212, 22.8.2018, and marine equipment regulated by Directive 2014/90/EU of the European Parliament and of the Council of 23 July 2014 on marine equipment and repealing Council Directive 96/98/EC, OJ L 257, 28.8.2014. Recitals 25, 26, and 27 CRA further clarify the reasoning behind these aforementioned exemptions, emphasizing that such sectoral legislation already ensures an equivalent or even higher level of protection, making the application of the CRA to these specific industries unnecessary to avoid regulatory overlap.

[10] For more on this see: European Parliamentary Research Service (EPRS), 2023; Eclipse Foundation, 2023; GitHub, 2023.

[11] The CRA extensive reach has sparked extensive debate. While some welcome its breadth, critics argue that the resulting regulatory burden creates prohibitive compliance costs that could stifle the competitiveness of SMEs. Industry groups like DigitalEurope, and ETNO GSMA supported the CRA extensive reach and unified security standards. See: Committee for European Construction Equipment, 2023; American Chamber of Commerce to the EU, 2023; European Cyber Security Organisation, 2022; DigitalEurope, 2023.

security by design is not a recent innovation in the cybersecurity landscape; rather, it is rooted in long-standing computer engineering principles. Over time, this framework has been increasingly championed as a primary strategy for neutralizing the unique security vulnerabilities inherent in the expanding Internet of Things (IoT) ecosystem (Bygrave, 2021, p. 126). Before being placed on the market, products must undergo a conformity assessment and receive CE marking.[12] Manufacturers are further obligated to provide a support period, generally a minimum of five years, during which they must effectively handle vulnerabilities, provide free security patches, and maintain a single point of contact for reporting flaws. Documentation, including the EU declaration of conformity and technical files, must be kept for at least 10 years or the duration of the support period. Finally, if a product is found to be non-compliant, the manufacturer must immediately take corrective action, such as issuing updates, withdrawing the product, or notifying authorities and users of a termination of operations (Article 13 CRA). Under Article 14 CRA, manufacturers must adhere to strict timelines for reporting actively exploited vulnerabilities and severe security incidents to ENISA[13] and the relevant national authorities via a centralized platform. Furthermore, manufacturers are legally required to inform impacted users about risks and corrective actions in an accessible format. If they fail to do so, authorities may intervene to alert the public. Article 15 CRA allows manufacturers and third parties to voluntarily report vulnerabilities, cyber threats and security incidents to ENISA or national authorities. If a third party reports a flaw, the authorities must inform the manufacturer immediately to ensure that the issue can be addressed promptly.

### *3.2. Evaluating Manufacturers' Obligations and the Implementation Gap*

Furthermore, to meet the requirements of Article 31 and Annex VII CRA, manufacturers must prepare thorough technical documentation before launching a product and keep the documentation updated as long as the product is supported. The documentation must remain accessible to regulatory authorities upon request (Teichmann, 2026, p. 4). The technical documentation must include a clear description of the product's purpose and software versions, as well as a detailed look at its internal architecture and development processes. Under Article 13 CRA, a manufacturer must provide a risk assessment and records of any security standards or tests which were used to ensure the product is safe for the market. Under Article 18 CRA, a manufacturer can appoint an authorised representative in order to handle specific compliance tasks. While this representative cannot take over the manufacturer's core design or development duties (as outlined in Article 13), they act as a local point of contact for

[12] Under CRA, Article 3(31) The CE marking serves as a manufacturer's official declaration that both their digital product and their internal development processes meet the mandatory cybersecurity standards defined in Annex I of the CRA, as well as any other relevant EU safety laws. Essentially, it is a visible guarantee that the product complies with all applicable European "harmonization" rules before it is sold.

[13] The European Union Agency for Cybersecurity (ENISA) is the European Union's centre of expertise for digital security, tasked with achieving a high common level of cybersecurity, as regulated by Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act), OJ L 151, 7.6.2019. Headquartered in Greece, ENISA supports Member States and EU bodies by providing technical advice, coordinating large-scale crisis responses, and developing the European cybersecurity certification frameworks mandated by the CRA Under the CRA, ENISA manages the platform for reporting vulnerabilities and incidents. Available at https://www.enisa.europa.eu/ (19. 2. 2026).

authorities. Their primary responsibilities include keeping the EU declaration of conformity and technical documentation available for at least 10 years (or the duration of the product's support period), providing proof of compliance upon request, and cooperation to resolve any security risks associated with the product. Under Article 21 CRA, an importer or distributor is considered the manufacturer if they sell a digital product under their own name or brand, or if they make a substantial modification to a product that is already placed on the market. In these cases, they have the same level of responsibility as the manufacturer. It should be emphasized that any individual or company that makes a substantial modification to a digital product and then puts it back on the market is regarded as a manufacturer. This means they also must comply with all security and documentation obligations of the manufacturer. These obligations apply specifically to the modified parts of the product. However, if the change affects the security of the entire product, the subject who made the modification becomes responsible for the compliance of the whole product (Article 22 CRA). These obligations are designed to ensure user security while assuring that products remain operational and receive necessary support throughout their entire lifecycle (Collona, 2025, p. 9). While the CRA sets out a broad set of cybersecurity requirements and obligations for the manufacturer, the analysis of its provisions shows the CRA lacks precise practical guidance, leaving its requirements difficult for manufacturers to translate into practice. This suggests that manufacturers might struggle with inconsistent regulatory interpretations of adequate security levels across the EU, leading to legal uncertainty. Such an implementation gap complicates the development and maintenance of products that meet the regulation's standards. In our view, this ambiguity represents a significant hurdle because without concrete frameworks, compliance remains largely speculative, an argument already expressed by industry experts who argue that legislative intent cannot succeed without technical clarity (Schoo, 2024, pp. 245–251). Moreover, we find that the CRA may unintentionally benefit big tech companies with vast compliance budgets at the expense of small businesses because the cost of certification and compliance can be disproportionately high.

## 4. CONCLUSION

It is widely accepted that establishing a transparent and robust liability framework for digital products would significantly enhance the overall security and resilience of global cyberspace (González Fuster & Jasmontaite, 2020, p. 110). As discussed above, the notion of cybersecurity has evolved significantly, moving beyond a purely technical understanding of IT security to become a complex social, economic, and multidisciplinary challenge. Cyberattacks today can violate fundamental human rights, compromising physical safety, causing disruptions and severe financial loss in businesses and the broader community (Chaira, 2022, p. 271). Because digital products function through continuous interaction with third-party data and numerous interconnected participants, traditional liability frameworks are no longer sufficient. Liability rules have therefore been modified to impose a broader duty of care on manufacturers, ensuring they remain liable for damages even when harms arise from the complex digital nature of the product (Koch, 2020, p. 120).

The conducted research demonstrated that the manufacturers' legal position under the new defective digital product legislation in the European Union is defined by a synergy between the provisions of the CRA and the PLD that have created a challenging legal environment for the

manufacturer. This synergy resulted, in our assessment, in a regime of continuous manufacturer liability throughout the product's whole lifecycle. Traditional manufacturer liability often ended when a product left the factory. For digital products, liability now extends throughout the period the manufacturer retains control, such as through the ability to push software updates or mandatory cybersecurity requirements, including security by design. In other words, the manufacturer's liability now encompasses a substantially longer duration, reflecting the product's extended expected security lifecycle. While the CRA imposes administrative mandates and security by design requirements onto manufacturer, in order to prevent unsafe digital products on the internal market, the PLD ensures that manufacturers are held liable if a defective digital product causes damage. Crucially, the two documents, as the conducted analysis has shown, are linked through the new definition of a defect. The CRA creates the benchmark for product safety expectation, meaning that if a manufacturer fails to comply with the CRA's essential requirements that failure can be used in court as evidence that the product was legally defective. A manufacturer's failure to meet CRA obligations does not result only in administrative fines but makes the manufacturer's legal position in the case of a cybersecurity breach quite difficult. In the context of the new regulatory framework of digital products in the European Union, the development risk defence allows manufacturers to avoid liability if they can prove that the state of scientific and technical knowledge at the time they put the product on the market was not advanced enough to discover the defect. However, the new framework significantly narrows this defence. Even though the PLD maintains the development risk defence, its application is now conditioned upon the manufacturer's rigorous adherence to the CRA's security by design mandates. Despite noted deficiencies, we expect this regulatory framework to catalyse innovation and trigger a judicial redefinition of liability for cybersecurity defects.

## LIST OF REFERENCES


A Europe fit for the digital age: Empowering people with a new generation of technologies. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en (18. 2. 2026)

Bouhafs, H. 2025. Cybersecurity in the Digital Era: Between Digital Transformation and Protection Challenges. *Law and World*, 11(35), pp. 111–125. https://doi.org/10.36475/11.3.8

Burri, M. & Zihlmann, Z. 2023. The EU Cyber Resilience Act – An Appraisal and Contextualization. *Zeitschrift für Europarecht (EuZ)*, 2, B1-B45. Available at: https://ssrn.com/abstract=4375552 (18. 2. 2026). https://doi.org/10.36862/eiz-euz015

Bygrave, A. L. 2021. Security by Design: Aspirations and Realities in a Regulatory Context. *Oslo Law Review*, 8(3), pp. 126–177. https://doi.org/10.18261/olr.8.3.2

Car, P. & Luca, S. 2022. *EU Cyber Resilience Act: Briefing.* Luxembourg: European Parliament. Available at: https://www.europarl.europa.eu/thinktank/hr/document/EPRS_BRI(2022)739259.

Chiara, P. G. 2022. The Cyber Resilience Act: the EU Commission's proposal for a horizontal regulation on cybersecurity for products with digital elements. *International Cybersecurity Law Review*, pp. 255–272. https://doi.org/10.1365/s43439-022-00067-6

Chiara, P. G. 2025. Understanding the regulatory approach of the Cyber Resilience Act: protection of fundamental rights in disguise? *European Journal of Risk Regulation*, 16 (2), pp. 469–484. https://doi.org/10.1017/err.2025.9

Colonna, L. 2025. The end of open source? Regulating open source under the cyber resilience Act and the new product liability directive. *Computer Law & Security Review*, 56, 106105. https://doi.org/10.1016/j.clsr.2024.106105

Eckhardt, P. & Kotovskaia, A. 2023. The EU's cybersecurity framework: the interplay between the Cyber Resilience Act and the NIS 2 Directive. *International Cybersecurity Law Review,* 4, pp. 147–164. https://doi.org/10.1365/s43439-023-00084-z

Fairgrieve, D. & Goldberg, R. S. 2020. *Product Liability*. 3rd ed. Oxford: Oxford University Press.

González Fuster, G. & Jasmontaite, L. 2020. Cybersecurity Regulation in the European Union: The Digital, the Critical and Fundamental Rights. In: Christen, M. Gordijn, B. & Loi, M. (eds.), *The Ethics of Cybersecurity*. Berlin: Springer Open, pp. 97–115. https://doi.org/10.1007/978-3-030-29053-5_5

Hacker, P. 2022. The European AI liability directives – Critique of a half-hearted approach and lessons for the future. *Computer Law & Security Review*, 51, 105871. https://doi.org/10.1016/j.clsr.2023.105871

Howells, G. (ed.). 2007. *Law of Product Liability*. 2nd ed. London: LexisNexis Butterworths.

Izquierdo Grau, G. 2025. The Development Risks Defence in the Digital Age. *European Journal of Risk Regulation*, 16(1), pp. 197–216. https://doi.org/10.1017/err.2024.43

Koch, B. A. 2020. Liability for Emerging Digital Technologies: An Overview. *Journal of European Tort Law*, 11(2), pp. 115–136. https://doi.org/10.1515/jetl-2020-0137

Koch, B. A. *et al*. 2022. Response of the European Law Institute to the Public Consultation on Civil Liability – Adapting Liability Rules to the Digital Age and Artificial Intelligence. *Journal of European Tort Law*, 13(1), pp. 25–63, https://doi.org/10.1515/jetl-2022-0002

Li, S. & Faure, M. 2024. The Revised Product Liability Directive: A Law and Economics Analysis. *Journal of European Tort Law*, 15(2), pp. 140–171. https://doi.org/10.1515/jetl-2024-0010

Li, S. & Schütte, B. 2023. The proposal for a revised Product Liability Directive: The emperor's new clothes? *Maastricht Journal of European and Comparative Law*, 30(5), pp. 573–596. https://doi.org/10.1177/1023263X231216941

Micklitz, H.W. 2023. *The Role of Standards in Future EU Digital Policy Legislation*: *A Consumer Perspective, Executive Summary.* Brussels: BEUC. Available at: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-152_Role_of_Standards_in_Future_EU_Digital_Policy_Legislation-Exec_Summary.pdf

Organization for Economic Co-operation and Development (OECD). 2019. *Going Digital: shaping policies, improving lives*. Paris: OECD Publishing. Available at: https://www.oecd.org/en/publications/going-digital-shaping-policies-improving-lives_9789264312012-en.html

Rimkutė, D. 2025. The New EU Product Liability Directive: Doctrinal Analysis. *Access to Justice in Eastern Europe*, 8 (Spec.), pp. 74–97. https://doi.org/10.33327/AJEE-18-8.S-c000160

Schoo, P. 2024. Navigating the CRA: A Brief Analysis of European Cyber Resilience Act and Resulting Actions for Product Development. *Proceedings of the 9th International Conference on Data of Things, Big Data and Security*, pp. 245–251. https://doi.org/10.5220/0012690500003705

Teichmann, F. 2026. The cyber resilience act as a new paradigm for product security: a compliance roadmap. *International Cybersecurity Law Review*, 7, pp. 1–17. https://doi.org/10.1365/s43439-025-00162-4

The Impact of the Product Liability Directive on Europe's Digital Innovation – Creating a Proportionate Product Liability Directive, Brussels: DigitalEurope, 2023, pp. 1–10. Available at: https://cdn.digitaleurope.org/uploads/2023/03/DIGITALEUROPE-PLD-position-March-2023.pdf

Zhao, F., Wallis, J. & Singh, M. 2015. E-government development and the digital economy: A reciprocal relationship. *Internet Research*, 25(5), pp. 734–766. https://doi.org/10.1108/IntR-02-2014-0055

Zirnstein, Y. 2022. Der Entwurf des Cyber Resilience Act. *Computer und Recht,* 38(11), pp. 707–714. https://doi.org/10.9785/cr-2022-381108

Veldt, G. 2023. The New Product Liability Proposal – Fit for the Digital Age or in Need of Shaping Up? *Journal of European Consumer and Market Law*, 24, pp. 24–31.

Wagner, G. 2024. Next Generation EU Product Liability – For Digital and Other Products. *Journal of European Tort Law*, 15(2), pp. 172–224. https://doi.org/10.1515/jetl-2024-0011

### *Internet sources*

American Chamber of Commerce to the EU (AmCham EU). 2023. *Our position, Cyber Resilience Act proposal*. Available at: https://www.amchameu.eu/system/files/position_papers/cyber_resilience_act_proposal_final.pdf (18. 2. 2026).

Committee for European Construction Equipment (CECE). 2023. *CECE issues a position paper on the Cyber Resilience Act*. Available at: https://www.cece.eu/news/cece-issues-a-position-paper-on-the-cyber-resilience-act (18. 2. 2026).

DigitalEurope. 2023. *Cybersecurity everywhere: deciphering the Cyber Resilience Act*. Available at: https://www.digitaleurope.org/ (18. 2. 2026).

Eclipse Foundation. 2023. *Open Letter to the European Parliament: Potential Impacts of the Cyber Resilience Act on the Open-Source Ecosystem*. Available at: https://www.eclipse.org/ (18. 2. 2026).

ETNO-GSMA. 2023. *ETNO-GSMA joint position paper on the Cyber Resilience Act*. Available at: https://www.gsma.com/gsmaeurope/wp-content/uploads/2023/03/ETNO-GSMA-joint-CRA-position (18. 2. 2026).

European Cyber Security Organisation (ECSO). 2022. *Position Paper, Cyber Resilience Act*. Available at: https://ecs-org.eu/ecso-uploads/2023/01/ECSO_position_on_the_CRA.02.pdf (18. 2. 2026).

European Parliamentary Research Service (EPRS). 2023. *Briefing: Cyber Resilience Act – Strengthening the Security of Hardware and Software*. Luxembourg: European Parliament.

GitHub. 2023. *Policy Brief: Navigating the Cyber Resilience Act for Open-Source Communities*. Available at: https://github.blog/ (18. 2. 2026).

### *Legal sources and case law*

Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, (2024) OJ L, 2024/2853.

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022 (Digital Services Act)

Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828 (Cyber Resilience Act), (2024) OJ L, 2024/2847.

CJEU, C-300/95, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:1997:255

The General Product Safety Regulation, Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC OJ L 135, 23.5.2023.

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, (1985) OJ L 210.

Judgment of 10 June 2021, C-65/20, *VI v KRONE-Verlag Gesellschaft mbH & Co. KG*, ECLI:EU:C:2021:471

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch22

***Obbie AFRI****

# BUSINESS, CLIMATE LITIGATION AND HUMAN RIGHTS IN A CHANGING GLOBAL POLITICAL CLIMATE

*Climate litigation is increasingly framed not only as an environmental issue, but as a struggle over human rights in a changing global political climate. At the same time, business and human rights frameworks in Europe—especially mandatory due diligence and sustainability reporting—are expanding and are often presented as tools to strengthen corporate accountability. This paper argues that, despite the expansion of legal and regulatory mechanisms, corporate actors continue to rely on ESG narratives as a form of corporate legitimization, while affected communities face structural barriers to accessing justice. Drawing on developments in Europe and the Global South, the paper highlights a persistent gap between corporate contribution to climate harm and legal accountability. It concludes that without stronger attention to power asymmetries and access to justice, climate litigation and Business and Human Rights (BHR) regulation may reinforce existing inequalities rather than deliver climate justice.*

***Keywords:*** climate litigation, business and human rights, ESG, greenwashing, access to justice.

## 1. INTRODUCTION: FROM CLIMATE PROTECTION TO CLIMATE JUSTICE

### *1.1. Research questions*

In 2021, the District Court of The Hague ordered Royal Dutch Shell to reduce its global carbon emissions, marking a historic moment in climate litigation and corporate accountability (*Milieudefensie et al. v Royal Dutch Shell plc*, 2021). For the first time, a multinational corporation was required not only to align its own operations but also its value chain, with global climate targets. The decision was widely celebrated as a breakthrough, signalling that courts could play a central role in addressing corporate contributions to climate change (Setzer & Higham, 2022, p. 12). More recently, the European Court of Human Rights has confirmed that inadequate climate action may constitute a violation of human rights, further strengthening the normative link between climate governance and fundamental rights (*Verein*

* PhD Student in Law and Political Sciences at the Faculty of Law, Károli Gáspár University of the Reformed Church in Hungary, ORCID: https://orcid.org/0009-0005-5536-9395, e-mail: *elaoln@kre.hu*

*KlimaSeniorinnen Schweiz and Others v Switzerland*, 2024). Yet, beyond these developments, a deeper structural question remains: can such legal victories meaningfully deliver justice to those most affected by climate harm? This question becomes particularly pressing when viewed against the global distribution of climate impacts. Many countries in the Global South have contributed far less to historical greenhouse gas emissions, yet they face some of the most severe climate impacts, including livelihood losses, displacement risks, and ecosystem degradation (IPCC, 2022; UNEP, 2024; GCEurope, 2024).

In parallel with the rise of climate litigation, regulatory frameworks addressing business and human rights have expanded significantly, particularly in the European Union, including mandatory sustainability reporting under the Corporate Sustainability Reporting Directive (European Parliament and Council, 2022). and mandatory due diligence under the Corporate Sustainability Due Diligence Directive (European Commission, 2024). In principle, these frameworks provide new tools for litigants, offering standards of conduct and evidentiary material that can be used to challenge corporate behaviour. However, they also introduce new risks. Corporate reliance on ESG narratives and disclosure practices may create an appearance of responsibility without necessarily leading to substantive changes in behaviour, raising concerns about greenwashing and formalistic compliance (Delmas & Burbano, 2011, pp. 64–67).

This paper examines the intersection of business, climate litigation, and human rights in this changing global political climate. It addresses three interrelated questions. First, how do courts and quasi-judicial bodies frame state duties to regulate corporate greenhouse gas emissions through a human rights lens? Second, how do business and human rights instruments, such as due diligence and sustainability reporting, enable and constrain claims about corporate climate harm? Third, how does the global political climate, including shrinking civic space, affect access to justice and the distribution of legal protection?

### *1.2. Methodology and scope*

This paper adopts a doctrinal comparative approach. It examines legal reasoning on State duties, standing/victim status, causation, and (where relevant) Scope 3/value-chain responsibility through four key European cases: *Urgenda v The Netherlands* (2019), *Milieudefensie v Shell* (2021), *KlimaSeniorinnen v Switzerland* (2024), and *Duarte Agostinho v Portugal and 32 Others* (2024). Knox explains that environmental human rights case-law is largely procedural, which helps clarify why access to information, participation, and remedies matter in climate cases (Knox, 2009, pp. 26–29).

The doctrinal analysis is combined with a critical governance perspective to assess whether EU accountability tools encourage meaningful conduct change or minimalist compliance. The paper therefore analyses the CSRD and CSDDD as regulatory frameworks that shape corporate duties and evidence production.

## 2. CORPORATE CLIMATE HARM AND THE PROBLEM OF ACCOUNTABILITY

### *2.1. Corporate emissions and diffused responsibility*

According to the Carbon Majors database, global fossil fuel and cement emissions are increasingly concentrated among a small group of producers. In 2023, just 36 companies were linked to

around half of global fossil $CO_2$ emissions, underscoring the central role of major corporate actors in the emissions landscape (InfluenceMap, 2026). However, attributing responsibility for climate harm to individual corporations remains legally challenging. Unlike traditional environmental damage, climate change is cumulative, global, and temporally dispersed, making it difficult to establish a direct causal link between a specific corporate activity and a particular harm suffered by individuals or communities (Peel & Osofsky, 2015, p. 67).

This challenge is further compounded by the significance of so-called "Scope 3" emissions, which arise from a company's value chain rather than its direct operations. In many companies, value chain (Scope 3) emissions represent the largest share of their total greenhouse gas footprint (GHG Protocol, 2022). Yet, legal frameworks have historically focused on direct emissions, thereby allowing corporations to externalize responsibility across suppliers, consumers, and jurisdictions. As a result, corporate accountability is often diluted, even where the overall contribution to climate change is substantial.

### *2.2. Landmark climate litigation reasoning*

Climate litigation has emerged as a key mechanism for addressing corporate contributions to climate change. Recent cases have demonstrated a growing willingness among courts to engage with complex questions of corporate responsibility and human rights. However, despite these developments, significant legal and practical limitations remain.

One of the central challenges lies in establishing causation. Courts are often reluctant to attribute liability where harm results from the cumulative emissions of multiple actors over time. Even where scientific evidence demonstrates that corporate emissions contribute to climate change, translating this into legal causation remains difficult (Bouwer, 2018, pp. 504-506). This creates a high evidentiary threshold for claimants, particularly those lacking access to technical expertise and financial resources.

#### *2.2.1. Milieudefensie v Shell (2021)*

In Milieudefensie v Shell, the Hague District Court treated climate change as a foreseeable and serious risk, and assessed Shell's responsibility through a duty of care under Dutch tort law. The court did not require claimants to prove that Shell alone "caused" a specific climate harm. Instead, it focused on Shell's contribution to a global risk and on whether Shell's corporate policy adequately reduced that contribution. This approach is important for climate litigation because it shifts the debate from strict "but-for" causation to a risk-based and contribution-based logic, where a major emitter may have duties even when many actors contribute to the problem (*Milieudefensie et al. v Royal Dutch Shell plc*, 2021, para. 4.3.6–4.3.7).

A key innovation was the court's treatment of Scope 3 emissions. The judgment recognised that, for an energy company, most climate impact may occur outside its direct operations, in its value chain and through the use of its products. The court therefore ordered Shell to reduce the $CO_2$ emissions of the Shell group, including value-chain emissions, by a net 45% by 2030 compared to 2019 levels, through corporate policy (*Milieudefensie et al. v Royal Dutch Shell plc*, para. 4.1.1–4.1.4). At the same time, the judgment distinguished between (i) a stronger obligation regarding emissions from Shell's own activities and (ii) a "best efforts" obligation regarding third-party emissions in the value chain, while leaving Shell flexibility on how to allocate reductions across Scopes (*Milieudefensie et al. v Royal Dutch Shell plc*, para. 4.4.20–4.4.22).

### *2.2.2. KlimaSeniorinnen v Switzerland (2024)*

In Verein KlimaSeniorinnen Schweiz and Others v Switzerland, the Grand Chamber confirmed that climate change can engage human rights protection, especially under Article 8 ECHR (private and family life). Building on its environmental case-law, the Court held that Article 8 must be understood as including a right to effective protection by State authorities from the serious adverse effects of climate change on individuals' life, health, well-being and quality of life (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, 2024, para. 519).

The Court also clarified that climate harms can create serious and foreseeable risks, and that States therefore have positive obligations to provide effective protection against those risks (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 439–440). On that basis, the Court stated that the State's primary duty under Article 8 is to adopt and effectively apply in practice regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland* , para. 545).

The judgment is central for standing (victim status). Because climate change affects the population broadly, the Court rejected an approach that would turn climate claims into *actio popularis*. Instead, it set strict criteria for individual victim status: applicants must show (a) high intensity exposure to adverse climate effects and (b) a pressing need for individual protection, with an especially high threshold (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 487–488).

Applying these criteria, the Court accepted that older women are a group particularly susceptible to heat impacts, but still found that the individual applicants did not meet the high threshold for victim status in their individual circumstances (ibid, para. 530–533). At the same time, the Court accepted the *locus standi* of the applicant association as a vehicle of collective recourse. It held that the association was lawfully established, genuinely representative, and qualified to act on behalf of members who may arguably face specific climate-related threats to their Convention rights (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 524).

### *2.2.3. Duarte Agostinho v Portugal and 32 Others (2024)*

*Duarte Agostinho* (*Duarte Agostinho and Others v Portugal and 32 Others*, 2024) is the key counterpoint which shows the limits of climate litigation when applicants try to reach multiple States through one human-rights procedure. The Grand Chamber stressed that the Convention system is built on primarily territorial jurisdiction, with only exceptional bases for extraterritorial jurisdiction (*Duarte Agostinho and Others v Portugal and 32 Others*, para. 168–171). In this case, the Court accepted that the applicants were within the territorial jurisdiction of Portugal, but it held that no jurisdiction could be established over the other respondent States. It rejected the idea that climate change, as a global phenomenon, automatically creates human-rights jurisdiction across multiple States. In particular, the Court found that the applicants' complaints did not fall within any recognised category of extraterritorial jurisdiction (no effective control over an area; no State-agent authority and control; no jurisdictional link through domestic proceedings) (*Duarte Agostinho and Others v Portugal and 32 Others*, para. 178–183).

This decision matters for "who can bring claims" because it highlights the gatekeeping role of admissibility and jurisdiction doctrines (*Duarte Agostinho and Others v Portugal and 32 Others*, para. 205–208; 213–214).

### *2.2.4. Urgenda v The Netherlands (2019)*

Urgenda (Urgenda Foundation v The State of the Netherlands, 2019) remains the baseline for State obligations in European climate-rights reasoning because it translates climate risk into positive obligations under Articles 2 and 8 ECHR. The Dutch Supreme Court rejected the State's cassation appeal and let stand the order requiring the Netherlands to reduce greenhouse gas emissions by at least 25% by the end of 2020 compared to 1990 (Urgenda Foundation v The State of the Netherlands, paras. 8.1-8.3.5). The Court grounded this in the "genuine threat" of dangerous climate change and the corresponding duty to take suitable protective measures where lives and welfare are at risk (Urgenda Foundation v The State of the Netherlands, paras. 4.1–4.8; 5.2.1–5.3.4). It also emphasised that when giving substance to these positive obligations, courts may rely on broadly supported scientific insights and internationally accepted standards, including IPCC pathways and the widely endorsed Annex I reduction range of 25–40% by 2020 (Urgenda Foundation v The State of the Netherlands, paras. 6.1–7.3.6).

## 3. BUSINESS AND HUMAN RIGHTS: BETWEEN ACCOUNTABILITY AND COMPLIANCE

### *3.1. The promise of due diligence and ESG frameworks*

In response to growing concerns over corporate impacts on human rights and the environment, regulatory frameworks governing business conduct have expanded significantly in recent years. At the international level, the UN Guiding Principles on Business and Human Rights established a baseline expectation that corporations should respect human rights and that states should regulate and adjudicate corporate conduct (UN, 2011). Building on these principles, regional initiatives, particularly within the European Union, have introduced more concrete obligations through mandatory human rights and environmental due diligence, as well as enhanced sustainability reporting requirements.

Due diligence regimes can reduce 'diffused responsibility' by requiring companies to map risks across their operations and value chains and to take preventive measures with suppliers and business partners. For example, under the EU Corporate Sustainability Due Diligence Directive, in-scope companies must identify and address actual and potential adverse impacts in their chain of activities (European Commission, 2024). Sustainability reporting obligations can also generate litigation-relevant evidence, because companies must disclose material sustainability risks, policies, and governance arrangements under the CSRD framework (European Parliament and Council, 2022). Moreover, sustainability disclosures may provide new forms of evidence, enabling claimants to rely on corporate reports, risk assessments, and transition plans in legal proceedings.

Business and human rights frameworks complement climate litigation in concrete ways by creating both harder standards of conduct and usable evidence. For example, the EU Corporate Sustainability Due Diligence Directive requires in-scope companies to identify and address actual and potential adverse human rights and environmental impacts in their own operations and across their chain of activities, including prevention, mitigation, and remedial measures (European Commission, 2024). In parallel, the Corporate Sustainability Reporting Directive requires companies to disclose material sustainability risks, policies, targets, and governance arrangements in a standardised way (European Parliament and Council, 2022).

### *3.2. ESG as legitimation*

Despite their promise, these frameworks also give rise to significant concerns regarding their practical effectiveness. In particular, the increasing reliance on ESG metrics and sustainability reporting may facilitate a form of "greenwashing", whereby corporations project an image of environmental responsibility without implementing meaningful changes to their underlying practices (Delmas & Burbano, 2011, pp. 64-67). Reliance on ESG metrics and sustainability reporting can facilitate greenwashing when disclosures rely on vague "sustainability" language, selective indicators, or long-term targets without clear implementation pathways (such as interim milestones, capex shifts, and limits on offsets). In that setting, reporting may function more as a reputation tool than an accountability tool, shaping investor and public perceptions while leaving high-emitting business models largely unchanged. This risk is higher where claims are not verifiable because methodologies and key assumptions are unclear or assurance is weak; ESMA highlights that greenwashing often involves sustainability claims that are unclear, unsubstantiated, or difficult to verify (ESMA, 2024). A concrete illustration is *Fossiel Vrij NL v. KLM* (2024), where the Amsterdam District Court found several KLM sustainability advertisements misleading, showing how sustainability messaging can overstate environmental performance when not supported by concrete evidence.

### *3.3. Counter-arguments and limited achievements*

A balanced assessment should acknowledge that ESG frameworks and climate litigation have produced some measurable improvements, even if they do not automatically deliver climate justice. First, litigation and regulation have increased corporate transparency. Mandatory reporting regimes and disclosure pressure can make climate risks and transition plans more visible to investors and the public, which may reduce information asymmetry and support market discipline (Setzer & Higham, 2022, pp. 10–13). Second, climate litigation can influence corporate behaviour even without final judgments. The risk of reputational damage, legal costs, and judicial scrutiny may encourage firms to adjust internal governance, adopt clearer targets, or improve risk management (Setzer & Higham, 2022, pp. 10–13). Third, ESG-driven investor engagement and shareholder activism can also produce change, especially where investors demand credible transition planning and react to weak strategies. In short, these tools can raise the cost of inaction and sometimes trigger incremental reforms in corporate governance and disclosure (Setzer & Higham, 2022, p. 12).

However, these achievements remain limited and uneven. Improvements in disclosure do not necessarily translate into real-world emissions reductions, especially when reporting allows vague claims, selective indicators, or long-term targets without concrete implementation pathways. Moreover, shareholder pressure tends to be stronger in large, listed firms and in jurisdictions with active capital markets, while many high-impact activities occur in complex value chains where accountability is harder to enforce (Peel & Osofsky, 2015, p. 67). Litigation outcomes are also structurally constrained: causation doctrines, standing rules, resource inequality, and political context can prevent affected communities from bringing cases or sustaining them (Amnesty International, 2022). Even when claimants succeed, remedies often focus on procedures and plans rather than enforceable outcomes, and implementation can depend on regulatory capacity and political will (Setzer & Higham, 2022, pp. 18–20).

Furthermore, Walker-Crawford shows that fossil fuel defendants in climate litigation no longer rely mainly on outright climate denial. Instead, they accept the broad scientific consensus but contest the use of climate science to establish legal responsibility. Based on a qualitative analysis of defendants' arguments in major lawsuits, he identifies three recurring strategies: (i) counter-narratives that shift blame to society and demand, (ii) challenges to the substantive quality of plaintiffs' evidence by emphasising uncertainty, and (iii) attacks on the integrity of compromising evidence by questioning the neutrality of scientists and experts. This suggests that the future impact of corporate climate litigation will hinge on how courts evaluate climate research as legal evidence and whether defendants succeed in reframing and discrediting it (Walker-Crawford, 2026, pp. 142–145).

## 4. ACCESS TO JUSTICE IN A SHRINKING CIVIC SPACE

### *4.1. Structural barriers to climate justice*

Access to justice remains a central challenge in climate litigation, particularly for individuals and communities most affected by climate change. While legal frameworks and procedural mechanisms have expanded, the ability to utilise them effectively is unevenly distributed. Claimants often face significant financial, technical, and institutional barriers, including the high cost of litigation, limited access to legal expertise, and the complexity of scientific evidence required to establish climate-related harm (Peel & Osofsky, 2015, p. 73).

Mayer cautions that identifying individual "victims" of a failure to mitigate climate change is legally problematic because the causal link between a defendant's mitigation failure and an individual's harm is too diffuse and remote. He argues that establishing victimhood would require a long causal chain—from individual harm to a physical event, from that event to climate change, and from climate change to the defendant's climate wrong, where each link is uncertain and mediated by exposure, vulnerability and resilience (Mayer, 2025, pp. 813–816). This critique helps explain why courts often tighten victim-status requirements, and why climate litigation may be more effective when it relies on public law and public interest standing rather than individualised victim narratives (Mayer, 2025, pp. 833–836).

### *4.2. Political context: authoritarianism and silenced claims*

The challenges of access to justice are further intensified by broader political developments, including the rise of authoritarian tendencies and the shrinking of civic space in many jurisdictions. In such contexts, legal systems may lack independence, civil society organisations may face restrictions, and environmental defenders may be subject to legal harassment or intimidation (Amnesty International, 2022).

#### *4.2.1 Hungary: the "Lex NGO" model and legal pressure on foreign-funded civil society*

A clear European example is Hungary's 2017 NGO "transparency" law (often called "Lex NGO"), which imposed registration and disclosure duties on organisations receiving foreign support. The European Commission challenged this framework, and the Court of Justice of the EU held that Hungary's restrictions on foreign donations to civil society organisations were incompatible with EU law (Commission v Hungary, 2020). For climate litigation, the relevance

is practical: when NGOs are burdened with "foreign agent"-style labels and disclosure duties, they become easier targets for political delegitimation, which weakens their capacity to mobilise claimants, fund litigation, and act as stable litigation platforms (European Commission, 2017; Commission v Hungary, 2020).

#### *4.2.2. India: FCRA restrictions and funding as a litigation barrier*

In the Global South, funding controls can be even more decisive. India's Foreign Contribution (Regulation) Act (FCRA) creates strict rules for NGOs receiving foreign donations, and its tightening has been widely discussed as a structural constraint on civil society capacity (ICNL, 2020). For climate justice, the link is direct: many community cases depend on civil society support for lawyers, experts, field documentation, and litigation costs. When funding is restricted or registrations are threatened, climate litigation becomes harder to initiate and sustain, especially for rural or vulnerable communities that cannot self-finance complex proceedings (ICNL, 2020; Amnesty International, 2022).

#### *4.2.3. Philippines: anti-terror framing, "red-tagging", and intimidation of defenders*

Another pathway is the security framing of dissent. In the Philippines, "red-tagging" and the use of vague security narratives have been documented as tools that can intimidate activists, including environmental defenders, creating fear, surveillance risks, and practical obstacles to organising (Amnesty International, 2024). When environmental and climate advocacy is associated with extremism, potential claimants may withdraw, witnesses may refuse to cooperate, and NGOs may divert resources to self-protection rather than litigation. This directly affects "who can sue" and "what evidence can be produced", making rights protection uneven even before courts consider the merits (Amnesty International, 2024).

## 5. WHOSE RIGHTS COUNT? POWER AND CLIMATE INJUSTICE

Climate litigation is often presented as a neutral legal mechanism for enforcing environmental standards and protecting human rights. However, this framing can hide how access to courts, the recognition of harm, and the attribution of responsibility are shaped by unequal power relations. Human rights-based environmental jurisprudence is strongly procedural: it relies on access to information, participation, and remedies as the main pathways to protect rights (Knox, 2009, pp. 26–29). When those procedural conditions are weak because claimants lack resources, civic space is restricted, or courts filter cases through strict admissibility rules, litigation does not operate on an equal playing field but reproduces broader structural inequalities.

A key dimension of this inequality lies in the asymmetric relationship between the Global North and the Global South. While major corporate emitters are often headquartered, financed, or regulated in developed jurisdictions, severe climate impacts are frequently experienced elsewhere. Climate litigation therefore becomes, in practice, a tool that depends on who can access effective fora and how international law shapes arguments, obligations, and remedies (Prévost *et al*., 2025, pp. 291–293). As Prévost et al. note, although most climate cases are filed domestically, international law increasingly structures climate responsibility claims

and pushes doctrinal developments on responsibility and causation (Prévost *et al*., 2025, pp. 292–293).

Moreover, Petersmann argues that climate litigation activates different "grammars of climate justice" that shape which harms and whose rights become legally visible. A traditional grammar focuses on actual harms to human victims within territorial jurisdiction, while a progressive grammar stretches legal concepts towards potential harms, extra-territorial obligations, and future generations. However, she argues that climate harms are often better understood as "entangled harms" across subjects, space, and time, and that this complexity is frequently weaponised by powerful actors as a tactic of de-responsibilisation (Petersmann, 2026, pp. 74–76; 78).

These dynamics raise a fundamental normative question: whose rights are effectively protected in climate litigation? Courts may increasingly recognise the human rights implications of climate change, but the benefits of this recognition are not evenly distributed. Without the procedural conditions that Knox identifies meaningful participation, access to information, and effective remedies—rights language risks remaining formal rather than protective in practice (Knox, 2009, pp. 26–29). Consequently, climate litigation and BHR regulation can drift towards a form of selective justice, where legal protection is more accessible to claimants with resources and favourable fora, while those most vulnerable remain excluded or underrepresented. The challenge, therefore, is not only to expand legal mechanisms, but to strengthen the political and procedural conditions especially civic space and access to expertise, under which climate litigation can deliver substantive climate justice (Prévost *et al*., 2025, pp. 297–298). In this light, the challenge is not merely to expand legal mechanisms, but to critically reassess the conditions under which they operate.

## 6. CONCLUSION

Climate litigation and business and human rights (BHR) regulation have reshaped climate governance. Courts now engage more directly with questions of climate responsibility, while due diligence and sustainability reporting seek to embed accountability within corporate structures by setting standards and generating evidence for scrutiny.

However, this paper shows that stronger legal tools do not automatically deliver climate justice. Accountability remains uneven because climate harm is cumulative and transboundary, corporate emissions are embedded in complex value chains, and doctrines on causation, standing, and jurisdiction continue to filter claims. ESG-based disclosure can also encourage formalistic compliance, allowing companies to maintain legitimacy through narratives and selective reporting while high-emitting business models persist.

These limits are amplified by a changing global political climate. Where civic space is shrinking, affected communities and civil society face greater barriers to organizing, producing evidence, and sustaining litigation, reinforcing a pattern of selective justice. For climate litigation and BHR regulation to be genuinely transformative, they must strengthen practical access to justice and enforceable remedies, protect civic participation, and support accountability pathways that can address collective and diffuse harms. Otherwise, climate litigation risks reinforcing existing inequalities rather than redistributing protection towards those most vulnerable to climate change.

## LIST OF REFERENCES


Amnesty International. 2022. Amnesty International Report 2021/22: The State of the World's Human Rights. Available at: https://www.amnesty.org/en/documents/pol10/4870/2022/en/ (6. 3. 2026).

Amnesty International. 2024. *Philippines: Authorities increasingly using Facebook to stifle young activists' right to freedom of expression and protest*, 14 October 2024. Available at: https://www.amnesty.org/en/latest/news/2024/10/philippines-authorities-using-facebook-to-red-tag-young-activists/ (20. 3. 2026).

Bouwer, K. 2018. The Unsexy Future of Climate Change Litigation. *Journal of Environmental Law*, 30(3), pp. 483–506. https://doi.org/10.1093/jel/eqy017

Delmas, M. & Burbano, V. 2011. The Drivers of Greenwashing. *California Management Review*, 54(1), pp. 64–87. https://doi.org/10.1525/cmr.2011.54.1.64

European Commission. 2017. *Infringements: European Commission refers Hungary to the Court of Justice of the EU for its law on foreign-funded NGOs*. Press release IP/17/5003, 6 December 2017. Available at: https://europa.eu/rapid/press-release_IP-17-5003_EN.htm (20. 3. 2026).

European Securities and Markets Authority (ESMA). 2024. Final Report on Greenwashing (ESMA36-287652198-2699). Available at: https://www.esma.europa.eu/sites/default/files/2024-06/ESMA36-287652198-2699_Final_Report_on_Greenwashing.pdf (26. 3. 2026).

GCEurope. 2024. *Global North and Global South: How climate change uncovers global inequalities*. Available at: https://gceurope.org/global-north-and-global-south-how-climate-change-uncovers-global-inequalities/ (26. 3. 2026).

GHG Protocol. 2022. Scope 3 Frequently Asked Questions (Detailed FAQ). Available at: https://ghgprotocol.org/sites/default/files/2022-12/Scope%203%20Detailed%20FAQ.pdf (5. 3. 2026).

ICNL. 2020. India: Foreign Contribution (Regulation) Act (FCRA) – background resource. Available at: https://www.icnl.org/post/assessment-and-monitoring/indias-foreign-contribution-regulation-act-fcra (20. 3. 2026).

InfluenceMap. 2026. Carbon Majors: 2024 Data Update. Available at: https://influencemap.org/briefing/Carbon-Majors-2024-Data-Update-35466 (26. 3. 2026).

IPCC. 2022. Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge: Cambridge University Press. Available at: https://www.ipcc.ch/report/ar6/wg2/ (2. 3. 2026).

Knox, J. 2009. Climate Change and Human Rights Law. *Virginia Journal of International Law*, 50(1), pp. 1–59.

Mayer, B. 2025. Victims in Climate Litigation. *International and Comparative Law Quarterly*, 74(4), pp. 811–839. https://doi.org/10.1017/S0020589325101358

Peel, J. & Osofsky, H. 2015. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139565851

Petersmann, M. 2026. Entangled harms: A reparative approach to climate justice. *Leiden Journal of International Law*, 39(1), pp. 74–95. https://doi.org/10.1017/S0922156524000281

Prévost, D., Kanetake, M. & Wouters, J. 2025. Climate Change Litigation: International Legal Perspectives. *Netherlands International Law Review,* 72, pp. 291–299. https://doi.org/10.1007/s40802-026-00290-6

Setzer, J. & Higham, C. 2022. *Global Trends in Climate Change Litigation: 2022 Snapshot*. London: Grantham Research Institute.
UNEP. 2024. Emissions Gap Report 2024. Available at: https://www.unep.org/resources/emissions-gap-report-2024 (5. 3. 2026).
United Nations. 2011. Guiding Principles on Business and Human Rights. Geneva: United Nations. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (2. 3. 2026).
Walker-Crawford, N. 2026. Save the Climate but Don't Blame Us: Corporate Arguments in Climate Litigation. *Transnational Environmental Law*, 15(1), pp. 142–169. https://doi.org/10.1017/S2047102525100186

### *Legal sources and case law*

Court of Justice of the European Union (CJEU). 2020. *Commission v Hungary (Transparency of associations)*, Case C-78/18, Judgment of 18 June 2020. Available at: https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?num=C-78%2F18 (20. 3. 2026).
District Court of Amsterdam. 2024. *FossielVrij NL v KLM*, Judgment of 20 March 2024, ECLI:NL:RBAMS:2024:1512. Available at: https://www.clientearth.org/media/cx4po41h/klm-judgment-20-march-2024.pdf (20. 3. 2026).
District Court of The Hague. 2021. *Milieudefensie et al. v Royal Dutch Shell plc*, Judgment of 26 May 2021, ECLI:NL:RBDHA:2021:5339.
European Commission. 2023. Proposal for a Directive on Corporate Sustainability Due Diligence. COM/2022/71 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071 (18. 1. 2026).
European Commission. 2024. Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence. Official Journal of the European Union, L Series. Available at: https://eur-lex.europa.eu/eli/dir/2024/1760/oj (2. 3. 2026).
European Court of Human Rights (Grand Chamber). 2024. *Duarte Agostinho and Others v Portugal and 32 Others*, Application No. 39371/20, Decision of 9 April 2024.
European Court of Human Rights (Grand Chamber). 2024. *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, Application No. 53600/20, Judgment of 9 April 2024.
European Parliament and Council. 2022. Directive (EU) 2022/2464 on Corporate Sustainability Reporting (CSRD). Official Journal of the European Union, L 322, pp. 15–80. Available at: https://eur-lex.europa.eu/eli/dir/2022/2464/oj (2. 3. 2026).
Supreme Court of the Netherlands. 2019. *Urgenda Foundation v The State of the Netherlands*, Judgment of 20 December 2019, ECLI:NL:HR:2019:2007.

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch23

***Dina JOKIĆ****

# LEGAL AND ETHICAL FRAMEWORKS FOR WORKING OUTSIDE THE EMPLOYER'S PREMISES IN SERBIA

*The legal framework in Serbia is still not fully adapted to the specific characteristics of work performed outside traditional office environments, which creates challenges in several areas that have long been widely recognized, both in academic discourse and within the business community, such as the regulation of working hours and rest periods, the protection of privacy, and occupational health and safety.*

*The ethical dimension of remote and home-based work presupposes a relationship of trust between employers and employees, as well as clear yet flexible policies that safeguard the rights and legitimate interests of both parties. By introducing adequate regulation and by actively responding to and understanding emerging trends, Serbia has the potential to successfully integrate this model of work and enhance the well-being of its working-age population, which continues to represent the primary driving force of any contemporary economy up to date.*

*This paper offers both a theoretical and practical examination of the existing legal framework governing digital work performed outside the employer's premises, viewed from the perspectives of employers and employees alike, as well as the ethical considerations—that is, the implications for the well-being and prosperity of all stakeholders involved in this form of work.*

***Keywords:*** remote work, home-based work, working hours, work breaks, privacy.

## 1. LEGAL FRAMEWORKS AND ETHICAL DIMENSIONS OF WORK OUTSIDE THE EMPLOYER'S PREMISES IN SERBIA

### *1.1. Introduction*

In contemporary society, remote work and work-from-home arrangements have been practiced by business entities since the 1980s. However, the legal construct of work performed outside the employer's premises emerged within the domestic labour law framework only during the 1990s. In the legislation of that period, this institute was primarily regulated in relation to

* Master of Laws with passed bar and lawyer's exam, Head of the Joint Affairs Service of the Accreditation Body of Serbia, ORCID: https://orcid.org/0009-0002-7669-8479, e-mail: *dina.jokic@ats.rs*

agricultural households and certain professions, including computer-based work. Nonetheless, its provisions remained underdeveloped and vague until the extensive amendments to the labour law enacted in 2014 (Employment act, 2014). Significantly, an article bearing this designation was incorporated into the Law on Occupational Safety and Health only in 2023 (Law on Occupational Safety and Health, 2023, Art. 44 and 45).

A decade later, this legal institute remains insufficiently defined, leaving ample room for interpretative discretion by both employers and employees – typically, to the detriment of the latter. It is beyond dispute that the right to perform work outside the employer's premises constitutes a recognized legal entitlement; however, it is equally clear that no right exists without corresponding obligations. Despite these ambiguities, this form of employment, over the course of its now mature existence, has succeeded – amidst a world of entrenched legal and organizational dogmas – in positioning itself simultaneously as a privilege for employees and a competitive advantage for employers.

As a foundational concept, it has also contributed to the development of the so-called hybrid work model, which, according to both statistical data and prevailing labour market trends, ranks as the most attractive arrangement for the contemporary workforce. The hybrid model combines remote work and work performed within the employer's premises, offering flexibility while preserving organizational cohesion. From a formal legal perspective, this arrangement serves not only as a mechanism for engaging but also for attracting a skilled and diverse labour force to perform tasks that contribute to the legitimate purpose of corporate existence – the generation of profit.

According to data collected and published by the Statistical Office of the Republic of Serbia in March 2024, during the year, a total of 219,100 employed persons in the Republic of Serbia worked from home, representing approximately ten percent of the total employed population (Statistical Office of the Republic of Serbia, 2025). These figures underscore the growing relevance of remote and hybrid work in the domestic labour market, as well as the urgent need for further normative clarification and alignment with contemporary European labour standards.

There exists a wide range of factors that justify and necessitate the introduction and application of this institution – Ffrom global circumstances such as the accelerated movement of capital and labour, and the increasing interconnection of world economies (now a supranational category), to global migration trends triggered by crises, wars, climate change, and pandemics.

Starting from the above, the structure of this paper is designed in such a way that, following the introductory section in which the problem is defined, and the theoretical framework is established, a general overview of the normative regulation of work outside the employer's premises in the Republic of Serbia is presented. This is followed by a presentation of empirical data and research findings, while the final part of the paper focuses on a critical assessment of existing solutions and proposes measures for improving both the legal and practical framework.

The main hypothesis of this paper is that the existing legal regulation of work outside the employer's premises in Serbia does not provide a sufficient level of legal certainty for either employers or employees, but instead leaves room for varying interpretations which, in practice, often operate to the detriment of employees. The methodological approach includes the analysis of positive law, as well as a review of relevant statistics, empirical studies, and practical experiences, accompanied by the interpretation of data and official positions of competent authorities, along with available international sources.

This paper also employs a survey as one of the research methods. The sample consists of respondents selected based on accessibility and relevance to the research topic. While this approach provides valuable insights into remote work practices, it is important to note that the sample is not fully representative of the broader Serbian labour market. Consequently, the findings should be interpreted with caution, particularly when considering generalizations at the national or international level. The limitations of the sample, including its size and scope, are acknowledged and taken into account in the analysis and discussion of results.

### *1.2. Legal and Ethical Framework*

Upon closer examination of this domain, one encounters multiple layers of both advantages and challenges that inevitably accompany this "remote" employment relationship. On the employer's side, the foremost and most evident benefit arises from the absence of any obligation to cover commuting expenses for employees. Closely following is the reduction of costs that would ordinarily be allocated for securing business premises and ensuring occupational safety and property protection of the employer owned assets – costs which vary depending on the nature of the workspace, the number of employees, and the type of work equipment provided.

Equally evident is the employer's enhanced capacity to operate effectively under unforeseen circumstances such as transportation strikes, adverse weather conditions, natural disasters, armed conflicts, terrorist attacks, or epidemiological crises (Radović-Marković, Radulović & Ćukanović, 2021, p. 101). At the lower end of the employer's benefit hierarchy lies a seemingly minor yet fundamentally important advantage: the reduced risk of interpersonal conflict resolution. This correlation is proportionate to the fact that, in the absence of regular personal contact – that is, the shared physical workspace—employees tend to engage in fewer interpersonal disputes due to the reduced frequency of interactions. Conversely, this same condition gives rise to the need for cultivating inspirational remote team dynamics, which demands considerable time and resources to develop a fluid and effective model capable of fostering a cohesive and vibrant team atmosphere.

In this regard, organisations frequently resort to digital community-building initiatives, as these forms of work create a virtual organisational structure which, by definition, differs from the traditional corporate culture associated with office-based employment.

From the employee's standpoint, work performed outside the employer's premises entails a gain in "free" time, primarily because commuting obligations are eliminated. Time, in turn, is closely linked with money: employees who are not required to be physically present in an office are likewise spared the financial burden of maintaining appropriate business attire – particularly when working for employers with strict dress codes – or the often-high costs of daily meals, which in large urban centres may vary considerably depending on the office location.

At the top (or bottom) of the hierarchy of benefits for the remote worker lies the elimination of one of the key factors contributing to deteriorating mental health – the daily commute. Research conducted over the past decade has consistently demonstrated that longer commuting times can significantly impact mental health, particularly through an increased risk of depression. This finding supports the broader thesis that the urban environment exerts a direct influence on individual well-being (Wang *et al.*, 2021).

Furthermore, the concept of a repetitive environment – that is, work performed exclusively within the employer's business premises – translates into a lack of stimulating or relaxing

content for the employee. This disadvantage is neutralised under remote work conditions: an employee whose duties require only a computer can be exposed to various sources of energy and stimulation, as they can change their working environment daily, assuming no personal or family obligations restrict such flexibility.

Nevertheless, it must not be generalised that such an arrangement is universally beneficial. As noted in recent psychological and organisational studies, "despite the obvious advantages of working from home, some individuals enjoy going to the office and engaging in direct contact with their colleagues, while others feel disconnected from their work and find it easier to communicate in person than via video conferencing" (Radović-Marković, Radulović & Ćukanović, 2021, p. 103). This observation confirms that social intelligence, which underpins human connection, manifests most strongly through verbal and non-verbal communication. In the context of remote work, communication channels are inherently limited, thereby constraining both interaction and mutual understanding.

## 2. UNCERTAINTIES OF THE DIGITAL WORK ENVIRONMENT IN SERBIAN LABOUR MARKET

The Employment act of the Republic of Serbia in its Article 42 unequivocally obliges employers to include in employment contracts governing work performed outside the employer's premises a provision stipulating reimbursement of expenses for the use and operation of the employee's own work equipment, as well as compensation for other work-related costs. These payments are subject to personal income tax on earnings**,** though they are not treated as social security contributions (Zakon o doprinosima za obavezno socijalno osiguranje [Law on Contributions for Mandatory Social Insurance, *Official Gazette of RS*, 2004], Art. 13). In practical terms, this provision means that the employer should bear the cost burden related to the employee's use and depreciation of personal equipment.

A position issued by labour inspectors and published on the *Paragraf Lex* digital platform clarifies this point: "[w]hen an employee uses their own equipment, the employment contract must specify the amount of compensation that the employer is required to pay to the employee." (Privredna komora Srbije, 2020). Employers' willingness to fulfil this obligation encounters a fundamental practical difficulty – how to calculate and express such expenses in monetary terms that realistically reflect actual costs. This challenge stems from the fact that these costs involve the consumption of electricity and internet services, which, within a household – even a single-member one – serve multiple purposes, while the proportion attributable to computer work and workspace lighting is comparatively minor, especially in the context of digital work.

Furthermore, the same Employment act obliges the employer to provide adequate working conditions and to organise work in such a way as to ensure the safety and protection of life and health at work, in accordance with the law and other regulations (Employment act, 2018, Art. 16). From the perspective of remote work, this obligation can arguably be described as one of the least logical statutory requirements – one that appears to have been incorporated by the legislator in a general and overly simplistic manner. It raises the question of whether the employer, merely by virtue of this mandatory legal provision, truly has the right, and more importantly, the practical ability, to enforce it without infringing upon other rights of the employee.

A reasonable conclusion is that the exchange of information between the parties represents the only rational means of ensuring compliance – preventing the employer from making either deliberate or accidental intrusions into the employee's private and family life while assessing workplace safety (Reljanović & Knežević Bojović, 2025, p. 124). Guided by this logic, many employers have opted for so-called self-assessment of occupational risks, thereby sharing responsibility with employees and avoiding the sensitive issue of domestic privacy intrusion. In practice, employers frequently require employees to complete structured home-working assessment forms, which typically group questions around themes such as work environment and equipment, organisation of work, and psychosocial factors. Employees may be asked to provide information on the safety of household electrical installations, adequacy of lighting, and noise levels. It is, however, reasonable to assume that an overwhelming majority of employees lack the expertise to competently evaluate and report such conditions, as doing so presupposes specialised technical knowledge typically acquired through formal education.

These forms often include questions such as whether work tasks and responsibilities are clearly defined, as well as inquiries into family members' opinions about home-based work or the frequency of contact with colleagues. In practice, this obligation tends to be reduced to a minimal preventive requirement – namely, for the employer to inform the employee about occupational risks associated with their position and to provide training on how to prevent health deterioration caused by work-related factors.

This type of training – both theoretical and practical – is accompanied by Form No. 6, prescribed under the Rulebook on Record-Keeping Methods and Deadlines in the Field of Occupational Safety and Health. The form identifies risks associated with prolonged sitting and computer use, including poor posture, overuse of musculoskeletal groups, visual fatigue, collision with hazardous surfaces, indirect electrical hazards, and prescribes corresponding preventive measures to ensure safe and healthy work conditions (Pravilnik o načinu vođenja i rokovima čuvanja evidencija u oblasti bezbednosti i zdravlja na radu [Rulebook on the Manner of Keeping and the Retention Periods of Records in the Field of Occupational Safety and Health], 2025).

Regarding the place of work, which is a mandatory element of all employment contracts – including those regulating remote work – there is currently no provision that explicitly exempts remote work arrangements from the requirement to specify a workplace location. As stated by authors of the professional commentary on remote work "[t]he place of work need not necessarily be known to the employer – the purpose of such work lies in its results, quality, and efficiency. Classical examples include programming, online product sales, and other occupations reducible to electronic communication or computer-based tasks. Naturally, this may extend to other types of work agreed upon by the employer and employee as suitable for performance from different locations. The law does not define remote work as a legal concept, leaving its modalities to mutual agreement. The only restriction, found in Article 44 of the Employment Act, is that remote work cannot include tasks hazardous to the employee's health or life, to others, or to the environment" (Paragraf Lex, 2014).

Consequently, employers remain formally obliged to indicate the employee's place of work (Employment Act, 2018, Art. 33), for example, by specifying the city, municipality, or administrative unit, thereby technically prohibiting the employee from leaving that location during working hours, even though, in practice, the location has little substantive significance in the context of remote work. This underscores the urgent need for legislative reform in this area.

A core pillar of successful remote employment relationships is mutual trust between employer and employee: trust reinforced by respect, dialogue, and demonstrable performance. However, this trust is not absolute; it necessarily implies a degree of work supervision. The most balanced form of supervision is periodic reporting, yet this may impose an additional burden on remote employees compared to those sharing a workspace with their supervisors, particularly where reporting requirements are unevenly applied.

In the absence of formal reporting systems, employers retain a legitimate right to monitor employees' work by other means, provided that such monitoring remains limited by the right to privacy at work – especially when it involves processing personal data—and is conducted lawfully, proportionately, purposefully, and transparently (Law on Personal Data Protection, 2018). Monitoring must also be restricted to the employee's working hours**,** while the protection of the employee's personal time has found expression in comparative law through the so-called "right to disconnect", defined as "the employee's right not to be disturbed by work-related communications after working hours and not to be assigned any duties once they have left their workplace or completed their workday." (Rajić Ćalić, 2023, p. 306).

When comparing the privacy rights of employees working on the employer's premises with those of remote employees, it is "rational to conclude that an employee working from home expects a greater degree of privacy than one performing duties within the employer's facilities" (Reljanović, & Knežević Bojović, 2025). Balancing the right to privacy with the employer's legitimate interest in monitoring work processes and outputs presents significant challenges – especially when the nature of work involves video recording, where family members or others may unintentionally appear on screen. In an ideal scenario, employers might attempt to mitigate this risk by contractually shifting liability to the employee, requiring them to guarantee that surveillance systems will not capture third parties and disclaiming employer responsibility should such incidents occur.

Another facet of trust lies in the employer's belief that employees will act responsibly, diligently, and proactively in performing their duties. Trust, in this sense, is even more essential within organisations adopting remote or hybrid work models than in traditional employer–employee relationships. The essential question arises: how can an employer objectively assess the performance and reliability of an employee they he may never meet in person, especially when evaluation often relies on reactive measures – intervening only after poor results are observed?

Many employers employ psychological testing during recruitment, following informed consent procedures, as a means of reducing the risk of future dismissal due to insufficient professional integrity. Nonetheless, such practices must be regarded as exceptions, as employers are not authorised to compile psychological profiles of employees; such data processing fails to meet the legal standards of necessity and proportionality, even when formalised by internal acts. The principle of data minimisation requires justification of the necessity of collecting such data for employment purposes, which remains legally contentious across industries. Under EU law, psychological testing is largely equated with medical testing, permitted only in exceptional cases. The Council of Europe similarly discourages psychological assessments except where legitimate, job-relevant, and accompanied by adequate safeguards (Reljanović, & Knežević Bojović, 2025). The ILO Code of Practice on the Protection of Workers' Personal Data emphasizes that psychological testing should not be conducted against the worker's will, and that workers must be informed in advance of the purpose and consequences of such

assessments, with refusal not leading to sanctions or adverse treatment (International Labour Organization, 1997).

## 3. SUSTAINABILITY OF THE REMOTE WORK MODEL IN THE REPUBLIC OF SERBIA

Current trends suggest that this form of work will soon gain traction even in the most rural areas of the Republic of Serbia, primarily because it is not constrained by geographic factors. Nevertheless, its expansion also brings certain adverse aspects, most notably social isolation, feelings of insecurity (whether personal or professional), and a tendency toward overwork – particularly among individuals who struggle to distinguish their professional duties from personal or family responsibilities, or among those who lack such obligations altogether. This trend is most pronounced among employers who have not succeeded, or are unable, to establish a genuine sense of community and team belonging, as well as in cases where employees lack genuine support from their close social or family environment. Networked remote collaboration, that is, virtual interaction among colleagues, is therefore an area in which employers will need to invest greater effort in the future, as not everyone is naturally inclined, or feels called, to provide support and ensure that neither the "remote" nor even the "present" colleague feels isolated. This implies that, if employers wish for this model of work to endure and continue to serve the purpose for which it was largely introduced, they must analyse, plan, design, initiate, encourage, and ultimately ensure that a sense of team belonging remains ever-present.

The results of surveys conducted by the author of this paper in 2021 and 2022 among employees of a client organization operating within the Republic of Serbia revealed that the feeling of pride in belonging to a team or employer exerts the strongest and most direct influence on the overall sense of belonging, surpassing even working conditions and other contributing factors. Should employers recognize this need and integrate a strategy that utilizes virtual content to strengthen the sense of belonging, they will be faced with a considerable challenge: to design content that is informative, preferably educational**,** engaging**,** creative, and appealing to diverse employee profiles; ideally interactive; and ultimately capable of inspiring enthusiasm and conversation among colleagues. Only through such engagement can the full potential of this form of content be realized, achieving one of its most legitimate objectives, fostering genuine team connection and cohesion**.**

The author of this paper, as a member of the senior management of an employer belonging to an international group primarily based in the Western world, participated in virtual social meetings, so-called town halls, which essentially represent open gatherings of the entire company or large teams, where management communicates directly with employees, inviting open dialogue and exchange of opinions. These meetings also serve to inform the entire workforce about operational results, planned or implemented changes, and future objectives, thereby reinforcing a culture of dialogue and employee engagement.

One effective way to ensure interactivity among team members, or within the subordinate–superior relationship, is through the design of knowledge-sharing formats. Such initiatives enable employers to further enhance the skills and competencies of their employees, while simultaneously encouraging them to share knowledge with others. In doing so, employers foster a genuine sense of growth and professional development and indirectly promote

solidarity and mutual support within the workforce. As the authors of publication on teamwork observe, "[w]ithin a team, cooperation among members – not competition – emerges as the most significant factor in joint work" (Grubić Nešić, Zubanov, & Jokanović, 2021, p. 9).

Conversely, cultivating pride of belonging among employees may be one of the most difficult tasks for an employer. The reasons are numerous, among them the fact that individuals differ widely in their beliefs about what makes them feel proud at work. For some, it is the opportunity for personal and professional growth within the team; for others, the recognition and reward in terms of remuneration for extra effort; while some value the assurance that all working conditions meet a satisfactory standard.

A particularly negative aspect of remote and home-based work, often highlighted in scholarly and professional literature, concerns its impact on the notion of working time (Kovač-Orlandić, 2020, pp. 101–117), which under the constitutional framework of the Republic of Serbia is legally limited (Ustav Republike Srbije [Constitution of the Republic of Serbia], 2021, Article 60). In the context of remote work, the employee often exercises direct influence over their own working hours, except in systems that monitor entry and exit from virtual workspaces. Employees working from home or in informal environments (such as parks) may lack the external cues that signal the end of the working day—no colleagues rising from desks, no collective departure from the office. At this stage, self-discipline emerges as the decisive factor that, on a subconscious level, distinguishes an individual who consciously and continuously extends their working hours—an action which, if repeated, may lead to overexertion or even addiction—from one who is able to conclude their working day in a timely manner. The latter practice contributes significantly to the sustainability of remote work and to the preservation of mental health. In contemporary society, self-affirmation is often closely associated with productivity, which in itself represents an additional complicating factor.

The author argues that the Republic of Serbia should introduce mandatory supplementary health insurance for workers, particularly those working outside the employer's premises, and establish penal provisions for non-compliance. This responsibility is, to some extent, already reflected in Article 67 of the Law on Occupational Safety and Health (Law on Occupational Safety and Health, 2023, Article 60), the violation of which is sanctioned as a misdemeanor under Article 101(20) of the same law. However, the existing provision is primarily designed to ensure compensation for damages; its purpose should be expanded to preventive protection of employees' physical and mental integrity. Given the well-known resource constraints of the national healthcare system, facilitating alternative forms of healthcare, particularly those focused on mental well-being, would allow employers to safeguard both the health and satisfaction of their employees, thereby strengthening overall productivity and job satisfaction.

It is also worth noting one of the newest trends emerging from Generation Z, known as silent vacationing, the practice of combining work and vacation without disclosure (Rao, 2025). Though lacking a formal legal definition, silent vacationing in practice constitutes a form of employee misconduct, as it involves unreported and unsanctioned time off occurring during official working hours. In more progressive organisations, of which Serbia is slowly becoming acquainted, this risk is mitigated through transparent support for remote work based on performance evaluation, as well as through co-living arrangements that maintain accountability while fostering flexibility. The first rural co-living space in Serbia, Mokrin House, located in Mokrin, has been promoted as an ideal temporary residence for digital nomads (Mokrin House of Ideas, 2025). In the Spanish banking sector, in order to ensure

greater autonomy in organising work schedules according to individual needs, a corporate policy was developed with the aim of preventing managers from acting in ways that could undermine employees' autonomy – for instance, by determining when employees must be available or by scheduling unnecessary meetings (Eurofound, 2020, p. 17).

Post-pandemic survey data collected in the Republic of Serbia reveal nuanced perceptions of remote work. Among respondents, 64.1% considered remote work conducive to a more balanced integration of professional and private life, 43.59% identified greater personal time availability, and 33.33% reported enhanced productivity. Conversely, 51.28% observed blurred boundaries between work and personal spheres, while 33.33% experienced a sense of isolation. Collectively, these results illustrate the complex duality of remote work, wherein its advantages coexist with the structural and psychosocial challenges it entails.

## 4. THE FUTURE OF REMOTE AND HOME-BASED WORK IN SERBIAN ECONOMY

An indispensable component of a productive and sustainable employer–employee relationship lies in the personal attributes of the worker, confirming the intuitu personae nature of this legal relationship. These attributes, in addition to professional competencies, include enthusiasm, dedication, tact, loyalty, and a spirit of cooperation. Whether this work modality influences the development of such qualities – at least among those who do not possess them innately or have not acquired them early in life, remains to be determined. Evidently, this work model contributes to the development of individuality, not in contradiction but in potential synergy with community. On the contrary, valuing individuality may enhance the need for connection, knowledge sharing, and experience exchange, thereby strengthening the workplace community and making it more stable and resilient in the face of unforeseen circumstances and demands. As the Viceroy Kopaonik Serbia hotel proclaims in its policy: "*We cherish our differences, it's what makes us stronger.*" (Viceroy Hotels & Resorts, 2025).

The loyalty of employees working outside their employer's premises will, in the future, have to be nurtured through the employer's virtual identity, so as to ensure that workers develop a genuine sense of belonging, as discussed earlier in this paper. This virtual identity must become an integral part of the employer's reputation management policy, and consequently, a competitive advantage. The principles that could substantially contribute to this mission are diversity, inclusion, and equality, which often constitute key elements of corporate ideologies and business philosophies – both in internal governance and in external communication with partners and the public. Loyalty, as a by-product of employee satisfaction, correlates directly with workforce turnover, which can disrupt regular workflows, increase operational costs, and cause organisational instability (Sudiarta *et al.* 2025, p. 121). Developing employee loyalty should thus be seen as an investment in the future: a strategy for retaining quality personnel who may prove to be a decisive factor in market competition.

The concept of remuneration and its determining elements are likewise evolving under the influence of new work modalities and the latest demographic composition of the labour force. Traditionally, the principal components of salary are work performance and time spent at work, making it impossible to calculate and pay basic wages without both. However, in the new era, "results, not hours spent at the computer, are becoming the measure of success." (Tešić, 2025). Hence, one of the essential elements of pay, time spent at work, is gradually losing its significance.

From an optimistic perspective, remote work is becoming an even more integrated part of work processes, thanks to the advancement of digital tools, artificial intelligence, and virtual environments that will allow for near-complete imitation of the physical workspace. Remote work does not necessarily limit participation in professional training, as online educational platforms and interactive webinars are becoming standard elements of everyday working life. Nevertheless, remote employees may still miss certain forms of informal learning, such as spontaneous conversations and knowledge exchange "on the go" (Eurofound, 2020, p.1). These gaps are expected to be mitigated by new forms of virtual socialisation, hybrid gatherings, and structured opportunities for learning and knowledge sharing, aimed at enhancing engagement, motivation, and productivity. Through these efforts, remote work may evolve into a practice that is not only efficient but also culturally and collegially fulfilling.

## 5. CONCLUSION

As Honoré de Balzac once wrote, "[a]ll happiness depends on courage and work" (Balzak, 2005, p. 123). Courage is indisputably a virtue, its connotation inherently positive, but the question that increasingly arises is: what of work itself? Is work, as we know it today, still a direct source of happiness, or has the 21st century, with its inheritance of Roman law, medieval feudalism, the industrial revolution, the entrance of women into the workforce, the founding of the International Labour Organization, and the rise of globalisation and digitalisation, divided the very concept of labour? How do remote and home-based work affect this philosophical and practical dimension?

If the trends of working outside the employer's premises continue, answers to these questions may soon emerge. For now, one conclusion is clear: the absence of a comprehensive regulatory framework in the Republic of Serbia complicates the implementation of remote work, a phenomenon that marks an undeniable turning point in modern labour history. It directly impacts the organisational maturity of employers in Serbia, many of whom still struggle to recognise the necessity of this work model and to regulate it in a transparent and holistic manner.

For the successful integration of remote and home-based work as a standard practice, clear and comprehensive regulations must be developed, primarily addressing working hours, rest rights, occupational safety and health, and privacy protection. This regulatory framework must be flexible enough to accommodate the specificities of different industries, sectors, and job profiles, while ensuring reliable digital infrastructure and effective systems for monitoring work performance, though not necessarily time spent at work.

To fulfil its potential and serve as a genuine driver of progress, this framework must be accompanied, as a matter of legal obligation**,** by internal employer policies carefully designed to address loyalty, virtual identity, team communication, effective recruitment and employee satisfaction, while remaining less rigid in terms of supervision and working time. In distributed teams, communication becomes a critical success factor; in fact, it has become apparent that it is often necessary to share more information than usual to ensure alignment, transparency, and effective collaboration across distances. At the same time, maintaining a clear daily structure is essential for preserving a healthy work-life balance. Without physical separation between work and personal life, employees may face challenges in setting boundaries, which can lead to decreased well-being and long-term productivity. Establishing routines and clear expectations helps mitigate these risks and supports sustainable performance.

Employers play a key role in this transition. Beyond providing technical tools, they should actively support employees in adapting to remote work through training, clear guidelines, and organizational practices that foster engagement and accountability. Such investments not only improve productivity but also contribute to a stronger return on investment by enhancing employee satisfaction and retention.

Finally, the role of Serbian legislation remains crucial in shaping the future of remote work. Although certain legal frameworks recognize work outside traditional office settings, there is a need for more comprehensive and clearly defined regulations that address the specific challenges of remote employment. Strengthening legal support in areas such as labour rights, occupational safety, and data protection would provide greater certainty for both employers and employees, enabling more effective and widespread adoption of remote work practices.

Given existing legal and ethical challenges, the relationship between employee and employer in the context of remote work requires continuous dialogue and mutual adaptation. Thus, the future of remote work will largely depend on the ability of legislators, employers, and employees to jointly shape a flexible yet protective framework—one that supports the ongoing digital revolution while simultaneously ensuring dignified working conditions and equal opportunities for all.

## LIST OF REFERENCES


Balzak, H. 2005. *Filozofija novca*. Beograd: Zavod za udžbenike.

Eurofound. 2020. *Telework and ICT-based mobile work: Flexible working in the digital age*. New Forms of Employment series. Luxembourg: Publications Office of the European Union. Available at: https://www.eurofound.europa.eu/en/publications/2020/telework-and-ict-based-mobile-work-flexible-working-digital-age (5. 8. 2025).

Grubić Nešić, L., Zubanov, V. & Jokanović, B. 2021. *Timski rad*. Novi Sad: Fakultet tehničkih nauka, Univerzitet u Novom Sadu.

International Labour Organization (ILO). 1997. *Code of Practice on the Protection of Workers' Personal Data*. Geneva: International Labour Office.

Kovač-Orlandić, M. 2020. Savremeni izazovi regulisanja radnog vremena: Da li je granica između radnog i slobodnog vremena isuviše zamagljena? *Studia Iuridica Montenegrina,* 2, pp. 101–117.

Mokrin House of Ideas. 2025. Welcome to Mokrin House – House of Ideas. Available at: https://mokrinhouse.com/ (29. 10. 2025).

Paragraf Lex. 2014. Stručni komentar. Radni odnos za obavljanje poslova van prostorija poslodavca nakon stupanja na snagu Zakona o izmenama i dopunama Zakona o radu („Službeni glasnik RS", br. 75/2014).

Privredna komora Srbije. 2020. Okrugli sto: Privrednici pitaju – inspektori odgovaraju. Available at: https://pks.rs/vesti/okrugli-sto-privrednici-pitaju-inspektori-odgovaraju-3304 (29. 10. 2025.)

Radović-Marković, M., Radulović, D. & Ćukanović, B. 2021. *Rad (k)od kuće*. Novi Sad: Izdavačka knjižarnica Zorana Stojanovića.

Rajić Ćalić, J. 2023. Pravo na isključivanje – između porodičnog života i profesionalnih dužnosti. *Radno i socijalno pravo*, 2, pp. 303–319.

Rao. R. 2025. 'Quiet vacationing': a secret revolt against workplace culture. Available at: https://theweek.com/business/jobs/quiet-vacationing-remote-work-travel (29. 10. 2025).
Reljanović, M. & Knežević Bojović, A. 2025. *Pravo na privatnost u radu*. Beograd: Institut za uporedno pravo.
Statistical Office of the Republic of Serbia. 2025. Working from Home in the Republic of Serbia. Available at: https://www.stat.gov.rs/vesti/?a=24&s=2402 (29. 10. 2025.)
Sudiarta, M. *et al.* 2025. Exploring the relationship between employee engagement, job satisfaction, and turnover intention in the hospitality industry. *Journal of Commerce Management and Tourism Studies*, 4(1), pp. 120–134.
Tešić, N. 2025. Remote rad je bio samo početak. Šta dolazi će vas šokirati. Available at: https://forbes.n1info.rs/biznis/remote-rad-je-bio-samo-pocetak-sta-dolazi-ce-vas-sokirati/ (5. 8. 2025).
Viceroy Hotels & Resorts. 2025. Diversity, Equity, Inclusion & Belonging. Available at: https://www.viceroyhotelsandresorts.com/diversity-equity-inclusion-belonging (5. 8. 2025).
Wang, B. *et al*. 2021. Achieving Effective Remote Working During the COVID-19 Pandemic: A Work Design Perspective. *Applied Psychology*, 70(1), pp.16–59.

***Legal sources***

Constitution of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, Nos. 98/2006 and 115/2021).
Employment act (*Official Herald of the Republic of Serbia*, Nos. 24/05, 61/05, 54/09, 32/13, and 75/14)
Employment act (*Official Herald of the Republic of Serbia*, Nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017-Decision of the CC, 113/2017 and 95/2018 - authentic interpretation)
Law on Contributions for Mandatory Social Insurance (*Official Gazette of the Republic of Serbia*, Nos. 84/04, 61/05 ... 6/26)
Law on Occupational Safety and Health (*Official Herald of the Republic of Serbia*, No. 35/23)
Law on Personal Data Protection (*Official Gazette of the Republic of Serbia*, No. 87/2018)
Rulebook on the Manner of Keeping and the Retention Periods of Records in the Field of Occupational Safety and Health (*Official Gazette of the Republic of Serbia*, Nos. 5/2025 and 38/2025).

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch24

*Andrea MAZELLIU**
*Megi GJONI***

# CIVIL SOCIETY'S ROLE IN ALBANIA'S POLICYMAKING PROCESS AND EU ENLARGEMENT

*Civil Society is considered to be one of the key actors that ensure participatory democracy and promote the values and needs of the categories they advocate for. Civil society advocacy aspires to focus on resilient and solution-based policies by promoting value-based decision-making. Their influence on government and legislative decision-making is considered by the EU to be a crucial factor in achieving human rights and rule of law standards by improving participatory democratic governance. The participation of civil society in the decision-making process of a country in the enlargement process is considered a great accelerator which contributes to deepening the citizens' understanding of the reforms needed to meet the requirements of EU membership.*

*This research analyses the participation of CSOs in the policy-making process in promoting sustainable development, enhancing democratic governance, and upholding human rights in strengthening institutions and enhancing good governance in Albania. This paper considers the timely and transparent follow-up of the enlargement process through country progress reports and important reputable national and international reports. The article analyses the contribution of CSOs to national policymaking processes over the last five years, in line with Albania's obligations under the EU accession process and the role of CSOs in safeguarding EU standards as essential actors in enlargement.*

***Keywords:*** CSOs, participatory democracy, Albania, EU enlargement, open governance.

## 1. INTRODUCTION

Civil society organisations (CSOs) are considered key actors in ensuring participatory democracy and in promoting values and needs in the drafting of resilient policies (Steffek, Kissling & Nanz, 2008). The participation of civil society in the decision-making process of a country in the enlargement process is a great accelerator that contributes to the deepening of

* Assistant Lecturer of Law, Department of Law, University of New York Tirana, Albania, ORCID: https://orcid.org/0000-0001-8134-0354, e-mail: *andreamazelliu@unyt.edu.al*

** Doctoral Student, Institute of European Studies, University of Tirana, Albania, ORCID: https://orcid.org/0009-0003-0596-3471, e-mail: *megi.gjoni@hotmail.com*

citizens' understanding of the reforms needed to meet the requirements of membership of the EU. CSOs' roles imply advocacy for inclusive policies and contributions to policymaking, implementation, and oversight. They help ensure that essential social services are accessible to all citizens while promoting innovation through the participation and inclusion of communities and vulnerable groups in decisions affecting their lives (Reci & Jance, 2024, p. 319–324). CSOs are organisations with expertise in their respective fields, developed through independent research outside government agendas, and they contribute valuable knowledge to the policymaking process while promoting democratic accountability (Scholte, 2002, p. 285). Civil society actors are broadly understood as all non-state, not-for-profit, independent, non-partisan, and nonviolent organisations, through which people pursue and defend shared objectives and ideals united around particular issues (European Commission, 2025, 790 final).

Civic participation is related to the active engagement of citizens in the process of public decision-making, which is directly related to the stakeholders (Suphattanakul, 2018, pp. 221–222). An open government depends on the cooperation with civil society and on the joint participation of both parties resulting in effective decision-making. Some common elements in the context of CSOs' inclusion in the decision-making process include links to information, consultation, collaboration and empowering the government's decision-making process (Suphattanakul, 2018, p. 226). Incorporating good practices of open government, such as the adoption of ethical standards, protocols, or guidelines on transparency and civil society inclusion, as well as the creation of translated legislation for public use, can support the post-legislative process, along with public and government consultation records (Careccia & Wallace, 2021, pp. 15–18). Democratic quality in the participatory process refers to the ability of the citizens to participate in and influence the public policy-making process (Moysan & Ródenas-Rigla, 2024, p. 2). It is up to the government to create an inclusive environment by informing the citizens on the choices they have to contribute to democracy processes (Steffek & Ferretti, 2009). Consultation is the most representative form of increasing the quality of democracy in influencing political decisions by ensuring effective participatory processes. The OECD's 2025 standards on exploring new frontiers in citizen participation in the policy cycle frame citizen participation as a means of reinforcing representative democracy. For participation to be meaningful, it must be supported by transparent and accountable legal frameworks, coordinated government leadership, administrative capacity, inclusive and citizen-centred processes, and safeguards for the responsible use of AI and digital tools. In this sense, citizen participation should not remain a formal consultation requirement but should function as a structured mechanism through which public authorities justify how citizens' input informs policymaking, implementation, and oversight. In this regard, governments can ensure more inclusive, citizen-centred participation processes through playing a key role in leading and building capacity for citizen participation across the public administration (OECD, 2025).

Civil society, particularly interest-based CSOs, plays a positive role in security governance when its activities and aspirations align with the principles of the rule of law, the protection of human rights, and a commitment to non-violent democratic politics. Civil society involvement in different issues often includes individual advocates or groups calling for the protection of human rights or for policy reforms in response to specific experiences, such as police misconduct, gender inequality, or the rights of survivors (Böhmelt *et al*., 2014). This

article analyses the participation of CSOs in the policy-making process in Albania, promoting sustainable enhancement of democratic governance and upholding the rule of law standards in strengthening institutions and improving good governance towards the EU integration process (Balkan Civil Society Development Network, 2025). The methodological approach followed in this research is qualitative, analysing current literature, EU progress reports for the last five (5) years, and Albania's actions in implementing recommendations to ensure CSOs' effective participation in the policy-making process.

Scholarly research on civil society was relatively limited during the early decades of the European integration process, as integration was largely understood as an elite-driven project led by political, administrative, and institutional actors rather than by citizens or civil society organisations (Romito, 2018, p. 237). The research defines participation of civil society in the EU integration process as an important alternative path to the democratisation of the EU and to rendering the decision-making process more legitimate and accountable (Trenz, 2009, p. 36). Even inside the EU, as of 2001 the inclusion of the CSOs and other interested parties is considered an important achievement in strengthening the institutions' relations with citizens (European Commission, 2001, 428 Final). In summary, the analytical shift towards civil society was associated with three mutually interrelated dynamics. First, growing concerns about the EU's democratic legitimacy politicised the EU decision-making and highlighted civil society as a new policy actor. Second, especially in mid-range theorising, scholars shifted from integration narratives to concrete governance questions, increasing interest in how civil society participation could improve both democracy and effectiveness. Third, practitioners in Brussels "discovered" civil society as a potential solution to problems of legitimacy, accountability, and efficiency in an ever-expanding Union (Heidbreder, 2012, p. 8).

## 2. EU CRITERIA ON CIVIL SOCIETY PARTICIPATION IN THE POLICY-MAKING PROCESS

After the 1990s, the European Union's enlargement policy increasingly emphasised good governance and administrative reform through conditionality and assistance mechanisms. The Copenhagen criteria, established in 1993, set the main political and economic conditions for accession, while the Madrid European Council of 1995 added the requirement of sufficient administrative capacity to implement the acquis (European Council, Madrid Criteria, 1995). To qualify for membership, candidate countries have to fulfil the political dimension of good governance (Börzel & Risse, 2009, pp. 14–16). Accession negotiations are opened only after democratic consolidation has been put on a sustainable trajectory in the candidate countries according to the progress report for each candidate country and the ability to effectively approximate and implement the *acquis communautaire*. Since the "Big Bang" enlargement of the EU in 2004 with the accession process of ten Central and Eastern European countries, the European Commission has strongly encouraged candidate countries to involve CSOs in the process of adopting and approximating more than 10,000 EU legal acts in ensuring both the effectiveness and legitimacy of the accession process (Kopiński, 2024; National Resource Centre for Civil Society in Albania, 2020). However, the one-sided nature of the accession process, the high implementation burden, the time pressure, and the strong emphasis on conditionality transformed accession into a largely technical and administrative process of transferring rules (Schimmelfennig & Sedelmeier, 2004).

With accession negotiations firmly established in an intergovernmental framework, neither the European Commission nor the governments of the candidate countries made systematic efforts to involve non-state actors in the adoption of the *acquis* (Börzel *et al.*, 2007). EU enlargement requires candidate countries to have democratic governance, and the approach followed by the EU has focused mainly on promoting 'effective governance', especially in the case of the accession process of the Western Balkan countries (Ghincea & Pleșca, 2025, pp. 3000–3003). The EU's enlargement policy framework for the Western Balkans aimed to establish an institutional and legislative framework to support democracy, the rule of law, consolidation of civil society's environment, media independence, as well as strengthen the rule of law and measures to fight corruption and organised crime. However, despite efforts to create an enabling environment for civil society, challenges in implementation have led to persistent issues, particularly limited funding from national authorities and insufficiently meaningful consultations (European Commission, 2025, 690 final).

The right of access to documents, regardless of the method of access, is provided for in Article 15 TFEU and is built on strong language, particularly in relation to the transparency of the legislative process, underlining the right of the public to follow and participate in the EU decision-making (Article 15, Treaty on the Functioning of the European Union). This article defines that the European Parliament should hold its meetings in public, as shall the Council when considering and voting on a draft legislative act. Furthermore, the Treaty on European Union contains a number of provisions which are based on democratic principles that every citizen shall have the right to participate in the democratic life of the Union and that the decisions shall be taken as openly and as closely as possible to the citizens and the obligation of the institutions maintain open, transparent, and regular dialogue with representative associations and civil society (Article 10(3) & 11 Treaty of European Union). Both treaties are important because they confer on the EU institutions the obligation of institutional openness to promote good governance and to ensure the participation of civil society (European Commission, 2023).

The 2020 revised enlargement methodology reinforced the rule of law issue in the EU Negotiating Framework (European Commission, 2020). According to this methodology, there should be clear and distinctive rules and procedures for how non-state actors, including CSOs, can be included in and contribute to the negotiation process (DG NEAR, 2022). The consultation process through policymaking and negotiations with CSOs should be considered as a priority for an effective, inclusive, and transparent process of the EU accession of a country, where all parts of society are being informed and offered a space for inclusion (National Resource Centre for Civil Society in Albania, 2020). This strategic document on the evaluation of the accession process of the WB countries gives significant focus to the fundamental requirements of the EU's negotiating position, particularly the strengthening of public engagement in the enlargement process, which, in the case of Albania, has not been fully implemented as the negotiating position has not been made transparent and accessible to the public and CSOs were not consulted (Zweers, 2025). The EU has recommended that it is essential for Albania's accession process that decisions in the country should be taken in the most open way possible by ensuring transparency. As the position of the EU has been made public, it is expected that during preparations for the integration process Albania should be transparent with stakeholders by involving them in this process through a dynamic dialogue with citizens and civil society. The EU position highlights that Albania should ensure a

consultation process in accordance with the criteria set out in EU legislation on public access to documents in all areas (Council of the European Union, CONF-ALB 2/22, 2022). As is clear from the negotiation process, the chapter on the fundamentals (Chapter 23 & 24) is key to the accession process, emphasising the maintenance of transparency standards and ensuring open governance through inclusiveness in the legislative and decision-making process, with a focus on integration (European Movement in Albania, 2014). The roadmap prepared by the candidate country must be approved as a result of the consultation process with stakeholders because it is believed that citizens are the main beneficiaries of this process, empowering them and making them responsible holders of the requirements and the process (Council of the European Union, 2024).

## 3. ALBANIA'S PROGRESS ON CSOS' INCLUSIVE PARTICIPATION: INCLUSION OR ILLUSION?

Albania being a candidate country, its government is struggling to adhere to a comprehensive process in the design, approval, and implementation of policy documents, including laws and strategies aimed at aligning its legislation with the EU *acquis*. Their influence on government and legislative decision-making is considered by the EU to be a crucial factor in achieving human rights and rule of law standards by improving participatory democratic governance (Curtin, 1999). Albania has taken steps to approve a legal and institutional framework to guarantee the rights that come as a result of open government by adopting successful mechanisms and models of good governance such as those of the OECD, the Council of Europe, other organisations, or the recommendations given by the EU. Until 2014, in Albania there were no consolidated mechanisms and standards that allow for the organisation and functioning of consultation processes. In 2011, the OGP was founded as an initiative that promotes transparency and greater citizen participation in government by making governments more responsible, transparent, accountable, and effective. In this context, Albania became member of the OGP in the same year, and as a condition for membership the country had to take a series of measures, including the Civil Society Charter, a political commitment that emphasises the role of civil society as a key partner in the country's development, although this has not yet been fully reflected in the legal and enabling framework (Pollo, 2012). The legal framework on ensuring CSOs' contribution in the policymaking process is the Law on Public Notification and Consultation of 2014 (Law no. 146/2014) and the Law on the Legislative Initiatives of Voters of 2019 (Law no. 54/2019). The latest action plan that Albania has adopted as an obligation of the OGP membership is the 2023-2025 Action Plan, which envisages priorities that are consistent with Albania's European integration process (Albania Sixth Action Plan 2023-2025). Albania's current OGP action plan is the country's first plan to be developed and implemented jointly with a formal multilateral forum, the Multi-Stakeholder Committee (MSC). However, during implementation, the political leadership of the MSC changed due to government restructuring, meetings were less frequent, and outreach was limited. The participation of civil society within the MSC was largely formal. Participation in the implementation of specific commitments was centred around strong CSOs operating in the capital and concentrated on central institutions that were more open to contributions from civil society. Compared to

previous cycles, the process showed a stronger structural organisation through the establishment of the MSC, but this institutional improvement did not lead to a broader involvement in practice (OGP, Report 2023–2025, p. 11).

The 2014 law on public notification and consultation is the main commitment of Albania in the framework of the EU integration process and the recommendations deriving from its membership in the Open Government Partnership (OGP) for integrating CSOs and citizens' rights into the policymaking process (Beqiri, 2017, pp. 202–205). Despite the importance that the law has when it comes to establishing the rights and framework of the interested parties in the consultation phases, the empirical analysis has been absent from its implementation starting from 2014 until today. The adoption of this law institutionalises public consultation in the drafting and approval of draft laws, national and local strategies, and policies of high public interest. According to analyses conducted by researchers, this law leaves out of its scope the normative sub-legal acts, which constitute most of the legislative framework, which has a direct impact on the rights of citizens and interest groups (Angjeli & Reçi, 2024, pp. 54–56). The influence of citizens or interest groups in decision-making is important because it makes it possible for laws not only to be followed in the way they are drafted and approved, but also to be monitored in their implementation. As a result, there is a need for legislation to provide mechanisms that grant citizens access to governance by consulting or informing them in a continuous and effective manner (Çani & Mazelliu, 2021, p. 145). To this effect, it is important to highlight the law on the legislative initiative of voters, which gives citizens the opportunity to take concrete initiatives to propose specific laws in addition to constitutional amendments, which are attributed only to deputies (Anastasi, 2019, p. 10). The adoption of this law represents an important moment for the functioning of sustainable democracies, as it enables citizens, interest groups, and organisations to undertake legislative initiatives. It provides citizens with the opportunity for meaningful involvement in the legislative process, not only through public consultation but also through the direct expression of their will in proposing legislative initiatives (Anastasi, 2019, p. 18). According to researchers, this law is drafted in accordance with the EU *acquis* and the regulation on citizens' initiative no. 211/2011, adopted by the European Parliament and the Council (Regulation (EU) No 211/2011).

Along with the OGP commitments, EU membership is the main catalyst for Albania's reforms. The government's ambition to join the EU by 2030 has created momentum for technical improvements, improved monitoring, and performance reporting. However, this also creates the risk that accelerated reforms may bypass inclusive and effective consultations. In general, Albania's commitment towards inclusion of the CSOs in the policymaking process is increasingly institutionalised, led by central bodies, and it complements the ongoing EU accession reforms, but its impact depends on expanding resources and involving all institutions and stakeholders (OGP, Report 2023–2025). Albania's progress in the process of fulfilling its obligations of CSOs' inclusion remains at a formal level, without necessarily translating into real public participation or full openness of decision-making processes. This phenomenon is present also due to the accelerated EU integration process. On the one hand, the accession process has increased institutional and private sector interest in consultation and reform implementation; on the other hand, fast deadlines may limit the time and quality of public consultations.

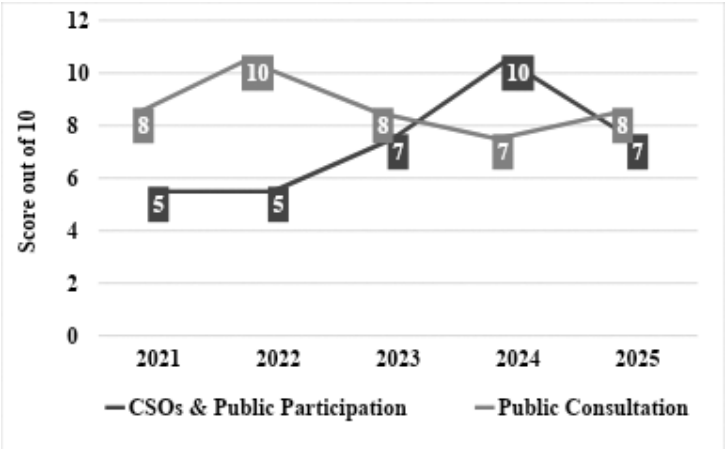


**Table 1.** Progress of Albania on CSO Enabling Environment and Public Consultation (Data Extracted from the Country's Progress Reports 2021–2025)

***Scoring note:*** *Scores are derived from Progress Report wording and coded as: 0 = no progress, 1 = limited/formal, 2 = some progress with gaps, 3 = clear progress. Scores are multiplied by 10 for presentation. Evidence is based on paragraphs extracted from Albania's Reports for the period of five years (2021–2025).*

From the chart, Albania's performance shows an uneven rather than linear trend in the CSO enabling environment and public consultation during 2021–2025. The CSO enabling environment remained weak in 2021 and 2022, improved moderately in 2023, declined again in 2024, and recorded an improvement in 2025. Public consultation improved in 2022, declined in 2023, and then remained stable from 2023 to 2025. Overall, the data suggest that while formal mechanisms such as online portals and consultation tools have been introduced or maintained, they have not consistently ensured meaningful participation, effective follow-up, or a fully enabling environment for civil society. The 2021 report highlighted that public consultation with civil society and interest groups remained formal and limited in its impact. Regarding the inclusion of CSOs in the policymaking process, the report shows that limited progress has been made in the implementation of the roadmap on an enabling environment for civil society. The National Council for Civil Society remains weak and should be reformed to provide appropriate representation of Albanian civil society (Albania Report 2021).

The trend of the effectiveness of public consultation in 2022 is progressive, highlighting that the electronic web-portal is operational, and the regulatory framework has been improved. However, the Report for 2022 states that the quality control of public consultations needs to be strengthened to focus on content rather than on process. The solution for the empowerment of the CSOs in 2022 remains unchanged, with the inability of the National Council for Civil Society to voice priorities of the CSOs in policy-making processes remaining weak, and with no progress in the implementation of the roadmap on an enabling environment for civil society (Albania Report 2022). In 2023, Albania showed a slight improvement in the CSO enabling environment score, although structural weaknesses persisted, particularly regarding the limited capacity of the National Council for Civil Society to shape CSO priorities in policymaking (Këruti *et al*., 2024). Public consultation is formally regulated and supported by

an operational online portal, but consultations remain largely formal with very low coverage: only 48 legal acts went under the public consultation process out of 866 acts for the period of 2022. The report highlighted a limited inclusion of implementing legislation and insufficient quality control and follow-up by the CSOs (Albania Report 2023).

The EU assessment of 2024 shall be considered stable when it comes to public consultation as rules are broadly aligned with EU standards, but implementation remains largely formal with inconsistent follow-up, and both RIAs and the share of legal acts undergoing consultation need improvement. But in the area of CSO enabling environment, the EU considers that CSOs face a challenging environment (registration constraints, limited funding, and delayed VAT exemptions) and consultation structures remain weak, especially in the 2019–2023 CSO roadmap, without a new strategic framework where no progress was achieved (Albania Report 2024). The 2025 report reflects partial institutional improvement rather than full effectiveness, emphasising that CSOs operate in a partly enabling environment while continuing to face persistent barriers, weak protection against intimidation and SLAPP-related threats, and limited safeguards for meaningful participation. The EU-Albania Joint Consultative Committee, which held its first meeting in April 2025, is nevertheless noted as a positive step. Meanwhile, public consultations still lack meaningful participation and scrutiny, follow-up is not consistently timely or transparent despite a new parliamentary consultation tool, Public Consultation Platform of the Parliament,1 and evidence-based policymaking needs strengthening as RIA use and quality remain limited, and the share of legal acts undergoing consultation should increase (Albania Report 2025).

Considering the current accelerated legal initiative that the Parliament is undertaking due to the EU integration obligations, 31 CSOs launched a joint declaration to the Albanian Parliament, emphasising that the efficiency of the legislative process must be accompanied by high standards of transparency, public participation, and parliamentary debate (Deklaratë e Shoqërisë Civile, Deklaratë e përbashkët mbi projektvendimin për ndryshime në Rregulloren e Kuvendit të Shqipërisë, 2026). The European Commission's monitoring framework assesses not only the pace of legislative approximation but also the quality and participation of interest groups as part of the functioning of democratic institutions. The proposed amendments made by Parliament to the Rules of Procedure of the Assembly provide for an accelerated procedure for the consideration of legislation related to the European integration process. According to the draft regulation, the accelerated procedure will automatically apply to the entire category of draft laws related to European integration, without a case-by-case parliamentary review. This avoids the procedural filter that currently requires that urgency be proposed, justified, and approved by the Assembly for each individual draft law. The proposed draft amendments do not include provisions guaranteeing consultation with civil society and interest groups, the involvement of experts, or public transparency in the context of the accelerated procedure. Even in accelerated procedures, the involvement of civil society organisations, experts, and interest groups contributes to improving the quality of legislation and strengthening the legitimacy of the decision-making process. When consultation remains solely at the discretion of parliamentary committees, it does not constitute a structured institutional mechanism and limits the predictability of the legislative process. Given this situation, it is necessary for the Regulation to provide clear standards to guarantee effective consultation with civil society organisations on legal initiatives from the European integration process, in line with the obligation set by the

[1] See the Public Consultation Platform of the Albanian Parliament. Available at: https://www.konsultimipublik.al/.

law on the role of the assembly in the integration process of the Republic of Albania into the European Union, which establishes clear standards for institutional transparency and continuous cooperation with civil society (Articles 4, 7, 11 of Albanian Law no. 15/2015).

## 4. CONCLUSIONS AND PERSPECTIVES

Albania's progress in fulfilling obligations for the EU accession process remains a challenge that cannot be translated into real public participation or full openness of decision-making processes. From the government's perspective, there is a perception that the government's open approach improved the participation of civil society in the policymaking process, but in reality, there is a declining level of cooperation with civil society in the policymaking process. As the accession process has increased the government's commitment to foster inter-institutional dialogue and meaningful participation of other stakeholders, including CSOs, most public administration institutions lack the infrastructure to establish effective participation of non-state actors in the public consultation process or the oversight of processes of public importance. The hindered effective involvement of non-state actors is a result of the administrative culture, the lack of institutional capacity, and full dependence on external support from different donors. The Multi-Stakeholder Committee is a pivotal moment in establishing a multilateral forum where CSOs are part of the policymaking processes, with substantial involvement in the consultation processes. As different evaluations, such as the EU and OGP reports, have made recommendations on the limited progress that Albania has made in empowering the CSO environment, there is a need to strengthen dialogue, broaden representation, and ensure more regular communication to translate this progress into real participatory practice. Albania's civil society's role in the policymaking process remains at a very formal and institutionalised level, and there is a need for more comprehensive reforms and a more proactive role from the government to ensure effective participation of CSOs in compliance with the EU's rule of law standards on transparency, accountability, and effectiveness.

## LIST OF REFERENCES

### *Books, articles and scholarly materials*


Anastasi, A. 2019. *Commentary. Law no. 54/2019 On the legislative initiative of voters in the Republic of Albania.* Tirana: Center for Civic Legal Initiatives.

Angjeli, M. & Reçi, D. 2024. *Public Consultation in Albania – The Illusion of Inclusion: A Long Distance Between Transparency and Participation in Government Consultations.* Tirana: The Institute for Democracy and Mediation (IDM).

Balkan Civil Society Development Network (BCSDN). 2025. *The missing piece: why civic space must be an EU accession priority.* Policy brief, February. Skopje: BCSDN.

Beqiri, E. 2017. *Grupet e interesit dhe ndikimi i tyre në politikat publike në BE dhe Shqipëri.* (*Interest groups and their influence on public policies in the EU and Albania).* Doctoral Dissertation. Faculty of Law, University of Tirana.

Böhmelt, T., Koubi, V. & Bernauer, T. 2014. Civil society participation in global governance: Insights from climate politics. *European Journal of Political Research*, 53(1), pp. 18–36. https://doi.org/10.1111/1475-6765.12016

Börzel, T. A. & Risse, T. 2009. Transformative Power Europe? The EU Promotion of Good Governance in Areas of Limited Statehood. In: *ERD Workshop "Transforming Political Structures: Security, Institutions and Regional Integration Mechanisms"*. Florence.

Börzel, T. A. *et al*. 2007. *Why member states will (not) comply with European law*. CES Working Paper 148. Cambridge, MA: Harvard University.

Çani, E. M. & Mazelliu, A. 2021. Public Consultation in the Western Balkans in the Light of the European Union Integration. *Regional Law Review*, 2, pp. 145–162. https://doi.org/10.18485/iup_rlrc.2021.2.ch9

Careccia, G. & Wallace, A. 2021. *Post-Legislative Scrutiny: From a Model for Parliamentarians to a CSO Strategic and Operational Tool*. Westminster Foundation for Democracy and Kaleidoscope Trust. Available at: https://www.wfd.org/

Curtin, D. M. 1999. Transparency and political participation in EU governance: A role for civil society? *Cultural Values*, 3(4), pp. 445–471. https://doi.org/10.1080/14797589909367178

Deklaratë e përbashkët mbi projektvendimin për ndryshime në Rregulloren e Kuvendit të Shqipërisë. Shoqëria civile i kërkon Kuvendit të mos cenojë transparencën, shqyrtimin parlamentar dhe konsultimin publik në procedurat e përshpejtuara për legjislacionin e integrimit European (Joint statement on the draft decision on amendments to the Rules of Procedure of the Assembly of Albania. Civil society urges the Assembly not to undermine transparency, parliamentary scrutiny and public consultation in accelerated procedures for European integration legislation). March 2026. Available at: https://scidevcenter.org/wp-content/uploads/2026/03/Deklarata-e-Organizatave-te-Shoqerise-Civile-per-ProjektVendimin-e-Rregullores-se-Kuvendit-13-Mars-2026.pdf.

Ghincea, M. & Pleşca, L. 2025. From transformation to demarcation: explaining the EU's shifting motivations of the enlargement policy. *Journal of European Public Policy*, 32(12), pp. 2999–3033. https://doi.org/10.1080/13501763.2025.2498033

Heidbreder, E. G. 2012. Civil society participation in EU governance. *Living Reviews in European Governance*, 7(2), pp. 5–30. https://doi.org/10.12942/lreg-2012-2

Këruti, K., Kosta, K. & Hoxha, J. 2024. *Monitoring Matrix on Enabling Environment for Civil Society Development: Country Report Albania 2023.* Tirana: Partners Albania for Change and Development.

Kopiński, D., et al. 2024. *The Big Bang Enlargement. 20 Years of Central Europe's Membership in the EU*. Warsaw: Polish Economic Institute.

Moysan, T. & Ródenas-Rigla, F. 2024. The participatory processes in public policy-making: A scoping review. *Societies*, 14(12), p. 244. https://doi.org/10.3390/soc14120244

National Resource Centre for Civil Society in Albania. 2020. *Inclusion of Civil Society Organizations on the EU Integration process of the country.* Partners Albania, the Albanian Center for Population and Development (ACPD) and the European Movement in Albania (EMA).

OECD. 2025. *Exploring New Frontiers in Citizen Participation in the Policy Cycle*, OECD Public Governance Reviews. Paris: OECD Publishing. https://doi.org/10.1787/77f5098c-en

Pollo, G. 2012. Transparency and public participation: The Albanian case of open government partnership. *Academicus – International Scientific Journal,* 6, pp. 35–40. https://doi.org/10.7336/academicus.2012.06.03.

Reci, M. & Jance, K. 2024. Albania's European Integration and Civil Society Impact. *Studia Europejskie-Studies in European Affairs*, 28(3), pp. 315–335. https://doi.org/10.33067/SE.3.2024.18

Romito, A. 2018. Civil Society, Democracy and the European Citizens' Initiative: What's the Missing Link? *Studia Europejskie – Studies in European Affairs*, 4, pp. 235–249.
Schimmelfennig, F. & Sedelmeier, U. 2004. Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe. *Journal of European Public Policy*, 11(4), pp. 661–679. https://doi.org/10.1080/1350176042000248089
Scholte, J.A. 2002. Civil society and democracy in global governance. *Global governance* 8(3), pp. 281–304. https://doi.org/10.1163/19426720-00803004
Steffek, J. & Ferretti, M. P. 2009. Accountability or 'Good Decisions'? The Competing Goals of Civil Society Participation in International Governance. *Global Society*, 23(1), pp. 37–57. https://doi.org/10.1080/13600820802556736
Steffek, J., Kissling, C. & Nanz, P. (eds.). 2008. *Civil society participation in European and global governance: A Cure for the Democratic Deficit?* London: Palgrave Macmillan UK.
Suphattanakul, O. 2018. Public participation in decision-making processes: concepts and tools. *Journal of Business and Social Review in Emerging Economies*, 4(2), pp. 221–230. https://doi.org/10.26710/jbsee.v4i2.213.
Trenz, H. J. 2009. European civil society: Between participation, representation and discourse. *Policy and Society*, 28(1), pp. 35–46. https://doi.org/10.1016/j.polsoc.2009.02.004
Zweers, W. *et al*. 2025. *Albania's EU Accession Sprint: Balancing Momentum, Reform, and EU Scrutiny*. Wassenaar: Clingendael – the Netherlands Institute of International Relations.

### *Legal sources and reports*

Consolidated Version of the Treaty on European Union, OJ [2016] C 202/13 (TEU).
Consolidated Version of the Treaty on the Functioning of the European Union, OJ [2016] C 202/47 (TFEU).
Ligj nr. 54/2019, datë. 18.7.2019. "Për nismën ligjvënëse të zgjedhësve në RSh" (Law No. 54/2019 on the Legislative Initiative of Voters)
Law no. 15/2015 "On the Role of the Assembly in the Integration Process of the Republic of Albania into the European Union" (as amended with the Law no. 19/2023)
Ligj nr. 146/2014. Për Njoftimin dhe Konsultimin Publik (Law No. 146/2014 "On Notification and Public Consultation")
Council of the European Union. 2022. *General EU Position: Ministerial Meeting opening the Intergovernmental Conference on the Accession of Albania to the European Union*. AD 5/22, CONF-ALB 2/22, 18 July. Brussels: Council of the European Union.
Council of the European Union. 2024. *European Union Common Position: Cluster 1: Fundamentals*. AD 18/24, CONF-ALB 3/24, 11 October. Brussels: Council of the European Union.
European Parliament & the Council. 2011. Regulation (EU) No 211/2011 of 16 February 2011 on the citizens' initiative.
DG NEAR. 2022. Guidelines for EU Support to Civil Society in the Enlargement Region 2021-2027.
European Commission. 2023. *New growth plan for the Western Balkans*. COM(2023) 691 final, 8 November. Brussels: European Commission.
European Commission. 2025. *2025 Communication on EU enlargement policy*. COM(2025) 690 final.
European Commission. 2023. Commission Recommendation (EU) 2023/2836 of 12 December 2023 on promoting the engagement and effective participation of citizens and civil society

organisations in public policy-making processes. *Official Journal of the European Union*, L 349.
European Commission. 2020. *New Enlargement Methodology – Enhancing the accession process – A credible EU perspective for the Western Balkans*.
European Commission. 2025. *EU Strategy for Civil Society*. COM(2025) 790 final, 12 November. Brussels: European Commission. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0790
European Commission. 2001. *European governance: a white paper*. COM(2001) 428 final. (2001/C 287/01).
European Council. 1995. Membership criteria (Madrid criteria).
European Commission. 2021. Albania 2021 Report. SWD(2021) 289 final. Available at: https://enlargement.ec.europa.eu/albania-report-2021_en.
European Commission. 2022. Albania 2022 Report. SWD(2022) 332 final. Available at: https://enlargement.ec.europa.eu/albania-report-2022_en.
European Commission. 2023. Albania 2023 Report. SWD(2023) 690 final. Available at: https://enlargement.ec.europa.eu/albania-report-2023_en.
European Commission. 2024. Albania 2024 Report. SWD(2024) 690 final. Available at: https://enlargement.ec.europa.eu/albania-report-2024_en.
European Commission. 2025. Albania 2025 SWD(2025) 750 final Report. Available at: https://enlargement.ec.europa.eu/albania-report-2025_en.
European Movement in Albania. 2014. *Civil Society in the EU Integration of the Western Balkans*. Report, October. Tirana: European Movement in Albania.
Open Government Partnership. Albania Sixth Action Plan 2023-2025.

Original scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch25

*Vedrana ŠVEDL BLAŽEKA**
*Iva BRZICA***

# REFORM OF MANAGEMENT IN LEGAL ENTITIES OWNED BY THE REPUBLIC OF CROATIA – STRENGTHENING PROFESSIONAL STANDARDS OR NEW MANAGEMENT CHALLENGES?

*Aiming to adopt the OECD Guidelines on Corporate Governance of State-Owned Enterprises, the Republic of Croatia enacted the Act on Legal Entities Owned by the Republic of Croatia in 2025. This legislative reform introduces modern international corporate governance standards system for legal entities owned by the Republic of Croatia into the Croatian legal, with the goal of establishing a foundation for effective, independent, and accountable operations. Additionally, it lays the groundwork for preventing conflicts of interest and corruption. However, an analysis of the relevant regulatory framework reveals potential difficulties in the procedures for the selection and appointment of members of supervisory boards and management boards of legal entities owned by the Republic of Croatia, where the lack of clear and transparent criteria for their selection and appointment is a particular concern. The purpose of this paper is to examine the regulatory and institutional aspects of the mechanisms for the selection and appointment of members of supervisory boards and management boards in legal entities owned by the Republic of Croatia, as well as to investigate the oversight mechanisms governing these procedures. The authors will explore the corporate governance standards relating to the expertise, experience, and independence of members of management bodies in state-owned companies. Furthermore, the study will assess the extent to which the implemented reform ensures the practical realisation of these standards and will highlight the identified shortcomings in the existing regulatory framework. The research employs qualitative and empirical scientific methods commonly used in the field of law. In conclusion, with the aim of contributing to existing scientific knowledge and encouraging further professional debate, the paper presents proposals for possible solutions to the identified regulatory deficiencies, as well as recommendations for addressing legal gaps in the area of selection and appointment of members of supervisory boards and management boards in legal entities owned by the Republic of Croatia.*

***Keywords:*** commercial company, expertise, transparency, supervisory board, management board.

* PhD, Lawyer, Croatia, ORCID: https://orcid.org/0000-0002-9452-5777, e-mail: *vedrana.svedl@gmail.com*

** LL.M, Lecturer, PhD candidate on J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Croatia, ORCID: https://orcid.org/0009-0006-4844-3232, e-mail: *iva.brzica@vevu.hr*

## 1. INTRODUCTION

The reform of the management of legal entities owned by the Republic of Croatia represents one of the key steps in harmonizing the national legal framework with internationally recognized standards of corporate governance, especially those developed within the framework of the Organisation for Economic Cooperation and Development (hereinafter: OECD). With the adoption of the Act on Legal Entities Owned by the Republic of Croatia (hereafter: Act) in 2025, a new regulatory framework was established, aiming to strengthen professionalism, transparency and responsibility in the management of state-owned entities, while at the same time limiting political influence and preventing conflicts of interest. Despite the harmonisation of the legislative framework with international standards, the real scope of this reform remains questionable, especially in the part relating to the procedures for electing and appointing members of supervisory and management boards. In this context, the main problem addressed by the research arises from the possible discrepancy between the declared goals of the legislator and their practical implementation, where the shortcomings in the clarity and transparency of the candidate evaluation criteria are particularly highlighted.

The aim of this paper is to analyse the regulatory framework for the election and appointment of members of the supervisory or management boards in legal entities owned by the Republic of Croatia, with special emphasis on compliance with OECD standards, and to identify key challenges in their application. Based on this, a research hypothesis is put forward that, despite normative improvement and the introduction of meritocratic principles, the existing regulatory framework does not sufficiently ensure transparent, objective and effective selection and appointment procedures, which can lead to new management challenges. The paper employs qualitative methods characteristic of legal science, including normative analysis of national regulations, analysis of legal theory, comparative method, with an emphasis on the Slovenian legal system as a good practice example, coupled with an empirical approach through the analysis of existing institutional solutions and their application.

The scientific contribution of the work is manifested in the critical evaluation of the legislative reform in the field of corporate management of state-owned legal entities, the identification of regulatory deficiencies and the formulation of concrete proposals for improving the criteria for the selection and appointment of members of supervisory and management boards. This aims to contribute to the development of legal theory and practice in the field of public corporate governance, and to encourage further professional and scientific discussion on the effectiveness of the implementation of international standards in the national legal system.

## 2. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT AS A SOURCE OF CORPORATE MANAGEMENT STANDARDS

The OECD is an international organization whose activities promote economic growth and an increase in the standard of living of its member states, as well as the economic growth of non-member states and the development of trade on a global scale. It was founded in 1960 and is headquartered in Paris (Members and Partners, 2026). It developed from the Organization for European Economic Cooperation (hereinafter: OEEC), which represented an institutional framework for cooperation between European countries in the reconstruction of economies destroyed during World War II (Organization for Economic Cooperation and Development

Forms, 2026). Unlike the OEEC, which was primarily European-oriented, the OECD is a global organization that includes not only European countries, but also, for example, Canada, the USA and Japan. It brings together mainly developed countries (38 member states) and acts as a framework for the exchange of experiences, analysis of public policies and the formulation of recommendations in various areas, including the economy, energy, education, social policy, the labour market, agriculture and ecology. The European Commission contributes to the work of the OECD together with the member states of the European Union. As for the Republic of Croatia, it has been in negotiations for full membership since 2022 (Accession Croatia, 2026). It is necessary to emphasize that it is not a legislative, but an advisory body whose importance stems from the influence it achieves through guidelines, standards and recommendations (Salzman, 2005, p. 189). They significantly influence practice, especially the shaping of national public policies and legislative frameworks in various areas of social and economic development. This is most pronounced in countries that strive to harmonize their institutional frameworks with internationally recognized standards.

As previously stated, the OECD's influence is primarily achieved through soft law. It is through such instruments, among which the guidelines occupy a special place, that the OECD establishes a reference framework. Although formally non-binding, in practice it is a de facto standard in accordance with which countries implement reforms of national legislation. In this sense, the guidelines do not act only as recommendations, but as a regulatory landmark that enables the harmonization of management practices and the strengthening of institutional quality, especially in areas that require a high level of expertise and transparency. The OECD Guidelines are characterized by a high level of systematicity and regulatory precision, and are based on a comparative analysis of the best practices of member states. Their purpose is to provide countries with concrete mechanisms for improving existing management models. In the context of transitional economies, such as Croatia, their role is additionally emphasized because they are a kind of link between existing institutional solutions and internationally recognized standards of efficient and accountable management.

Within the various socio-economic areas on which the OECD has influence, the Guidelines on Corporate Governance of State-Owned Enterprises (hereinafter: Guidelines) occupy an important place. Their specificity stems from the fact that they regulate the management of entities that simultaneously operate on the market but are under the direct or indirect influence of the state as owner. Such dual character of state-owned entities creates a number of specific challenges, including potential conflicts of interest and political influence on business decisions. Precisely for the stated reasons, the Guidelines start from the need to demarcate between the ownership function of the state and its management functions, emphasizing the need for professionalization of management structures, transparency of operations and responsibility towards all stakeholders. In this context, the state is the owner whose role is focused on strategic management and supervision over the achievement of goals, but refraining from directly intervening in operational, or daily business (OECD Guidelines for Corporate Governance in State-Owned Enterprises, 2020, p. 3). The purpose of such an approach is to limit political influence on business decision-making and to ensure that management decisions are made in accordance with the principles of expertise and efficiency. Special emphasis was placed on the professionalization of management bodies, including the introduction of meritocratic criteria in the selection and appointment of members of supervisory and management boards, as well as on the development of mechanisms for evaluating their effectiveness.

Understanding the Guidelines presupposes their observation in the broader institutional context from which they emerge, with the OECD occupying a central position as the key bearer of international standards. Although the basic features of the OECD and the Guidelines are generally known to the professional and scientific community, their summary presentation in this paper has a methodological function. Namely, the Guidelines form the basis of the legislative reform in the Republic of Croatia, which is the subject of the analysis of this paper, and in order to understand them, it is necessary to have insight into the institutional framework of the OECD in which they were formed. Therefore, it was necessary to point out the basic features of the Guidelines and the significance of the OECD.

In the context of the Republic of Croatia, the importance of the Guidelines is manifested not only in the advisory context, but also in the *de facto* influence on the national legislative framework (Independent members of the supervisory board in the new Act on Legal Entities Owned by the Republic of Croatia, 2025). Namely, the process of joining the OECD, as well as the general tendency to harmonize with internationally recognized standards of good governance, prompted the legislator to reconsider the existing management model of state-owned legal entities. In this sense, the Guidelines were an incentive and reference framework for the design of legislative solutions, especially in the part related to the professionalization of management structures, the demarcation of ownership and management functions, and the strengthening of transparency and accountability mechanisms. Their influence is manifested in directing legislators towards standards that ensure more efficient and transparent management of state-owned legal entities. In accordance with the above, the following will present the relevant provisions of the Act (*Official Gazette*, No. 102/25) that govern the selection and appointment of members of the supervisory and management boards in legal entities owned by the Republic of Croatia.

## 3. FROM INTERNATIONAL STANDARDS TO NATIONAL LEGISLATION: ACT ON LEGAL ENTITIES OWNED BY THE REPUBLIC OF CROATIA

As a follow-up to the previously presented basic principles of the Guidelines, it is necessary to analyse the manner in which the specified international standards were implemented in the legal order of the Republic of Croatia. It is in this context that the adoption of the Act, which represents a key instrument of legislative reform aimed at modernizing the management system of state-owned legal entities, should be viewed. The Act entered into force in 2025 with the aim of harmonizing the Croatian legal framework with internationally recognized principles of good corporate governance. This aims to ensure more efficient, transparent and responsible management of legal entities owned by the state, while at the same time strengthening the trust of the public and market participants. The regulatory framework it establishes is based on several key postulates of the OECD Guidelines, among which the professionalization of management structures, separation of ownership and regulatory functions of the state, and ensuring transparency and responsibility in business stand out. The Act introduces a systematic approach to the management of state-owned legal entities, where a special place is occupied by the provisions governing the selection and appointment of members of the supervisory and management boards. In this way, an effort is made to ensure the professionalization of management bodies, the reduction of political influence and the strengthening of responsibility and efficiency of operations, which is in accordance with the basic postulates of the Guidelines.

### *3.1. Selection and appointment procedure*

The provision of art. 2. Determines the scope of application of the Act, whereby it is primarily aimed at legal entities owned by the Republic of Croatia in which the state exercises a predominant influence (art. 1). Such a legal solution reflects the legislator's intention to regulate those subjects in which the Republic of Croatia, as the owner, has a decisive role in the management and making of key business decisions. The same provision provides for a deviation from the stated general rule. Namely, even legal entities owned by the Republic of Croatia in which the state does not have a predominant influence can be covered by the application of the Act, but only on the condition that this is expressly provided for (Art. 2). This establishes the flexibility that allows the extension of the scope of the Act to certain legal entities, depending on the specific legislative reasons and goals of the regulation.

Article 45. Act regulates the selection procedure of candidates for members of supervisory and management boards. The selection process is based on the principle of meritocracy, whereby the selection of candidates must be based on their competences (Art. 1), that is, on the objective and measurable evaluation of their professional, managerial and professional competences that are relevant to the performance of work. In the selection process, special attention must be paid to the structural diversity of the supervisory or management board (Art. 2). The above implies a balanced representation of members with regard to gender and age structure, education and professional experience. Such a solution improves the quality of corporate management and strengthens the ability to make decisions. Furthermore, by the same provision, the Act regulates that the selection of candidates is carried out through a public and transparent competition announced and conducted by the Government of the Republic of Croatia (Art. 3), which ensures equal access to all qualified candidates. In the institutional sense, the Government of the Republic of Croatia establishes the so-called Commission for the selection of candidates for members of the supervisory or management boards (Art. 4), which is entrusted with the implementation of the evaluation procedure, including the analysis of applications, the assessment of qualifications and the preparation of a ranking list and a proposal for the selection of candidates. Based on the reasoned proposal of the competent commission, the Government of the Republic of Croatia makes the final decision on the selection of members of the supervisory or management boards (Art. 5), thus ensuring hierarchical accountability and the legitimacy of the selection procedure. In order to preserve the continuity of management functions and the institutional stability of state-owned legal entities, the decision must be made in a timely manner, i.e. before the expiration of the term of office of the existing members of the supervisory or management boards (Art. 6). The power to appoint and dismiss members of the supervisory or management boards of legal entities owned by the Republic of Croatia Act is entrusted to the assembly or general meeting (Art. 7), as the highest body of corporate governance. The aforementioned power of the assembly or general meeting establishes a mechanism for oversight over the composition of the supervisory and management bodies. Such a solution reflects the principle of hierarchical supremacy of the ownership function, whereby key personnel decisions are delegated to the body that directly protects the interests of the Republic of Croatia as the owner.

### *3.2. Requirements for a candidate for membership of the supervisory or management board*

The legal regulation of the conditions for the selection and appointment of members of the supervisory and management boards of legal entities owned by the Republic of Croatia is

designed as a complex and multi-layered system of criteria, aimed at ensuring a high level of professional competence, ethical integrity and functional efficiency of members.

In material terms, in accordance with art. 47. para. 1. of the Act, candidates are required to have a good personal and professional reputation (para. 1), while also having an appropriate level of professional knowledge, formal education, developed abilities and relevant professional experience necessary for the quality and responsible performance of their duties. The aforementioned qualifications apply to each individual candidate; they are not viewed in isolation, but rather in a synergistic relationship with the competencies of other board members (para. 2). In this sense, the legislator explicitly emphasizes the need for complementarity of competencies, requiring that board members as a whole possess knowledge, skills and experience sufficient for independent and autonomous performance of their duties (Art. 4). This establishes a conceptual framework that goes beyond individual qualifications and emphasizes the importance of interdisciplinarity and functional cohesion in achieving the goals of modern corporate governance in the public sector. Furthermore, the legislator considers the independence of candidates important, which is why the legal provisions prohibit the existence of conflicts of interest (para. 3). In addition to the above, there is also an obligation that the candidate must be able to provide sufficient time to perform tasks (para. 4). In this way, the legislator tries to prevent the formalization of membership and to ensure the real, continuous and substantial involvement of members in the work of supervisory and administrative committees. From a formal legal point of view, the candidate must also meet the conditions prescribed by the law governing the legal status of companies in the Republic of Croatia (para. 5), i.e. the Companies Act (*Official Gazette* No. 111/93, 34/99, 121/99, 52/00, 118/30, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23, 136/25) (hereinafter: CA), which will be discussed below. Additionally, the candidate should be distinguished by fiscal orderliness, which is manifested in the absence of outstanding tax obligations towards the Republic of Croatia (para. 6). Also, the legal framework foresees the obligation to fulfil the special criteria established in the Regulation on the Requirements for Members of the Governing Bodies of Legal Entities Owned by the Republic of Croatia and for Members of the Commission, special regulations and founding and general acts of a specific legal entity (para. 7), which enables the differentiation of requirements in accordance with the specifics of individual state-owned entities. In terms of personnel restrictions, the legislator introduces a quantitative limit for state and public servants, as well as officials in local and regional self-government units, allowing them to be members of a maximum of two state-owned legal entities, while maintaining equal legal status in relation to other board members (Art. 2). At the same time, persons covered by the regime for preventing conflicts of interest in the performance of public duties are in principle excluded from membership, apart from cases where a special act provides for an exception (Art. 3).

Within the framework of the regulation of the conditions for candidacy for membership in the supervisory or management board, the additional criteria referred to by the Act derive from the provisions of the previously mentioned CA. It is a general regulation that, among other things, governs the prerequisites for membership in the bodies of commercial companies and therefore also applies to legal entities owned by the Republic of Croatia. Unlike the Act, which emphasises the positive assumptions of expertise, competence and integrity of candidates, the CA primarily regulates negative assumptions, i.e. the reasons that exclude certain persons from membership. Pursuant to act. 255. art. 1. A CA member of the supervisory board

can be a natural person with full legal capacity. Provision of art. 2. excludes from the pool of potential candidates those candidates who simultaneously hold the office of a member of the board of the same company (para. 1). In this way, a clear demarcation between management and supervisory powers is ensured. Furthermore, excessive accumulation of membership is restricted by stipulating that a member of the supervisory board cannot be a person who already participates in the work of the supervisory or management boards of a large number of companies (para. 2), which seeks to ensure the real ability to effectively perform managerial or supervisory duties. Additionally, persons who hold management positions in dependent companies are excluded (para. 3), as are those who participate in interconnected management and supervisory structures of different companies, especially in situations that may lead to reciprocal relationships and the impairment of independence of decision-making (para. 4). This establishes a regulatory system of restrictions aimed at preserving the functional autonomy of the supervisory board and the integrity of corporate governance. Also, the CA in para. 5 refers to the application of act. 239, Art. 2. The aforementioned provision defines additional restrictions for membership, with an emphasis on the legal suitability and integrity of the candidate. In this context, a person who has been finally convicted of certain criminal offences in the field of economic crime, including but not limited to money laundering, terrorist financing, economic fraud or breach of trust, may not become a member, as long as the legal consequences of such a conviction are in place. The same restriction applies to persons who have been issued international measures restricting the disposal of property during their term (para. 1). Furthermore, the ban extends to persons convicted in other countries for criminal offences that correspond in their essential features to the aforementioned criminal offences (para. 2), thus ensuring international harmonisation of the eligibility criteria. Membership is also not permitted to persons who have been issued a security measure prohibiting them from exercising a certain profession, if that profession is wholly or partly related to the company's activities, for the duration of such measure (para. 3). Finally, the same restrictions apply in cases where the prohibition of exercising the relevant profession has been issued in another country (para. 4). This establishes a comprehensive framework that seeks to prevent persons with impaired professional or legal status from being members of supervisory or management boards in state-owned legal entities.

The aforementioned restrictions, which refer to the prevention of conflicts of interest, the incompatibility of functions and the limitation of cumulation of duties, do not apply only to the members of the supervisory board, but, in accordance with act. 272. b Art. 2. CA extends to members of the board of directors. In this way, the legislator ensures regulatory consistency in regulating the conditions for membership in various corporate governance bodies. Such a solution reflects the aspiration to establish unique standards of independence, responsibility and functional separation, thus ensuring the preservation of the integrity of management structures and the effective functioning of supervision mechanisms.

From the regulatory and theoretical analysis carried out so far, it follows that the regulation of the conditions for the selection and appointment of members of supervisory or management boards of legal entities owned by the Republic of Croatia is the result of efforts to harmonise the national legislative framework with international standards, i.e., the OECD Guidelines. The Guidelines served as the basis for the national legislative reform, which is reflected in the emphasis on professionalisation, transparency, responsibility and strengthening the independence of supervisory and management bodies. In this context, the combined application

of the Act and CA provisions results in a complex regulatory framework that includes both positive criteria - competence and integrity- as well as negative assumptions aimed at preventing conflicts of interest and preserving functional independence. This establishes a relatively high standard of formal conditions for membership, which, at least at the regulatory level, should ensure quality and efficient corporate governance in state-owned entities. However, it is precisely the complexity and ambition of such a regulatory framework that give rise to doubts as to its real applicability and effectiveness in practice. In this sense, there is a need for a critical review of the scope and effects of the legislative reform, especially with regard to its implementation, which is the starting point for the analysis of the challenges arising from the application of the provisions in question in the real management environment.

## 4. REGULATORY CHALLENGES IN ACHIEVING CORPORATE STANDARDS IN THE CROATIAN LEGAL SYSTEM

### *4.1. Regulatory challenges in the Croatian legal system*

In the Republic of Croatia, at the state level, in 2024, there were 36 legal entities of special interest to the Republic of Croatia, followed by 10 majority state-owned legal entities and 138 minority state-owned companies, while 800 companies are under the jurisdiction of counties, municipalities and cities (vlada.gov.hr, 2024). The OECD Guidelines, which have been implemented in the Act, as previously described, are aimed at transparency, accountability and improving the efficiency of state-owned companies. The domestic legislative framework is aimed at harmonizing and improving the corporate management of state-owned legal entities based on the international standards mentioned (Ilijazović, 2025, p. 2). The new regulation of state-owned legal entities emphasises independence in management, while also strengthening the protection mechanisms against corruption and conflicts of interest. Therefore, the processes for appointing the administrative bodies of state-owned companies have been prescribed, all with the aim of achieving professionalisation and independence of management and supervision. Regarding the organisation and management of state-owned legal entities, according to the norms of Art. 33-43 of the Act, these companies have the following bodies: the general assembly (assembly), where the representative of the ownership body is appointed by the Government of the Republic of Croatia (for legal entities of special interest) and the head of the ownership body (other companies), the supervisory board and the management board, or the management. The supervisory board of a large state-owned legal entity must have an audit committee, a nomination and remuneration committee and a risk committee (Art. 40, para. 1 of the Act).

According to the provisions of Art. 3 of the still valid Regulation on the conditions for the election and appointment of members of the supervisory boards and management boards of legal entities of special interest to the Republic of Croatia and the manner of their election (hereinafter: the Regulation on conditions) (*Official Gazette* No. 12/19), a candidate for a member of the supervisory board of legal entities of special interest to the Republic of Croatia, in addition to the previously mentioned conditions prescribed in Art. 255. CA and special regulations governing the selection and/or appointment for certain activities, must meet the following requirements: completed graduate university studies or integrated undergraduate and graduate university studies or specialist graduate professional studies or equivalent studies

in a relevant profession, at least five years of work experience acquired in management positions for legal entities of special interest to the Republic of Croatia in which the Republic of Croatia has a majority share and whose consolidated income in the previous business year is less than 750,000,000.00 kuna (99,542,106.31 EUR), or ten years of work experience acquired in management positions for legal entities of special interest to the Republic of Croatia in which the Republic of Croatia has a majority share and whose consolidated income in the previous business year is more than 750,000,000.00 kuna (99,542,106.31 EUR), knowledge of corporate governance and knowledge of finance and accounting and the absence of a conflict of interest in accordance with special regulations governing the prevention of conflicts of interest between private and public interests in the performance of public duties and the rules of the Corporate Governance Code for companies in which the Republic of Croatia holds shares or interests (hereinafter: the Code) (*Official Gazette* No. 132/17).

According to the provisions of Art. 11 of the Regulation on the requirements, a candidate for a member of the management board (president of the management board, members of the management board, director, manager), in addition to the conditions prescribed by the aforementioned Art. 239 of the CA and special regulations governing the selection and/or appointment for certain activities, must meet the following requirements: completed graduate university studies or integrated undergraduate and graduate university studies or specialized graduate professional studies or equivalent studies in a relevant profession, at least ten years of work experience in jobs that require an appropriate level of education, of which at least five years of work experience in management positions, work experience in organizing work and managing affairs, and particularly outstanding results in organizing work and managing affairs, absence of conflict of interest in accordance with the regulation governing the prevention of conflict of interest between private and public interests in the performance of public duties and the rules of the Code, knowledge of at least one world language.

In evaluating the competences and good reputation of candidates, it is necessary to assess the level of risk from the perspective of a possible conflict of interest according to the Act on the Prevention of Conflict of Interest (hereinafter: ZSCI) (*Official Gazette* No. 143/21) which refers to presidents and members of the management boards of companies in which the Republic of Croatia has a majority stake, as well as presidents and members of the management boards of companies in which the Republic of Croatia has a majority stake, as well as presidents and members of the management boards of companies in which local and regional self-government units have a majority stake, and presidents and members of the management boards of companies in which local and regional self-government units have a majority stake (Art. 2 ZSCI). The aforementioned officials, in the performance of their public duties, are obliged not to put their private interests ahead of the public interest. According to Art. 6. of the ZSCI, when performing public duties, the duty bearers must, among other things, be able to act honourably, fairly, conscientiously, responsibly and impartially, preserving their own credibility and the dignity of the duty entrusted to them, as well as the trust of citizens. In addition, duty bearers must not use public duty for personal gain or the gain of a person connected to them, and must not be in any relationship of dependence towards persons who could influence their objectivity.

It is evident that the new regulations encourage expertise, experience and competence in the appointment of management bodies of state-owned companies, which should reduce political influences in the processes of their appointment. This certainly contributes to strengthening citizens' trust (Ožić, 2025, p. 1). A detailed analysis of the existing regulations, despite

the positive progress towards the set goals, as previously presented, shows that there is still a lack of sufficiently clear and transparent implementation mechanisms, especially in the conduct of the tender procedure and the process of proving compliance with legal conditions and appointment criteria. In the current circumstances, the question remains whether the transparency and legality of tender procedures can truly be ensured and whether the planned Regulation on the requirements for members of the bodies of legal entities owned by the Republic of Croatia and for committee members will ensure the protection of the tender procedure from political and other particular interests (Ilijazović, 2025, p. 2). Therefore, it is necessary to consider mechanisms that would ensure the described goals and purpose of the reform of the governance of state-owned legal entities. The analysis of the existing regulatory framework shows that the criteria for evaluating professional competencies, i.e. knowledge and abilities, and good reputation, are under-standardized. In this regard, practical disputes are possible regarding the transparency of the procedure for appointing members of the management bodies of state-owned legal entities. Therefore, when adopting the Regulation on the conditions for members of the bodies of legal entities owned by the Republic of Croatia and for members of the committees defined in Art. 51 of the Act, clear and transparent criteria for evaluating professional competencies and assessing good reputation should be established. In this regard, the example of the Slovenian legal system will be presented.

At the same time, it is possible to consider the degree of political exposure of the candidate as a criterion for evaluating candidates in the future, following the model of the regulations in the Act on the Prevention of Money Laundering and Financing of Terrorism (*Official Gazette* No. 108/07, 39/09, 151/22). Furthermore, in evaluating the competences and good reputation of the candidate, it is necessary to assess the degree of risk of exposure to illegal lobbying. Namely, according to Art. 8 and Art. 9 of the Lobbying Act (*Official Gazette* No. 36/24), if a lobbyist conducts illegal lobbying activities through actual or attempted lobbying, the lobbied persons are obliged to refuse further communication with the lobbyist and immediately inform the Commission for Deciding on Conflicts of Interest. Also, if a person is lobbying and is not registered in the Register of Lobbyists, the lobbied persons are obliged to refuse further communication with them and inform the commission immediately upon learning of this.

### *4.2. Comparative overview of solutions in the Slovenian legal system - an example of good practice?*

In the Republic of Slovenia, the issue of state-owned legal entities is regulated by the Slovenian State Holding Act (hereinafter: ZSDH-1) (Official Gazette No. 25/14 in 140/22). In addition to ZSDH-1, the general regulation governing commercial companies is also applicable, namely the Companies Act (hereinafter: ZGD-1) (*Official Gazette* No. 65/09 - official revised text, 33/11, 91/11, 32/12, 57/12, 44/13 - odl. US, 82/13, 55/15, 15/17, 22/19 – ZposS, 158/20 – ZintPK-C, 18/21, 18/23 – ZDU – 10, 75/23, 102/24, 77/25 and 1/26 – ZdZEETD). The candidacy process itself is governed by the internal rules of the Slovenian State Holding (hereinafter: SSH), namely the Ordinance on the Assessment of Potential Candidates for Members of Supervisory and Administrative Bodies of State-Owned Companies (hereinafter: Ordinance) (www.sdh.si, 2025), which established the Personnel Commission as a body charged with accreditation and nomination in the selection of candidates for members of supervisory and administrative bodies of state-owned companies. The Republic of Slovenia has also adopted the State Investment Management Strategy and the Corporate Governance

Code of State-Owned Companies (www.sdh.si, 2022), but these acts will not be discussed in more detail in this paper.

ZSDH-1 regulates the status and operations of SSH and the Pension and Disability Insurance Company d. d. (Art. 1, para. 1, ZSDH-1). In addition, it regulates the management of investments owned by SSH and investments of the Republic of Slovenia managed by SSH, investment management acts, measures to strengthen integrity and accountability, and limiting the risk of corruption, conflict of interest and abuse of privileged information in the management of investments owned by SSH and investments of the Republic of Slovenia managed by SSH (Art. 1, para. 1, ZSDH-1). SSH operates under the same conditions as other companies, sole proprietors and private individuals on the relevant market, and may not exploit its position in a manner that could result in the restriction of competition or the restriction of other companies, sole proprietors and private individuals on the market (Art. 1, para. 3, ZSHD-1).

The aims and purpose of ZSDH-1 are manifold. First, it aims to separate the function of the state as the owner of capital investments from other state functions. Second, it introduces the concentrated management of investments owned by SSH, KAD and investments of the Republic of Slovenia managed by SSH. Further, it sets out to establish, a transparent system of management of investments owned by SSH and investments of the Republic of Slovenia managed by SSH, with a clear division of authority and responsibility and the implementation of measures that limit the risks of corruption and other unethical and unauthorized behaviour and influence, and that strengthen business compliance, consistency and responsibility in decision-making (Art. 1. para. 2. ZSDH-1). In addition, the goal of all ZSDH-1 is the management of investments owned by SSH and investments of the Republic of Slovenia managed by SSH in accordance with Slovenian and international guidelines for good practice in the management of state investments and corporate governance in general (Art. 1. para. 1. ZSDH-1). Through the ZSDH-1 regulation, the intention is to prevent conflicts of interest, distortion of market competition and unequal treatment of companies, achieve profitability and value of the described investments for achieving economic and development goals and tasks of public interest (Art. 1. para. 1. ZSHD-1).

Regarding the evaluation criteria for the members of the management bodies of state-owned companies, it should be emphasised that ZSHD-1 does not regulate the appointment of members of the administrative bodies of companies owned by the Republic of Slovenia, but rather regulates the decision-making process of the SSH General Assembly on the appointment of members of the supervisory bodies of state-owned companies (Art. 21 of ZSHD-1). In this regard, it is stipulated that, at SSH general assemblies, the appointment of members of the supervisory bodies of companies with state-owned capital assets must be voted on according to objective criteria that are equal for all candidates, where the criteria for selecting and appointing candidates are exclusively professionalism and experience. Anti-corruption goals are particularly emphasised in the regulation of the provisions of Art. 57, para. 1, ZSHD-. This Article prescribes that members of the management and supervisory board of SSH, employees of SSH, members of the personnel board and advisory bodies of SSH, and members of administrative and supervisory bodies of companies in which SSH has a majority share or dominant influence, who believe in good faith that they are being asked to act illegally or unethically in connection with their work or position, or that they are exposed to non-public influence, pressure, psychological or physical violence or who received inappropriate offers from third parties, are obliged to report such behaviour to the compliance and integrity officer.

The compliance and integrity officer is then obliged to act so as to prevent further illegal and unethical requests and their harmful consequences. Furthermore, Art. 57, para. 3. ZSHD-1 prescribes that the aforementioned individuals are required to report, within three days, any non-public contact they had with a member or representative of a political party or a person acting on their behalf (including officials of the executive and legislative authorities and local self-government officials outside their legal powers), if such contact includes lobbying in connection with the exercise of management rights in certain state-owned companies or in connection with the acquisition or alienation of state capital.

The SSH Personnel Commission is responsible for accreditation and nomination and carries out the recruitment procedures of candidates for members of the supervisory boards of state-owned companies (Art. 48 ZSHD-1). The appointment of candidates to the aforementioned position is decided by the SSH General Assembly (Art. 57, para. 3, ZSHD-1). In the process of selecting or appointing candidates, the candidates must meet the general criteria for individual members of the supervisory board from ZGD-1. In this regard, in accordance with the provisions of Art. 263, para. 1, ZGD-1, a member of the administrative or supervisory body must, in the performance of his or her duties, act in the best interest of the company with the care of a conscientious and honest businessman and protect the company's business secrets. According to the provisions of Art. 255 ZGD-1 in the spirit of the provisions of Art. 515, para. 6, ZGD-1, a member of the administrative or supervisory body may be any natural person with business capacity, except for a person who: is already a member of another administrative or supervisory body of this company; has been finally convicted of a criminal offence against the economy, against labour and social security, against legal transactions, against property or against the environment, space and natural resources, and this is five years after the finality of the judgment and two years after the prison sentence has been served; has been finally convicted in another Member State for a criminal offence comparable to the criminal offences referred to in the previous indent (five years after the judgment became final and two years after the prison sentence has been served); has been imposed a security measure prohibiting him from exercising his profession, for the duration of the ban; has been ordered in another Member State to pay compensation to creditors as a member of the management or supervisory body of a company against which bankruptcy proceedings have been initiated, in accordance with the provisions on liability for damage in the law governing financial operations, insolvency proceedings and compulsory liquidation (two years after the finality of the court decision on the payment of compensation to creditors); or has been ordered in another Member State to pay compensation to creditors comparable to the provisions on liability for damage (two years after the finality of the court decision on the payment of compensation to creditors). The provision of Art. 273. ZGD-1 stipulates that a member of the supervisory board may not be a member of the management board or the board of directors of a company that is a branch of the company, a procurator or an authorized representative of that company; a member of the management board of another capital company in whose supervisory board there is a member of the management board of that company; a person who is already a member of the supervisory board or the board of directors of three companies, or a person who does not meet the conditions set out in the statute.

In addition to the previously described general criteria prescribed for the appointment of supervisory board members according to ZGD-1, the SSH general assembly must vote with a view to ensure that the supervisory boards of companies with state-owned capital assets

as a whole are composed of members who complement each other in terms of professional knowledge and competences, and that experts in finance, corporate management, company operations and other professional profiles, that are necessary for effective supervision are appointed to the supervisory board, taking into account the activity, scope of business and other characteristics of the companies (Art. 57, para. 3, ZSHD-1). When assessing the professional profiles of the candidates, due regard is to be given to the target profiles formulated by the supervisory boards of companies with state capital in the process of preparing proposals for new members of the supervisory board for general assemblies (Art. 57, para. 3, ZSHD-1). In addition, SSH cannot vote for candidates for members of supervisory bodies who are, for example, natural persons having a direct business relationship with the company whose supervisory board they are applying for or its subsidiaries, unless such relationship concerns the purchase of regular products and services under general conditions that apply to all market entities; natural persons who are members of supervisory or administrative bodies and are employed for an indefinite or fixed period of time in legal entities that have a business relationship with the company whose supervisory board they are applying for or its subsidiaries, unless it is about the purchase of regular products and services under general conditions that apply to all subjects on the market; natural persons with a function which, according to the law governing integrity and corruption, prevention is incompatible with membership in the supervisory body or the administrative body of a commercial company according to this or another law and who have not performed such functions in the last six months; members of the administrative body in the company in which SSH has a majority share or dominant influence and natural persons who hold or in the last six months have held a position in the political party to which they were elected or appointed.

SSH may vote at the general meeting only for candidates who, in addition to the previously mentioned criteria regulated by the ZGD-1, and the criteria that exclude the possibility being appointed as a member of the supervisory board from Art. 57 of the ZSHD-1, also meet the following criteria: they are distinguished by personal integrity and business ethics and the Commission for the Prevention of Corruption has not determined a violation of integrity against them by a final act, as defined by the law regulating integrity and corruption prevention of ; their experience testifies of business success and reputation; they have appropriate education; they have appropriate work experience; they possess comprehensive business and other relevant professional knowledge; they know the rights and obligations of a member of the supervisory board, which they prove with a certificate confirming they acquired knowledge about the competence, responsibility and work of supervisory boards; in their work and decision-making, they are able to take into account primarily the long-term interest of the company and subordinate all other personal or individual interests to this; they are available on time or will be available on time while performing their function; they are capable of effective communication and teamwork; they are not economically, personally or in any other way connected with the company or its management; are not in a potential conflict of interest as defined by the law governing integrity and corruption prevention.

When it comes to the evaluation criteria in the selection of candidates for members of supervisory and administrative bodies and state-owned companies, it can be said that the Ordinance regulates in detail the accreditation and nomination requirements for appointment to the specified position. As to the supporting documents that are submitted with the application, it is the candidate's obligation to submit a list of supervisory and administrative bodies

in which he has served as a member and a certificate of training for members of supervisory boards and boards or a certificate of training to perform the duties of a member of supervisory boards and boards (supervisory candidates) . Each candidate must meet the relevant legal and additional requirements. Eligible candidates are divided into two classes: accredited candidates for supervision of complex systems (includes candidates accredited for supervision) and accredited candidates for supervision (includes candidates accredited for managerial functions).

The legal requirements that a potential candidate for a member of a supervisory body must meet in order to be successfully accredited are therefore set out in the ZGD-1 and ZSDH-1 and have been discussed earlier. Additional requirements for the accreditation of candidates for members of supervisory and management bodies include: additional requirement of formal education, additional requirement of experience in corporate governance, additional requirement of professional competence and additional requirement of personal integrity. The Regulations specify in detail each of the individual additional requirements, from how each requirement is met, to exceptions e.g. in the case of experience acquired in a certain period in certain positions or functions. Particular attention is given to regulating the additional requirements of professional competence and personal integrity. When it comes to the requirement of professional competence, the areas covered include, for example, management, corporate governance, finance, commercial law and other legal areas, sustainable business, human resources management, business in non-financial activities, business economics, etc. When it comes to fulfilling the requirement of personal integrity, the Commission will, taking into account the information collected by the candidate, having considered publicly available information and non-public information at its disposal, assess for each candidate whether he is suitable from the point of view of personal integrity or not. In addition, the Commission will take into account all possible dismissals of candidates from supervisory and management positions due to guilt as an aggravating circumstance.

With regard to the nomination procedure, it is important to highlight the verification of candidates' knowledge in the field of corporate governance (Art. 15 of the Regulations). The Personnel Commission, in cooperation with SSH's professional services, will implement an online system for verifying potential candidates' knowledge in the field of corporate governance in which the candidate will fill out a questionnaire with randomly selected questions from the field of corporate governance. If the candidate does not pass the knowledge verification first, he will be excluded from the nomination procedure. Such a candidate will not be re-entered into any nomination process before three months have passed since the test. A successfully completed online renewal test is valid for two years and the candidate does not have to re-take it in subsequent nomination processes during that period.

## 5. CONCLUSION

The reform of the Act, as previously described, is aimed at transparency, accountability, professionalism, independence and improving efficiency in work as well as harmonizing corporate governance of state-owned legal entities and strengthening mechanisms for protection against corruption and conflicts of interest. The conducted regulatory and theoretical analysis shows that the combined application of the Act and the CA includes both positive criteria of competence and integrity, as well as negative assumptions aimed at preventing

conflicts of interest and preserving functional independence. It is evident, namely, that the new regulations primarily value expertise, experience and competences in the appointment of management bodies of state-owned companies. However, in the current circumstances, the question remains whether the previously described objectives can truly be effected and the relevant criteria for evaluating candidates as well as the transparency of the prescribed procedures can be met, and whether the planned Regulation on the requirements for members of bodies of legal entities owned by the Republic of Croatia and for committee members will contribute to this goal. An analysis of the existing regulatory framework shows that the criteria for evaluating professional competences, i.e. knowledge and abilities and good reputation, are under-standardized. In this sense, practical disputes are possible regarding the transparency of the procedure for appointing members of the management bodies of state-owned legal entities. Therefore, when adopting the Regulation on the conditions for members of the bodies of legal entities owned by the Republic of Croatia and for members of committees, clear and transparent evaluation criteria that can be objectively assessed should be defined, especially professional competencies and assessments of good reputation. In this direction, the example of the Slovenian legal system, which is very thorough in this context, is pointed out.

In addition to the above, the possibility of considering the degree of political exposure of candidates as a criterion for their evaluation in the future, based on the provisions of the Act on the Prevention of Money Laundering and Financing of Terrorism, is pointed out. Also, when evaluating the competencies and good reputation of candidates, it is necessary to assess the degree of risk of exposure to illegal lobbying according to Art. 8 and Art. 9 of the Lobbying Act. This paper aims to encourage further scientific research and analysis of this issue, aimed at further growth and development of state-owned companies.

## LIST OF REFERENCES


Accession Croatia. 2026. Available at: https://www.oecd.org/en/countries/croatia.html (13. 3. 2026)

Act on Legal Entities Owned by the Republic of Croatia, *Official Gazette* No. 102/25. Available at: https://www.zakon.hr/z/3964/zakon-o-pravnim-osobama-u-vlasnistvu-republike-hrvatske (12. 2. 2026)

Companies Act, *Official Gazette* No. 111/93, 34/99, 121/99, 52/00, 118/30, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23, 136/25. Available at: https://www.zakon.hr/z/546/zakon-o-trgovackim-drustvima (27. 3. 2026)

*Corporate Governance Code for companies in which the Republic of Croatia holds shares or interests, Official Gazette* No. 132/17. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2017_12_132_3023.html (23. 3. 2026)

Ilijazović, B. 2025. *Reforma upravljanja državnim poduzećima u kontekstu Zakona o pravnim osobama u vlasništvu Republike Hrvatske*. Republika Hrvatska: Notarius Tehnologija Lexpera. Available at: https://www.notarius.hr/aktualno/u-sredistu/65724 (20. 2. 2026)

Independent members of the supervisory board in the new Act on Legal Entities Owned by the Republic of Croatia. 2025. Available at: https://www.iusinfo.hr/aktualno/u-sredistu/neovisni-clanovi-nadzornog-odbora-u-novom-zakon-o-pravnim-osobama-u-vlasnistvu-republike-hrvatske-67387 (2. 2. 2026)

Members and Partners. 2026. Available at: https://www.oecd.org/en/about/members-partners.html (14. 2. 2026)
OECD Guidelines for Corporate Governance in State-Owned Enterprises. 2020. Available at: https://www.oecd.org/hr/publications/smjernice-oecd-a-za-korporativno-upravljanje-u-poduzecima-u-drzavnom-vlasnistvu_45a716e6-hr.html (17. 3. 2026)
Organization for Economic Cooperation and Development Forms. 2026. Available at: https://www.ebsco.com/research-starters/history/organization-economic-cooperation-and-development-forms (14. 2. 2026)
Ožić, S. 2025. *OECD-ove smjernice „guraju" javna poduzeća prema promjenama: Što znače nova pravila za mrežu od 1.460 poduzeća?*. Republika Hrvatska: LinkedIn. Available at: https://www.linkedin.com/pulse/oecd-ove-smjernice-guraju-javna-poduzeća-prema-što-znače-ožić-phd-qe1bf (20. 2. 2026)
Regulation on the conditions for the election and appointment of members of the supervisory boards and management boards of legal entities of special interest to the Republic of Croatia and the manner of their election, *Official Gazette* No. 12/19. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2019_02_12_237.html (23. 3. 2026)
Salzman, J. 2005. Decentralized Administrative Law in the Organization for Economic Cooperation and Development. *Law and Contemporary Problems*, 68(3–4), pp. 189–224. Available at: https://scholarship.law.duke.edu/lcp/vol68/iss3/8/ (1. 3. 2026).
The Act on the Prevention of Conflict of Interest, *Official Gazette* No. 143/21. Available at: https://www.zakon.hr/z/423/zakon-o-sprjecavanju-sukoba-interesa#google_vignette (23. 3. 2026)
The Act on the Prevention of Money Laundering and Financing of Terrorism, *Official Gazette* No. 108/07, 39/09, 151/22. Available at: https://www.zakon.hr/z/117/zakon-o-sprjecavanju-pranja-novca-i-financiranju-terorizma (23. 3 2026)
The Companies Act, *Official Gazette* No. 65/09 – official revised text, 33/11, 91/11, 32/12, 57/12, 44/13 - odl. US, 82/13, 55/15, 15/17, 22/19 – ZposS, 158/20 – ZintPK-C, 18/21, 18/23 – ZDU – 10, 75/23, 102/24, 77/25 and 1/26 – ZdZEETD). Available at: https://pisrs.si/pregledPredpisa?id=ZAKO4291 (25. 3. 2026)
The Lobbying Act, *Official Gazette* No. 36/24. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2024_03_36_567.html (23. 3 2026)
The Ordinance on the Assessment of Potential Candidates for Members of Supervisory and Administrative Bodies of State-Owned Companies. Available at: https://www.sdh.si/Data/Documents/pravni-akti/Pravilnik_o_presoji_potencialnih_kandidatov.pdf (25. 3.2026)
The Slovenian State Holding Act, *Official Gazette* No. 25/14 in 140/22, https://pisrs.si/pregledPredpisa?id=ZAKO6677 (23. 3. 2026)
*The State Investment Management Strategy and the Corporate Governance Code of State-Owned Companies.* Available at: https://www.sdh.si/Data/Documents/pravni-akti/Kodeks%20upravljanja%20družb%20s%20kapitalsko%20naložbo%20države_junij_2022.pdf (25. 3. 2026)

Review scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch26

***Robert Doya NANIMA****

# CONCLUDING OBSERVATIONS: CENTRAL TO SOLIDARITY, AND THE CONTEMPORARY DEVELOPMENT OF CHILDREN'S RIGHTS IN AFRICA?

*Concluding observations of human rights treaty bodies are often treated as supervisory outputs, yet they function as authoritative interpretive instruments capable of generating normative content. This paper examines selected concluding observations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and argues that, when analysed through a normative-doctrinal methodology, they operate as instruments of normative production within African human rights law. It advances the central claim that concluding observations generate solidarity as a legal doctrine that structures the promotion and protection of children's rights in contexts of structural inequality, governance failure, and social transformation. Drawing on eleven concluding observations, the paper identifies recurring patterns relating to state responsibility, institutional coordination, non-discrimination, socio-economic rights, and the protection of children in situations of vulnerability, and demonstrates how these patterns crystallise into expectations of conduct through iterative interpretive practice. Situating these developments within a global context in which human rights norms are increasingly contested, the paper shows that concluding observations provide a framework for governance grounded in legally constructed solidarity, thereby contributing to the evolution of child-centred rights within the African human rights system.*

***Keywords:*** African Committee of Experts on the Rights and Welfare of the Child, non-discrimination, socio-economic rights, protection of children in situations of vulnerability.

## 1. INTRODUCTION

The statistical distribution of State Parties reporting to the ACERWC must be situated within the threshold question of ratification of the ACRWC. As of 30 April 2026, of the 55 States on the continent, 52 have ratified the Charter and are accordingly under a legal obligation to submit periodic reports, while three States, namely Morocco, South Sudan and Tunisia, have not ratified the Charter and are therefore not bound by its reporting requirements (ACERWC, 2026). Within the pool of 52 States Parties, the reporting record reveals a sharply uneven pattern of compliance. Only a narrow core, most notably Kenya and Rwanda, have completed the full reporting cycle up

* Associate Professor and Head of Department, Criminal Justice and Procedure, Faculty of Law, University of the Western Cape, South Africa, https://orcid.org/0000-0001-8825-3376, e-mail: *rnanima@uwc.ac.za*

to the third periodic report, while a small group, including Burkina Faso, Eritrea, Niger, Senegal and South Africa, demonstrate partial continuity through the second periodic stage (ACERWC, 2026). The dominant trend among the remaining States Parties is one of truncated engagement, with most States confined to initial or, at best, first periodic reporting, and a number failing to submit any report at all despite being legally bound to do so.

This distinction is doctrinally significant. Non-reporting by non-ratifying States does not constitute a breach, whereas non-reporting by ratifying States reflects a failure of compliance within the Charter's supervisory framework. More critically, the uneven progression across reporting cycles constrains the Committee's ability to engage in sustained, iterative dialogue with States. The consequence is not merely procedural but normative: limited reporting cycles weaken the production, refinement, and consolidation of interpretive standards. In effect, where reporting is truncated, the jurisprudential development of children's rights is equally constrained, and the emergence of system-wide doctrines, including solidarity, is correspondingly weakened.

A percentage-based analysis confirms this structural limitation. Approximately 18.2% (10/55) of States have not submitted any report, a category comprising both non-ratifying States and ratifying States in default of their obligations (ACERWC, 2026). A further 32.7% (18/55) have submitted only an initial report, indicating minimal engagement with the supervisory framework. The largest share, 36.4% (20/55), have advanced to both initial and first periodic reports, reflecting partial but incomplete compliance. More sustained engagement is observed in 9.1% (5/55) of States, which have submitted initial, first, and second periodic reports, while only 3.6% (2/55) have completed the full reporting cycle up to the third periodic report

The authority of concluding observations is not incidental to the reporting process but is grounded within the supervisory architecture of the African Charter on the Rights and Welfare of the Child (ACRWC). Article 43 establishes the reporting obligation, requiring States Parties to submit periodic reports on measures adopted to give effect to the Charter, while Article 42 mandates the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) to monitor implementation, interpret the provisions of the Charter, and formulate principles and rules aimed at protecting children's rights. Concluding observations emerge from this institutional process of examination, dialogue, and interpretation (ACERWC, 2026). They therefore derive their legitimacy and authority from the Committee's interpretive mandate and its supervisory function within the Charter system, positioning them as integral components of treaty implementation rather than ancillary outputs.

This paper proceeds from the position that the significance of concluding observations lies not in their frequency but in their function. It argues that concluding observations of the ACERWC, when treated as interpretive instruments and analysed through a normative-doctrinal methodology, operate as mechanisms of norm production within African human rights law. More specifically, it advances the claim that the iterative and patterned articulation of obligations within concluding observations generates solidarity as a legal doctrine that structures the promotion and protection of children's rights in contexts of structural inequality, governance failure, and contemporary social change.

## 2. CONCLUDING OBSERVATIONS AS INSTRUMENTS OF NORM PRODUCTION

Concluding observations must be understood, not as advisory outputs that have gradually acquired significance, but as authoritative interpretive instruments embedded within the

architecture of treaty-based supervision (Borlini & Crema, 2019, p. 12). Emerging from the process of constructive dialogue between treaty bodies and States, they are juridically consequential products of a structured engagement through which compliance is interrogated, gaps are identified, and the normative implications of treaty provisions are clarified (O'Flaherty, 2006, p. 29). Their authority is therefore inherent rather than derivative: it flows from their institutional location within supervisory mechanisms and from the iterative, reasoned character of their production. In this sense, concluding observations operate as a distinct mode of legal interpretation within international human rights law.

This interpretive function becomes clearer when examined across both international and continental systems, where concluding observations perform a shared doctrinal role of norm clarification. At the international level, they function as a secondary source of law that progressively defines the normative core of broadly framed treaty rights (Mechlem, 2009, p. 905). This process is mirrored within the African human rights system, where supervisory bodies such as the African Commission and the ACERWC utilise concluding observations to specify State obligations under the African Charter and the ACRWC. The significance of this dual practice lies in its convergence: across both systems, concluding observations translate indeterminate legal norms into concrete expectations of conduct, thereby reducing ambiguity while simultaneously expanding normative reach.

The legitimacy of concluding observations must be located within this interpretive practice rather than in any formal binding force. At the international level, legitimacy is constructed through consistency, reasoning, and transparency in the outputs of treaty bodies (Keller & Ulfstein, 2012, p. 116). Within the African system, this legitimacy is intensified through a closer alignment between interpretation and implementation. Unlike the relatively diffuse follow-up mechanisms characteristic of the United Nations system, the African framework increasingly embeds concluding observations within structured supervisory and reporting processes (von Staden, 2018, p. 30). This produces a tighter linkage between norm articulation and compliance monitoring, thereby strengthening the functional authority of concluding observations as instruments of governance rather than mere interpretive guidance.

The doctrinal significance of concluding observations is most evident in their role within a jurisprudential loop of norm development. At the international level, they function as the primary site for the articulation of emerging legal interpretations (Tladi, 2016, p. 333). Issues repeatedly identified across State reviews generate patterns of reasoning that are subsequently consolidated into General Comments. This iterative process reflects a form of bottom-up norm production in which practice informs doctrine. A comparable dynamic is observable within the African system, where recurring thematic concerns in concluding observations contribute to the development of soft jurisprudence, policy frameworks, and normative instruments, including General Comments and model laws. In both contexts, concluding observations are not endpoints but transitional instruments within a broader cycle of doctrinal consolidation.

This jurisprudential loop is particularly evident within the African children's rights system. Recurring patterns identified in concluding observations are subsequently consolidated into authoritative interpretive instruments such as General Comments. The General Comment on Article 22 of the ACRWC, for instance, draws on persistent concerns relating to the protection of children affected by armed conflict, including recruitment, displacement, and attacks on essential services, to articulate detailed normative standards and State obligations (ACRWC, 2026). In this way, concluding observations function as the empirical and

interpretive foundation upon which broader doctrinal instruments are constructed, transforming repeated recommendations into structured legal guidance.

This process of doctrinal consolidation extends beyond interpretive clarification to normative codification. The African Union Model Law on Children Affected by Armed Conflict reflects the translation of recurring obligations identified in concluding observations into legislative templates for domestic implementation (ACERWC, 2021). Issues consistently raised by the Committee, such as child recruitment, protection systems, reintegration, and institutional coordination—are codified within the Model Law as concrete legislative standards (ACERWC, 2021). The Model Law therefore represents the final stage of the jurisprudential loop, where interpretive practice is transformed into operational legal frameworks capable of guiding State action (ACERWC, 2021).

This jurisprudential function is operationalised through the capacity of concluding observations to convert abstract rights into concrete, measurable standards. Within the international system, they have been used to transform broadly framed entitlements, such as the right to health, into specific indicators and actionable State obligations (Meier *et al.*, 2018, pp. 4, 9). The same logic is evident in the African context, where concluding observations are deployed to articulate context-specific standards in areas such as children's rights, socio-economic rights, and governance obligations. The convergence here is doctrinally significant: across both systems, concluding observations bridge the gap between normative abstraction and practical enforceability, thereby enhancing the operational utility of human rights law.

The African system, however, reflects an intensification of this function through its stronger emphasis on implementation and follow-up. By embedding concluding observations within more structured monitoring processes, it creates a tighter feedback loop between interpretation and compliance (von Staden, 2018, p. 30). This position's concluding observations are not only interpretive outputs but also instruments of governance that actively shape State behaviour. The comparative implication is clear: while both international and continental systems generate normative guidance through concluding observations, the African system more directly integrates these outputs into compliance architectures, thereby enhancing their practical effect.

This movement from interpretation to implementation is further reinforced at the domestic level, where concluding observations acquire traction through their mobilisation by institutional actors. Empirical studies demonstrate that their effectiveness depends on both their specificity and the presence of actors capable of translating them into reform initiatives (Krommendijk, 2014). Within the African context, National Human Rights Institutions, civil society organisations, and courts increasingly deploy concluding observations as advocacy and interpretive tools (Viljoen & Murray, 2024, p. 1344). Their influence does not derive from formal binding force but from their structured, repeated, and institutionally endorsed articulation of legal standards. In this way, concluding observations function as a normative roadmap for domestic reform, informing legislative change and underpinning strategic litigation.

The evolution of this dynamic is particularly evident in the African children's rights system. Mezmur (2020, p. 696) demonstrates that the reporting procedure of the ACERWC has shifted from a largely passive exercise to a substantively rigorous process of constructive dialogue. This transformation repositions concluding observations as active instruments through which the Committee interrogates State practice and incrementally constructs a body of context-responsive interpretive guidance. Building on this, Adeola (2023, p. 2) shows

that concluding observations in jurisdictions such as Kenya, Nigeria, South Africa, and Egypt have informed legislative and policy reform, thereby operating as a bridge between regional soft law and domestic hard law. This evidence a maturing feedback loop in which continental normative outputs are internalised within national legal systems, reinforcing both their authority and their practical utility.

In sum, concluding observations operate as doctrinal instruments across and between international and continental legal orders. Their significance lies in their integration of three core elements: constructive dialogue as the site of production, normative stringency as the mechanism of interpretation, and follow-up procedures as the means of sustaining compliance. Through this integrated cycle, concluding observations move beyond episodic reporting outputs to function as enduring instruments of normative consolidation, linking interpretation, supervision, and implementation within a coherent system of human rights governance.

## 3. METHODOLOGY: NORMATIVE-DOCTRINAL APPROACH

This paper adopts a normative-doctrinal methodology (Mzezewa, 2024, p. 6) applied to concluding observations of the ACERWC, treating them as authoritative interpretive instruments through which State obligations under the ACRWC are clarified, expanded, and operationalised. The methodology is structured along two interrelated dimensions: a substantive aspect and a procedural aspect.

The substantive aspect is grounded in purposive sampling (Campbell *et al*., 2020). The study relies on eleven selected concluding observations, chosen not for representativeness but for their capacity to demonstrate convergence in the Committee's interpretive practice. These observations consistently articulate concerns relating to coordination deficits, fragmented implementation, weak resource allocation, and systemic protection gaps. For instance, the ACERWC's observations on Malawi explicitly identify challenges relating to data coordination, inter-agency collaboration, and the need for centralised systems to enhance implementation (Malawi, 2025, para. 10). Similarly, in Senegal, the Committee highlights deficiencies in institutional coordination and overlapping mandates, calling for a coherent and integrated child protection system (Senegal, 2019, paras. 9–10). The purposive selection, therefore, enables the identification of recurring normative signals that are capable of doctrinal consolidation.

The selection of States is guided by three purposive criteria. First, the study includes States at different stages of engagement with the reporting procedure, ranging from those with multiple reporting cycles, such as South Africa, to those with more limited but substantively rich engagements, such as Malawi and Senegal. This allows the analysis to capture both continuity and variation in the Committee's interpretive practice. Second, the selected States reflect diversity in legal systems, governance structures, and socio-economic contexts within the African region, thereby strengthening the comparative dimension of the study. Third, the selected concluding observations exhibit a high degree of thematic density, particularly in relation to coordination, resource allocation, and vulnerability, making them suitable for identifying recurring normative patterns. The aim is therefore not representativeness in a statistical sense, but analytical depth in demonstrating how interpretive convergence produces doctrinal consolidation across varied State contexts.

The procedural aspect concerns the analytical method applied to these concluding observations. The analysis proceeds in three steps. First, textual extraction identifies directive

language, recommendations, and recurring formulations within each observation. Second, norm identification interrogates what obligation is being clarified or reinforced, including duties relating to coordination, resourcing, monitoring, and protection of vulnerable groups. Third, doctrinal consolidation examines whether repetition across different State contexts produces stable expectations of conduct, thereby generating normative feedback that informs the interpretation of Article 1 obligations (OAU, 1990, Art. 1). This is evident, for example, in the repeated emphasis on data systems, institutional coordination, and implementation structures across multiple State reviews, including Malawi (Malawi, 2025, para. 10) and Senegal (Senegal, 2019, paras. 9–10), where similar recommendations are articulated despite differing national contexts.

Through this dual structure, the methodology moves beyond descriptive reporting and instead constructs a feedback loop in which concluding observations function as sites of norm production, refinement, and consolidation within the African child rights system.

## 4. TEXT TO DOCTRINE: CONSTRUCTING SOLIDARITY THROUGH CONCLUDING OBSERVATIONS

This section operationalises the methodological framework by moving from textual patterns in concluding observations to the identification of legal obligations and, ultimately, to the consolidation of solidarity as a doctrinal construct within the African child rights system. It proceeds on the basis that concluding observations are interpretive instruments through which the ACERWC articulates and stabilises normative expectations across State Parties.

### *4.1. Textual Extraction: Recurring Directive Patterns*

A close reading of the concluding observations to Malawi (Malawi, 2025), Senegal (Senegal, 2019), and South Africa (South Africa, 2019; 2023) reveals a consistent pattern in the Committee's directive language. Across reporting cycles and State contexts, the ACERWC formulates recommendations that converge around four interrelated domains: coordination, resource allocation, data systems, and the prioritisation of children in vulnerable situations.

The Committee repeatedly identifies deficiencies in coordination and institutional integration. In Malawi, it notes "limited coordination between government agencies" and recommends the establishment of "a centralised coordination framework" and enhanced inter-agency collaboration (Malawi, 2018, para 10). In Senegal, similar concerns are raised regarding "overlapping mandates" and the absence of clear coordination procedures, with the Committee calling for a "robust coordination system (…) integrated, stable [and] effective" (Senegal, 2019, paras. 9–10). In South Africa, the Committee identifies coordination gaps in implementation and urges the development of broader mechanisms to ensure coherent engagement among State institutions and with civil society actors (South Africa, 2011, para. 11).

The Committee also consistently advances resource-based directives. In Malawi, it recommends that the State Party increase budgetary allocation and ensure "adequate human and technical resources" for institutions responsible for children's rights (Malawi, 2018, para 6). In Senegal, concerns about "limited financial and human resources" lead to recommendations that institutions be equipped with the "necessary human, technical and financial resources" to discharge their mandates effectively (Senegal, 2019, paras. 9–10). In South Africa, the Committee similarly calls for the allocation of sufficient budgetary resources to promote and protect

children's rights (South Africa, 2011; 2019, para. 6) and reiterates in its subsequent reporting cycle the need to "mobilize resources and increase (…) budget allocation for children's rights sectors and programs" (South Africa, 2023, para. 6).

A further recurring theme concerns the absence or inadequacy of data systems. In Malawi, the Committee identifies the "lack of a coordinated data collection mechanism" and recommends the establishment of a "comprehensive data collection system" with disaggregated statistical data (Malawi, 2018, para 10). In South Africa, the Committee similarly calls for "a comprehensive data collection and keeping system" (South Africa, 2011, para. 10) and reiterates in 2023 the absence of "centralised and updated data collection and management systems" as a barrier to effective implementation (South Africa, 2023, para. 8).

Finally, the Committee consistently foregrounds the need to address structural inequality and vulnerability. In Senegal, it calls for measures to remove barriers affecting "children in vulnerable and marginalised situations," particularly in access to education, health care, and protection services (Senegal, 2019, para. 14). In South Africa, it highlights the discrimination faced by migrant and undocumented children in accessing education and basic services (South Africa, 2023, para. 9) and reiterates that such exclusion persists despite existing legal frameworks (South Africa, 2023, para. 13). These recurring formulations are not episodic. They reflect a patterned use of directive language through which the Committee articulates expectations of State conduct across multiple jurisdictions.

### *4.2. Norm Identification: Operationalising Article 1 of the ACRWC*

The repetition of these directives across States and reporting cycles gives rise to identifiable normative content. This interpretive approach is consistent with the Committee's broader jurisprudence, including its General Comments, where Article 1 is understood as imposing an obligation of comprehensive and effective implementation requiring coordinated institutional frameworks, adequate resourcing, and targeted protection measures (OAU, 1990). The convergence between concluding observations and General Comments confirms that these obligations are not incidental but form part of a coherent interpretive framework governing State responsibility under the Charter. The concluding observations clarify the scope of State obligations under Article 1 of the ACRWC, which requires States Parties to recognise the rights in the Charter and to undertake the necessary measures to give effect to those rights (OAU, 1990).

The Committee's insistence on coordination establishes an obligation of institutional integration as an element of implementation under Article 1. By requiring centralised coordination frameworks and coherent inter-agency collaboration (Malawi, 2018, para. 10; Senegal, 2019, para. 10), the Committee makes clear that fragmented governance structures are incompatible with the effective realisation of children's rights. The repeated emphasis on budgetary allocation and resourcing articulates an obligation of material implementation under Article 1. The requirement to increase budgetary allocation and ensure adequate human and technical resources (Malawi, 2018, para. 6; South Africa, 2023, para. 6) reflects an interpretation that the duty to implement rights necessarily entails the mobilisation and distribution of resources.

The Committee's focus on data systems produces an obligation of information governance as far as the requirement for comprehensive and disaggregated data collection (Malawi, 2018, para. 10; South Africa, 2023, para. 8) demonstrates that implementation under Article 1 includes the obligation to generate, manage, and utilise data necessary for monitoring,

planning, and accountability. In contrast, the consistent attention to marginalised groups establishes an obligation of substantive prioritisation. By directing States to remove barriers affecting children in vulnerable situations (Senegal, 2019, para. 14; South Africa, 2019, para. 9), the Committee clarifies that implementation must address structural inequality and ensure that those most at risk of exclusion are prioritised in policy and practice. It is argued that through these repeated interpretive moves, the Committee gives operational meaning to Article 1. The obligation to take "necessary steps" is concretised into identifiable duties relating to coordination, resourcing, data, and prioritisation.

### *4.3. Doctrinal Consolidation: Solidarity as the Logic of Implementation*

When these obligations are read cumulatively across concluding observations, they form a coherent and interdependent framework. Coordination, resource allocation, data governance, and prioritisation are not discrete requirements; they function as mutually reinforcing components of a single system of implementation. For instance, the system reflects a particular organising logic as far as coordination ensures that institutions act in concert rather than in isolation. Resource allocation ensures that commitments are materially supported. Data systems ensure that implementation is informed, monitored, and accountable. Prioritisation ensures that structural inequalities are addressed. Taken together, these elements constitute a model of implementation grounded in interdependence and shared responsibility. The consistent articulation of these obligations across States establishes a standard of conduct, generates expectations regarding State behaviour, and positions the Committee as the authoritative interpreter of the measures required under Article 1. It is argued that this convergence gives rise to a doctrinal principle to the end that solidarity functions as the organising logic through which Article 1 obligations are interpreted and applied within the African child rights system.

### *4.4. Solidarity as a Structuring Principle of the ACRWC*

Understood in this way, solidarity operates as a structuring principle that informs the implementation of the Charter as a whole. The obligation of coordination reflects institutional solidarity, requiring integrated governance across State structures. The obligation of resource allocation reflects material solidarity, requiring States to direct financial and human resources towards the realisation of children's rights. The obligation of prioritisation reflects substantive solidarity, ensuring that marginalised and vulnerable children are not excluded from protection. The obligation of data governance reflects systemic solidarity, enabling evidence-based and accountable implementation.

These dimensions of solidarity provide the operational framework through which the foundational principles of the ACRWC, non-discrimination, the best interests of the child, the right to life, survival and development, and participation, are translated into practice. The concluding observations thus function not merely as supervisory outputs, but as interpretive instruments through which the content of Article 1 is specified and consolidated into a coherent doctrinal framework.

The result is a structured understanding of implementation within the African child rights system: one in which the realisation of rights is organised through a doctrine of solidarity, articulated and developed through the jurisprudential practice of the ACERWC.

## 5. SOLIDARITY AS DOCTRINE

### *5.1. Solidarity in the ACRWC Framework*

The ACRWC is normatively anchored in four foundational principles: non-discrimination, the best interests of the child, the right to life, survival and development, and participation. These principles are explicitly codified and consistently guide the interpretation and implementation of the ACRWC across the jurisprudence of the ACERWC. They provide the normative grammar through which obligations are framed and assessed.

However, the operational logic of the ACRWC extends beyond these codified principles. The ACRWC does not expressly recognise solidarity as a principle, nor does it articulate it as a standalone obligation. Notwithstanding this textual silence, the interpretive practice of the ACERWC reveals that solidarity operates as an underlying organising logic of implementation. It is embedded in the structure of obligations, particularly under Article 1, which requires States Parties to take all appropriate legislative, administrative, and other measures to give effect to the rights contained in the ACRWC. Solidarity, therefore, is not textually declared but normatively implied. Its status must be constructed doctrinally through the analysis of the Committee's interpretive outputs, particularly concluding observations and recommendations.

### *5.2. Solidarity Through the Jurisprudential Loop*

The doctrinal construction of solidarity emerges through a jurisprudential loop that proceeds from text to norm to doctrine. This method reveals how recurring interpretive patterns in concluding observations crystallise into binding expectations of State conduct. The stability of this jurisprudential loop is further evidenced by its consolidation into formal normative instruments. General Comments systematise recurring interpretive patterns into authoritative legal guidance, while instruments such as the Model Law on Children Affected by Armed Conflict translate these patterns into legislative frameworks. Together, they confirm that the obligations identified in concluding observations are not isolated recommendations but components of an evolving doctrinal structure within the African children's rights system.

At the level of text, the ACERWC consistently articulates recommendations across State reports that converge around specific themes. These include institutional coordination, prioritisation of vulnerable children, and the allocation of adequate financial, human, and technical resources. For instance, in its review of Senegal, the Committee highlights deficiencies in coordination and recommends the establishment of a "robust coordination system… integrated, stable, effective, participatory" (Senegal, 2019, paras 9–10). Similarly, in its consideration of South Africa, the Committee underscores the need for improved coordination mechanisms and effective implementation supported by adequate resources (South Africa, 2011; 2019, paras. 10–11) and reiterates the obligation to "mobilize resources and increase (…) budget allocation for children's rights sectors and programs" (South Africa, 2023, para 6). Parallel concerns are raised in relation to Malawi, where the Committee emphasises the necessity of adequate financial, human, and technical resources to ensure effective implementation of child protection systems (Malawi, 2025, paras. 6–10).

At the level of norm, these recurring textual formulations clarify the content of State obligations under the Charter. The consistent emphasis on coordination establishes a duty to coordinate institutional action in the implementation of children's rights. The repeated focus on marginalised

and vulnerable groups establishes a duty to prioritise children who are at risk of exclusion, including those affected by discrimination, poverty, disability, or geographic marginalisation (Senegal, 2019, para. 14; South Africa, 2019, para. 9). The insistence on adequate resourcing establishes a duty to allocate financial, technical, and human resources as a necessary condition for effective implementation (Malawi, 2025, para. 6; South Africa, 2023, para. 6). These duties are not optional policy considerations; they are presented as integral to compliance with the Charter.

At the level of doctrine, repetition across different States and reporting cycles produces crystallisation. The convergence of recommendations on coordination, prioritisation, and resource allocation generates a stable and coherent pattern of expectations. This pattern constitutes a doctrinal framework through which the implementation of the Charter is understood as a collective, integrated, and resource-dependent process. Within this framework, solidarity emerges as the organising logic that binds these obligations together. It is through this jurisprudential loop that solidarity is produced as doctrine.

### *5.3. Elements of Solidarity as Doctrine*

As a doctrinal construct, solidarity comprises identifiable and interrelated elements that structure the implementation of the Charter. First, solidarity manifests as State responsibility. The obligation under Article 1 is interpreted as requiring active, continuous, and comprehensive measures by the State to realise children's rights. This includes legislative reform, policy development, institutional design, and enforcement mechanisms. Implementation is thus an affirmative and ongoing obligation.

Second, solidarity requires institutional coordination. The repeated emphasis on coordination across concluding observations demonstrates that implementation must be organised through coherent and integrated institutional frameworks. Fragmentation, overlapping mandates, and lack of coordination are treated as structural deficiencies that undermine compliance (Senegal, 2019, paras. 9–10; Malawi, 2025, para. 10). Third, solidarity entails the protection of vulnerable children. The ACERWC consistently directs States to prioritise children in marginalised situations, including those facing discrimination, poverty, disability, or exclusion from basic services. This establishes a model of substantive equality, where implementation is measured by the extent to which it reaches those most at risk (South Africa, 2019, para. 9; Senegal, 2019, para. 14).

Fourth, solidarity incorporates socio-economic redistribution. The obligation to allocate adequate resources reflects a redistributive dimension of the Charter. States are required to direct financial, technical, and human resources towards sectors and programmes that realise children's rights, including health, education, and protection systems. Budgetary allocation is therefore a central component of compliance (South Africa, 2023, para. 6; Malawi, 2025, para. 6). These elements operate cumulatively. State responsibility is exercised through coordinated institutional action, which must be directed towards the protection of vulnerable children and supported by adequate resource allocation. Together, they constitute a coherent doctrinal framework of solidarity.

### *5.4. Solidarity, Grounded in Concrete Obligations*

Solidarity, as constructed within the ACRWC framework, does not function as a rhetorical device. It is not invoked merely to signal commitment or aspiration. Rather, it is grounded in concrete obligations that are consistently articulated and operationalised

through the Committee's jurisprudence. It is not political in the sense of discretionary policy choice. The obligations associated with coordination, prioritisation, and resource allocation are framed as requirements for compliance, not matters of political preference.

While it may align with broader ethical considerations, its normative force derives from its consolidation as doctrine through the interpretive practice of the ACERWC and its anchoring in binding obligations under the Charter. Solidarity thus operates as a doctrinal construct that structures how States must organise, prioritise, and resource the implementation of children's rights under the African Charter. To this end, concluding observations of the ACERWC, when analysed through a normative-doctrinal methodology, generate solidarity as a legal doctrine through iterative and patterned interpretive practice.

## 6. EMPIRICAL DOCTRINAL ANALYSIS OF SELECTED CONCLUDING OBSERVATIONS

This section applies a normative-doctrinal method to selected concluding observations of the ACERWC to demonstrate how these instruments move beyond descriptive reporting and function as sites of norm production. The analysis proceeds through a structured three-step approach. First, it undertakes a textual extraction of recommendations, directives, and interpretive language contained in the concluding observations. Secondly, it identifies the underlying normative content by interrogating the obligations being clarified, expanded, or reinforced. Thirdly, it consolidates these findings doctrinally by identifying patterns across State Parties which collectively generate standards, expectations of conduct, and institutional positioning. The objective is not to catalogue recommendations, but to demonstrate how repetition and consistency transform interpretive statements into a coherent body of doctrine within the African children's rights system.

The analysis reveals that across different State Parties, the ACERWC consistently articulates a core set of governance-oriented obligations that extend beyond formal legal compliance. In relation to State responsibility and accountability, concluding observations repeatedly frame delays in legislative reform and weak implementation as violations of children's rights rather than administrative shortcomings. For instance, in its observations on Malawi, the ACERWC emphasises the need to fast-track legislative processes and ratification of relevant instruments, thereby linking legislative delay directly to gaps in protection Malawi, 2025, paras. 5–7). This language does more than recommend reform; it establishes a normative expectation that States must ensure timely legislative alignment with the ACRWC, thereby consolidating a doctrine of immediacy in implementation.

A similar pattern emerges in relation to institutional coordination and governance. The ACERWC consistently identifies fragmented institutional arrangements, weak inter-agency coordination, and inadequate data systems as structural barriers to the realisation of children's rights. In Malawi, the Committee explicitly highlights deficiencies in data systems and coordination, recommending the establishment of comprehensive and centralised mechanisms (Malawi, 2025, para. 10). This is mirrored in Senegal, where the Committee emphasises the need for clearly defined mandates, integrated coordination systems, and adequate resourcing of child protection institutions (Senegal, 2019, paras. 9–10). Through repetition across jurisdictions, these recommendations consolidate into a doctrinal expectation that States must establish integrated, clearly mandated child protection systems as a condition of compliance with the Charter.

In the domain of non-discrimination and vulnerability, the Committee's language demonstrates a shift from formal equality to substantive equality. Concluding observations consistently identify specific groups of children, including children with disabilities, children with albinism, and marginalised communities, as requiring targeted measures to ensure effective access to services. In Malawi, the Committee calls for increased allocation of resources to support children with disabilities and continued implementation of disability-focused strategies (Malawi, 2025, paras. 13–15). Similarly, in Senegal, the Committee highlights persistent discrimination against vulnerable groups and calls for comprehensive legislative reform and awareness campaigns to address structural inequalities (Senegal, 2019, para. 14) . When read together, these patterns establish a doctrinal position that States are under a positive obligation to adopt targeted, context-sensitive interventions to address systemic disadvantage.

The analysis further demonstrates that socio-economic rights are operationalised through concluding observations in a manner that translates broad Charter provisions into concrete service delivery obligations. The ACERWC repeatedly links the right to life, survival, and development to measurable State action, including access to nutrition, healthcare, and education. In Malawi, the Committee identifies persistent challenges in child survival and development and recommends expansion of health and nutrition interventions (Malawi, 2025, paras. 17–18). Comparable observations in South Africa further emphasise the need for increased budget allocation, improved health infrastructure, and expanded access to basic services (South Africa, 2023, paras. 39–40). This repetition consolidates a doctrinal understanding of socio-economic rights as programmatic, resource-linked, and subject to measurable implementation benchmarks.

A distinct and increasingly prominent doctrinal cluster concerns children in situations of vulnerability, violence, and systemic instability. Although not always framed explicitly as children affected by armed conflict, concluding observations consistently address issues such as violence against children, weak protection systems, and gaps in emergency response. In South Africa, the Committee highlights persistent violence against children and calls for coordinated, evidence-based prevention strategies and strengthened institutional responses (South Africa, 2019, para. 18) . In Malawi, similar concerns arise in relation to abuse, corporal punishment, and weak legal enforcement mechanisms (Malawi, 2025, paras. 22–23). When analysed collectively, these recommendations reveal an emerging doctrinal position that situates child protection within broader governance and security frameworks, thereby aligning with the understanding of children's rights as integral to stability and institutional resilience.

Across these thematic areas, the cumulative effect of repeated recommendations is the consolidation of a coherent normative framework that defines expected standards of State conduct. The ACERWC's concluding observations, when read across multiple State Parties and reporting cycles, demonstrate consistency in identifying obligations, precision in articulating required measures, and continuity in follow-up expectations. This repetition produces more than guidance; it generates a structured body of norms that inform legislative reform, institutional design, and policy implementation at the domestic level. Accordingly, concluding observations function as a mechanism through which the African children's rights system translates abstract Charter provisions into operational governance standards, thereby contributing to the progressive development of doctrine grounded in practice rather than formal adjudication.

## 7. CONCLUDING OBSERVATIONS IN A CONTESTED GLOBAL ORDER

The contemporary human rights landscape is increasingly characterised by the erosion of normative commitments, governance fragility, and deepening structural inequality. Within this context, the protection of children's rights is particularly vulnerable to regression. Across multiple State Parties, concluding observations of the ACERWC reveal persistent gaps in implementation that are not merely technical but symptomatic of broader governance crises. These include fragmented institutional arrangements, weak coordination mechanisms, insufficient resource allocation, and systemic failures in service delivery. For example, in Malawi, the Committee identifies deficiencies in coordination, data systems, and implementation structures, indicating systemic governance weaknesses that undermine effective protection (Malawi, 2025, para. 10). Similarly, in Senegal, the Committee highlights institutional fragmentation and overlapping mandates, pointing to structural governance challenges that impede coherent policy implementation (Senegal, 2019, paras. 9–10).

These governance deficits are compounded by persistent inequality and exclusion. Concluding observations consistently identify groups of children who remain structurally marginalised, including migrant children, children with disabilities, and those affected by poverty and discrimination. In South Africa, for instance, the Committee underscores the continued exclusion of migrant and undocumented children from access to education and basic services (South Africa, 2019, para. 9) and reiterates ongoing disparities in access to essential services despite the existence of legislative and policy frameworks (South Africa, 2023, para. 13). In Senegal, similar concerns are raised regarding barriers affecting children in vulnerable and marginalised situations (Senegal, 2019, para. 14). These patterns reflect entrenched socio-economic inequalities that constrain the realisation of children's rights across jurisdictions.

Within this contested global order, concluding observations perform a stabilising normative function. Their repeated articulation of obligations across States and reporting cycles generates consistency in interpretation and reduces normative uncertainty. By consistently requiring coordination, resource allocation, data systems, and targeted measures for vulnerable groups (Malawi, 2025, paras. 6, 10; South Africa, 2023, paras. 6, 8), the ACERWC establishes clear expectations of conduct that transcend individual State contexts. This repetition does not merely reinforce existing norms; it consolidates them, ensuring continuity in the face of shifting political and institutional landscapes.

In this respect, concluding observations operate as mechanisms through which human rights norms are stabilised through iteration. The jurisprudential loop—where recurring recommendations crystallise into identifiable obligations—ensures that normative content is not dependent on singular interpretations or isolated decisions. Instead, it is sustained through continuous engagement across reporting cycles, thereby embedding expectations of conduct within the operational fabric of governance.

It is within this stabilising function that solidarity assumes its full doctrinal significance. In contexts marked by governance failure and inequality, solidarity operates as the legal response that structures how States must act. The obligations of coordination, resource allocation, prioritisation of vulnerable children, and systemic integration collectively constitute a model of governance grounded in interdependence and shared responsibility. Solidarity, in this sense, is not an abstract ideal but a doctrinal framework through which States are required to organise their institutional, financial, and policy responses to ensure the realisation of children's rights.

Accordingly, concluding observations do more than monitor compliance; they provide a framework for governance in conditions of normative contestation. Through their iterative and patterned articulation of obligations, they stabilise human rights norms and generate solidarity as a legally constructed doctrine. In doing so, they contribute to the evolution of child-centred rights within the African human rights system, ensuring that the protection of children remains anchored in structured, enforceable, and context-responsive obligations.

## 8. CONCLUSION

This paper has demonstrated that concluding observations of the ACERWC function as authoritative interpretive instruments that generate normative content within African human rights law. Through a normative-doctrinal methodology, it has shown that recurring patterns in concluding observations, particularly relating to institutional coordination, resource allocation, prioritisation of vulnerable children, and systemic implementation, are not merely descriptive, but operate to clarify and concretise State obligations under Article 1 of the ACRWC. These patterns, identified through textual extraction and norm identification, establish consistent expectations of conduct across State Parties and reporting cycles.

Building on this, the paper has advanced its central argument that concluding observations generate solidarity as a legal doctrine. The analysis has shown that solidarity is not expressly codified within the Charter but is constructed through the jurisprudential loop of interpretive practice. The repeated articulation of obligations relating to coordination, prioritisation, redistribution, and systemic governance produces a coherent doctrinal framework that structures how States must organise and implement children's rights. In this sense, solidarity operates as the organising logic of implementation, linking foundational Charter principles—non-discrimination, best interests, survival and development, and participation—to concrete governance obligations.

Finally, the paper has situated these developments within a contested global context marked by governance fragility, inequality, and the erosion of human rights norms. In such conditions, concluding observations perform a stabilising function by reinforcing normative consistency through repetition and iteration. They provide a framework for governance grounded in legally constructed solidarity, enabling States to respond to structural inequality and systemic gaps in protection. Accordingly, concluding observations must be understood not as episodic supervisory outputs, but as instruments of normative consolidation that contribute to the evolution of child-centred rights within the African human rights system.

This analysis demonstrates that the African children's rights system has moved beyond passive supervision towards an interpretive and quasi-normative model of governance in which concluding observations function as instruments of doctrinal development. However, this development remains structurally uneven. The persistence of incomplete reporting cycles, weak follow-up mechanisms, and limited domestic institutional uptake constrains the full consolidation of these norms. What emerges, therefore, is a system that is normatively advanced but operationally fragile. Within the broader international human rights landscape, this positions the African system in a paradoxical space: it exhibits greater coherence in linking interpretation to implementation than many global counterparts yet remains dependent on State compliance patterns that are inconsistent and, in some cases, structurally deficient. The future trajectory of this system will depend on whether these interpretive gains are matched

by institutional strengthening, systematic follow-up, and deeper domestic internalisation of concluding observations as binding governance frameworks.

## LIST OF REFERENCES


ACERWC. 2021. Model Law on Children Affected by Armed Conflict (CAAC). Available at: https://reporting.acerwc.africa/sites/default/files/2023-07/Model%20Law%20on%20CAAC_2023_English.pdf (31. 3. 2026).

ACERWC. 2026. The African Committee of Experts on the Rights and Welfare of the Child. Available at: https://www.acerwc.africa/en (31. 3. 2026).

Adeola, A. 2023. Moving Beyond Baby Steps? An Examination of the Domestic Implementation of Concluding Observations from State Parties' Reports on the African Children's Charter. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 26(1), pp. 1–30. https://doi.org/10.17159/1727-3781/2023/v26i0a8325

African Committee of Experts on the Rights and Welfare of the Child. 2011. *Concluding observations on South Africa*. Available at: https://www.acerwc.africa/sites/default/files/2022-06/South-Africa-concluding-Observations.pdf

African Committee of Experts on the Rights and Welfare of the Child. 2018. *Concluding observations on Malawi*. Available at: https://www.acerwc.africa/sites/default/files/2022-09/Malawi%20CO%20-2-17.pdf

African Committee of Experts on the Rights and Welfare of the Child. 2019. *Concluding observations on the report of Senegal*. Available at: https://www.acerwc.africa/sites/default/files/2022-09/CO_Periodic_Senegal_July_2019_English.pdf

African Committee of Experts on the Rights and Welfare of the Child. 2019. *Concluding observations on South Africa*. Available at: https://www.acerwc.africa/sites/default/files/2022-09/Concluding%20observation%20for%20South%20African%20Periodic%20State%20Party%20Report.pdf

African Committee of Experts on the Rights and Welfare of the Child. 2023. *Concluding observations on South Africa*. Available at: https://www.acerwc.africa/sites/default/files/2023-10/CONCLUDING%20OBSERVATIONS%20AND%20RECOMMENDATIONS%20SOUTH%20AFRICA.docx_.pdf

African Committee of Experts on the Rights and Welfare of the Child. 2025. *Concluding observations on Malawi*. Available at: https://www.acerwc.africa/sites/default/files/2025-01/ACERWC%20Concluding%20Observations%20on%20Malawi%20First%20Periodic%20Report.pdf

Borlini, L. S. & Crema, L. 2019. The legal status of decisions by human rights treaty bodies: authoritative interpretations or mission éducatrice? In: Ziccardi Capaldo, G. (ed.), *The Global Community Yearbook of International Law and Jurisprudence*, pp. 129–158. https://doi.org/10.1093/oso/9780197513552.003.0007

Campbell, S. *et al.* 2020. Purposive sampling: complex or simple? Research case examples. *Journal of research in Nursing*, 25(8), pp. 652–661. https://doi.org/10.1177/1744987120927206

Keller, H., & Ulfstein, G. (eds.). 2012. *UN Human Rights Treaty Bodies: Law and Legitimacy Vol. 1*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139047593

Krommendijk, J. 2014. *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* Cambridge/Antwerp/Portland: Intersentia.

Mechlem, K. 2009. Treaty bodies and the interpretation of human rights. *Vanderbilt Journal of Transnational Law*, 42, pp. 905–947.
Meier, B. M. *et al*. 2018. Accountability for the human right to health through treaty monitoring: Human rights treaty bodies and the influence of concluding observations. *Global Public Health*, 13(11), pp. 1558–1576. https://doi.org/10.1080/17441692.2017.1394480
Mezmur, B. D. 2020. The African Children's Charter @ 30: A distinction without a difference? *The International Journal of Children's Rights*, 28(4), pp. 693–714. https://doi.org/10.1163/15718182-28040015
Mzezewa, S. 2024. *uBuntu and certainty in commercial contracting: A study of burial societies in Cape Town*. PhD thesis. Cape Town: University of Cape Town, Faculty of Law.
O'Flaherty, M. 2006. The concluding observations of United Nations human rights treaty bodies. *Human Rights Law Review*, 6(1), pp. 27–52. https://doi.org/10.1093/hrlr/ngi037
Organisation of African Unity (OAU), African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 1990, 11. 7. 1990. Available at: https://www.refworld.org/legal/agreements/oau/1990/en/13798 (18. 4. 2025).
Tladi, D. 2016. Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga. *African Human Rights Law Journal*, 16(2), pp. 310–338. https://doi.org/10.17159/1996-2096/2016/v16n2a1
Viljoen, F., & Murray, R. 2024. Conclusion: Contours of a Conclusion, into the Sixth UN Treaty System Decade. In: Heyns, C., Viljoen, F. J. & Murray, R. (eds.) *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On*. Leiden: Brill Nijhoff, pp. 1320–1352. https://doi.org/10.1163/9789004377653_023
Von Staden, A. 2018. *Strategies of compliance with the European Court of Human Rights: Rational choice within normative constraints*. Philadelphia: University of Pennsylvania Press. https://doi.org/10.9783/9780812295153

Original scientific paper DOI: 10.56461/iup_rlrc.2026.7.ch27

*Ivan ALLEGRANTI**

# "COURAGE" AS A LEGAL VALUE: RETHINKING FUNDAMENTAL RIGHTS UNDER THE ECHR AND THE ECTHR

*Resilience is commonly defined within scientific literature as the capacity to adapt successfully to stressors while preserving psychological and social continuity in the face of adversity. Yet before resilience can emerge, there must first be a situation of vulnerability and an "act of courage": a deliberate decision to confront danger, uncertainty, or loss rather than withdraw. This paper argues that such "acts of 'courage'" acquire juridical relevance within the framework of the European Convention on Human Rights, particularly under Article 2, Article 8, and Article 1 of Protocol No. 1. Adopting a qualitative methodology, the study examines how natural catastrophic events activate the intrinsic bond between individuals and their environment, placing them before the choice to remain, rebuild, or abandon their homeland. Through an analysis of the jurisprudence of the European Court of Human Rights, the article contends that, although neither the Convention nor the Court explicitly refers to "courage" as an autonomous legal category, "act of courage" are implicitly protected insofar as they express free will and human dignity. By safeguarding life, private and family life, home, and property, the Court secures the material and relational conditions that allow individuals to determine their place of belonging and affirm their identity within a community. Ultimately, the paper demonstrates that courage constitutes the subjective manifestation of dignity, while resilience emerges as the collective outcome of such acts. The protection of fundamental rights in disaster contexts thus preserves not heroism, but the dignified capacity to remain and persist within one's social fabric.*

***Keywords:*** resilience, European Court of Human Rights, disaster law, property law, courage.

## 1. INTRODUCTION

The increasing frequency and intensity of disasters, together with the growing awareness of the social and institutional dimensions of disaster risk, have profoundly reshaped the legal understanding of human exposure to harm. Catastrophic events are no longer perceived

* Lecturer in Disaster Risk Management in the EU, Comenius University Bratislava, Slovakia, ORCID: https://orcid.org/0000-0003-0184-0194, e-mail: *ivan.allegranti@flaw.uniba.sk*

This paper is a realized within project 101177083-DisMEU Jean Monnet Module „Disaster Risk Management in EU Law".

merely as exceptional ruptures produced by uncontrollable natural forces; rather, they are increasingly recognised as situations in which structural vulnerability, collective protection, and individual responses intersect (Ruggeri, 2023, p. 73). In such contexts, the law is called upon not only to provide remedies after damage has occurred, but also to create the conditions under which persons may continue to live, remain, and rebuild within their territories despite instability and uncertainty. It is precisely within this tension between exposure and response that the present study is situated.

The article adopts a twofold conceptual structure, comprising a sociological part and a legal part, each divided into dedicated sections. The first part, from section 2 to 5, develops a conceptual framework by clarifying three crucial notions frequently employed in contemporary sociological scholarship yet rarely distinguished with sufficient precision: vulnerability, resilience, and courage.

The second part of the article (from section 5 to 10) turns to the juridical dimension of this theoretical reconstruction. Adopting a qualitative methodology, the study examines the normative framework of the European Convention on Human Rights (hereinafter ECHR) and the case law of the European Court of Human Rights in Strasbourg (hereinafter ECtHR). Through a close reading of judgments concerning environmental risks and disasters, the analysis investigates how the protection of the right to life (Article 2), right to private and family life and home (Article 8), and right to property (Article 1, Protocol 1) shapes the legal environment in which individuals confront catastrophic events. Although the Court does not explicitly refer to courage as an autonomous legal category, its jurisprudence reveals an implicit recognition of the concrete "acts of 'courage'" performed by those who choose to remain, rebuild, and continue their lives in affected territories.

Methodologically, the purpose of the current analysis is twofold: first, to investigate the discipline of the European Convention on Human Rights in relation to disasters; second to investigate how catastrophic natural events may reactivate the intrinsic bond between individuals and their environment, thereby transforming an initial "act of courage" into the very foundation of resilient conduct. In this sense, the study ultimately explores the legal dimension of "acts of 'courage' ", examining how they intersect with the protection of fundamental rights and, in particular, how they relate to safeguarding the "right to remain in one's homeland" in the aftermath of disaster.

## 2. VULNERABILITY AS A CONDITION FOR "COURAGE" AND RESILIENCE

When speaking of vulnerability, one does not refer merely to a contingent weakness or an exceptional deviation from normality, but to a constitutive and inescapable dimension of the human condition. Whether approached from an anthropological, social, or legal perspective, vulnerability denotes the fundamental exposure of every person to dependence, risk, and harm. It is not an accidental attribute affecting only certain categories of individuals, but a structural feature of human existence as such (Maragno, 2015, p. 13; Pastore, 2021, p. 2). As vulnerability scholarship has consistently emphasised, to be human is already to be vulnerable, and even autonomy does not eliminate this condition but rather presupposes it (Fineman, 2008, p. 1; Re, 2018, p. 22). In this sense, vulnerability is universal in principle, though it is always experienced in situated and differentiated ways.

At the same time, vulnerability is neither static nor homogeneous. It manifests differently depending on relational, economic, bodily, and environmental contexts. Each individual occupies a specific position within networks of dependence and asymmetry, and such positions continuously shift over time (Ferrarese, 2010, p. 21; Pigliaru, 2014, p. 231). A person may be permanently vulnerable, as in the case of congenital disability, or situationally vulnerable, as occurs in contractual or market relations in which informational or structural imbalances place one party at a disadvantage (Femia, 2021, p. 499). Vulnerability, therefore, does not simply describe personal fragility but rather the relational and contextual conditions within which agency must operate (Stanzione, 2004, p. 391; Perlingieri, 1990, p. 80).

Disaster studies further clarify this structural dimension. Hazards become disasters not solely because of natural forces, but because existing vulnerabilities transform exposure into loss (Chambers, 1989, p. 1; Watts & Bohle, 1993, p. 46). Catastrophic events such as earthquakes, floods, or wildfires simultaneously produce physical displacement, material deprivation, and psychological destabilisation, leaving individuals without shelter, security, or certainty about the future (Chen, 2011, p. 1121). Empirical research shows that losing one's home disrupts not only economic stability but also identity, belonging, and social well-being (Nettleton, 2001, p. 82; Rollero & De Piccoli, 2010, p. 233). Vulnerability thus appears as the starting condition of post-disaster life: a state of exposure in which ordinary guarantees collapse, and individuals must act despite the absence of stability. It is precisely at this juncture that vulnerability reveals its theoretical relevance for the present inquiry. If vulnerability were absent, courage would be unnecessary and resilience would not exist.

## 3. THE DIFFERENT FACETS OF RESILIENCE

Resilience is commonly portrayed as an implicit defining trait of peoples and communities (Bonanno, 2004, p. 102). In more analytical terms, it is understood as the capacity to adapt to stressors or sudden changes in the surrounding environment to which individuals are involuntarily exposed (Norris *et al.*, 2008, p. 129): an environmental crisis or another critical event that generates a condition of imbalance which, thanks to the resilient predisposition of a given social group, is progressively absorbed and/or reconfigured into a new state of normality (Adger, 2000, pp. 349–350). Resilience, especially in relation to the interaction between human beings and catastrophic events, may therefore be defined as "the capacity of a system, community, or society exposed to hazards to resist, absorb, adapt, transform, and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential structures and functions by means of risk management" (UNDRR, 2017).

Rarely, however, does the literature, particularly legal scholarship, focus on what precedes resilient behaviour, namely the individual decision, sometimes intrinsic to the very condition of human exposure to danger, to confront a crisis rather than withdraw from it (Beck, 1992, p. 36). In fact, before any adaptive process can emerge, the resilient subject must decide whether to assume the risk of uncertainty, remain exposed to vulnerability, and therefore actively engage in the construction of a new equilibrium between the individual and the surrounding territory compromised by a shock or crisis event (Folke, 2016, p. 5). Resilience thus reflects the capacity of individuals, communities, societies, and cultures to live with and develop through change in constantly evolving contexts. It entails cultivating the ability to sustain development

in the face of change, whether gradual or sudden, expected or unexpected (Folke, 2006, p. 253). It may therefore be understood as the capacity of a system to absorb disturbances and reorganise while undergoing change in such a way as to retain essentially the same functions, structures and feedback (and thus its identity) or, in other words, the capacity to change in order to preserve continuity. Resilience is consequently a dynamic concept concerned with how systems persist through change and evolve in response to change (Walker *et al*., 2004, p. 5).

A further methodological premise is required before turning to the legal dimensions of the present analysis. This paper adopts the concept of resilience from the perspective of "ecological resilience", which differs from its common understanding in psychological terms. In the latter case, the traumatic event that triggers resilient behaviour is typically extraordinary and unlikely to recur. By contrast, ecological resilience presupposes an awareness that every ecosystem is constantly evolving and that continuous adaptation to new equilibria is intrinsic to terrestrial habitats. This implies an ongoing transformation of both ecological systems and their adaptive capacities (Davoudi, 2012, pp. 300–301). This approach is also reflected in contemporary understandings of disasters. Indeed, disasters are no longer regarded as extreme events produced solely by natural forces, but rather as manifestations of unresolved problems of development (Yodmani, 2001, p. 1). Consequently, communities must constantly maintain the capacity to anticipate, mitigate, and respond to risks. This calls for an inter-sectoral and preventive risk-management model, often described as a holistic approach, rather than a purely top-down or reactive one (Allegranti, 2026, p. 77).

## 4. "COURAGE" AS THE NORMATIVE PRECONDITION OF RESILIENCE

From this perspective, resilience cannot be conceived as an autonomous or spontaneous quality; rather, it should be understood as the outcome – arising from a condition of vulnerability (Blaikie *et al*., 1994, p. 11) – of a prior act, namely an "act of 'courage'".

In efficiency-driven societies, however, such preliminary acts tend to be progressively eroded, with the consequence that resilience itself becomes fragile and increasingly difficult to sustain (Walker & Salt, 2006, p. 7). Resilience may therefore be described as a condition that follows from an antecedent, while an "act of 'courage'" constitutes its causal and generative foundation (Nussbaum, 2011, p. 33).

Rather than being understood as the mere absence of fear, "courage" is increasingly described as a deliberate orientation toward situations perceived as threatening, undertaken in order to pursue goals regarded as meaningful or valuable (Woodard, 2004, p. 28). From this standpoint, "courage(ous)" conduct does not imply emotional invulnerability; instead, it involves sustaining commitment and action despite apprehension, persisting in one's efforts, and resisting withdrawal when confronted with risk (Woodard & Pury, 2007, p. 76; Norton & Weiss, 2009, p. 214). Consistently, "courage" has also been interpreted as a behavioural tendency to approach, rather than avoid, fear-arousing circumstances (Rachman, 2004, p. 165). At the same time, "courage" cannot be reduced to a unitary psychological trait but should instead be conceived as a multidimensional phenomenon. Some accounts distinguish among physical, moral, and psychological forms of "courage" (Putman, 1997, p. 9; Putman, 2010), while others identify recurrent structural features of "courage(ous)" action, such as intentionality, the presence of fear, the pursuit of a worthy aim, and the perception of personal risk (Rate *et al*., 2007, p. 95). Moreover, the capacity to act "courage(ously)" appears to depend not only on situational

pressures but also on personal and relational resources (hope, optimism, social support, and value commitments) that enable individuals to endure uncertainty without relinquishing agency (Hannah, Sweeney & Lester, 2010, p. 560).

Accordingly, at a more foundational level, an "act of 'courage'" may be defined as an action performed by a subject who, in the context of the present analysis, inhabits a territory continuously exposed to natural hazards and to the instability and uncertainty that such exposure inevitably entails. In these circumstances, the individual acts from what may be described as a "state of 'courage'", understood not as a permanent or dispositional trait, but rather as a situated and time-bound condition that emerges contingently in response to concrete circumstances and characterises the individual at a specific moment in life. This state does not imply the absence of vulnerability; rather, it denotes a form of inner strength that enables the individual to acknowledge vulnerability, confront risk consciously, and nonetheless preserve responsibility, accountability, and meaningful agency in the face of potential harm.

In this sense, "courage" functions as a mental power that enables one to overcome anxiety without surrendering one's capacity for imputability, even under conditions of profound instability (Tillich, 1952, p. 35). Such a capacity sustains what Ricoeur characterises as the self as an agent capable of acting, committing, and remaining answerable for one's deeds over time (Ricoeur, 1992, pp. 118–119). At the same time, this understanding resonates with the capabilities approach, according to which genuine freedom consists in the substantive possibility of choosing a course of action (or even deliberate inaction) within situations of vulnerability or crisis (Nussbaum, 2011, p. 25). In this perspective, "courage" emerges as the precondition that renders resilience intelligible: it is the moment in which agency is reaffirmed in the face of fear, allowing the subject not merely to withstand disruption but to continue acting meaningfully within it.

The definition outlined above will be progressively specified in juridical terms in the sections that follow, where "courage" will be analysed as a condition capable of acquiring legal relevance within the framework of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. From this perspective, "courage" becomes visible as a practical form of agency operating within law, shaping how individuals respond to vulnerability, risk, and institutional constraints.

## 5. AN ACT OF "COURAGE": *BUDAYEVA AND OTHERS V. RUSSIA*

To better understand the scope of this contribution, it is necessary to analyse a specific case: *Budayeva and Others v. Russia* (ECtHR, no. 15339/02, judgment of 20 March 2008). The judgment in *Budayeva and Others v. Russia* represents a landmark in the jurisprudence of the European Court of Human Rights concerning State responsibility for foreseeable natural hazards. Although formally grounded in Article 2 of the European Convention on Human Rights, the decision has broader normative implications, as it reveals how the protection of life intersects with dignity,[1] attachment to territory, and individual agency in post-catastrophic contexts.

The applicants lived in the town of Tyrnauz, an area exposed to recurrent mudslides. On 19 July 2000, a massive mudflow destroyed residential buildings and infrastructure, causing

[1] This aspect will be addressed in paragraph 9 of this paper.

the death of several inhabitants, including the husband of the first applicant, Mrs Budayeva (ECtHR, *Budayeva and Others v. Russia*, 2008, §§ 39–44). Prior to the disaster, the authorities were aware of the environmental risk and of the potential consequences for the population, as demonstrated by technical assessments and previous incidents (ECtHR, *Budayeva and Others v. Russia*, § 14). In the days immediately preceding the fatal event, smaller mudflows had already occurred, signalling an escalation of danger; nevertheless, no evacuation measures were adopted, and the population was not adequately informed (ECtHR, *Budayeva and Others v. Russia*, §§ 116).

The catastrophe therefore unfolded in a context of known vulnerability rather than an unforeseeable natural event. Its impact was not limited to the immediate loss of life and material destruction but profoundly altered the applicants' living conditions and their relationship with the surrounding territory. After the disaster, the applicants faced prolonged uncertainty, lack of institutional support, and the absence of effective accountability mechanisms, circumstances that extended the effects of the catastrophe well beyond the moment of its occurrence.[2]

Concretely, the applicants alleged a violation of Article 2 of the ECHR, arguing that the authorities had failed to comply with their positive obligations to protect life despite the foreseeability of the risk (ECtHR, *Budayeva and Others v. Russia*, §116). The Court upheld this claim, reiterating that Article 2 not only prohibits the intentional and unlawful taking of life by State agents, but also requires States to take reasonable measures to safeguard individuals when authorities know or ought to know of the existence of a real and immediate risk (ECtHR, *Budayeva and Others v. Russia*, §§ 128–129). The Court found a substantive violation of Article 2, holding that the disaster could not be characterised as unavoidable. Rather, it resulted from the failure to ensure effective monitoring systems, warning mechanisms, and evacuation procedures (ECtHR, *Budayeva and Others v. Russia*, §153). In addition, a procedural violation of Article 2 was established, as the domestic investigations were ineffective, excessively lengthy, and incapable of identifying responsibility at the appropriate institutional level (ECtHR, *Budayeva and Others v. Russia*, §§ 158–165).[3]

---

[2] In fact, as noted by the applicants, they were forced to change their place of residence and, like Mrs Budayeva, to rely on accommodation provided by the State that was unsuitable to ensure dignified living conditions. In particular, the property in which Mrs Budayeva lived had not been renovated since 1952 and, beyond the purely material hardships, the psychological harm suffered significantly affected the applicants' living conditions and health (ECtHR, *Budayeva and Others v. Russia*, § 52; §§ 59–62; §§ 67–70; § 79; § 88).

[3] Although the Court did not explicitly examine Article 8 of the ECHR (the right to respect for private and family life) or Article 1 of Protocol No. 1 (the protection of property), the factual circumstances of the case undeniably affected interests traditionally safeguarded by these provisions. The destruction of homes and the severe disruption of private and family life directly interfered with the applicants' relationship with their living environment. Environmental harm of this nature has long been recognised in legal scholarship and in the Court's case law as capable of engaging Article 8 and property protection, even where the Court elects to resolve a case primarily under Article 2. At the same time, it is important to note that, in the present case, the Court emphasised the wide margin of appreciation enjoyed by the State in addressing the consequences of natural disasters, which by their nature lie beyond direct human control (ECtHR, *Budayeva and Others v. Russia*, § 174). In this context, the Court recalled that the right to the peaceful enjoyment of possessions is not absolute (ECtHR, Budayeva and Others v. Russia, § 175) and that the level and form of protection afforded must remain within reasonable limits. Accordingly, compensation for property loss is not required to correspond to full market value but may instead be determined through alternative measures adopted by the authorities, taking into account the complexity of the situation, the number of affected owners, and the economic, social, and humanitarian considerations inherent in disaster relief policies (ECtHR, *Budayeva and Others v. Russia*, § 182).

## 6. WHY AN ACT OF "COURAGE"

If resilience is conceived as the capacity of a system or community to absorb disturbance, reorganise, and persist through change, it should not be interpreted as a merely technical or adaptive mechanism. In the event of a disaster, before any recovery or reorganisation becomes possible, a more elementary decision must occur: the person's decision not to leave their homeland. Resilience, in this sense, begins with a form of permanence. It is rooted in the "act of courage" to remain physically and existentially present in a place that has become dangerous thus prolonging the condition of vulnerability.

The events in Tyrnauz reveal precisely this antecedent moment. Even before the mudslide, the territory was no longer a neutral background to life but a compromised and unstable environment, marked by loss, fear, and institutional failure, conditions that were highlighted by the disastrous events of July 2000 and had come to represent the norm rather than the exception. Under such circumstances, departure would have appeared rational. To abandon the area, to seek safety elsewhere, or to sever one's ties with a place associated with trauma: these reactions would have been understandable forms of self-preservation. Yet the applicants chose otherwise and fought both for the right to return home and to address the lack of protection for their lives offered by the State.[4]

This choice should not be trivialised. Remaining in one's homeland (or fighting for this possibility) after a catastrophe is not inertia or passivity; it is an active stance. It implies accepting continued exposure to risk and vulnerability while refusing definitive displacement. "Courage" here consists in resisting the silent pressure to lose one's bond with a sacred place called "home," as "home connotes a sense of being and belonging in the world" (Zeffert, 2024, p. 134).

Such persistence reflects the bond that links a person to a specific territory. A place is never merely geographical. Rather, it is the sedimentation of memories, relationships, habits, and expectations; it constitutes the material condition of identity itself (Allegranti, 2022, p. 349). To be forced away from it is not simply to change residence, but to suffer disproportionately as a result of the loss of the object, namely, the "home" (Radin, 1982, p. 959). Fundamental rights, including the protection afforded by Article 2 of the Convention, encompass the protection of the person and thus implicitly include the safeguarding of this territorial rootedness (*Budayeva and Others v. Russia*, 2008, § 133).

From this perspective, the applicants' decision to fight in court in order to remain in Tyrnauz acquires normative significance. Their presence affirms that the disaster has not dissolved their claim to inhabit that space nor their bond with the surrounding environment. In this regard, they implicitly assert that the land is not expendable and that belonging cannot be treated as a disposable good, because the notion of "home" encompasses "our needs to belong and to have meaningful control over our social environment" (Jenkins & Brownlee, 2022, p. 443). "Courage" thus appears as a form of resistance to displacement (the situation of vulnerability).

Resilience, consequently, emerges only afterwards. Reconstruction, adaptation, and legal protection presuppose that someone has first chosen not to abandon the ground on which these processes must take place. Without this preliminary gesture, there would be nothing to rebuild, and no community left to protect. The true origin of resilience is therefore not recovery but the "act of courage" to resist to the critical and vulnerable condition or, in the present case, to remain in one's own homeland.

[4] See footnote 4.

Budayeva ultimately shows that "courage" may take its simplest and most radical form in remaining. To stay where one's life has taken shape, even when that place becomes vulnerable, is already an "act of courage". It is the quiet but decisive affirmation that one's homeland, whether inherited or chosen, is not to be relinquished. In this sense, "courage" is the refusal of uprooting, and resilience is the consequent life that grows from that refusal.

## 7. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS DIMENSION ON NATURAL HAZARDS

To understand why *Budayeva and Others v. Russia* is relevant and why the "act of courage" performed by the applicants acquires legal significance, it is first necessary to circumscribe the legal treatment of natural disasters within the framework of the European Convention on Human Rights as it emerges from the case law of the Strasbourg Court. The usefulness of this analysis lies in situating the case within a broader overview of how the Convention protects what may be described as a "right to remain", also from the perspective of environmental protection and of the bond connecting individuals to the territory affected by a natural catastrophe, while simultaneously clarifying the limits within which individual "courage" may be exercised.

Although the Convention does not expressly recognise a substantive right to a clean or healthy environment (ECtHR, *Hatton and Others v. United Kingdom* [GC], 2003, § 96; ECtHR, *Kyrtatos v. Greece*, 2003, § 52), environmental degradation, natural hazards and climate change increasingly fall within its scope insofar as they directly interfere with the applicant and their right to life, the right to respect for private and family life and home, and the peaceful enjoyment of possessions (ECtHR, *Guerra and Others v. Italy*, 1998, § 57; ECtHR, *Ivan Atanasov v. Bulgaria*, 2010, § 66; ECtHR, *Thibaut v. France (dec.)*, 2022, § 38). Consistently with its teleological interpretation, the Court has repeatedly stated that the object and purpose of the Convention is to render its guarantees practical and effective rather than theoretical or illusory (ECtHR, *McCann and Others v. the United Kingdom*, 1995, § 146), and this approach has enabled environmental risks to be addressed through existing Convention provisions.

Under Article 2, which provides that "everyone's right to life shall be protected by law," States are subject not only to the negative obligation to refrain from the intentional and unlawful taking of life but also to positive obligations requiring them to take appropriate steps to safeguard the lives of those within their jurisdiction. These duties translate into the obligation to establish an adequate legislative and administrative framework, to adopt preventive operational measures capable of averting foreseeable risks to life, and to conduct effective investigations into alleged breaches of the substantive limb of Article 2 (ECtHR, *Armani Da Silva v. the United Kingdom*, 2016, §§ 229–231).

The Court has clarified that cases concerning lethal accidents and environmental or industrial disasters may fall within the scope of Article 2 where life-threatening risks are involved (ECtHR, *Kolyadenko and Others v. Russia*, 2012, § 155). A substantial body of case law has developed in relation to natural hazards and environmental catastrophes, confirming that States must act with due diligence in organising prevention and emergency response systems (ECtHR, *Öneryıldız v. Turkey*, 2004, § 89; ECtHR, *Budayeva and Others v. Russia*, 2008, § 132; ECtHR, *Kolyadenko and Others v. Russia*, 2012, § 159; ECtHR, *Brincat and Others v. Malta*, 2014, § 101).

In this context, particular importance is attached to preventive measures aimed at avoiding loss of life and to the right to information, which requires authorities to establish appropriate procedures, take into account the technical aspects of dangerous activities, and identify possible shortcomings attributable to those responsible. At the same time, the Court recognises that States retain a margin of appreciation in selecting the measures to be adopted, provided that these are neither disproportionate nor impossible to implement and that operational burdens are not imposed without regard to available priorities and resources.

In assessing compliance with these positive obligations, the Court examines the domestic legality of the authorities' acts or omissions, the quality of the decision-making process, the existence of adequate investigations and studies, and the overall complexity of the issue. The obligation is therefore one of means rather than of result: States must deploy the capacities at their disposal to mitigate risks and minimise the effects of catastrophic or violent events, rather than guarantee absolute safety (ECtHR, *Erdal Muhammet Arslan and Others v. Türkiye*, 2023, § 128). More recently, climate change has also been analysed through the lens of Article 2, with the Court holding that complaints may arise where State action or inaction exposes individuals to an imminent and real risk to life, understood as a serious, genuine and sufficiently ascertainable threat characterised by material and temporal proximity to the harm alleged (ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 2024, § 513).

Parallel considerations apply under Article 8, which protects the right to respect for private and family life and the home. The Court has consistently stated that Article 8 applies to environmental issues only where there is a direct and immediate link between the environmental interference and the applicant's private life or home, since the Convention does not guarantee a general right to a clean and quiet environment nor is it specifically designed to provide general environmental protection as such (ECtHR, *Hatton and Others v. the United Kingdom*, 2003, § 96). Accordingly, a mere general deterioration of the environment is insufficient to trigger the State responsibility; what is required is a concrete and personal impact on the applicant (ECtHR, *Powell and Rayner v. the United Kingdom*, § 40). Nevertheless, where such a link exists, Article 8 entails positive obligations on the authorities to ensure effective protection against serious environmental nuisances and, in the contemporary context, against the adverse effects of climate change on individuals' life, health, well-being and quality of life. In particular, the Court has clarified that States are under a duty to secure such protection and that, while they retain discretion in the choice of the measures to be adopted, they do not enjoy a margin of appreciation as to whether to act at all to combat climate change; they must take serious and effective measures capable of addressing the risks posed by rising temperatures and their potentially irreversible consequences for Convention rights, including the rights to private and family life and to the home (ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 2024, §§ 518 and 541–548). At the same time, interferences with Article 8 rights may themselves be justified where environmental protection serves the rights and interests of the broader community, since safeguarding the environment may constitute a legitimate aim capable of justifying restrictions on individual interests (ECtHR, *Kaminskas v. Lithuania*, 2020, §§ 56–66).

Environmental concerns may affect the protection of property under Article 1 of Protocol No. 1. The right to the peaceful enjoyment of possessions may be restricted on environmental or safety grounds when justified by the public interest, including in situations involving natural hazards (ECtHR, *Aktürk and Others v. Türkiye*, 2023, §§ 70–73, 76). The Court has also

recognised that environmental considerations have gained increasing weight within the law of ownership (ECtHR, *Hamer v. Belgium*, 2007, § 79).

Finally, from a procedural perspective, in the context of individual applications as set forth in Article 34 of the Convention, the mere fact that a resident manages to escape from a harmful situation or lives in an accommodation provided by State does not automatically entail the loss of victim status; to deprive an applicant of such status there must be both adequate compensation and acknowledgment by the authorities of the violation of the applicant's rights (ECtHR, *López Ostra v. Spain*, § 42; ECtHR, *Öneryıldız v. Turkey*, 2004, § 137).[5]

## 8. FRAMING "COURAGE" IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND IN THE JUDGMENTS OF THE EUROPE AN COURT ON HUMAN RIGHTS

Within this framework, the protection afforded by the Convention to individuals exposed to natural hazards reveals the gradual emergence of what may be described as a home–territory bond, situated at the intersection of the right to life under Article 2, the right to respect for private and family life and the home under Article 8, and the protection of property under Article 1 of Protocol No. 1. These guarantees do not merely secure biological survival or abstract proprietary interests but protect the concrete possibility for individuals to remain embedded in the places where their personal, social, and family identities are formed (Allegranti, 2025, p. 10). The Strasbourg Court has consistently clarified that environmental and disaster-related risks become legally relevant where they threaten life (ECtHR, *Öneryıldız v. Turkey*, 2004, § 89; ECtHR, *Budayeva and Others v. Russia*, 2008, § 132), directly interfere with the enjoyment of private and family life and the home (ECtHR, *Hatton and Others v. the United Kingdom*, 2003, § 96; ECtHR, *Fadeyeva v. Russia*, 2005, § 68), or justify limitations on property rights in the general interest (ECtHR, *Hamer v. Belgium*, 2007, § 79). Read together, these strands of jurisprudence demonstrate that, although the Convention does not enshrine an autonomous environmental right, it nonetheless constructs a dense and increasingly articulated network of positive obligations requiring States to regulate risks, prevent foreseeable harm, inform the population, and mitigate the consequences of disasters. In doing so, the Strasbourg Court's jurisprudence progressively departs from a purely reactive model of responsibility centred on ex post compensation and moves toward a preventive and anticipatory logic of governance.

This evolution closely mirrors developments in contemporary disaster law theory, where legal intervention is no longer conceived primarily as a response to damage already sustained, but rather as a framework for risk assessment, preparedness, and vulnerability reduction. As several scholars have observed, disasters are not purely "natural" phenomena (Farber, 2007, p. 297) but are shaped by legal, political and (natural) infrastructural vulnerabilities that transform hazards into human tragedies (Verchick, 2012, p. 26). Responsibility therefore lies not only in post-event remedies but in the design of regulatory systems capable of protecting life and ensuring social continuity in light of the more frequent interaction between humans and nature in the evolution of the evolving climate crisis (Stephens, 2009, p. 23). Insights

[5] Particular attention must be paid to the procedural dimension. Although the State frequently offers provisional shelter in the immediate aftermath of a disaster, what is fundamental is the effective possibility for individuals to return to their homes and remain in their homeland. Emergency housing solutions, given their temporary and exceptional character, cannot in themselves meet this need.

from disaster sociology reinforce this understanding by demonstrating that hazards become disasters only through the interaction between environmental exposure and pre-existing conditions of fragility – such as poverty, marginalisation, weak governance, or inadequate planning – so that law and public policy play a constitutive role long before the catastrophic event occurs (Tierney, 2014, p. 5). From this perspective, institutional choices shape both the likelihood of harm and the capacity of communities to cope with it.

Climate change further accentuates this shift, as slow-onset degradation, cumulative risks, and progressive loss of habitability challenge traditional distinctions between ordinary environmental nuisances and acute emergencies, demanding instead continuous regulatory engagement and long-term governance strategies. Within this broader legal landscape, State's positive obligations under the Convention correspond to what disaster risk-reduction scholarship describes as resilience-oriented governance, namely the systemic effort to minimise exposure, reduce vulnerability, and strengthen collective preparedness (Clark *et al*., 2025, p. 4). Consequently, the Convention's guarantees operate not only as safeguards against isolated violations, but as structural tools aimed at preserving the material and social conditions that enable individuals and communities to maintain their homes, relationships, and territorial ties over time, situating individual experiences of risk within a broader framework of institutional responsibility and preventive protection (Allegranti, 2025, p. 1).

## 9. RIGHT TO DIGNITY AS A SELF EXPRESSION OF "COURAGE"

Against this background, although neither the Convention nor the Court explicitly refers to "courage" as an autonomous concepts (nor it should), "courage" may nonetheless be understood as implicitly protected insofar as it constitutes an expression of free will and, as such, of human dignity. The individual, in relation to the social fabric of which they form part, enjoys the internationally recognised right to determine the course of their life and place of belonging (Dussias, 2004, p. 92); in doing so, individuals may decide to remain, rebuild, or resist evacuation despite danger, thereby performing acts that can be described as "courage(ous)", because they affirm both individuality and dignity as members of a community[6] (Allegranti, 2025, p. 11). This understanding resonates with broader developments in European Human Rights Law, where dignity, used together with identity, is increasingly treated as the normative foundation of personal autonomy and effective self-determination rather than merely as a rhetorical principle (Barak, 2015, pp. 44–45) and as the essence of the fundamental rights enshrined within the entire framework of the European Union (Lenaerts, 2019, p. 779). Within both the Convention system and European Union Law, the protection of life, home, and property is thus interpreted as safeguarding the material conditions that allow individuals to exercise meaningful agency. In this respect, it seems that the Charter of Fundamental Rights of the European Union (Article 1, Article 7 and Article 17) read in combination with the European Convention on Human Rights (Preamble, Article 2, Article 8 and Article 1 Protocol 1)[7] link

[6] One of the few limits to this protection lies in the need to balance it against the rights of others. As recognised in ECtHR, Kaminskas v. Lithuania, 2020, §§ 56–66, interferences may be justified where they pursue environmental protection, since the Convention also acknowledges the environmental interests of other members of the community, particularly in the context of Article 8.

[7] Although the European Convention on Human Rights does not expressly enshrine "dignity" as an autonomous right or principle within its operative provisions, its Preamble explicitly refers to the Universal Declaration of Human Rights of 1948. The latter, both in its Preamble and in Article 1, proclaims human

dignity, private life and property within the general EU legal framework that conceives ownership not as an absolute power but as a right embedded in social responsibility and subject to limitations justified by environmental protection, public safety and solidarity (Treaty of Lisbon, Article 1a).

A similar relational understanding emerges from contemporary private law theory. Property scholarship has progressively moved away from an atomistic conception of ownership towards models that emphasise its social function and its role in structuring relations of stability, expectation and belonging within communities. Ownership, in this sense, allocates not only control but also risks and responsibilities, and the protection of the home therefore preserves identity, continuity and participation in social life (Allegranti, 2023, p. 450). From this perspective, the loss of one's home as a consequence of environmental hazards represents not simply patrimonial damage but the non-patrimonial damage derived from the disruption of the relational and existential foundations of personhood (Ruggeri, 2023, p. 75). The increasing acceptance, in both constitutional and private law, of limitations on property justified by ecological and collective interests confirms that ownership is inherently contextual and socially conditioned, yet it simultaneously reinforces the obligation of public authorities to prevent avoidable displacement and to secure the basic conditions for habitation (Allegranti, 2025, p. 13).

Consequently, resilience cannot be reduced to individual fortitude; it must be structurally supported through regulatory design, preparedness and collective protection. Within this broader governance framework, individual responses acquire meaning precisely because they unfold against a background of institutional duties intended to minimise the need for personal sacrifice.

"Courage" thus becomes the subjective manifestation of dignity, while resilience emerges as the collective outcome of many such acts. Yet, the legal order cannot depend on heroism: rights must be guaranteed through prevention, regulation and risk reduction so that remaining in one's homeland does not require extraordinary bravery. Ultimately, the protection of life, family life and property in situations of disasters serves the deeper purpose of safeguarding the individual's capacity for autonomous and meaningful action within a community. It is within this protected sphere of dignity that "acts of courage" acquire normative and legal significance, transforming what might appear as private moral strength into a conduct that the legal order indirectly recognises and sustains.

## 10. "COURAGE" IN THE WAKE OF VULNERABILITY AND RESILIENCE: CONCLUSION

It has been argued that resilience, when observed through the lens of law rather than psychology alone, cannot be understood as an autonomous or spontaneous quality of individuals or communities. Instead, resilience emerges as the outcome of prior "acts of courage"

dignity as the foundational value of the entire human social order, affirming that all human beings are born free and equal in dignity and rights. In accordance with the principle of systemic integration, as reflected in Article 31 of the Vienna Convention on the Law of Treaties, the Convention must be interpreted in harmony with other relevant rules of international law applicable between the parties. From this perspective, the reference to the Universal Declaration is not merely rhetorical but normative in significance. Consequently, although the Convention does not specifically mention dignity, that value is implicitly incorporated into its interpretative framework and operates as a foundational principle informing the scope and application of the rights it protects, thus also including "dignity" as one of its core values and principles.

performed under conditions of vulnerability. This analysis has shown that disasters are not merely natural events but legally mediated situations in which exposure, risk, and displacement are shaped by institutional design and regulatory choices. Within this framework, the European Convention on Human Rights' positive obligations – requiring prevention, preparedness, risk regulation, and the protection of life, home, and property – function not simply as remedial safeguards but as structural conditions that make collective resilience possible.

Against this background, the article has advanced its central claim: before resilience can materialise at the systemic or community level, there must first be an individual decision to act. Remaining, rebuilding, or resisting withdrawal in the face of danger presupposes an exercise of "courage" that cannot be reduced to adaptation alone. This antecedent moment has been conceptualised here as an "act of courage" and "courage" has been defined not as fearlessness but as the deliberate choice to pursue meaningful action despite vulnerability. Resilience, accordingly, should be understood as the cumulative and social consequence of many such acts.

From a juridical perspective, this reframing clarifies why "courage" acquires legal relevance even without explicit recognition. The protection of life, family life, home, and property under the Convention ultimately safeguards the material and relational conditions that enable individuals to exercise "courage" and remain embedded within their communities. Human rights law does not require individuals to act heroically; rather, it aims to ensure that they are not placed in situations where the protection of their fundamental rights depends on acts of personal sacrifice or exceptional courage. In this sense, vulnerability and the "act of courage" constitute the starting points of legal protection. It is the recognition of exposure and the protection of the "act of courage" that activate the normative framework; resilience emerges in the wake of such protection as its structural and collective outcome.

## LIST OF REFERENCES


Adger, W. N. 2000. Social and ecological resilience: Are they related? *Progress in Human Geography*, 24(3), pp. 347–364. https://doi.org/10.1191/030913200701540465

Allegranti, I. 2022. The right to remain and produce in your homeland. *Athens Journal of Law*, 8(3), pp. 349–360. https://doi.org/10.30958/ajl.8-3-7

Allegranti, I. 2023. L'attualità di un caso 20 anni dopo (nota a Durini c. Italia, Corte EDU, 12 gennaio 1994 n. 19217/91). *Rivista Giuridica dell'Edilizia*, 6, pp. 449–469.

Allegranti, I. 2025. Il binomio comunità-territorio nel prisma dello sviluppo sostenibile umano. *Federalismi*, 16, pp. 1–14. Available at: https://www.federalismi.it/nv14/articolo-documento.cfm?artid=52268

Allegranti, I. 2026. *Zur Regelung von Stromabrechnungen in Notfallzeiten: Am Beispiel der deutschen und italienischen Gesetzgebung.* Berlin: Logos.

Barak, A. 2015. *Human dignity: The constitutional value and the constitutional right.* Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781316106327

Beck, U. 1992. *Risk society: Towards a new modernity.* London: Sage Publications.

Blaikie, P. *et al*. 1994. *At risk: Natural hazards, people's vulnerability and disasters.* London: Routledge.

Bonanno, G. A. 2004. Loss, trauma, and human resilience: Have we underestimated the human capacity to thrive after extremely aversive events? *American Psychologist*, 59(1), pp. 20–28. https://doi.org/10.1037/0003-066X.59.1.20

Chambers, R. 1989. Editorial Introduction: Vulnerability, Coping and Policy. *IDS Bulletin*, 20(4), pp. 1–7. https://doi.org/10.1111/j.1759-5436.1989.mp20002001.x
Chen, J. 2011. Modern disaster theory: Evaluating disaster law as a portfolio of legal rules. *Emory International Law Review*, 25(3), pp. 1121–1168.
Clark, N. *et al*. 2025. Strengthening *all-of-society* approaches for disaster resilient societies through competency building: A European research agenda. *International Journal of Disaster Risk Reduction*, 121, 105345. https://doi.org/10.1016/j.ijdrr.2025.105345
Davoudi, S. 2012. Resilience: A bridging concept or a dead end? *Planning Theory & Practice*, 13(2), pp. 299–307. https://doi.org/10.1080/14649357.2012.677124
Dussias, A.M. 2004. Does the right of self-determination include a right to homeland? *Syracuse Journal of International Law and Commerce*, 31(1), pp. 83–93.
Farber, D. A. 2007. Disaster law and inequality. *Minnesota Journal of Law & Inequality*, 25(2), pp. 297–321.
Femia, P. 2021. Discriminazione (divieto di). In: D'Amico, G. (ed.) *Enciclopedia del diritto.* Milano: Giuffrè Francis Lefebvre, pp. 499–528.
Ferrarese, E. 2010. Vivere alla mercé. *La società degli individui*, 38, pp. 21–35. https://doi.org/10.3280/LAS2010-038003
Fineman, M. A. 2008. The vulnerable subject: Anchoring equality in the human condition. *Yale Journal of Law and Feminism*, 20(1), pp. 1–23.
Folke, C. 2006. Resilience: The emergence of a perspective for social-ecological systems analyses. *Global Environmental Change*, 16(3), pp. 253–267. https://doi.org/10.1016/j.gloenvcha.2006.04.002
Folke, C. 2016. Resilience (republished). *Ecology and Society*, 21(4). https://doi.org/10.5751/ES-09088-210444
Hannah, S. T., Sweeney, P. J. & Lester, P. B. 2010. The courageous mind-set: A dynamic personality system approach to courage. In: Pury, C. L. S. & Lopez, S. J. (eds.), *The psychology of courage: Modern research on an ancient virtue.* Washington, DC: American Psychological Association, pp. 125–148. https://doi.org/10.1037/12168-007
Jenkins, D. & Brownlee, K. 2022. What a home does. *Law and Philosophy*, 41, pp. 441–468. https://doi.org/10.1007/s10982-021-09414-w
Lenaerts, K. 2019. Limits on limitations: The essence of fundamental rights in the EU. *German Law Journal*, 20(6), pp. 779–793. https://doi.org/10.1017/glj.2019.62
Maragno, G. 2015. Alle origini (terminologiche) della vulnerabilità: vulnerabilis, vulnus, vulnerare. In: Giolo, O. & Pastore, B. (eds.), *Vulnerabilità: Analisi multidisciplinare di un concetto.* Roma: Carocci, pp. 13–35.
Nettleton, S. 2001. Losing a home through mortgage repossession: The views of children. *Children & Society*, 15(2), pp. 82–94. https://doi.org/10.1002/chi.608
Norris, F. H. *et al*. 2008. Community resilience as a metaphor, theory, set of capacities, and strategy for disaster readiness. *American Journal of Community Psychology*, 41(1–2), pp. 127–150. https://doi.org/10.1007/s10464-007-9156-6
Norton, P. J. & Weiss, B. J. 2009. The role of courage on behavioral approach in a fear-eliciting situation: A proof-of-concept pilot study. *Journal of Anxiety Disorders*, 23(2), pp. 212–217. https://doi.org/10.1016/j.janxdis.2008.07.002
Nussbaum, M. C. 2011. *Creating capabilities: The human development approach.* Cambridge: Harvard University Press. https://doi.org/10.4159/harvard.9780674061200

Pastore, B. 2021. *Semantica della vulnerabilità.* Torino: Giappichelli.
Perlingieri, P. 1990. Diritti della persona anziana, diritto civile e stato sociale. *Rassegna di diritto civile*, pp. 80–95.
Pigliaru, A. 2014. L'esperienza di vulnerabilità: Prime ricognizioni. *Giornale critico di storia delle idee*, 12(13), pp. 231–233.
Putman, D. A. 1997. Psychological courage. *Philosophy, Psychiatry & Psychology*, 4(1), pp. 1–11. https://doi.org/10.1353/ppp.1997.0008
Putman, D. A. 2010. Philosophical roots of the concept of courage. In: Pury, C. L. S. & Lopez, S. J. (eds.), *The psychology of courage: Modern research on an ancient virtue.* Washington, DC: American Psychological Association, pp. 9–22. https://doi.org/10.1037/12168-001
Rachman, S. J. 2004. Fear and courage: A psychological perspective. *Social Research: An International Quarterly*, 71(1), pp. 149–176. https://doi.org/10.1353/sor.2004.0060
Radin, M. J. 1982. Property and Personhood. *Stanford Law Review*, 34(5), pp. 957–1015. https://doi.org/10.2307/1228541
Rate, C. R. *et al.* 2007. Implicit theories of courage. *Journal of Positive Psychology*, 2, pp. 80–98. https://doi.org/10.1080/17439760701228755
Re, L. 2018. Introduzione. La vulnerabilità fra etica, politica e diritto. In: Bernardini, M. G. *et al.* (eds.), *Vulnerabilità: etica, politica, diritto*. Roma: IF Press, pp. 7–22.
Ricoeur, P. 1992. *Oneself as another.* Chicago: The University of Chicago Press.
Rollero, C. & De Piccoli, N. 2010. Does place attachment affect social wellbeing? *European Review of Applied Psychology*, 60(4), pp. 233–238. https://doi.org/10.1016/j.erap.2010.05.001
Ruggeri, L. 2023. L'interesse ad abitare nei luoghi colpiti dal sisma: tra individuo e comunità. In: Genova, A. *et al.* (eds.), *Salute e Benessere nel post-sisma. One welfare nelle Marche per una programmazione integrata*. Milano: Franco Angeli, pp. 73–88.
Stanzione, P. 2004. Dal soggetto alle persone. In: Scalisi, V. (ed.), *Scienze e insegnamento del diritto civile in Italia*. Milano: Giuffrè, pp. 391–406.
Stephens, T. 2009. *International Courts and Environmental Protection*. New York: Cambridge University Press.
Tierney, K. 2014 *The Social Roots of Risk: Producing Disasters, Promoting Resilience.* Redwood City: Stanford University Press.
Tillich, P. 1952. *The courage to be.* New Haven: Yale University Press.
United Nations Office for Disaster Risk Reduction (UNDRR). 2017. *The Sendai Framework Terminology on Disaster Risk Reduction: Resilience.* Available at: https://www.undrr.org/terminology/resilience (25. 1. 2026).
Verchick, R. R. M. 2012. Disaster Justice: The Geography of Human Capability. *Duke Environmental Law & Policy Forum*, 23(1), pp. 23–71.
Walker, B. & Salt, D. 2006. *Resilience thinking: Sustaining ecosystems and people in a changing world.* Washington, DC: Island Press.
Walker, B. *et al.* 2004. Resilience, adaptability and transformability in social-ecological systems. *Ecology and Society*, 9(2). https://doi.org/10.5751/ES-00650-090205
Watts, M. & Bohle, H. G. 1993. The space of vulnerability: The causal structure of hunger and famine. *Progress in Human Geography*, 17(1), pp. 46–67. https://doi.org/10.1177/030913259301700103
Woodard, C. R. 2004. Hardiness and the concept of courage. *Consulting Psychology Journal: Practice and Research*, 56(3), pp. 173–185. https://doi.org/10.1037/1065-9293.56.3.173

Woodard, C. R. & Pury, C. L. 2007. The construct of courage: Categorization and measurement. *Consulting Psychology Journal: Practice and Research*, 59(2), pp. 135–147. https://doi.org/10.1037/1065-9293.59.2.135

Yodmani, S. 2001. Disaster risk management and vulnerability reduction: Protecting the poor. Paper presented at the Asia and Pacific Forum on Poverty, Asian Development Bank, pp. 1–32. Available at: http://58.137.55.82/infores/adpc-documents/PovertyPaper.pdf

Zeffert, H. 2024. Nowhere home. *London Review of International Law*, 12(2), pp. 131–153. https://doi.org/10.1093/lril/lrae013

***Case law***

ECtHR, *Aktürk and Others v. Türkiye*, 2023, Application no. 53600/20

ECtHR, *Armani Da Silva v. the United Kingdom*, 2016, Application no. 5878/08

ECtHR, *Brincat and Others v. Malta*, 2014, Application no. 32457/12

ECtHR, *Budayeva and Others v. Russia*, 2008, Application no. 15339/02

ECtHR, *Erdal Muhammet Arslan and Others v. Türkiye*, 2023, Application no. 53600/20

ECtHR, *Fadeyeva v. Russia*, 2005, Application no. 55723/00

ECtHR, *Guerra and Others v. Italy*, 1998, Application no. 14967/89

ECtHR, *Hamer v. Belgium*, 2007, Application no. 21861/03

ECtHR, *Hatton and Others v. the United Kingdom* [GC], 2003, Application no. 36022/97

ECtHR, *Ivan Atanasov v. Bulgaria*, 2010, Application no. 12852/03

ECtHR, *Kaminskas v. Lithuania*, 2020, Application no. 14097/16

ECtHR, *Kolyadenko and Others v. Russia*, 2012, Application no. 17423/10

ECtHR, *Kyrtatos v. Greece*, 2003, Application no. 41666/98

ECtHR, *López Ostra v. Spain*, 1994, Application no. 16798/90

ECtHR, *McCann and Others v. the United Kingdom*, 1995, Application no. 18984/91

ECtHR, *Öneryıldız v. Turkey*, 2004, Application no. 48939/99

ECtHR, *Powell and Rayner v. the United Kingdom*, 1990, Application no. 9310/81

ECtHR, *Thibaut v. France (dec.)*, 2022, Application no. 48125/20

ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 2024, Application no. 53600/20

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

004.8:34(082)

342.7(082)

34(4-6EU)(082)

**INTERNATIONAL Conference Regional Law Review (7 ; 2026 ; Beograd)**

[Seventh International Conference] Regional Law Review, Belgrade, 2026 : annual edition / [editor in chief Mario Reljanović]. - Belgrade : Institute of Comparative Law ; Pécs : University, Faculty of Law, 2026 (Beograd : Birograf comp). - [12], 358 str. ; 24 cm. - (Collection Regional law review, ISSN 2812-698X)

"In front of you is the seventh volume of RLR collection of papers..." --> foreword. - Tiraž 100. - Str. [7]: Foreword / editor. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad.

ISBN 978-86-82582-50-2

1. Reljanović, Mario, 1977- [уредник] [аутор додатног текста]
а) Право -- Европска унија -- Зборници б) Људска права -- Зборници в) Вештачка интелигенција -- Правни аспект -- Зборници

COBISS.SR-ID 197485321