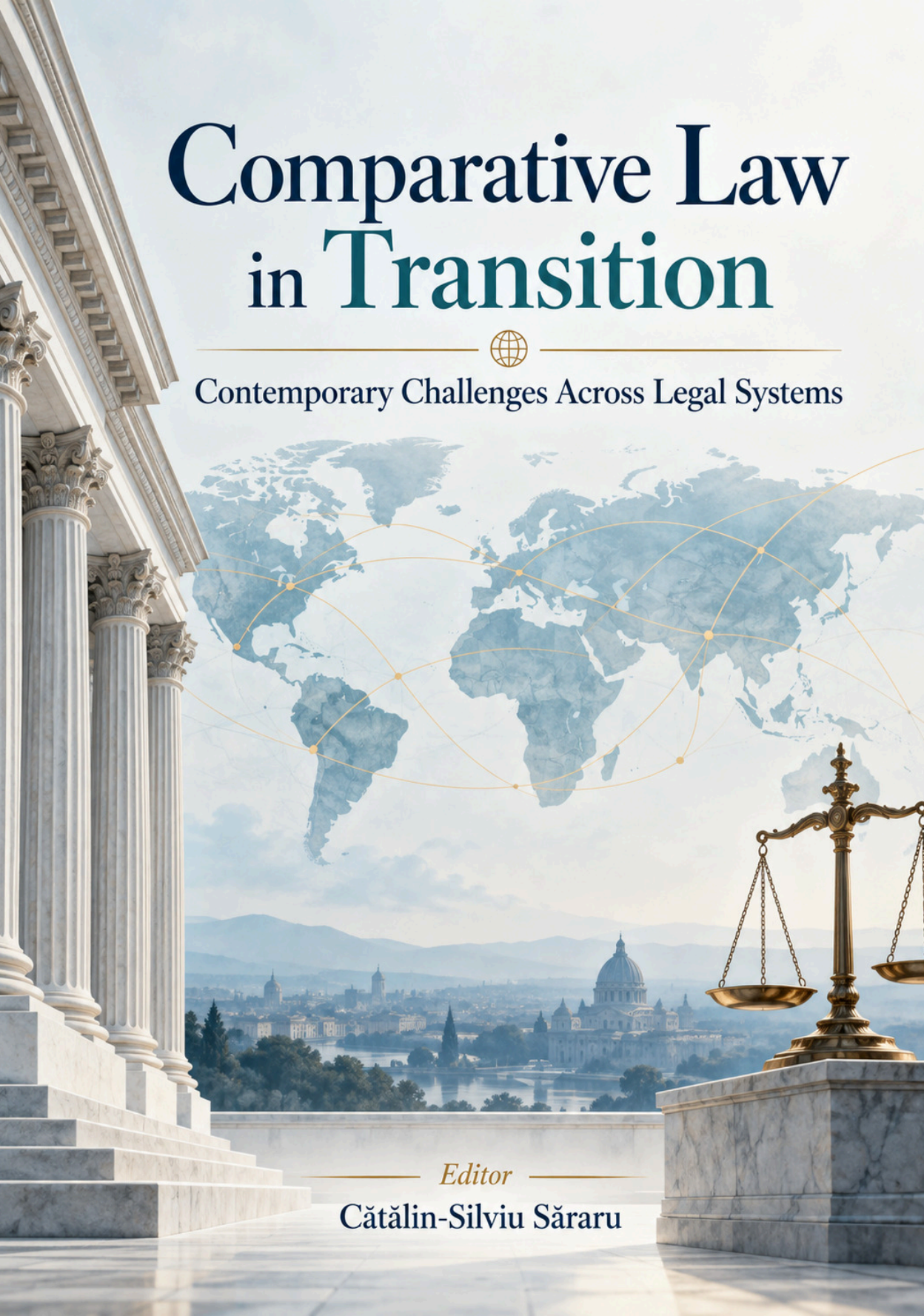
Comparative Law in Transition

Contemporary Challenges Across Legal Systems



Editor

Cătălin-Silviu Săraru

Comparative Law in Transition: Contemporary Challenges Across Legal Systems

EDITOR



Cătălin-Silviu SĂRARU

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Prizes

He is the laureate of the following prizes:

- "Tudor Popescu" Prize awarded by the Romanian Academy of Scientists in 2024 for the work *Tratat de contencios administrativ* (*Treatise on administrative litigation*), Universul Juridic Publishing House, Bucharest 2022.
- "Anibal Teodorescu" Prize awarded by the Union of Jurists of Romania in 2014 for the work „Cartea de contracte administrative – modele, comentarii, explicații" („The Book of administrative contracts - models, comments, explanations"), C.H. Beck Publishing House, Bucharest, 2013.

EDITOR

Cătălin-Silviu Săraru

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Preface

Editor
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This volume brings together the scholarly papers presented at the 1st International Workshop of Doctoral Students in Law, "Contemporary Challenges in Comparative Law," held online via Zoom on April 24, 2026, and hosted from Bucharest, Romania. The workshop was jointly organized by *the Doctoral School of Law, Faculty of Law, Bucharest University of Economic Studies, Romania*; *the European Law and Governance School, Italy*; and *Charles University, Czech Republic*, which was ranked in the 401–500 band in the 2025 Times Higher Education World University Rankings.

More information about the conference can be found on the official website: https://doctorat.ase.ro/1st-international-workshop-of-doctoral-students-in-law.

The scientific studies included in this volume are grouped into five parts:

- *Constitutionalism, Human Rights and the International Legal Order.* The papers in this chapter address the following topics: constitutional transplant or constitutional irritant?; legislative and jurisprudential asymmetries in corporate political expression: a comparative study of American and European law; the new Magna Carta: the crystallization of digital rights from a global perspective; convergence or conflict? comparing the procedural standards of refugee protection under the European Court of Human Rights, European Union Law, and the 1951 Geneva Convention; the right to water: comparative constitutional trends in Latin America; minority rights under international legal standards and Vietnamese law: recommendations for improvement in Vietnam; from domestic legal systems to international law: the evolution of the abuse of rights doctrine; clashing first-order jus cogens norms: how the ICJ and the ILC draft conclusions have left unanswered the hierarchy between conflicting jus cogens norms.
- *Criminal Justice, Punishment and Corporate Criminal Liability*. This chapter includes papers on: criminal liability of legal persons in comparative law: conditions of liability in Romanian law and major European legal systems; organizational fault as an autonomous foundation of corporate criminal liability: a comparative inquiry into the US, German and

EU models; reasonable doubt as a standard of legitimacy: a comparative analysis of judicial reasoning in criminal proceedings; the supervisory judge for the penitentiary system: a comparative analysis of Romania and Italy; conceptualizing the abstract victim: the national financial system as the primary injured interest in offences of fraud against the financial interests of the European Union.

- *Digital Law, Artificial Intelligence and Data Governance*. The papers in this chapter address the following topics: the impact of artificial intelligence on sales contracts; to train or to protect? copyright challenges in AI model training; a historical-comparative approach to risk-based liability: reinterpreting Roman *actiones adiecticiae* within the framework of the EU AI Act; smart contract recognition in international trade: comparing the CISG and CUECIC frameworks.
- *Competition, Taxation, Trade and Transnational Dispute Resolution*. The papers in this chapter refer to: the need to sanction anti-competitive practices in the European Union; algorithmic hub-and-spoke arrangements and the attribution of anticompetitive liability: a comparative analysis of EU and US law; the limits of the VAT neutrality principle: the distribution of tax risk between the state and the taxpayer in the case law of the CJEU; global steel overcapacity and possible options to safeguard the South African steel industry; the law applicable to the substantive validity of arbitration agreements: a comparative approach under the UNCITRAL model law and the New York Convention; the enforcement of sports arbitration awards: a comparative approach.
- *Comparative Private Law, Labour Regulation and Legal Traditions*. The papers in this chapter address the following topics: a comparison of selected principles of private law in the countries of the former Czechoslovakia; the indeterminate legal concept of good morals from the perspective of Greek legal theory and case law; subsequent impossibility and hardship in contract law: a comparative study of Hungarian and Slovak law; general aspects concerning the regulation of construction works contracts in comparative law; post-mortem dignity: normative constraints on perpetual repose in Romania, France and Germany; C50 recruiting of Indigenous Workers Convention, 1936: the Construction of gendered working subjects in Uganda employment law; green jobs and labour regulation: a comparative analysis of sustainable employment contracts in France and Germany.

All full papers submitted for inclusion in the workshop proceedings are subject to *double-blind peer review* by at least two independent reviewers. Acceptance for presentation at the Workshop does not automatically guarantee publication. The final revised manuscript must satisfy the reviewers' recommendations and the editorial requirements of the proceedings. The peer-review proce-

dure and publication ethics are described here: https://doctorat.ase.ro/1st-international-workshop-of-doctoral-students-in-law/

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical sciences, who are interested in recent developments and prospects for development in the field of comparative law.

We thank all contributors and partners and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in comparative law.

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CONSTITUTIONALISM, HUMAN RIGHTS AND THE INTERNATIONAL LEGAL ORDER

Constitutional Transplant or Constitutional Irritant?

PhD Student **Georgian Ionuț STAN**[1]

Abstract

This article examines the phenomenon of constitutional borrowing through the theoretical perspectives of Alan Watson's legal transplant theory and Gunther Teubner's concept of the legal irritant. It seeks to determine whether constitutional norms and institutions transferred from one legal system to another retain their original meaning and functions or whether they are fundamentally transformed by the political, social, cultural, and religious characteristics of the receiving system. The research employs logical, comparative, historical, and analytical methods and focuses on two case studies: the Islamic Republic of Pakistan and the Republic of Lebanon. In the Pakistani context, the analysis addresses the transplantation of the federal model, the continued influence of British colonial constitutional rules, and the use of the doctrine of necessity and Kelsenian theory to legitimize exceptional political changes and military interventions. In the Lebanese case, the study considers the borrowing of the Western model of the unitary parliamentary state and its subsequent transformation under the influence of confessional fragmentation and institutionalized power-sharing. The findings indicate that Watson's theory convincingly explains the mechanisms, frequency, and motivations underlying constitutional borrowing, particularly the role of legal and political elites and the authority of prestigious foreign models. Teubner's theory, however, more adequately explains the consequences of such transfers, as borrowed norms interact with local realities and acquire new meanings and functions. The article concludes that legal transplants and legal irritants should not be regarded as mutually exclusive concepts, but as complementary analytical perspectives describing different stages of the same process of constitutional circulation, adaptation, and transformation.

Keywords: *transplant, irritant, constitutional, borrowing.*

1. Introduction

Without claiming to formulate immutable truths, it is necessary to acknowledge that the analysis of contemporary legal phenomena must be conducted within the context of a body of knowledge in constant evolution, characterized by revisions, reinterpretations, and conceptual adjustments. Both in the field of the exact sciences and in that of the social sciences, conclusions inherently remain open to reevaluation, depending on the development of research and the transformations of the reality under study.

Within this framework, it can be observed that contemporary societies display a significant degree of convergence with regard to forms of politico-legal

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organization. The state has established itself as the dominant model for structuring political power at the global level, representing the primary framework within which authority is exercised, social organization is achieved, and legal relations between authorities, as well as between these and the individual, are regulated[2]. Although the concrete configurations of states differ considerably, their fundamental elements, from a sociological perspective — population, territory, and institutionalized political power — are found, in various forms, throughout the contemporary world.

Correlatively, constitutionalism has become an essential benchmark of modern political legitimacy. Even though not all states possess a constitution in the formal sense, codified in a single document, all operate on the basis of fundamental norms that regulate the organization of power, the distribution of competences, and the relations both among state authorities and between them and individuals[3].

In this context, the circulation of constitutional law institutions among states becomes a central phenomenon of politico-legal modernity. Constitutions, forms of state, mechanisms of separation of powers, or jurisprudential doctrines have often been adopted, adapted, and reinterpreted from one legal space to another. It is precisely the manner in which these borrowings occur and the effects they generate that constitute the focus of the present analysis.

In our view, however, this relative institutional uniformity should not be interpreted as the result of a unified and conscious choice of all humanity, nor as the expression of the simple reproduction of a single original model. More rigorously, it reflects the interaction of two complementary processes: on the one hand, functional necessity, which leads different societies to adopt comparable solutions to similar problems, and on the other hand, the historical diffusion of politico-legal institutions and ideas, carried out through mechanisms such as mutual influence between states, the circulation of normative models, the colonial experience, or constitutional transplants.

It must be emphasized that the similarities between contemporary constitutional systems should not necessarily be understood as the result of mechanical copying, but rather as expressions of processes of reception, selection, and, at times, adaptation. Institutions are not adopted identically; they are reinterpreted according to the historical, social, and cultural specificity of each state. This observation applies both at the level of the general structures of the state and in the case of particular institutions, such as federal organization, which, although inspired by pre-existing models, often takes on varied forms of implementation depending on the context in which it is introduced.

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[2] Gheorghe Iancu, *Drept constituțional și instituții politice*, 2nd ed. (Bucharest: C.H. Beck, 2011), 377–84.

[3] Dan Claudiu Dănișor, *Drept constituțional și instituții politice. Vol. 1, Teoria generală. Tratat* (Bucharest: C.H. Beck, 2007), 135–49; Ștefan Deaconu, *Drept constituțional*, 5th ed. (Bucharest: C.H. Beck, 2022), 28.

Therefore, the analysis of institutional patterns common to contemporary states requires a nuanced approach that goes beyond simplistic explanations based on the idea of a single original model or of absolute uniformity. It entails recognizing the complex character of politico-legal evolution, marked both by convergence and diversity, by influence and adaptation, by regularity and particularism. This perspective constitutes the starting point of the present analysis.

2. Alan Watson's Theory

The work of Alan Watson is of considerable scope and cannot be fully analyzed or critically assessed in just a few lines. Therefore, from the outset, we specify that we will limit ourselves to a review of the most important ideas presented in his work.

The core of Watson's theory lies in the idea that the development of law occurs primarily through the borrowing of rules and institutions from other legal systems, rather than through an exclusively internal generation determined by the particular culture of each society[4].

Watson views legal transplantation as a principal and historical driver of legal change. He argues that the transplant—or, in other words, the borrowing — of a legal rule from one country to another is not an exception, but by far the most common way in which laws develop[5]. He provides detailed historical evidence, ranging from ancient Middle Eastern laws such as the Code of Hammurabi and the Law of the Twelve Tables, to the spread of Roman law and English law, namely Common Law, in order to demonstrate that almost all legal systems are the result of massive borrowings[6].

Watson also addresses the issue of the autonomy of law and the decisive role of legal elites. Thus, unlike many theorists, he argues that law operates with an extremely high degree of autonomy from the social, economic, or political factors of a given country[7]. The remarkable success of the transfer of legal institutions between societies with completely different socio-economic structures is explained by the highly developed autonomy of the modern legal profession[8]. Legal change is driven by legal elites — lawyers, judges, and legislators — who, out of convenience or a desire to find quick solutions to legal problems, prefer to look for already formulated rules in other legal systems rather than create new ones from scratch[9].

It is important to note that Watson rejects culturalist categories and the

[4] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, GA: University of Georgia Press, 1993), 21.
[5] Watson, *Legal Transplants*, 21.
[6] Watson, *Legal Transplants*, 21–27.
[7] Watson, *Legal Transplants*, 15.
[8] Watson, *Legal Transplants*, 15.
[9] Watson, *Legal Transplants*, 114, 119.

notion of the "Spirit of the People." In other words, he directly challenges the theories of Montesquieu and Friedrich Carl von Savigny, who argued that laws are inseparably linked to the culture, customs, climate, and unique spirit of a nation[10].

From his perspective, laws do not govern only a single people, and legal rules are often transferred with great ease between societies at completely different levels of material and cultural development, as illustrated by the adoption of European codes in Asian or African countries[11]. The transplantation of legal rules is a "socially easy" phenomenon, and resistance to it is rare[12].

Very often, a rule or a legal system is borrowed not because it is inherently superior from a logical or practical standpoint, but due to the authority, prestige, or reputation of the donor system — such as the admiration for Roman law, the Napoleonic Code, or the English system[13]. Moreover, Watson emphasizes that practical accessibility is often the main criterion: a system tends to borrow from a source simply because the law is written in a familiar language, is available in libraries, and is easy to find and copy[14].

Gunther Teubner observes that Watson's analogies are of a medical and biological nature[15]. A successful legal transplant is like a transplanted human organ: it grows within its new body and becomes an integral part of it[16]. Once adopted, the rule adapts to the new reality and continues its own development within the host system, independently of its evolution in the system of origin[17].

A fascinating aspect of Watson's theory is his claim that foreign laws can be highly influential even when they are completely misunderstood by their recipients[18]. A misinterpretation of a foreign rule does not prevent it from becoming a strong and functional norm within the new system[19].

Watson argues that the discipline of comparative law should not be limited to static comparative analyses[20]. Its role should be the dynamic study of historical relationships between systems, tracing how norms have been transmitted from one society to another and understanding the complex process of adaptation of legal borrowings[21].

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[10] Watson, *Legal Transplants*, 14, 21.
[11] Watson, *Legal Transplants*, 95, 98–99.
[12] Watson, *Legal Transplants*, 95.
[13] Watson, *Legal Transplants*, 99.
[14] Watson, *Legal Transplants*, 113.
[15] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies," *The Modern Law Review* 61, no. 1 (1998): 11–32, https://doi.org/10.1111/1468-2230.00125.
[16] Watson, *Legal Transplants*, 21.
[17] Watson, *Legal Transplants*, 21.
[18] Watson, *Legal Transplants*, 99.
[19] Watson, *Legal Transplants*, 99.
[20] Watson, *Legal Transplants*, 9.
[21] Watson, *Legal Transplants*, 9.

It must be acknowledged that Watson's theory, although open to criticism, represents a turning point in the history of law—moving away from older conceptions that viewed law primarily as an internal product of a society, and instead recognizing its autonomous character. In the constitutional sphere, his conception, while also subject to critique, likewise finds validation, which we will demonstrate in what follows.

3. Gunther Teubner's Theory

Gunther Teubner proposes a critique of the theory of Alan Watson, replacing the metaphor of "transplant" with an approach grounded in the sociology of systems and the idea of coevolution[22].

While Watson convincingly explains the frequency and mechanisms of legal borrowing, his theory leaves less room for analyzing how the borrowed rule is transformed by the social context into which it is introduced. It is precisely this point that Teubner radicalizes, shifting the focus from the mere circulation of norms to the disruptive effects of their transfer.

Concretely, in Teubner's view, it is more accurate to speak of a "legal irritant" rather than a "transplant." He rejects Watson's simple dichotomy of integration versus rejection, arguing that the medical metaphor of "transplant" is misleading[23]. In his view, a foreign institution imposed on a domestic culture does not function like an organ that preserves its original role within a new organism. Instead, it acts as a "fundamental irritation."[24] This "legal irritant" is an external disturbance that triggers a series of new and unexpected evolutionary events, forcing the host system to reconstruct the foreign element from the ground up in order to assign it its own meaning[25]. Thus, the rule is not domesticated, but radically transformed[26].

Teubner also criticizes Watson's view that legal evolution is isolated from social, economic, or political factors and dictated exclusively by the legal elite[27]. Although he accepts that law no longer simply reflects the "totality" of a nation's spirit, he rejects Watson's claim that law is decoupled from social realities[28]. Modern law is deeply interconnected with society, but these connections are no longer comprehensive; rather, they are highly selective, linking law only to specific social fragments or discourses[29].

To overcome the tension between the autonomy thesis and the cultural-context perspective, Teubner argues that law is connected to certain social sectors

[22] Teubner, "Legal Irritants," 11–32.
[23] Teubner, "Legal Irritants," 11–32.
[24] Teubner, "Legal Irritants," 11–32.
[25] Teubner, "Legal Irritants," 11–32.
[26] Teubner, "Legal Irritants," 11–32.
[27] Teubner, "Legal Irritants," 11–32.
[28] Teubner, "Legal Irritants," 11–32.
[29] Teubner, "Legal Irritants," 11–32.

through "linkage arrangements."[30] Some areas of law exhibit a "loose coupling" with social processes, making transfer easier, while others display a "tight coupling," where legal rules are deeply intertwined with the internal logic of a specialized social domain[31]. In areas of tight coupling, resistance to the transfer of foreign rules is extremely high[32].

When a legal transfer does occur, compatibility between law and social discourse cannot simply be imported as such; instead, a "double transformation" is required[33]. The irritant triggers a process of coevolution: on the one hand, the rule is recontextualized within the network of legal distinctions of the receiving system; on the other hand, the legal impulse generates disturbances within the social system, which is itself forced to reformulate and send "irritations" back to the legal sphere[34]. This circular dynamic of reciprocal irritations fundamentally alters the identity of the rule[35].

Teubner directly challenges the "convergence thesis," which assumes that globalization and legal unification will lead to similar or equivalent socio-economic and legal systems[36]. It can be said that he demonstrates that, because a "legal irritant" interacts with deeply different economic, cultural, and productive regimes from one country to another, efforts to unify law do not result in uniformity[37]. On the contrary, paradoxically, they generate new cleavages and new divergences, as each system reconstructs the rule according to its own internal imperatives[38].

4. Islamic Republic of Pakistan Case

Before proceeding to the analysis of the case of the Islamic Republic of Pakistan, a few preliminary clarifications are necessary. It is neither the place nor the objective of the present study to examine the Pakistani constitutional regime and all its constitutional borrowings in their entirety; rather, we will limit ourselves to analyzing the borrowing of the concept of federation and the manner in which it has accommodated the social realities of the Pakistani state. We will also address the borrowing of the doctrine of necessity.

Why do we consider it relevant to focus only on the federation and the doctrine of necessity? With regard to the federation, on the one hand, an analysis of multiple borrowed concepts would affect the economy of the text, and on the other hand, we consider that federalism represents the most interesting concept

[30] Teubner, "Legal Irritants," 11–32.
[31] Teubner, "Legal Irritants," 11–32.
[32] Teubner, "Legal Irritants," 11–32.
[33] Teubner, "Legal Irritants," 11–32.
[34] Teubner, "Legal Irritants," 11–32.
[35] Teubner, "Legal Irritants," 11–32.
[36] Teubner, "Legal Irritants," 11–32.
[37] Teubner, "Legal Irritants," 11–32.
[38] Teubner, "Legal Irritants," 11–32.

to analyze, especially when viewed in relation to the phenomenon of the partition of British India and the Muslim cohesive factor, which could have led to the adoption of a unitary state instead of opting for a federation. As for the doctrine of necessity, it is particularly interesting to observe how a young state resorts to this theory in order to justify certain actions that carry a degree of controversy.

The emergence of the Islamic Republic of Pakistan was not a political accident of the twentieth century or merely a product of British "divide and rule" policy, but rather the direct and inevitable result of a colonial history in the Middle East that also manifested itself through pan-Islamic movements[39].

The starting point of modern Islamic separatism was the death of Aurangzeb in 1707 and the decline of the Mughal Empire in the face of Maratha, Jat, and Sikh forces[40]. This loss of power generated profound concern among Muslim elites[41]. The philosopher and theologian Shah Waliullah Dehlawi theorized that this decline was caused by the dilution of "pure" Islam through contact with Hindu and Sufi practices, considered heretical[42]. Dehlawi rejected the notion of a syncretic culture, arguing that Muslims should not integrate into Hindu polytheistic communities.

Syed Ahmed Khan is regarded as the true father of the Two-Nation Theory[43]. He firmly rejected representative democracy and the introduction of joint electorates, arguing that Hindus and Muslims constituted two antagonistic "nations" and "races" that could not share power, with Muslims at risk of being subordinated in a democracy dominated by the former subject class[44].

Subsequently, separatism became institutionalized, beginning with the partition of Bengal. Lord Curzon divided the province, creating "Eastern Bengal and Assam," a region with a Muslim majority[45].

As a direct consequence of the desire to protect the identity and power of the Muslim "nation," the All-India Muslim League was formed in December 1906[46]. The British, seeking a counterbalance to Hindu nationalists in Congress, accepted the demand, enshrining through the Indian Councils Act 1909 the constitutional separation of the two communities[47].

In order to secure Muslim support in the struggle against British rule, Mahatma Gandhi endorsed the Khilafat Movement, overlooking its dogmatic nature[48]. The fragile and artificial unity thus created between Hindus and Muslims

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[39] J Sai Deepak, *India, Bharat and Pakistan: The Constitutional Journey of a Sandwiched Civilisation* (New Delhi: Bloomsbury India, 2022), 7–8.
[40] Deepak, *India, Bharat and Pakistan*, 9.
[41] Deepak, *India, Bharat and Pakistan*, 9.
[42] Deepak, *India, Bharat and Pakistan*, 10–11.
[43] Deepak, *India, Bharat and Pakistan*, 56, 74.
[44] Deepak, *India, Bharat and Pakistan*, 75.
[45] Deepak, *India, Bharat and Pakistan*, 175.
[46] Deepak, *India, Bharat and Pakistan*, 137.
[47] Deepak, *India, Bharat and Pakistan*, 211.
[48] Deepak, *India, Bharat and Pakistan*, 348.

ultimately disintegrated in violence[49].

Although the history of the Indian subcontinent cannot be reduced to a few lines — even from the constitutional perspective that concerns us — it is nonetheless essential to provide a brief introduction to the Two-Nation Theory and the manner in which the confrontation between these two identities led to the partition of British India and the emergence of Pakistan.

The historical assertion of the Muslim nation in the Indian subcontinent, presented as a solid core in opposition to the Hindu nation, could have inherently led to the adoption of a unitary state. However, the colonial legacy, along with certain local social realities, led instead to the adoption of federalism as the form of state organization. This brief genealogy of the idea of Muslim separation is relevant not as an autonomous object of study, but because it explains why the constitutional choice of federalism, following the emergence of Pakistan, was by no means obvious and requires separate analysis.

The early constitutional crises of Pakistan, particularly the case of Federation of Pakistan v. Moulvi Tamizuddin Khan, provide fertile ground for observing how a legal borrowing can be explained both through the logic of transplantation described by Alan Watson and through the disruptive effects highlighted by Gunther Teubner.

The initial federal structure of Pakistan and its legal instruments constituted precisely the terrain on which this theoretical clash unfolded. At the moment of independence, Pakistan's system of self-government can be described as a direct transplant of the British colonial legal machinery. The federation functioned on the basis of inherited foreign laws, namely the Government of India Act 1935 and the Indian Independence Act 1947.

When the Governor-General of Pakistan dissolved the Constituent Assembly, its President brought a case against the Federation of Pakistan[50]. On appeal, the Federal Court invalidated the lower court's decision based on a purely British rule — namely, that the laws granting jurisdiction to the court had not received the "royal assent" of the Governor-General, a requirement inherited from the colonial period[51].

The Pakistani legal elite preferred to apply a formal rule borrowed from English law, relying strictly on authority and colonial precedent, thereby decoupling law from the real context of the newly independent state.

From Teubner's perspective, this transplant of British federal and colonial rules did not integrate smoothly into the new organism of the Pakistani state. On the contrary, it acted as a massive legal irritant.

The strict application of the foreign rule of "royal assent" did not produce

[49] Deepak, *India, Bharat and Pakistan*, 480.
[50] Constantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Athens and Thessaloniki: Sakkoulas Publications, 2015), 48.
[51] Kombos, *Doctrine of Necessity*, 50.

stability, as it did in its system of origin, but instead retroactively invalidated dozens of crucial laws adopted by the Assembly[52]. It created a legal vacuum that threatened the very existence of the federation[53].

Rather than leading to convergence with the British federal and democratic model, the colonial irritant interacted with the local reality — namely, the power struggle between an authoritarian Governor-General and a weak Assembly — triggering an internal systemic crisis.

Faced with this collapse, the Pakistani Federation was forced to "co-evolve" in an unexpected direction. In order to prevent the state from falling into an abyss, the Federal Court had to borrow another foreign concept — the doctrine of necessity — to grant the Governor-General the power to retroactively validate laws and maintain the federation[54].

Subsequently, although Pakistan's supreme courts continued to declare federalism a fundamental feature of the Constitution[55] that could not be amended, they repeatedly invoked the doctrine of necessity to validate military coups[56].

In the case of the Pakistani federation, it can be observed that the state borrowed a federal framework and formal British rules out of inertia and respect for authority. However, these rules acted as irritants which, when colliding with the local political context, generated a profound crisis. The result of this coevolution was a "mutant" federation — a state that retains the label of "federation" and employs Western legal language, but in practice operates through a succession of military dictatorships legitimized by the courts. The hoped-for convergence turned, as Teubner warned, into radical divergence.

The interaction of the Pakistani system with foreign concepts such as "necessity" and "efficacy" illustrates both the borrowing mechanism described by Watson and the socially disruptive effects theorized by Teubner.

As Watson argues, legal elites tend to seek solutions in authoritative foreign precedents rather than innovate from scratch. When confronted with unprecedented constitutional crises, judges in the Islamic Republic of Pakistan did not create new rules, but borrowed concepts from outside their system, such as the doctrine of necessity from Common Law and Roman law.

One of Watson's most striking arguments is that "foreign law can be influential even when it is completely misunderstood." The Pakistani case perfectly illustrates this. In the famous Dosso case (1958), the Supreme Court justified a coup through a profoundly distorted interpretation of the theory of Hans Kelsen[57]. The Chief Justice transformed a descriptive theory of legal science into a binding

[52] Kombos, *Doctrine of Necessity*, 50–51.
[53] Kombos, *Doctrine of Necessity*, 51.
[54] Kombos, *Doctrine of Necessity*, 53.
[55] Kombos, *Doctrine of Necessity*, 71.
[56] Kombos, *Doctrine of Necessity*, 73.
[57] Kombos, *Doctrine of Necessity*, 27–28.

normative rule legitimizing any successful revolution—an interpretation that Kelsen himself later publicly rejected as incorrect. Nevertheless, although this "transplant" was theoretically flawed, it became the foundation of Pakistan's legal order for years[58].

From Teubner's perspective, Kelsen's theory and the doctrine of necessity were not simply "transplanted" into the Pakistani system, but functioned as external legal irritants that generated major disruptions. Instead of producing convergence with Western constitutional stability, these concepts led to new divergences, transforming a functioning state "into an autocracy and, eventually… into a military dictatorship."

Teubner argues that when a rule is transferred, it undergoes a "double transformation" due to the structural coupling between law and society. In Pakistan, the concept of "state necessity" was removed from its limited original context — where it functioned as an exceptional justification for protecting the state — and was reconstructed to serve the political interests of the military and the dismantling of the constitution. The legal impulse interacted with a socio-political reality dominated by military power, creating a circular evolutionary dynamic that fundamentally altered the identity of the doctrine of necessity.

While Watson believed that law evolves largely independently of social factors, guided primarily by jurists, Teubner rejects this view — and the Pakistani reality supports his position. Although Pakistani judges employed highly sophisticated legal language and invoked a "pure" theory of law to preserve the appearance of legal autonomy, their decisions were in fact deeply shaped by socio-political pragmatism and the coercive force of those in power. When a judge acknowledges that coercive power lay with the Governor-General rather than with the Court, he implicitly recognizes the limits of legal autonomy in the face of the social forces to which it is coupled[59].

The Pakistani case demonstrates that Watson is correct regarding the mechanism of transfer: states borrow extensively from prestigious external sources (such as Kelsen or the doctrine of necessity), even when they misunderstand them, driven by elites' desire to cloak legal gaps with authoritative concepts.

At the same time, Teubner is correct regarding the effects of such transfers: these concepts do not integrate as perfectly functional organs in isolation, but become irritants that interact with the political regime and local social forces. Through this collision, an entirely new coevolutionary trajectory emerges — in Pakistan's case, the rise of an atypical system in which courts use foreign legal sophisms to legitimize recurring dictatorships, confirming the warning that "necessity can very easily become merely a mask for anarchy."

[58] Kombos, *Doctrine of Necessity*, 27–28.
[59] Kombos, *Doctrine of Necessity*, 54.

If initially "necessity" emerged to fill procedural gaps, it gradually became — together with the Kelsenian "doctrine of efficacy" — a mere theoretical umbrella for legitimizing military dictatorships, thereby undermining the rule of law and democratic order in favor of pragmatism and de facto power.

5. Lebanese Republic Case

And in the case of the Lebanese Republic, it must be clarified that, for reasons of economy of the text, we cannot analyze the entire constitutional architecture of the republic, nor can we examine a multitude of borrowed concepts or institutions. We will focus on analyzing the concept of the unitary state in relation to the fragmentation of power and in relation to the two theories, Alan Watson's theory and Gunther Teubner's theory.

From a constitutional and politico-historical perspective, the current system of the Lebanese Republic is not a recent invention, but the result of a complex evolution that gradually institutionalized confessional diversity.

The first political model of cooperation between Christians and Druze in Mount Lebanon was established in 1516 by Fakher Al-Din I of the Ma'n dynasty[60]. This incipient system was founded on two pillars, one social, based on sectarian diversity and geographic-demographic coexistence, and one political, expressed through the representation of each sect in political authority and their active participation in decision-making[61]. This regime managed to preserve social peace in Mount Lebanon for more than 300 years[62].

However, in the first half of the nineteenth century, the system collapsed because of conflicts among feudal families and the shifting demographic and power balance in favour of the Maronites[63]. This collapse led to the decline of feudal institutions, which gradually gave way to purely sectarian institutions[64].

After bloody events between Maronites and Druze, the conflict was internationalized. A committee composed of representatives of Great Britain, France, Russia, Austria, and Prussia decided upon a new organization for Lebanon[65]. On June 9, 1861, a new regulation was adopted, known as the "Basic Law," by which Lebanon became an Ottoman province with internal autonomy[66].

From a constitutional perspective, the "Basic Law" was a revolutionary act for its time because it abolished the feudal system and grounded the administration on a clear sectarian law[67].

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[60] Edgard Abawatt, *Ethnogeographical Federalism in Lebanon: A Proposal for a New Political and Constitutional System for Lebanon* (Jdeide: Baylayan Center, 2022), 27.
[61] Abawatt, *Ethnogeographical Federalism in Lebanon*, 27.
[62] Abawatt, *Ethnogeographical Federalism in Lebanon*, 27.
[63] Abawatt, *Ethnogeographical Federalism in Lebanon*, 27.
[64] Abawatt, *Ethnogeographical Federalism in Lebanon*, 28.
[65] Abawatt, *Ethnogeographical Federalism in Lebanon*, 28.
[66] Abawatt, *Ethnogeographical Federalism in Lebanon*, 28.
[67] Abawatt, *Ethnogeographical Federalism in Lebanon*, 28.

The province was governed by a Christian Catholic governor, appointed by the Sublime Porte, who had to be an Ottoman citizen, but not a Lebanese one. Public offices and administrative posts were distributed proportionally among the six main sects of Mount Lebanon[68].

Through the creation of councils that managed the affairs of the region, the first nucleus of a sectarian "federal" system was formed, recognizing the religious sects as socio-political entities with vital interests in the architecture of power[69]. The creation of these councils outlined not a federalism in the proper constitutional sense, but rather a proto-pluralist logic of distributing power among religious communities, a logic that would deeply shape the later Lebanese political architecture.

After the collapse of the Ottoman Empire, France established its mandate over the region. In 1920, the French authorities proclaimed the State of Greater Lebanon, extending the borders of the old province. This move radically altered the sectarian balance, creating a state that brought together Muslim, Christian-Maronite, and non-Maronite Christian populations[70]. Many Muslims felt forced to join an entity they perceived as Christian, and initially opposed separation from Syria[71].

In this context, in 1926 the Constitution of Lebanon was adopted, and it remains in force to this day. It was drafted and imposed by the French colonial power, without any real consultation of the Lebanese people[72]. A central constitutional element of this document was Article 95, which formalized the recognition of religious cleavages by requiring, on a transitional basis, that all confessions be represented in a balanced manner in the state administration and in the composition of the Government[73]. Likewise, under the influence of the colonial power, the office of President was reserved for the Maronites, a population that had developed an affinity for the French regime[74].

All these constitutional and pre-state mechanisms culminated in the Lebanese National Pact of 1943, a political agreement between Christian and Muslim leaders that formed the basis of independence. The Pact represented a fundamental compromise: Christians renounced Western protection and accepted the "Arab face" of Lebanon, while Muslims renounced demands for unification with Syria, accepting the Lebanese entity[75].

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[68] Abawatt, *Ethnogeographical Federalism in Lebanon*, 28.
[69] Abawatt, *Ethnogeographical Federalism in Lebanon*, 29.
[70] Georgian Ionuț Stan, "The Separation of Powers as a Unifying Factor of the Nation," *Perspectives of Law and Public Administration* 14, no. 1 (March 2025): 63–69, https://doi.org/10.62768/PLPA/2025/14/1/03.
[71] Abawatt, *Ethnogeographical Federalism in Lebanon*, 31.
[72] Stan, "Separation of Powers," 63–69.
[73] Stan, "Separation of Powers," 63–69.
[74] Stan, "Separation of Powers," 63–69.
[75] Abawatt, *Ethnogeographical Federalism in Lebanon*, 33.

This Pact took over prior demographic and constitutional realities, consecrating the distribution of the highest state offices on purely confessional grounds: the President must be a Maronite Christian, the Prime Minister a Sunni Muslim, and the Speaker of the National Assembly a Shiite Muslim.

The adoption of the model of the unitary state and of the principle of the separation of powers in the Lebanese Republic is indeed a remarkable sui generis case. Although the constitutional texts were imported from the West, the reality of their application was radically transformed in order to accommodate deep religious cleavages.

This evolution can be deciphered if we view it through the lens of the two major theories we have discussed, Alan Watson's theory of legal transplants and Gunther Teubner's theory of the legal irritant.

In accordance with Alan Watson's ideas, political and legal elites often borrow ready-made solutions from prestigious systems. The establishment of "Greater Lebanon" and the drafting of the 1926 Constitution were the direct product of French colonial power, a transplant carried out without real consultation of the Lebanese population.

The Maronite Christians, who had a historical affinity with the French regime, supported this transplant, seeing in the creation of the unitary state within the 1920 borders a national project that would guarantee them an independent presence in a region dominated by Arab Muslims. Thus, a classic Western model was borrowed: a democratic and parliamentary republic, a unitary state.

Watson argues that transplanted laws acquire a life of their own, often different from that in the system of origin. Classically, the separation of powers in the state was created in order to protect the individual from the arbitrariness of state power. In Lebanon, however, this Western principle was completely resignified: it protects not only the individual, but has become a mechanism for protecting religious communities from one another and for easing sectarian conflicts, serving as a factor of cohesion for a fragmented nation. Power is not merely separated into executive, legislative, and judicial branches, but is fractured along confessional lines.

Although Watson would explain the ease with which the 1926 Constitution was copied, Teubner helps us understand why this import did not lead to a French state in the Middle East, but rather to successive crises. According to Teubner, the imposition of a foreign rule acts as an "irritant," triggering massive disturbances.

The Western model of the unitary state presupposes a direct relationship between citizen and state. In Lebanon, however, the imposition of this model created the illusion of a "fused and homogeneous homeland." The reality was that society functioned through strongly individualized groups, and for the majority of Muslims at the time, the new unitary state was an artificial construct from which they felt alienated. The "irritant" of Western centralization forced the Lebanese social system to react.

Teubner argues that when law is tightly linked to a social reality, the transplant causes a "double transformation" of both the rule and society. In Lebanon, politics is tightly coupled with religion. The result was the National Pact of 1943 — an arrangement that profoundly modified the functioning of the written Constitution by requiring that the President be a Maronite Christian, the Prime Minister a Sunni Muslim, and the head of Parliament a Shiite Muslim. Thus, the unitary state was transformed de facto into a fragmented sectarian regime.

The importation of the Western concepts of "unitary state" and "sovereignty" did not lead to convergence with Europe. On the contrary, it generated a system in which the confessions entrenched themselves within their own state institutions. At present, the sovereignty of the Lebanese state, defined in Weberian terms by the monopoly of force, is strongly contested[76]. Actors such as Hezbollah not only participate in this sectarian state system, but also retain their own army and parallel external relations, which turns Lebanon into a unitary state only in name, its sovereignty being fragmented and shared.

The borrowing of the model of the unitary state in Lebanon validates the complementarity of the two theories. As Watson shows, the elite formally transplanted the architecture of a modern Western state for reasons of prestige and authority.

Yet, as Teubner predicted, this model acted as an irritant, being unable to erase deep cultural or demographic differences. In order to survive, the host organism reconstructed this unitary state in a sui generis manner, applying a "separation of powers" horizontally and vertically, not only institutionally, but also confessionally. Although the 1926 Constitution (and the later Taif Agreement) theoretically aimed at a secular, non-confessional horizon, the coevolutionary dynamic, in the Teubnerian sense, anchored religious belonging even more deeply at the heart of the state. The Lebanese system thus became a perfect example of the way in which a "transplant" that is textually identical ultimately ends in a radical "divergence" in practice.

6. Conclusion

The analysis of the two case studies demonstrates that Alan Watson's theory of legal transplants and Gunther Teubner's theory of legal irritants should not be regarded as mutually exclusive explanations of constitutional borrowing. Rather, they operate at different, but complementary, levels of analysis. Watson convincingly explains why legal systems borrow constitutional norms, doctrines, and institutional models from other jurisdictions. His theory highlights the decisive role played by political and legal elites, the prestige attributed to certain foreign legal systems, and the practical tendency to adopt solutions that are

[76] Georgian Ionuț Stan, "Does Hezbollah Remain a Competitor for Sovereignty within the Lebanese Republic?," *Review of Law and Social Studies* 2, no. 2 (December 2025): 260–69, https://lssreview.adjuris.ro/articole/an2v2/6.pdf.

already available instead of creating entirely new ones. Teubner's approach, however, offers a more persuasive explanation of what occurs after the transfer has taken place. A borrowed constitutional norm does not remain unchanged, but is reconstructed through its interaction with the political, social, cultural, and religious characteristics of the receiving system.

The constitutional evolution of Pakistan illustrates this distinction particularly clearly. The federal structure, the colonial constitutional rules, the doctrine of necessity, and the Kelsenian doctrine of efficacy were borrowed from authoritative external sources. Their reception confirms Watson's observation that legal elites frequently rely on prestigious foreign concepts, even when those concepts are imperfectly understood or removed from their original theoretical context. Nevertheless, their subsequent development supports Teubner's argument. Rather than contributing to the consolidation of a stable democratic and federal order, these borrowed doctrines interacted with local political conflicts, the weakness of representative institutions, and the recurrent influence of military power. As a result, concepts initially invoked to preserve constitutional continuity were gradually transformed into instruments capable of legitimizing exceptional governmental measures and military interventions.

The Lebanese case reveals a comparable process of transformation. The constitutional model of the unitary parliamentary state was introduced under strong French influence and formally reproduced institutions characteristic of Western constitutionalism. However, the imported model could not operate independently of the confessional structure of Lebanese society. The separation of powers and the organization of public authority were reinterpreted in order to accommodate the distribution of political offices among religious communities. Consequently, the unitary state was not rejected, but reconstructed in a distinctive form in which political power, institutional representation, and even the practical exercise of sovereignty became fragmented along confessional lines. The Lebanese experience therefore confirms that the formal adoption of an external constitutional model does not necessarily produce substantive convergence with the donor system.

Both case studies show that constitutional borrowing is neither a process of mechanical reproduction nor one of complete rejection. The transferred institution may preserve its name, terminology, and formal structure while acquiring substantially different functions in the receiving legal order. Constitutional norms therefore have no entirely predetermined effects. Their practical meaning depends on the institutional environment, the structure of political power, the conduct of legal elites, and the social conflicts with which they interact.

From this perspective, the distinction between "transplant" and "irritant" may be understood as describing two successive stages of the same phenomenon. The concept of transplantation explains the circulation and formal reception of constitutional models, while the concept of irritation explains their adaptation, re-

signification, and sometimes radical transformation. A comprehensive study of constitutional borrowing must consequently examine both the origin of the imported norm and the evolutionary trajectory it follows after its incorporation into the host system.

The broader conclusion is that constitutional similarity at the textual level should not be confused with institutional or political similarity in practice. Comparative constitutional analysis must therefore move beyond the identification of common provisions and examine the concrete effects produced by those provisions within different historical and social contexts. The complementarity between Watson and Teubner provides a useful framework for this purpose, since it allows constitutional borrowing to be understood simultaneously as a mechanism of legal circulation and as a source of institutional innovation, divergence, and unforeseen constitutional consequences.

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Legislative and Jurisprudential Asymmetries in Corporate Political Expression: A Comparative Study of American and European Law

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Abstract

This paper examines the constitutional foundations of corporate political expression in the United States and Europe, identifying the structural asymmetries that produce divergent regulatory outcomes across the two jurisdictions. Drawing on a qualitative doctrinal analysis of the First Amendment, Article 10 ECHR, and Article 11 of the EU Charter, alongside a quantitative review of case-law from the US Supreme Court, the ECtHR, and the CJEU, the paper maps four core points of divergence: the identification of the primary democratic threat, the role of content neutrality, the treatment of economic power asymmetry, and the preferred judicial methodology. The findings demonstrate that American jurisprudence, organised around speaker neutrality and scrutiny-based review, broadly insulates corporate expression from regulation, while the European proportionality framework openly weighs expressive freedom against pluralism, electoral fairness, and competing public interests. These foundational differences extend beyond speech doctrine, conditioning the regulatory latitude available in adjacent domains, including consumer protection, competition law, and strategic litigation. The paper concludes that the divergence between the two systems reflects competing constitutional visions of democratic legitimacy, and that this fault line will remain consequential as corporate communicative power continues to expand.

Keywords: *corporate rights, freedom of expression, corporate speech, political expression.*

1. Introduction

The question of corporate personhood sits at the intersection of legal doctrine, political philosophy, and regulatory theory. Debates over the nature and scope of rights to be recognised in favour of corporations are rarely neutral: support for corporate fundamental rights tends to be framed as a pro-corporation stance, while opposition is cast as a call for greater accountability and constraint. Yet these binary positions obscure the deeper complexity of the issue. Corporate personhood is neither a straightforward extension of natural personhood nor a purely instrumental legal fiction, it is a dual construct, simultaneously facilitative and regulatory in character.

This dual character took shape between the nineteenth and twentieth centuries, as rapid commercial expansion forced legal systems to develop

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mechanisms to address perceived corporate abuses, for example, in antitrust law, consumer protection, and labour regulation. During this period, German legal scholarship was grounding theories of legal personhood in Kantian notions[2] of freedom and autonomy as the foundation of any new, 'formally equal' legal system.[3] The tension between enabling corporate activity and constraining its excesses has never been fully resolved, and it is precisely this unresolved tension that animates contemporary debates over corporate expressive rights. At the heart of these debates lies the question of corporate moral agency, namely, whether corporations, whose primary purpose is profit maximisation,[4] can be regarded as moral subjects capable of bearing constitutional rights in a manner analogous to natural persons. Scholarly efforts to conceptualize "the firm" and its role within the legal system can be traced back at least to the 19th century.[5] During this period, German legal scholars began debating whether a broadly defined legal entity (or juristic person) should be regarded as a "real person" or merely a "fiction".[6] This debate, which gained momentum toward the end of the nineteenth century and into the early twentieth century, centred primarily on two competing theories and their variations: the "fiction theory," rooted in Roman law, and the "real entity theory," which emerged from Germanic legal traditions.

Today, one can observe a trichotomy of perspectives on the moral agency of corporations, which is still debated in the international community.[7] The *artificial entity theory*, where it is argued that a corporation exists only at the will of its founders, complying with legal impositions for incorporation,[8] because it is a

[2] Immanuel Kant, *Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, 2nd ed., trans. John Ladd (Indianapolis: Hackett Publishing, 1999), xvii, https://hackettpublishing.com/ political-theory/metaphysical-elements-of-justice.

[3] Visa A. J. Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019), 25, https://global.oup.com/academic/product/a-theory-of-legal-personhood-9780198844037.

[4] *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668, 684 (1919), quoted in Ryne T. Duffy, "Corporate Rights and Moral Theory: The Need for a Coherent Theoretical Justification of Corporate Rights," *Washington University Jurisprudence Review* 12, no. 2 (2020): 267–94, https://openscholarship.wustl.edu/law_jurisprudence/vol12/iss2/7/.

[5] Arthur W. Machen Jr., "Corporate Personality," *Harvard Law Review* 24, no. 4 (1911): 253, 255, https://doi.org/10.2307/1324056.

[6] Rolf H. Weber, *Juristische Personen* (Basel and Frankfurt am Main: Helbing & Lichtenhahn, 1998), 39, cited in Martin Petrin, "Reconceptualizing the Theory of the Firm—From Nature to Function," *Penn State Law Review* 118 (2013): 1–53, https://insight.dickinsonlaw.psu.edu/pslr/vol118/iss1/1/.

[7] Ronit Donyets-Kedar, "Challenging Corporate Personhood Theory: Reclaiming the Public," *Law & Ethics of Human Rights* 11, no. 1 (2017): 61–88, https://doi.org/10.1515/lehr-2017-0006.

[8] Carliss N. Chatman, "The Corporate Personhood Two-Step," *Nevada Law Journal* 18 (2018): 811–62, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992275.

creature of the state,[9] the *real entity theory*, where it is argued that once a corporation is formed it possesses individual rights and obligations,[10] and the *aggregate theory* or the 'contracts model',[11] referring to the fact that the rights of corporations are a sum of the rights of the individuals who make up that corporation.[12] None of these theories has proven fully satisfactory, leading courts and scholars on both sides of the Atlantic to adopt hybrid approaches, applying different frameworks depending on the context and the nature of the right at stake. *The hybrid theory* refers to the need to analyse the applicable personhood theory on a case-by-case basis, as corporations are "no single thing".[13] It also refers to the utilization of all pre-existing models simultaneously in comparison with the autonomy of the corporation in relation to its constituents, owners, partners, or shareholders, and its autonomy in relation to the state, which laid down the grounds for incorporation. As such, when analysing the autonomy of the corporation, and therefore its ability to hold legal powers, it must be understood that these powers can stem both from the state and from the associated individuals.[14] Although corporations are treated as legal persons, they do not possess all attributes of natural persons and do not require equivalent protections. Rights assigned to corporations are granted purely based on their structural features, such as perpetual existence, limited liability, freely transferable shares, and a flexible, transient character. These attributes afford corporations distinct legal benefits.[15] Individuals associated with corporations, as established in cases like *Citizens United*[16] and *Hobby Lobby*,[17] can extend certain personal rights to the corporation without taking on its liabilities.[18] Many fundamental protections are extended to corporations and their constituents by virtue of the corporate form itself. Thus, affording corporations the full scope of individual rights effectively elevates them to a status beyond that of a natural person, giving them more rights and advantages.[19]

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[9] Siina Raskulla, *European Constitution of Corporations: Legal Personhood, Legal Powers & Legal Governance of Corporate Entities in the European Union* (Tampere University Dissertations 607, 2022), 53, https://trepo.tuni.fi/handle/10024/139718.

[10] Raskulla, *European Constitution of Corporations*, 53.

[11] See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–88, 91 (1809); and *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 91–92 (1827), cited in Raskulla, *European Constitution of Corporations*.

[12] Chatman, "Corporate Personhood Two-Step," 820.

[13] Chatman, "Corporate Personhood Two-Step," 821.

[14] Raskulla, *European Constitution of Corporations*, 58.

[15] Andrew A. Schwartz, "The Perpetual Corporation," *George Washington Law Review* 80 (2012): 764, 768–69, https://www.gwlr.org/wp-content/uploads/2018/04/80-Geo.-Wash.-L.-Rev.-764.pdf.

[16] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[17] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

[18] Roger M. Michalski, "Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood," *San Diego Law Review* 50 (2013): 125, 126–27, https://digital.sandiego.edu/sdlr/vol50/iss1/5/.

[19] Robert Sprague and Mary Ellen Wells, "The Supreme Court as Prometheus: Breathing Life into

At the European level, scholars[20] also propose a hybrid framework for understanding corporate legal personhood within the European Union. This approach synthesizes elements of the artificial, aggregate, and real entity theories to more accurately capture the nature of corporate powers and relationships as defined by EU primary law. Additionally, the study cited revisits and adapts Hohfeld's typology of legal relations, offering a refined lens through which to examine the complex, often trilateral, dynamics of corporate governance in the European context.[21]

This article undertakes a comparative analysis of corporate freedom of expression as articulated in United States constitutional doctrine and in the jurisprudence of the ECtHR and the CJEU. Rather than juxtaposing individual cases or doctrinal tests in isolation, the analysis focuses on the deeper constitutional architectures within which each legal order conceptualises the corporate speaker and structures the relationship between expression, economic power, and democratic governance. The aim is not to rank systems by generosity or restrictiveness, but to identify the constitutional premises that shape the protection and regulation of corporate expression across jurisdictions.

Corporate freedom of expression is not a self-contained right but a derivative constitutional problem, emerging at the intersection of expressive freedom, economic power, and competing conceptions of democratic legitimacy. Corporate speech becomes controversial not merely because corporations speak, but because they do so from positions of organised capital, institutional continuity, and market influence. The constitutional treatment of such speech therefore reveals how a legal system conceptualises democratic risk, whether the primary threat to public discourse lies in state censorship, private power distortion, informational asymmetry, or structural inequality.

The divergence between the two systems can be mapped along five axes: the identification of the primary democratic threat; the role of content neutrality as a constitutional trigger; the treatment of corporate power asymmetries; the relationship between commercial and political speech; and the preferred regulatory technique. These axes illuminate not only doctrinal differences but underlying constitutional philosophies, and, as this article demonstrates, they directly condition the regulatory latitude each system affords in adjacent domains such as consumer protection, competition law, intellectual property, and strategic litigation against public participation.

2. The Structural Models of Corporate Expression

Drawing on a typological analysis of corporate speech and a quantitative

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the Corporate Supercitizen," *American Business Law Journal* 49, no. 3 (2012): 507, 550–51, https://doi.org/10.1111/j.1744-1714.2012.01138.x.

[20] Raskulla, *European Constitution of Corporations*.

[21] Raskulla, *European Constitution of Corporations*, 59.

review of case-law from both jurisdictions, two dominant regulatory models emerge: a proportionality-based European model and a libertarian American model. Before turning to the central points of contention between these systems, which is the primary focus of this article, this section offers an overview of each model's theoretical foundations, doctrinal structure, implications for corporate speech, and internal tensions.

The comparative analysis undertaken here does not propose a third framework or alternative constitutional model. Its aim is rather to demonstrate that the structural premises embedded in each constitutional order carry consequences that extend well beyond the freedom of expression doctrine. The way each system conceptualises the primary democratic threat determines the relevance attributed to speaker identity, shapes the structure of judicial review, and conditions the degree of regulatory flexibility available in adjacent domains, such as consumer protection, competition law, intellectual property, and strategic litigation against public participation. Constitutional theory, in this sense, is not merely abstract rights adjudication, but rather it defines the permissible boundaries of state intervention across the legal order.

2.1. The Proportionality-Based Model

The European model accepts a hierarchy of expression, placing commercial speech at the basis of its pyramid of expression rights, and culminating with political and artistic expression. This *proportionality-based model* most concerns itself with the issue of power asymmetry, which appears indirectly through the concept of pluralism[22] and margin of appreciation,[23] among others. The central question is not whether the state has regulated speech based on its content or the identity of the speaker, but whether the restriction is justified in light of legitimate aims and is "necessary in a democratic society". This framework reflects a constitutional perspective in which democratic legitimacy is preserved not only by constraining governmental power, but also by safeguarding the conditions of pluralistic participation.

The core doctrinal structure through which the European model operates is the proportionality analysis. Rather than relying on rigid categorisations, European courts assess restrictions on expression through a structured inquiry that typically examines: whether the interference pursues a legitimate aim; whether the measure is suitable to achieve that aim; whether it is necessary in the sense that less restrictive alternatives are unavailable; and whether a fair balance has

[22] The relevant example is *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08 (ECtHR, April 22, 2013), where the Court upheld a ban on political advertising intended to protect democratic discourse from distortion by wealthy entities.

[23] The relevant example is *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94 (ECtHR, June 28, 2001), where the Court reasoned that, although states enjoy a margin of appreciation, that margin is reduced for speech on matters of general public interest.

been struck between competing interests.[24] This approach allows for a comprehensive and transparent evaluation of the expression at issue in relation to other constitutional values, such as public health, consumer protection, electoral fairness, or the protection of the rights of others. Unlike tiered scrutiny in the United States, proportionality does not operate through predetermined formal classifications. Instead, it embeds the level of scrutiny of review within the balancing exercise itself, allowing courts to adjust their analysis according to context.

A further structural feature of the European model is its explicit recognition that different forms of expression occupy different normative positions within democratic society. Political speech and matters of public interest generally receive the highest level of protection,[25] while purely commercial advertising or speech primarily focused on economic gain may be subject to broader regulatory latitude.[26] This hierarchy is not framed as a categorical exclusion, but as contextual differentiation grounded in the contribution of free speech to democratic debate. The Court has repeatedly emphasised the importance of pluralism and the free exchange of ideas in political discourse, while simultaneously acknowledging that commercial communication, although protected, does not carry the same constitutional weight. The absence of a rigid content-neutrality doctrine allows European courts to openly take into account the function and societal impact of the expression under scrutiny.

Even more, the European framework recognises that the integrity of public discourse may be threatened not only by state censorship but also by structural imbalances in communicative power.[27] While the jurisprudence does not articulate a formal doctrine of "power asymmetry", concerns about monopoly, market distortion, and unequal influence are implicitly accommodated within the proportionality analysis and the margin of appreciation afforded to States, particularly in areas such as political advertising, media regulation, and consumer protection. The protection of pluralism may therefore justify regulatory intervention where the aim is to prevent the distortion of democratic debate or to safeguard fair conditions of participation. In this sense, the European model treats freedom of expression as situated within a broader constitutional ecosystem in which democratic equality and social balance are legitimate and fundamental considerations.

An additional structural element distinguishing the European approach is

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[24] See, for example, *Handyside v. the United Kingdom*, no. 5493/72 (ECtHR, December 7, 1976); *The Sunday Times v. the United Kingdom (No. 1)*, no. 6538/74 (ECtHR, April 26, 1979); *Axel Springer AG v. Germany* [GC], no. 39954/08 (ECtHR, February 7, 2012); and *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, Joined Cases C-92/09 and C-93/09, ECLI:EU:C:2010:662 (CJEU, November 9, 2010).

[25] See, for example, *Lingens v. Austria*, no. 9815/82 (ECtHR, July 8, 1986).

[26] *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, no. 10572/83 (ECtHR, November 20, 1989).

[27] See, for example, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08 (ECtHR, April 22, 2013); for a contrary analysis, see *Informationsverein Lentia and Others v. Austria*, nos. 13914/88, 15041/89, 15717/89, 15779/89, and 17207/90 (ECtHR, November 24, 1993).

the doctrine of the margin of appreciation. Particularly in politically sensitive or morally contested domains, the ECtHR recognises that national authorities are often better placed to assess the needs of their societies. This doctrine introduces calibrated deference into the proportionality framework, especially in cases involving commercial advertising, electoral regulation, or public morals.[28] While such deference may reduce predictability, it reflects a clear understanding that democratic legitimacy involves not only judicial supervision but also space for national variation. The result is a model that combines structured balancing with contextual sensitivity to regulatory and societal objectives.

Taken together, these elements produce a constitutional ecosystem in which freedom of expression is protected robustly but relationally. Corporate expression is neither categorically insulated from regulation nor presumptively scrutinized. Instead, it is assessed within a framework that openly weighs expressive value against other democratic and societal interests. The European model thus reflects a constitutional order in which threats to democratic discourse may arise from both public authority and private concentration of power, and where regulatory intervention is evaluated through proportionality rather than categorisation.

2.2. The Libertarian Model

The American model proposes a presumption of distrust toward the state,[29] which intrinsically leads to an evolutionary collapse of the commercial and political speech boundary. This *libertarian model* treats freedom of expression as a negative right against state interference. The core concern of this model is that the state is the primary threat to free speech and that only through the marketplace of ideas can distortions be self-corrected.[30] The philosophical foundation of this model can be traced to John Stuart Mill's argument in *On Liberty* that the suppression of opinion, even of a false one, is harmful to society, since it is only through the open collision of competing ideas that truth can be identified and error exposed. As Mill wrote, it is not the violent conflict between parts of the truth, but the quiet suppression of half of it, that constitutes the gravest threat to public knowledge, since truth has no chance of prevailing except insofar as every opinion which embodies any fraction of it finds advocates and is heard.[31] This epistemic defence of expressive freedom, resting on the assumption that the open competition of ideas produces better outcomes than any form of

[28] See, for example, *Müller and Others v. Switzerland*, no. 10737/84 (ECtHR, May 24, 1988), where the Court held that states enjoy a wider margin of appreciation in matters of public morals because there is no uniform European conception of morality.

[29] This can be traced to Mill's harm principle and his warning against the "tyranny of the majority." John Stuart Mill, *On Liberty* (London: John W. Parker and Son, 1859), chap. 1, https://catalog.hathitrust.org/Record/011538483.

[30] See, for example, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[31] Mill, *On Liberty*, chap. 2.

authoritative selection, provided the intellectual foundation upon which American First Amendment jurisprudence would later build its constitutional architecture. The translation of Mill's philosophical argument into constitutional doctrine was accomplished most influentially by Justice Holmes, whose dissent in *Abrams v United States* articulated the marketplace of ideas as a judicial principle, reasoning that the best test of truth is the power of a thought to get itself accepted in the competition of the market and that the ultimate good desired is better reached by free trade in ideas.[32] The core concern of this model is that the state is the primary threat to free speech and that only through the marketplace of ideas can distortions be self-corrected.

In the American context, a model grounded in distrust of state interference and in a strong presumption of content and speaker neutrality tends to narrow the range of constitutionally acceptable regulatory strategies when corporate expression is implicated. By contrast, the European proportionality-based approach, which openly balances expression against pluralism, market fairness, and other public interests, permits a more integrated assessment of corporate power within the broader democratic order. The comparison, therefore, operates at a structural level: it does not ask which system protects speech more robustly, but how each system's underlying constitutional commitments condition the interaction between expressive freedom and regulatory governance.

One theoretical foundation relevant to the discussion is the counter-majoritarian function of the First Amendment.[33] In American doctrine, it is argued that the survival of constitutional democracies depends less on how majoritarian they are and more on how well they limit the stakes of political conflict. In this view, countermajoritarian rules often play an indispensable role in maintaining constitutional stability rather than undermining democratic legitimacy.[34] Even more, the counter-majoritarian dimension of the First Amendment is not conceptually in tension with the marketplace of ideas metaphor; rather, the two are structurally interdependent. As mentioned previously, the marketplace theory, famously articulated by Oliver Wendell Holmes Jr. in his dissent in *Abrams v. United States*,[35] rests on the assumption that truth emerges from the free competition of ideas and that no authority, including a democratic majority, possesses a monopoly on truth. Yet this competitive process can only function if majorities are prevented from suppressing dissenting or unpopular viewpoints. It is precisely

[32] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[33] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), https://doi.org/10.2307/j.ctv102bj77; Christopher J. Peters, "Adjudicative Speech and the First Amendment," *UCLA Law Review* 51 (2004): 705–91, https://www.uclalawreview.org/adjudicative-speech-and-the-first-amendment/.

[34] Daniel B. Rodriguez and Barry R. Weingast, "Constitutional Stability and the Role of Countermajoritarian Rules (or How We Learned to Stop Worrying and Love Our Antidemocratic Constitution)," Northwestern Public Law Research Paper no. 25-08 (2025), https://doi.org/10.2139/ssrn.5126993.

[35] *Abrams v. United States*, 250 U.S. 616 (1919).

here that the First Amendment's counter-majoritarian function becomes indispensable. Through decisions such as *West Virginia state Board of Education v. Barnette*[36] and *New York Times Co. v. Sullivan*,[37] the Supreme Court has invalidated laws reflecting majoritarian hostility toward dissent, thereby preserving the structural conditions necessary for open deliberation. In this sense, counter-majoritarian judicial review is not a democratic anomaly but a functional precondition for maintaining an undistorted marketplace of ideas. The First Amendment constrains majority rule not in opposition to democracy, but to safeguard the epistemic and deliberative infrastructure upon which democratic legitimacy ultimately depends.

Consequently, the doctrinal structure of the libertarian model is threefold; it relates to content neutrality, speaker neutrality, and the categorisation of speech. First, the central organising principle of modern First Amendment doctrine is the distinction between content-based and content-neutral regulation. Laws that regulate speech because of its subject matter, message, or communicative content are presumptively suspect and generally subject to strict scrutiny. As seen in the previous Section, in cases such as *Reed* or *Sorell*, content-based restrictions on speech are subject to strict scrutiny with respect to both political and commercial speech. The core finding here is that content neutrality is the structural safeguard against government overreach.

Closely linked to the commitment to content neutrality is the Court's insistence on speaker neutrality. In the logic of *Bellotti* and *Citizens United*, corporate identity is constitutionally irrelevant since speech protection does not depend on speaker characteristics.[38] The First Amendment, as repeatedly articulated by the Court, protects speech rather than speakers,[39] and the identity or corporate character of the speaker does not, in principle, diminish the constitutional value of the expression at issue. By rejecting the relevance of speaker identity, the Court has treated corporations, associations, and individuals as constitutionally equivalent participants in public discourse, particularly in the political domain. Economic power, institutional continuity, or access to aggregated capital do not, within this framework, constitute constitutionally cognisable grounds for differential regulation. Concerns about disproportionate influence or the distorting effects of concentrated resources are therefore recast as political or policy questions rather than as First Amendment considerations. Speaker neutrality thus operates as a doctrinal barrier against regulatory efforts aimed at equalising expressive influence, reinforcing the libertarian orientation

[36] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[37] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[38] Jud Campbell, "The Emergence of Neutrality," *Yale Law Journal* 131 (2022): 861–947, https://yalelawjournal.org/article/the-emergence-of-neutrality; Michael Kagan, "Speaker Discrimination: The Next Frontier of Free Speech," *Florida State University Law Review* 42 (2015): 765–818, https://scholars.law.unlv.edu/facpub/901/.
[39] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

of the American model and its suspicion of state attempts to recalibrate the balance of communicative power.

The third structural component of the American model is the use of tiered scrutiny as a mechanism for calibrating judicial review. Rather than engaging in balancing between expression and competing public interests, the Court channels constitutional analysis through predetermined levels of scrutiny that vary in intensity according to the nature of the regulation and the classification of the speech. Content-based restrictions on core political expression trigger strict scrutiny, requiring the government to demonstrate a compelling interest and narrow tailoring. Commercial speech, while recognised as constitutionally protected, is generally evaluated under the intermediate framework articulated in *Central Hudson*, which permits regulation where it directly advances a substantial governmental interest and is not more extensive than necessary. In other contexts, such as compelled factual disclosures, the Court has applied a more deferential standard.[40] This tiered structure reflects an effort to manage the tension between expressive freedom and regulatory authority without collapsing all speech into a single category.

The cumulative effect of these elements is a constitutional structure in which regulation is evaluated primarily through procedural suspicion of governmental intervention rather than through substantive assessment of means of democratic distortion. Corporate power, as such, enters the analysis only indirectly and rarely as an independent constitutional concern.

3. Core Points of Divergence Between the European and American Models

This Section serves the purpose of clearly defining and underlining the core divergences between the two analysed legal frameworks, the European and the American systems. In completing this analysis, it is necessary to review the five main concepts that shape the doctrine of corporate freedom of expression: (1) what each system identifies as the main democratic threat, (2) the role of content neutrality, (3) the relevance of power asymmetry, and (4) the judicial methodology.

3.1. The Democratic Threat

First, concerning the main threat perceived by the systems under analysis, it is clear that, while the European system perceives as threats both the undue influence of private and state actors, its counterpart, the American system perceives state censorship as the primary danger to freedom of expression.

[40] *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

The European system has a more complex conception of democratic vulnerability, as deduced from the jurisprudence of the ECtHR, which has historically emphasised pluralism as a foundation of democratic society.[41] In this sense, pluralism not only refers to a lack of undue state influence but also to the existence of diversity of opinions and voices. This perception allows for regulatory or judicial intervention to preserve an equal opportunity to engage in public discourse, for example, measures aimed at safeguarding electoral integrity, media diversity, or preventing market dominance. In the European framework, these measures are analysed through the lens of proportionality and democratic equality.

In contrast, in the American system, such measures would be automatically treated as suspect because the primary democratic danger is state censorship. The First Amendment must be analysed by taking into consideration the historical and institutional context of its inception, which was deeply suspicious of governmental overreach.[42] The modern corporate-speech doctrine must be analysed through this anti-censorship framework. One can deduct from previous discussions on the jurisprudence of American courts that limitations on political spending,[43] on advertising,[44] or attempts to differentiate between different types of speakers[45] are strictly scrutinised through the lens of potential governmental overreach.

The implications of these divergences for corporate speech are quite immense, since under the American system, corporate political expenditures or extensive advertising campaigns are presumptively protected so long as they do not involve fraud or illegality, even if they amplify already dominant voices. Regulatory efforts justified by the need for expressive equality encounter substantial constitutional resistance. Under the European model, however, the same situation may be subject to a proportionality analysis, within which competing interests are balanced. While corporate expression remains protected, its regulation may be necessary where it is convincingly linked to the preservation of pluralism or the prevention of distortion in democratic processes. To illustrate, had a case analogous to *Citizens United* arisen within the European human-rights framework, the constitutional scrutiny would likely have proceeded along a very different path. Rather than treating restrictions on corporate political spending as inherently suspect because they differentiate among speakers, as the American courts proceeded, a European court would have arguably begun by identifying the legiti-

[41] *Handyside v. the United Kingdom*, no. 5493/72, § 49 (ECtHR, December 7, 1976).
[42] Ronald J. Colombo, "The First Amendment: Background," in *The First Amendment and the Business Corporation* (New York: Oxford University Press, 2014), 107–18, https://doi.org/10.1093/acprof:oso/9780199335671.003.0006.
[43] *Citizens United*, 558 U.S. 310; *Buckley v. Valeo*, 424 U.S. 1 (1976).
[44] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).
[45] *First National Bank of Boston v. Bellotti*, 435 U.S. 765.

mate aims pursued by the measures, such as the protection of democratic pluralism, electoral fairness, or the prevention of disproportionate influence. The decisive question would not have been whether the government sought to equalise expressive power, but whether the restriction was proportionate to safeguarding the integrity of the democratic process. While the outcome could never be certain, concerns about the distorting effects of concentrated financial resources would have likely formed part of the court's assessment, rather than being excluded from it. This contrast illustrates how the two systems diverge in their willingness to treat private economic power as relevant to the protection of democratic discourse.

Ultimately, the disagreement between the two systems is not about whether corporations may speak, but about whether democracy requires attention to the distribution of expressive power. The American approach locates the constitutional threat primarily in the coercive authority of the state, while the European approach recognises that democratic distortion may also arise from asymmetries within civil society itself. This foundational divergence shapes the subsequent treatment of content neutrality, and speech categorisation, and thus frames the broader comparative analysis that follows.

3.2. Content Neutrality

A second point of contention between the two systems lies in the role attributed to content neutrality in the analysis of the courts. While both systems agree that freedom of expression must be protected against discriminatory regulation, they diverge on the weight assigned to content-based restrictions.

The European system does not treat content neutrality as an independent rule, but rather the content of the expression under scrutiny is regarded as a fundamental element in the proportionality analysis.[46] The courts distinguish between artistic expression, political speech, and commercial advertising, and there is no presumption that such a distinction is suspect. That is because the question the courts ask themselves is not whether the state has imposed a content-based restriction, but whether this restriction pursues a legitimate aim and is necessary in a democratic society.

In contrast, in the American model, content neutrality acts as a constitutional trigger, and any restriction based on the content of the expression prompts immediate scrutiny.[47] The Court's modern jurisprudence reinforces this principle with considerable rigidity. Where a restriction draws distinctions based on what

[46] *Lingens v. Austria*, no. 9815/82 (ECtHR, July 8, 1986); *Axel Springer AG v. Germany* [GC], no. 39954/08 (ECtHR, February 7, 2012).

[47] Minch Minchin, "The Content-Neutrality Doctrine Still Works," *Florida Law Review Forum* 67 (2017): 320–28, https://www.floridalawreview.com/article/88710-the-content-neutrality-doctrine-still-works.

is said rather than on time, place, or manner, heightened judicial suspicion is activated almost automatically.[48] The implications of this content-neutrality rule are significant for corporate speech since many contemporary advertising regulations are inherently content-based because they target specific products, industries, or informational categories. Restrictions on pharmaceutical marketing, alcohol advertising, or professional solicitation typically depend on the content of the communication. As the content neutrality doctrine has intensified, particularly in more recent case-law,[49] such regulations increasingly encounter constitutional resistance not because they lack legitimate aims, but because they differentiate speech by subject matter. The doctrinal result is a structural tension within the commercial speech framework.[50] *Central Hudson* was designed to stabilise commercial expression through intermediate scrutiny, yet a robust commitment to content neutrality threatens to collapse this distinction by subjecting content-based commercial regulations to heightened review. The destabilising effect arises not from an explicit elevation of commercial speech to the status of political expression, but from the expansion of content neutrality as a constitutional baseline.

In any case, this divergence on content-neutrality determines substantively different outcomes in judicial proceedings. Where content-neutrality operates rigidly, regulations based on differentiating between types of corporate expression face heightened scrutiny regardless of the purpose and aim pursued.

3.3. Power Asymmetry

The third point of contention is the weight assigned to the danger of power asymmetry. The systems diverge in whether they regard power asymmetry as a concern within the corporate freedom of expression analysis.

The European approach has a very integrated understanding of the relationship between expression and power.[51] Although corporate entities are recognised as rights-bearers under Article 10 of the Convention and Article 11 of the Charter, the European framework openly weighs the impact of expression on pluralism and democratic fairness. Economic power, while not articulated as a standalone category in the analysis, may enter the proportionality scrutiny since

[48] *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).
[49] *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[50] William D. Araiza, "Invasion of the Content-Neutrality Rule," *BYU Law Review* 2019, no. 4 (2020): 875–921, https://digitalcommons.law.byu.edu/lawreview/vol2019/iss4/5/.
[51] Tom Lewis, "Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?," *Modern Law Review* 77, no. 3 (2014): 460–74, 474, https://doi.org/10.1111/1468-2230.12074.

it affects the conditions of public debate.[52] Measures designed to prevent the distortion of electoral processes, safeguard media diversity, or mitigate the influence of concentrated resources are evaluated as potentially legitimate aims capable of justifying interference, provided the restriction remains proportionate.[53]

On the other side of the coin, the American system treats economic power asymmetry as constitutionally irrelevant. The American commitment to speaker neutrality entails that corporations, associations, and individuals are entitled to equivalent protection when engaging in public discourse. Disparities in wealth, organisational capacity, or access to aggregated capital do not diminish the constitutional status of the speech.[54] Regulatory measures justified by the need to equalise influence or prevent disproportionate political power are viewed with deep suspicion, as they risk authorising the state to determine which speakers have "too much" voice. The USSC famously underlined in *Buckley* that: "*The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure `the widest possible dissemination of information from diverse and antagonistic sources'."*[55] The First Amendment thus resists the incorporation of democratic equality as an independent constitutional objective within speech doctrine. Expressive inequality is regarded as an inevitable feature of a free society, and governmental attempts to recalibrate the distribution of communicative power are frequently characterised as paternalistic or censorial.[56] In this framework, the protection of corporate speech flows not from an endorsement of corporate dominance, but from a structural refusal to treat economic influence as a permissible ground for differential treatment.

As such, the American system treats expressive inequality as an inevitable feature of a free society and rejects governmental interference as incompatible with the First Amendment's core commitment to speaker neutrality. By contrast, the European approach is more willing to acknowledge that unchecked disparities in economic power may undermine the conditions necessary for effective democratic participation. This difference reflects competing understandings of how democracy is distorted: whether the principal danger lies in state control of ideas or in the capacity of powerful private actors to dominate the communicative environment, circling back to the first point of contention.

3.4. Regulatory and Judicial Methodology

[52] *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 111 (ECtHR, April 22, 2013).
[53] *Animal Defenders International*, §§ 114–16; see also the concurring opinion of Judge Bratza, §§ 12–13.
[54] *First National Bank of Boston v. Bellotti*, 435 U.S. 765; *Citizens United*, 558 U.S. 310.
[55] *Buckley v. Valeo*, 424 U.S. 1, 49–50 (1976).
[56] Eugene Volokh, "Why *Buckley v. Valeo* Is Basically Right," *Arizona State Law Journal* 34 (2003): 1095–1103, https://www2.law.ucla.edu/Volokh/buckley.pdf.

The final point of contention underlined in this discussion concerns the regulatory and judicial approaches through which each system perceives corporate expression and the degree to which speech categories endure within those approaches. Although both systems recognise distinctions between political, commercial, and other forms of expression, they embed those distinctions within markedly different architectures of judicial review.

The European model operates through a unified proportionality framework in which the nature of the speech informs, but does not intrinsically determine, the intensity of scrutiny. Both the ECtHR and the CJEU recognise that political expression occupies a particularly protected position, while commercial advertising, though protected, carries lesser democratic weight. Critically, this hierarchy does not trigger separate doctrinal tests, it influences the margin of appreciation afforded to states and the weight attributed to competing interests within the balancing exercise. Content sensitivity is openly integrated into judicial reasoning rather than treated as presumptively suspect. The constitutional question is simply whether the interference pursues a legitimate aim and remains necessary in a democratic society. Commercial speech is thus distinct from political expression not because it falls outside protection, but because its democratic weight is assessed differently within a flexible, contextual framework, a structure that generates considerable judicial stability precisely because it accommodates differentiation without internal contradiction.

The American model, by contrast, relies on a tiered scrutiny structure in which the level of judicial review depends on how the speech is classified. Political and ideological expression triggers strict scrutiny, while commercial speech is generally subject to intermediate scrutiny under the *Central Hudson* framework, and lesser-value categories may receive even more deferential review. This architecture presupposes relatively clear categorical boundaries and the jurisprudential classification of types of speech determines the applicable standard of review, which in turn frequently shapes the constitutional outcome. However, this structure has shown signs of instability. As content-based regulation has come to trigger heightened judicial suspicion across First Amendment doctrine, the structural insulation of commercial speech under intermediate scrutiny has weakened.[57] Many modern advertising regulations are content-based by design, and when such measures are characterised as content-based or speaker-based distinctions, they risk being subjected to more exacting scrutiny than the original commercial speech framework contemplated. In this sense, the American commitment to content neutrality exerts pressure on categorical distinctions. The more rigorously the Court polices content differentiation, the more fragile the boundary between commercial and political speech becomes. Commercial expression does not formally merge with political speech, but its intermediate status becomes increasingly contingent.

[57] Araiza, "Invasion of the Content-Neutrality Rule," 875–921.

4. Conclusion

The divergence between the American and European approaches to corporate freedom of expression is not merely doctrinal but structural. The two systems differ along four fundamental axes: their identification of the primary democratic threat, the constitutional function assigned to content neutrality, their treatment of economic power asymmetries, and the regulatory and judicial techniques through which speech categories are implemented.

The American model is organised around a deep suspicion of state censorship. Its commitment to content neutrality and speaker neutrality, combined with a scrutiny-based architecture of judicial review, produces a framework in which regulatory intervention is presumptively suspect and corporate expression is broadly insulated from restriction. Economic power asymmetry is treated as constitutionally irrelevant, and efforts to equalise expressive influence are resisted as incompatible with First Amendment principles. The internal tensions of this model are considerable: as content neutrality has expanded as a constitutional baseline, the boundary between commercial and political speech has grown increasingly unstable, undermining the structural insulation that intermediate scrutiny was designed to provide.

The European model, by contrast, embeds corporate expression within a proportionality framework attentive to pluralism, contextual democratic risk, and the balancing of competing interests. Speech categories are openly acknowledged and integrated into the balancing exercise rather than treated as triggers for categorical review. Crucially, the European framework recognises that democratic distortion may arise not only from state censorship but also from asymmetries within civil society itself, from the capacity of economically powerful actors to dominate public discourse. Regulatory intervention aimed at preserving pluralism or safeguarding electoral fairness is therefore constitutionally available in a way that the American model structurally forecloses.

These foundational choices carry consequences that extend beyond speech doctrine. Where judicial review is organised around rigid categorical triggers tied to content classification, regulatory strategies in adjacent domains, consumer protection, media governance, competition law, electoral regulation, and encounter structural constitutional constraints. Where review proceeds through proportionality, courts retain the capacity to calibrate intervention according to context, impact, and democratic function.

The deeper question raised by this comparison is not which system is more protective of corporate speech, but what vision of democracy each system presupposes. The American approach locates constitutional risk in governmental authority over ideas. The European approach recognises that the conditions for democratic participation may themselves require protection, including protection

from the distorting effects of concentrated private power. As corporations continue to expand their communicative reach across both jurisdictions, this foundational divergence will remain a live and consequential fault line in comparative constitutional law.

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The New Magna Carta: The Crystallization of Digital Rights from a Global Perspective

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Abstract

This study examines the transition from classical constitutionalism to the digital era, focusing on the legal configuration of a new Magna Carta. By evaluating a diverse spectrum of global initiatives — ranging from Brazil's pioneering "Marco Civil da Internet", to the "Digital Rights and Freedom Bill" of Nigeria and the Philippines' "Magna Carta for Internet Freedom" — the research identifies a universal trend towards digital codification. This comparative analysis culminates with the European Declaration on Digital Rights, which represents the most comprehensive framework for protecting individual dignity against algorithmic dominance. Following the theoretical contributions of Danielle K. Citron, Edoardo Celeste, and Oreste Pollicino, the research evaluates whether these instruments function as a "digital habeas corpus". The study employs a combination of scientific analytical methods, including the comparative, historical, and logical methods. By applying these methodological tools, the research aims to identify a transition from traditional constitutional protection of fundamental rights to a multi-jurisdictional data sovereignty model. While "soft law" mechanisms are emerging into "hard law" across different jurisdictions, a global consensus is forming around algorithmic accountability and the protection of digital rights.

Keywords: *digital constitutionalism, digital rights, data sovereignty, digital habeas corpus.*

1. Introduction

Magna Carta Libertatum[2] represented a genuine evolution at the time of its inception. Even today, this document is considered to be the foundation of modern constitutionalism. In 1215, its emergence marked the turning point of a profound political crisis between the monarchy and the aristocracy. On June 15, 1215, England established a landmark precedent upon which legal systems still rely today*: no power, not even the sovereign, is above the law*.

If at that time the discussion was centered on the absolute power of the monarch, today we are confronted with the discretionary power of technological giants. Autocratic systems have been replaced by democratic ones, and power now resides with the people, who elect representatives to advocate for their

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[2] Magna Carta Libertatum (1215) was sealed by King John under pressure from the English barons. It sought to limit royal power, curb abuses committed by the monarch or his representatives, and guarantee certain rights.

interests. In a historical paradigm shift, power is no longer considered of divine origin but is placed, through democratic mechanisms, in the hands of the people. Within an efficient legal system, the state protects its citizens' interests through laws—binding norms that dictate the conduct to be followed in a society. For a long time, laws regulated social interactions between individuals occurring in physical space, bounded by geographical borders and a tangible material presence. With the emergence of virtual space, a new pole of power has taken shape, namely the dominance of technological giants. The struggle for power between the public sphere (the state) and the private sphere (tech giants) has necessitated the adoption of new norms tailored for the digital world. Some classical norms have been adapted to this new reality, while other new norms have gradually codified the virtual space. Globally, initiatives have emerged incessantly. From the Declaration of Independence of Cyberspace (1996) to the current pillars of European digital regulation — the AI Act (2024), DSA (2022), and DMA (2022) — a digital constitutional order is steadily taking shape.

The present research aims to analyze the transition from classical to digital constitutionalism, drawing upon the guiding principles established from the Magna Carta (1215) to the European Declaration on Digital Rights and Principles for the Digital Decade (2022). To achieve this objective, the scientific endeavor seeks to highlight several constitutional landmarks of digital codification, in order to outline an authentic *digital habeas corpus*.

2. The Origins of Classical Constitutionalism. Magna Carta Libertatum

Classical constitutionalism has its roots in 13th-century medieval England, when King John was compelled by the English barons to sign the famous "Magna Carta Libertatum." Through this document, the king limited his own power and implicitly recognized that all individuals are equal before the law, with the sovereign himself being likewise subject to its norms.

Although it is not a constitution in the modern sense of the term, Magna Carta introduces essential landmarks of the legal world. Among these, it establishes that the monarch's power is not arbitrary, just as — drawing a parallel between past and present — the power of state today is not, and cannot be, discretionary within a democracy. The concept of *lex facit regem* (the law makes the king) constitutes the foundation of constitutionalism and the rule of law. Magna Carta introduces the first mechanisms of the right to a fair trial and the principle of *habeas corpus* through Clause 39: ”*No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.*”[3]. Habeas corpus clearly stipulates that no citizen

[3] “The 1215 Magna Carta: Clause 39,” The Magna Carta Project, translated by Henry Summerson

may be arrested or deprived of their property without a fair trial, in accordance with the law of the land. It was stipulated as an explicit means of controlling the monarch's power or, in today's terms, limiting the coercive power of the state. These are, in fact, the first seeds of the developing concept of *digital habeas corpus*. Legal certainty aims to protect citizens against potential abuses. Just as in 13th-century England the king could no longer invoke "reasons of state" to punish an individual but was compelled to follow the law of the land (the principles of Magna Carta), digital platforms are similarly constrained by supranational legal frameworks for the protection of the digital citizen.

Beyond the political reasons of that era, the purpose of the Magna Carta was also a psychological one: the elimination of fear regarding an unpredictable power. Today, the intangible and unpredictable element that exerts a powerful chilling effect on fundamental rights and freedoms is the virtual space—invisible surveillance, data storage, and informational control.

In a fascinating manner, history seems to repeat itself within the digital sphere. Neither the physical body (*habeas corpus*) nor the digital self (*digital habeas corpus*) should be subject to unclear, inaccessible, or unpredictable norms; on the contrary. The transition from protecting physical integrity to safeguarding virtual identity marks a significant shift in legal frameworks, laying the foundations of digital constitutionalism and an increasingly vigorous current of ideas[4].

3. The Genesis of Digital Constitutionalism

Classical constitutionalism aimed to ensure the traditional balance of powers by limiting the sovereign's authority and restricting state power in favor of the citizens. Digital constitutionalism, however, analyzes the poles of power within the online environment, specifically state surveillance and the control exerted by major technological giants. This paradigm shift began nearly three decades ago with the *Declaration of Independence of Cyberspace* (1996), a manifesto of the early internet: ”*Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.*”[5]. John Perry Barlow's declaration emerged as a reaction to the adoption of the *Telecommunications Act* in the United States, representing the American government's first significant

et al., accessed March 28, 2026, https://magnacartaresearch.org/read/magna_carta_1215/Clause_39.

[4] Mircea Duțu, “Constituționalismul digital: o nouă provocare științifică și inedită din perspectivă juridică” [Digital Constitutionalism: A New and Original Scientific Challenge from a Legal Perspective], Juridice.ro, March 20, 2026, https://www.juridice.ro/essentials/11315/constitutionalismul-digital-o-noua-provocare-stiintifica-si-inedita-din-perspectiva-juridica.

[5] John Perry Barlow, “A Declaration of the Independence of Cyberspace,” Electronic Frontier Foundation, February 8, 1996, https://www.eff.org/cyberspace-independence.

initiative at that time to regulate online content. The Telecommunications Act included a separate section dedicated to communication decency (the Communications Decency Act), a section that was subsequently declared unconstitutional by the U.S. Supreme Court in the case *Reno v. American Civil Liberties Union (1997)*, for violating the First Amendment regarding the guarantee of freedom of speech. The Court ruled at that time that the Internet must benefit from the highest degree of protection for freedom of expression, similar to the printed press: "*the Internet — as <the most participatory form of mass speech yet developed> — is entitled to <the highest protection from governmental intrusion>*"[6]. Although the Communications Decency Act (CDA) was largely invalidated following the challenges of unconstitutionality, Section 230 survived and remains in force today, providing immunity to platforms for user-generated content.

Returning to the *Declaration of Independence of Cyberspace*, although illusory at the time, it established the idea that virtual space requires its own constitutional rules to prevent governmental abuses. At the beginning of the 21st century, the prevailing social conception was that the internet must be free — a space for the unrestricted flow of ideas, shielded from traditional state control. While the United States attempted to regulate the internet through the lens of morality, civil society, through Barlow's intervention, demanded total freedom.

Digital space is not constrained by the limits of the material world. As Barlow stated in his Declaration: "*Cyberspace does not lie within your borders ... Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here*"[7]. This is the origin of the current challenge: imposing digital borders and algorithmic control upon a space that is, in its essence, free. Barlow specifies that in the virtual space, order is not mandated by the Government, but rather emerges from the ethics and interactions of its users. Furthermore, in the spirit of liberty, he expressly demands that this space — at that time still unknown and unexplored — remain unregulated: "*Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world.*" His declaration calls for the protection of privacy, what we would nowadays refer to as data protection and the safeguarding of online interactions. He envisions cyberspace as a sanctuary of the mind, where freedom of expression is guaranteed and state sovereignty ceases to exist. In Barlow's vision, digital identity is intrinsically connected to freedom of thought: "*We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity*".

In the 1990s, virtual space was considered a global common good.

[6] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), https://supreme.justia.com/cases/federal/us/521/844/.

[7] Barlow, "Declaration of the Independence of Cyberspace."

Barlow believed in online self-governance through the application of the ”golden rule”, as stipulated in the case *Grey v. Pearson* (1857) 6 HL Cas 1: ”*the ordinary sense of the words is to be adhered to, unless it would lead to absurdity, when the ordinary sense may be modified to avoid the absurdity but no further.*”. However, future practice proved otherwise; while the principle is useful for identifying the *ratio legis*, algorithms cannot identify absurdity or injustice without human oversight.

Barlow sought a total separation from the state (”leave us alone”). Conversely, current regulations represent an integration of the internet under the protective shield of the rule of law. Today, states attempt to ensure the protection of citizens' rights by implementing the AI Act, DSA, and DMA; nonetheless, there remains a fine line between the power wielded by major technological giants and the coercive means available to the state machinery.

4. Digital Habeas Corpus

The divergence between the King and the English barons that laid the foundation for the Magna Carta has been transposed, centuries later, into a modern conflict between the state and corporations. Public power (the state) and private power (the tech giants) fight for supremacy over the virtual space. While one dominates through legally binding norms, the other asserts itself through economic force, leaving the digital citizen at risk of being caught in this power play without any recourse. The rule of law has the norms on its side, yet these were shaped for a world with territorial borders, not for the multifaceted nature of the virtual space.

Following the constitutional revolutions of the late 18th century (the U.S. Declaration of Independence – 1776, the Declaration of the Rights of Man and of the Citizen – 1789) and the shift in the paradigm of social interactions as they moved predominantly into the online sphere, digital users felt the necessity to outline new declarations to safeguard their digital rights and freedoms. The principle that ”men are born and remain free and equal in rights”[8] needed to be transposed into virtual space and made implicitly applicable to the digital citizen. Consequently, new global initiatives for the codification of digital rights emerged, which we shall analyze in the following sections.

4.1. Protection of Virtual Identity

Drawing upon the ideas highlighted by the scholars of digital constitutionalism, we are advancing into a new stage of constitutional reform: the adaptation of classical rights for the digital world and the shaping of new rights

[8] “Declaration of Human and Civic Rights of 26 August 1789,” art. 1, Conseil constitutionnel, https://www.conseil-constitutionnel.fr/en/declaration-of-human-and-civic-rights-of-26-august-1789.

for the online environment. Numerous regulatory initiatives exist (emanating from NGOs, governments, private companies, activists, civil society representatives, international organizations, etc.) regarding digital risks and opportunities. Even though many of these constitute ”soft law” regulations, they pave the way for identifying a ”hard law” consensus.

Legal scholars warn that this global consensus on digital regulations — the new Magna Carta — must also consider the types of values to be protected and promoted in the online environment: ranging from identifying a baseline of fundamental digital rights to techniques for limiting online power and ensuring accountability and ethics within the digital sphere[9]. Moreover, ethics is frequently associated with law — AI ethics, digital ethics — the entire concept of ethics being structured around fundamental rights.

Analyzing the sphere of new digital rights, through the perspective of Danielle K. Citron[10], Edoardo Celeste[11], and Oreste Pollicino[12], as leading experts in this field, a new generation of constitutional rights can be identified, including:

- The right of access to the internet, including the right to disconnect;
- The right to the protection of personal data;
- The right to be forgotten;
- The right to data portability;
- The right to digital education and literacy;
- The right to neural autonomy, freedom of choice, and informational self-determination;
- The right to a fair trial in the digital space, including the right to information, the right to an explanation, and transparency regarding automated decisions through the use of AI, as well as the right to contest a decision made by AI software, etc.

Legal doctrine demonstrates that the governing principles of the digital space are, in reality, not so different from classical concepts regarding the separation of powers or the limitation of power[13]. There are concepts such as net

[9] Guillaume Tusseau, *Taking Chaos Seriously: From Analog to Digital Constitutionalism(s)* (Paris: Chair Digital, Governance and Sovereignty, Sciences Po, 2023), 72, https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2023/11/chaire-digitale-g-tusseau-consitutionalism.pdf.

[10] See, for example, Danielle Keats Citron, “Cyber Civil Rights,” *Boston University Law Review* 89 (2009): 61–125, https://www.bu.edu/law/journals-archive/bulr/volume89n1/documents/CITRON.pdf.

[11] See, for example, Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (Abingdon: Routledge, 2022), https://doi.org/10.4324/9781003256908.

[12] See, for example, Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Oxford: Hart Publishing, 2021), 205, https://ius.unibocconi.eu/publications/judicial-protection-fundamental-rights-internet-road-towards-digital-constitutionalism.

[13] Tusseau, *Taking Chaos Seriously*, 74.

neutrality[14] (the equal and non-discriminatory treatment of all data flows on the internet), digital democracy (as the accountability of digital actors toward users and civil society), the digital rule of law, and accessible and transparent digital public institutions.

4.2. Global Codification Initiatives

Over time, states have attempted to regulate various charters of digital rights. Some initiatives were courageous; however, few materialized as legally binding acts, with the vast majority remaining at the level of recommendations.

4.2.1. France

In France, the proposal for such a charter did not achieve the desired success, as it was initially considered at the jurisprudential level that new digital rights — such as internet access or the protection of personal data — were already included within the provisions regulating freedom of expression or the right to privacy in the 1789 Declaration (the Declaration of the Rights of Man and of the Citizen): "*Considérant qu'aux termes de l'article 11 de la Déclaration des droits de l'homme et du citoyen de 1789 : «La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme : tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi»; qu'en l'état actuel des moyens de communication et eu égard au développement généralisé des services de communication au public en ligne ainsi qu'à l'importance prise par ces services pour la participation à la vie démocratique et l'expression des idées et des opinions, ce droit implique la liberté d'accéder à ces services*"[15]. Various criticisms were also expressed in the legal doctrine[16] regarding the risk of fragmenting the unity of the Constitution

[14] See, for example, Tim Wu, "Network Neutrality, Broadband Discrimination," *Journal on Telecommunications & High Technology Law* 2 (2003): 141–76, https://scholarship.law.columbia.edu/faculty_scholarship/1281/; Christoph B. Graber, "Bottom-Up Constitutionalism: The Case of Net Neutrality," *Transnational Legal Theory* 7, no. 4 (2016): 524–52, https://doi.org/10.1080/20414005.2017.1300678.

[15] Author's translation: "Considering that Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789 provides: 'The free communication of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write and print freely, unless he is liable for the abuse of this freedom in the cases determined by law'; that in the current state of the means of communication and in view of the widespread development of online public communication services and the importance of these services for participation in democratic life and the expression of ideas and opinions, this right implies the freedom to access these services." Conseil constitutionnel, *Decision no. 2009-580 DC of June 10, 2009*, para. 12, https://www.conseil-constitutionnel.fr/en/decision/2009/2009580DC.htm.

[16] Éric Desmons, "Peut-on encore critiquer la politique des droits de l'homme?" *Revue des droits et libertés fondamentaux*, 2019, chron. no. 26, https://revuedlf.com/droit-fondamentaux/peut-on-encore-critiquer-la-politique-des-droits-de-lhomme/.

by introducing new rights, given the contemporary legislative inflation.

Loi n° 2016-1321 pour une République numérique (2016) nevertheless represented an ambitious initiative that promoted the implementation of a progressive policy on digital technology — a legislative policy centered on individuals, "*strengthening their power to act and their rights in the digital world*" [17]. The law had three primary objectives: the circulation of data and knowledge, the protection of individuals in the digital society, and digital access for all. Even today, the law remains one of the pillars of French digital legislation, anticipating many of the fundamental safeguards later provided by the General Data Protection Regulation (GDPR, 2018). For instance, the Digital Republic Act addressed data portability (the right of citizens to retrieve their data from service providers to transfer it elsewhere), the right to be forgotten (introducing specific mechanisms for the erasure of minors' data upon request), and the confidentiality of electronic correspondence (prohibiting providers from using automated message-scanning technologies for advertising purposes) — all of which are also found in the GDPR. As a legislative innovation, the French law regulated "*digital death*"[18], specifically an individual's right to leave instructions regarding the storage, deletion, or communication of their data after death. Such a legislative initiative serves as primary evidence attesting that the digital persona outlives the physical person. Data protection should, therefore, also be applied post-mortem. Meta has already implemented mechanisms to this effect since 2015, allowing a *legacy contact* to manage a deceased user's profile, thereby recognizing the significance of the user's digital identity.

4.2.2. The Philippines

Regarding the sphere of new digital rights, outside the European space, in Asia, the Philippines created its own Digital Magna Carta as a result of an open public consultation (*crowdsourced*). "The Magna Carta for Philippine Internet Freedom" was submitted twice to the Philippine Congress, yet it was not adopted. Nonetheless, the initiative set a powerful precedent and highlighted the legal issues raised by the development of new technologies. This digital revolution was sparked by a social media revolt following the *Cybercrime Prevention Act of 2012*, a regulation that criminalized online libel. Furthermore, the provision concerning libel was challenged before the Supreme Court; however, the Court ruled that the article was indeed constitutional, with one significant qualification: the provision applies only to the original author of the post, and not to those who

[17] "Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique," legislative dossier, Vie-publique.fr, accessed April 5, 2026, https://www.vie-publique.fr/dossierlegislatif/JORFDOLE000031589829.

[18] Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, art. 63, https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000033203260.

interact with the online content (by likes, shares, comments, etc.)[19].

Even so, users argued that such a law infringes upon freedom of expression, leading to the emergence of the idea for a new Magna Carta to protect user rights in virtual space. The initiative stemmed from the desire to decriminalize online libel and treat it as a civil dispute, resolved through the awarding of potential damages, rather than as a criminal matter.

"*The Magna Carta for Philippine Internet Freedom*" included provisions such as: protecting the internet as an open network, net neutrality, universal access to the internet, freedom of expression, freedom of innovation, data privacy and security, and the protection of intellectual property. Additionally, other aspects specific to the digital environment were mentioned, for instance: cybercrime, cyber defense, and cybersecurity. The Charter also stipulated a mandatory and periodic review of the norms at intervals of at least three years and at most five years, in order to keep pace with technological advancements and other occurring changes[20]. This was, in practice, an acknowledgment of the rapid pace of technological shifts, which digital legislation must keep up with so that legal norms continue to respond to social reality.

4.2.3. Nigeria

The magnitude of the digital phenomenon has been felt in all corners of the globe. In turn, Nigeria was among the pioneer countries in regulating virtual space by initiating a legislative project on digital rights and freedoms (the *Digital Rights and Freedom Bill*), titled: "*A bill for an act to provide for the protection of human rights online, to protect internet users in Nigeria from infringement of their fundamental freedoms and to guarantee application of human rights for users of digital platforms and/or digital media and for related matters, 2017 (HB. 98)*". Although the legislative proposal was adopted by Parliament in 2019, the President did not grant his assent for its promulgation, exercising his right of veto despite persistent pressure from civil society representatives. As in France, the primary argument was driven by legislative inflation — specifically, the risk of overlapping norms. The President of the Republic maintained that the legislative initiative targeted areas already subject to other laws or which fell within the jurisdiction of existing governmental structures. He also invoked the presence of formal defects and ambiguous language, particularly regarding the provisions aimed at protecting anonymity and data encryption — areas that interfered with the operational sphere of intelligence services.

Even though the law did not enter into force, the ideas set forth in the *Digital Rights and Freedom Bill* sought alignment with a series of globally

[19] *Disini v. Secretary of Justice*, G.R. No. 203335 (Supreme Court of the Philippines, February 11, 2014), https://lawphil.net/judjuris/juri2014/feb2014/gr_203335_2014.html.

[20] Magna Carta for Philippine Internet Freedom, S.B. No. 1091, 16th Cong., 1st Reg. Sess. (Philippines 2013), sec. 76, https://legacy.senate.gov.ph/lis/bill_res.aspx?congress=16&q=SBN-1091.

established values, such as: digital privacy, anonymity, freedom of expression online, freedom of information online, the freedom to learn, the right to create public knowledge, e-governance, and others. Furthermore, the inter-institutional dialogue regarding the legislative enshrining of digital rights in Nigeria remains one of the primary themes on the national agenda. The most recent development involves a strategic analysis conducted at the end of 2025, through consultations with specialists aimed at raising awareness of digital rights, learning from international best practices (such as the AI Act and GDPR), and identifying a balance between citizens' rights and national security.

4.2.4. Brazil

Similar attempts to regulate digital rights — this time successful, unlike in other jurisdictions — took place in Brazil with the adoption of the "Marco Civil da Internet" [21], one of the first relevant examples of digital constitutions. The law, adopted in 2014, established the principles, guarantees, rights, and duties concerning internet use in Brazil, serving as a model even at the European level. The Marco Civil was configured to represent more than a mere series of digital rights, acting instead as a guide for digital governance. Brazil offers a model of participatory governance (through online public consultations) over the virtual space. The *crowdsourcing* option — namely, involving citizens in the legislative process concerning new technologies and, essentially, the regulation of virtual space — represents an innovative approach in which the configuration of the digital sphere is achieved democratically through collaboration between authorities, tech giants, and civil society.

Drawing once again a parallel with classical constitutionalism, the involvement of citizens — each yielding a small portion of their freedom for the triumph of the universal good — recalls the origins of the social contract theory of J. J. Rousseau. Citizens recognize their need for online freedom of expression, personal data protection, and the right to digital privacy; for this cause, they are willing to accept certain rules governing the use of virtual space.

Brazil's proposal, through the implementation of a model of direct digital democracy, set an important precedent regarding procedural legitimacy. An interactive platform was utilized where citizens could propose amendments to each paragraph, publicly presenting their arguments. Consequently, when tech giants opposed the concept of net neutrality, the opposition from civil society was highly visible, compelling a compromise from the private sector. It is noteworthy that the legitimacy of Brazil's digital legislation also derives from shifting the classic legislative typology from the traditional model (*top-down* — imposed by

[21] Luiz Fernando Marrey Moncau and Diego Werneck Arguelhes, "The Marco Civil da Internet and Digital Constitutionalism," in *The Oxford Handbook of Online Intermediary Liability*, ed. Giancarlo Frosio (Oxford: Oxford University Press, 2020), 190–213, https://doi.org/10.1093/oxfordhb/9780198837138.013.10.

state authority) to a "*bottom-up*" process (initiated by citizens).

The *Marco Civil da Internet* inverted the decision-making pyramid, placing a share of responsibility in the hands of citizens, and the model proved successful. Functioning as a digital social contract, the *Marco Civil* includes among its provisions the following:

- Global recognition of the internet;
- Protection of human rights and the exercise of citizenship in virtual space;
- Support for free initiative, free competition, and consumer protection;
- Establishing a social purpose for the network (beyond data exchange, the internet must serve the common good);
- Guaranteeing freedom of expression;
- Protection of privacy and personal data;
- Preservation and guarantee of net neutrality (prohibiting the restriction of data flows based on content);
- Preservation of the participatory nature of the network (by citizen involvement);
- The right of access to the internet for all citizens;
- Access to information, knowledge, and participation in cultural life, as well as in the conduct of public affairs;
- Innovation and the promotion of widespread use of new technologies and models for information access and use;
- Adherence to flexible technological standards that allow for communication, accessibility, and interoperability between applications and databases, etc.[22]

Brazil established a general framework of digital principles based on a participatory model, which subsequently proved to be a standard for digital regulation — utilizing public consultations and digital petitions that allow citizens to take part in the legislative process. Net neutrality, one of the most significant concepts addressed by the *Marco Civil da Internet*, was enshrined shortly thereafter within the European framework through the adoption of the EU Net Neutrality Regulation (2015/2120). Since then, the interpretation of the net neutrality principle has been subject to analysis by the Court of Justice of the EU (CJEU). In its analysis of the *Telenor* case (C-807/18 and C-39/19), the CJEU established clear limits regarding the commercial strategies of internet service providers and, implicitly, the constitutional rights of users. The standard is defined by the application of equal and non-discriminatory treatment of traffic in the provision of internet access services. Therefore, commercial packages that allow preferential use of certain applications while the rest of the traffic is restricted after data limits are reached "*are incompatible [with EU law], as such*

[22] Lei no. 12.965, de 23 de abril de 2014 (Marco Civil da Internet), arts. 2–4 (Brazil), https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm.

packages, agreements, and blocking or slowing-down measures limit the exercise of the rights of end-users"[23], being based on commercial considerations to the detriment of freedom of information.

4.2.5. Portugal

The protection of end-users and the continued functioning of the internet ecosystem as an engine for innovation[24] represent the primary objectives of digital legislation. At the European level, Portugal aligns itself with countries possessing dynamic legislations adapted to the virtual space through the adoption of a digital rights charter — *Carta dos direitos humanos na era digital* (2021)[25]. The Portuguese Charter is the closest example of a new 21st-century Magna Carta that establishes the foundations of virtual constitutionalism.

The principles of the Charter recall the concepts initially stated in 2014 by the *Marco Civil da Internet*. The Charter protects:

- The right of access to the digital environment, as a *sine qua non* condition for the exercise of modern citizenship;
- Freedom of expression and creation in the digital environment;
- The right to protection against disinformation;
- The right to privacy in the digital environment;
- The use of artificial intelligence and robotics (establishing ethical and legal principles for new technologies);
- The right to the development of digital skills;
- The right to net neutrality (previously enshrined in CJEU jurisprudence);
- The right to be forgotten (likewise established through case law);
- The right to protection against abusive geolocation;
- The right to a digital will (recognition of the post-mortem transmission of digital assets);
- Digital *actio popularis* and other safeguards.

Portugal has established a significant set of values in which the use of artificial intelligence systems is centered on the respect for fundamental rights and freedoms. Automated decisions are subject to human oversight, with the Portuguese regulatory framework emphasizing algorithmic transparency and the right to an explanation — values subsequently adopted by the AI Act (2024). The

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[23] *Telenor Magyarország Zrt. v. Nemzeti Média- és Hírközlési Hatóság Elnöke*, Joined Cases C-807/18 and C-39/19, ECLI:EU:C:2020:708 (CJEU, September 15, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0807.

[24] Regulation (EU) 2015/2120 of the European Parliament and of the Council of November 25, 2015, laying down measures concerning open internet access, preamble, https://eur-lex.europa.eu/eli/reg/2015/2120/oj/eng.

[25] Domingos Miguel Soares Farinho, "La Carta Portuguesa de Derechos Humanos en la Era Digital: Una valoración jurídica," *Revista Española de la Transparencia* 13 (2021): 85–105, https://doi.org/10.51915/ret.191.

Portuguese Charter also explicitly regulates the concept of digital *actio popularis* as evidence of the increasing flexibility of legal frameworks. This action aims to serve as a remedy against algorithmic discrimination, to protect net neutrality, and to ensure cybersecurity. Any citizen may initiate such an action in the name of the public interest.

4.3. Future Perspectives

Other European states have also implemented regulations within the digital sphere, albeit as recommendations (*soft law*), rather than as legally binding acts (*hard law*). For instance, Italy adopted the *Dichiarazione dei diritti in Internet* (2015)[26], while in Spain, digital rights were enshrined through the *Carta de Derechos Digitales* (2021)[27].

The European Union adopted the *European Declaration on Digital Rights and Principles for the Digital Decade (2022)* as a manifesto for future regulations aimed at placing the citizen at the center of the digital transformation. This declaration includes concepts such as solidarity and inclusion (through connectivity, digital education and skills, and online digital public services), freedom of choice (in interactions with algorithms and artificial intelligence systems), participation in the digital public space (by ensuring online freedom of expression), safety and security (through privacy protection and the fight against cybercrime), and sustainability.

5. Conclusions

Although the discourse on the Digital Decade (2021–2030) represents the current regulatory framework for technological innovation in all spheres of social life, the origins of these concepts began long ago with the Magna Carta, continuing with the Declaration of the Independence of Cyberspace (1996). It can be argued that the idea of a constitutional regulation of virtual space emerged alongside the global expansion of the internet.

The analysis conducted in this study sought to establish a theoretical parallel between the past and the present, from the foundations of classical constitutionalism to the pillars of virtual constitutionalism — specifically, from ”*habeas corpus*” to ”*habeas data*”. Drawing upon the classical principles of the *Magna Carta Libertatum*, which reconfigured the nature of power dynamics, we are witnessing a revolutionary moment: the configuration of a new Magna Carta intended for the digital sphere. On one hand, there is a profound transformation

[26] Camera dei deputati, *Dichiarazione dei diritti in Internet* (July 28, 2015), https://www.camera.it/application/xmanager/projects/leg17/commissione_internet/dichiarazione_dei_diritti_internet_pubblicata.pdf.

[27] Government of Spain, *Carta de Derechos Digitales* (July 2021), https://www.lamoncloa.gob.es/presidente/actividades/Documents/2021/140721-Carta_Derechos_Digitales_RedEs.pdf.

of legal norms; on the other, the essence of the values remains unchanged. No entity stands above the law — neither the sovereign (the past) nor the tech giants (the present).

Viewed as a whole, the digital transformation reflects the consolidation of a set of common principles: from Brazil's participatory model (*Marco Civil da Internet*) to Portugal's legislative innovation (*Carta dos direitos humanos na era digital*) and the Declaration on the Digital Decade, all these initiatives lay the foundations of virtual constitutionalism — prioritizing the human factor, net neutrality, informational self-determination, transparency, and algorithmic accountability.

The comparative analysis of norms adopted at the global level — France, the Philippines, Nigeria, Brazil, and Portugal — captures the manner in which different jurisdictions ensure the protection of the digital citizen. Legal scholars highlight the distinction between two approaches: the configuration of new digital rights or the adaptation of existing rights to meet the demands of the virtual space. Although some legally binding regulations exist, most states exercise legislative caution, exploring this new sphere through *soft law* instruments and recommendations.

The difficulty of implementing *hard law* mechanisms into global legislation reflects a potential conflict between the innovative principles of digital constitutionalism and traditional mechanisms of state control. We are, therefore, facing a new constitutional moment that will reconfigure the impact of regulations and public policies on virtual space. The digital citizen is far more involved in the legislative sphere. Furthermore, the contemporary demand for freedom increasingly focuses on "*habeas data*" (the protection of personal data against state surveillance) as a natural extension of "*habeas corpus*".

Classical norms were often fragmented, depending on the territorial borders of a state; in contrast, the digital norms of platforms (the new Magna Carta) apply a single set of global rules. The AI Act, DSA, DMA, and GDPR initiatives aimed to unify the European legislative framework and provide uniform regulations within the EU's digital architecture.

The concept of a "new Magna Carta" for virtual space is a landmark ever closer to materialization. Just as the sovereign was once compelled to limit his power in favor of citizens' rights to guarantee social peace, it is now the turn of digital platforms to do the same.

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Convergence or Conflict? Comparing the Procedural Standards of Refugee Protection under the European Court of Human Rights, European Union Law, and the 1951 Geneva Convention

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Abstract

Human migration is a natural and complex concept, which is why it is difficult for governments to control societies. From the perspective of the legal system, cross-border movement is closely linked to international refugee law, national migration law, and other regional norms. All of these are used in concordance with the provisions on the protection of human rights. This paper aims to provide a comparative analysis of how three frameworks protect refugees and non-European migrants: the jurisprudence of the European Court of Human Rights, EU asylum law, as shaped by the Court of Justice of the EU, and the Geneva Convention. Both rights are grounded in the 1951 Refugee Convention, which defines "refugee" and guarantees the principle of non-refoulement. Over time, the Strasbourg system has strengthened human protection through judicially developed procedural guarantees. While EU law has codified common standards in a private interpretation and introduced subsidiary protection for people who do not qualify as refugees, but who nevertheless face serious harm. The study argues that these legal systems of protection largely overlap in their basic concepts and principles. Where tensions arise, they are usually reflected in the implementation of protection in Member States under social and migratory pressures.

Keywords: *ECHR, refugees, European Union, protection, Geneva, subsidiary protection.*

1. Introduction

In recent decades, due to socio-political uncertainty, people have fled to different regions in search of a better life. With the scale of the phenomenon, armed conflicts and climate change have led to massive displacements; the population from unstable areas: Africa, Asia and, in recent years, Eastern Europe, due to the Russian Ukrainian conflict, has begun to move to states where human rights are not only theoretically respected, but also fully respected.

The high level of migration at the same time is the cause of multiple factors: persecution, politics, ethnicity, and other limited human rights. In this way, people facing various problems create a new lives in countries where their rights and freedoms are respected. All member states of the European mechanism of protection must ensure absolute and secure protection for all newcomers, in accordance with the European Convention on Human Rights (ECHR). During the

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explosion, the authorities need to check, "*in concreto*" and individually, if in the country, if the transfer of human rights is respected in accordance with ECHR, and if the procedural guarantees offered are transparent, real, and sufficient.

European Union (EU) law has succeeded in harmonizing the legislative framework for the protection of vulnerable people, mainly concerning reception conditions, asylum status, access to effective remedies with suspensive effect and minimum guarantees upon return. The Dublin Regulation has been adapted to reflect the best interests of the child in transfer procedures, and the detention of children upon entry into the European area is no longer permitted in prison-type facilities; instead, exceptional facilities and appropriate conditions for families and minors are required. Although in theory, the CJEU has strengthened the link between the provisions of the Geneva Convention on Refugees and the case law of the ECtHR, legislative and practical differences between Member States make harmonization incomplete: sensitive areas, in particular procedural guarantees and transfer mechanisms, often require clarification and rigorous application to ensure the adequate protection guaranteed by European rules.

1.1. Methodology

This paper draws largely on the way in which the three European regimes: EU law, the ECHR and the Geneva Convention. All of them address the same factors: procedural guarantees, effective remedies and the absolute prohibition of expulsion in the presence of a real risk. The paper proposes an approach that analyses in depth the provisions of the Treaties, EU law, the case law of the ECtHR and the way in which the Geneva Convention is applied, directly and indirectly, in European states. The Geneva Convention is the cornerstone of refugee protection, providing the first definition of a refugee. The transformations of the era and new challenges have led to the deepening and repositioning of the protection it offers.

The paper aims to demonstrate that EU law serves as a bridge between the Geneva Principles and the ECtHR's case law. An EU Member State cannot, before the Strasbourg Court, rely on compliance with EU law to evade obligations arising from the ECHR mechanism; these must be respected and implemented.

1.2. Terminology

The notion of refugees has existed throughout history and continues to do so. In the black times of history when the wars were considered normal, people who were deemed vulnerable were in a continuing movement. Thus, a refugee does not benefit from the protection of their country of origin and is forced to seek assistance in a foreign country[2]. A refugee must be a person who has a well-

[2] Victor Dan Zlătescu and Irina Moroianu Zlătescu, *Refugiații și statutul lor juridic* [Refugees and

founded fear, according to[3] to the Refugee Convention[4].

As for the well-founded fear, there must be a cumulative element: fear and a real reluctance to return to the country of origin, which expresses the subjective component of the notion. This fear must be supported by objective conditions indicating a real, actual, or foreseeable risk of persecution, in relation to the individual's circumstances and in accordance[5] with the 1951 Geneva Refugee Convention.

In a few decades, the Geneva Conventions (1951) came to play a central role in the international protection of refugees. During this period, legislative systems across Europe adopted and adapted definitions of refugees in contemporary legislation to reflect the realities of asylum. In EU Law, the notion of „well-founded fear" was taken over by the Qualification Directive[6]. In European societies, a clear delimitation was created between refugee status and subsidiary protection.

The concept of "refugee" within the EU essentially retains the 1951 definition. Still, it is accompanied by a distinct subsection entitled "subsidiary protection," intended to protect both people: who fall directly within the scope of the Convention and those who, indirectly, are exposed to serious risks upon return.

The ECHR mechanism did not create a private definition of the term "refugee". It focused on respecting human rights as enshrined in the Convention, particularly the application of the absolute character of Article 3 of the ECHR. Article 3 of the ECHR is interpreted broadly to prevent the return of people to conditions incompatible with this standard.

2. The Application of Human International Law Through the Prism of the Geneva Convention and the Role of UNHCR

The National League was founded in 1920, after the Peace Conference in Paris. In 1921, Fridtjof Nansen was named the representative of the League of

Their Legal Status] (Bucharest: IRDO, 1992), 12–14, https://irdo.ro/refugiati-azilanti.php?id pagina=181.

[3] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137, art. 1A(2), and Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267, https://www.unhcr.org/sites/default/files/2025-02/1951-refugee-convention-1967-protocol.pdf.

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Nations. The primary objective of the National League was to address the problems of a refugees[7]. Nansen initiated an official document for travel, a special delicacy for the apartheid people and refugees. This document was called the "Nasen passport," and the main objective was to facilitate safe travel[8]. Due to political reasons and, as a result of failures in preventing and managing major conflicts during the interwar period and the Second World War, the National League was disbanded after the Second World War. The successor of the League of Nations was the United Nations Organization. The Nasean passport was gradually discontinued at that time. The status of refugees: protection and regulation are taken over and developed in an international and modern instrument: the Geneva Convention (1951). It is a solid and contemporary legal basis for the global protection of refugees and for the documentation and mobility instruments governing them[9].

The autonomous character of international refugee law was articulated after the Second World War, through the Geneva Conventions[10]. Alongside this law, other branches of law became autonomous: international criminal law and international human rights law. It is necessary to announce that this juridical branch of law is closely related to humanitarian law[11]. Humanitarian law is complex: the Geneva Law, which has as its primary objective the protection of civilians and ex-military people and the second group, the Hague Law, which draws the limits of harming the enemy, establishes the rights and obligations of the belligerents[12]. The Convention established a limited enumeration of reasons for granting refugee status.[13] This requires an individual assessment of a rigorous documentation of the individually[14] invoked cause to the detriment of the group's

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[7] Mihail Niemesch, *Drept internațional public* [Public International Law] (Bucharest: Hamangiu, 2018), 129–30, https://www.hamangiu.ro/drept-international-public-editia-2018.

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[11] Laura-Maria Crăciunean-Tatu, *Drept internațional umanitar* [International Humanitarian Law], 2nd ed. (Bucharest: Hamangiu, 2019), 23–25, https://www.hamangiu.ro/drept-international-um anitar-editia-a-2-a.

[12] Romanian Red Cross, "Ce este dreptul internațional umanitar?" [What Is International Humanitarian Law?], accessed December 25, 2025, https://crucearosie.ro/ce-facem/drept-inter national-umanitar/ce-este-dreptul-international-umanitar/.

[13] Convention Relating to the Status of Refugees, art. 1A(2).

[14] Rajit H. Das, "Refugees and Immigration Policies," in *Encyclopedia of Violence, Peace, & Conflict*, 3rd ed., vol. 3, ed. Lester R. Kurtz (Elsevier, 2022), 669–78, https://doi.org/10.1016/B978-0-

appreciation encountered during the interwar period[15]. Competent authorities conduct the examination, which entails analyzing all relevant elements of the request and the country of origin's context. The causes of climate change, poverty, or a simple situation of armed conflict do not constitute grounds for refugee status under the a. People who move solely for these reasons are known as migrants. They are likely to seek subsidiary protection in accordance with EU Law.

The minimum standard guaranteed to refugees under the Geneva Conventions is a form of protection equivalent to the human right to citizenship in the host country. Protection gives them integrity and security. This regime ceases when the person voluntarily returns to their country of origin or when the crisis ends. The guarantee of the principle of non-returning has a relative character. There are limited exceptions under which a person may be expelled. The nature of this principle is found in the customary history of law. It has become, over time, a principle established and integrated into various legislative systems and jurisprudence for the protection of human rights.

The United Nations High Commissioner for Refugees (UNHCR) was defined by Resolution 428(V)[16] and it was made official in January 1951. The UNHCR character was purely humanitarian and devoid of any political connotation[17]. The central role is to lead and coordinate international efforts to protect refugees. The exercise of the mandate is based on the practical application of the provisions of the 1951 Convention together with the 1967 Additional Protocol. We must see UNHCR as an international advocate intended to protect refugees[18] and who observed the way in which the states respect the minimum human rights and exercise the principle of non-refoulement. At the same time, UNHCR must be able to develop a series of guides and offer specialization programs in refugee protection.

Following the Russian-Ukrainian War in 2022, UNHCR intensified its protection activities, including the provision of medical and psychological aid and facilities for the humanitarian convoys. Because of bombs that hit the infrastructure and medical institutions, the people with serious health problems were

12-820195-4.00232-6.

[15] Daniela-Anca Deteșeanu, *Drept internațional umanitar și al refugiaților* [International Humanitarian and Refugee Law] (Bucharest: Hamangiu, 2024), 235–38, https://www.hamangiu. ro/drept-international-umanitar-si-al-refugiatilor; Convention Relating to the Status of Refugees, art. 33(2).

[16] United Nations General Assembly, "Statute of the Office of the United Nations High Commissioner for Refugees," GA Res. 428 (V), UN Doc. A/RES/428(V), December 14, 1950, para. 1, https://docs.un.org/en/A/RES/428(V).

[17] United Nations High Commissioner for Refugees (UNHCR), *Self-Study Module 1: An Introduction to International Protection: Protecting Persons of Concern to UNHCR* (Geneva: UNHCR, 2005), 7–9, https://www.unhcr.org/media/self-study-module-1-introduction-internation al-protection-protecting-persons-concern-unhcr.

[18] Joël Glasman, "Seeing Like a Refugee Agency: A Short History of UNHCR Classifications in Central Africa (1961–2015)," *Journal of Refugee Studies* 30, no. 2 (2017): 337–62, https://doi.org/10.1093/jrs/few044.

transferred with their help to neighboring states: Moldova, Romania, and Poland[19]. The medical assistance provided by UNHCR was also evident in Ukrainian hospitals, thereby alleviating shortages of qualified medical personnel across more than 600 health facilities[20]. Regarding the assistance provided by UNHCR to persons entering through the Romanian border, diplomatic aid, through discussions with other national and international organizations, was essential to establish conditions for social, economic, and educational integration[21].

3. European Convention on Human Rights and Its Role in Refugee Protection

The protection system established in the Geneva Conventions is the universal cornerstone of refugee protection. Today, it is one of the most relevant conventions in the World and in Europe. The ECtHR applies these standards in practice, functioning as a complementary or subsidiary judicial mechanism that ensures respect for rights in the member states.

In 1953, the ECHR protection was officialized, the main scope of this was the protection of human rights across Europe with a significant implication for refugee protection. The perception of greater safety for refugees and migrants has evolved.

The law case Soering v. the United Kingdom played a central role. The interpretation of Article 3 was extended by the judges of the Strasbourg Court, thereby consolidating the principle of non-refoulement as an absolute obligation. At the same time, the necessity of evaluating the actual risk before authorizing a transfer by competent authorities was noted. The ECtHR jurisprudence overlooks the concept of the dead way, which is covered by Article 3 of the ECHR. For the first time, the judges recognized that the physical and psychological suffering can be anticipated in certain conditions, as the death penalty is a part of this article.

The Strasbourg Jurisprudence[22] imposed on national competence authorities the obligation to observe, in a concrete and individual way, the risk of transfer for all who would be exposed and imposed on national authorities the responsibility to verify concretely and individually the risk to which the transferred per-

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[19] Mieke Van Hemelrijck et al., "Cancer Care for Ukrainian Refugees: Strategic Impact Assessments in the Early Days of the Conflict," *Journal of Cancer Policy* 34 (2022): 100370, 2–5, https://doi.org/10.1016/j.jcpo.2022.100370.

[20] Marta Dzhus and Iryna Golovach, "Impact of Ukrainian-Russian War on Health Care and Humanitarian Crisis," *Disaster Medicine and Public Health Preparedness* 17 (2023): e340, https://doi.org/10.1017/dmp.2022.265.

[21] Valentin Macec and Cătălin Baba, "Romania, the Crisis of Ukrainian Refugees: Political and Humanitarian Perspectives," *Conflict Studies Quarterly*, no. 52 (2025): 69–91, https://doi.org/10.24193/csq.52.4.

[22] European Court of Human Rights, *M.S.S. v. Belgium and Greece*, app. no. 30696/09, Grand Chamber, judgment of January 21, 2011, https://hudoc.echr.coe.int/eng?i=001-103050.

son would be exposed. At the same time, limitations were imposed on the application of the return procedure. We note that the EU law was mandatory to adapt its legislation based on these case-law standards[23].

Moreover, the indirect effects were feeling in Dublin II Regulation[24]. It received criticism for the way it processed automatic transfers and for the lack of guarantees regarding respect for rights. In response to these criticisms, the EU made changes transforming it into the Dublin III Regulation. The main changes were felt on: the best interests of the child; the existence of an adequate remedy; family reunification; and the obligation to verify, before the transfer, the respect of human rights guarantees in the receiving state. Today, we must see the new regulation as a genuine effort to translate the requirements of ECHR case law into practice in European law.

All the new law cases from Strasbourg are interpreted in the light of contemporary European society. After this, the national authorities of the states are mandated to implement the Court's decision in their practice. In this context, we recall two well-known cases in the Strasbourg Jurisprudence: *M.S.S. v. Belgium and Greece* and *Tarakhel v. Switzerland*.

The first one is known for its limitation to the application of Dublin Regulation II. It was established that, in the event of systemic deficiencies in the destination state, the sending state should verify the actual risk of human rights limitation if the transfer takes place. The second case law reaffirmed that the primary focus needs to be on individual guarantees, and no transfer should happen in the absence of credible guarantees by the receiving state[25]. At the same time, the court puts great emphasis on the family's unity.

It is certain that the M.S.S case was so influential that it led to a change in the administration system and influenced the development of the EU regulatory system.

The history of the M.S.S case started in Greece when an Afghan man ran to Belgium because of primary conditions. The Belgian authorities, under the Dublin Regulation and without adequate verification of his reception and detention, returned him to Greece.

The Strasbourg Court found more violations by both countries. He was exposed to inhuman and degrading conditions in Greece, and the Belgian authorities ignored them. In the Court's judgment, the judges held that both violated

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[23] Joanna Lenart, "'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms," *Utrecht Journal of International and European Law* 28, no. 75 (2012): 4–19, https://doi.org/10.5334/ujiel.bd.

[24] Council Regulation (EC) No. 343/2003 of February 18, 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, OJ L 50 (February 25, 2003): 1–10, https://eur-lex.europa.eu/eli/reg/2003/343/oj/eng.

[25] Ilse Derluyn, "A Critical Analysis of the Creation of Separated Care Structures for Unaccompanied Refugee Minors," *Children and Youth Services Review* 92 (2018): 22–29, esp. 23–25, https://doi.org/10.1016/j.childyouth.2018.03.047.

Articles 3 and 13 of the ECHR. Following finalization, the Belgian authorities halted the transfer to Greece and initiated a new, complex procedure for a better protecting human rights.

The complexity of the Tarakhel case law is in the family history of jurisprudence. In this case, a family with six children was sent from Switzerland to Italy by the competent authorities despite the risk of family separation. Moreover, the Italian authorities could not have accommodation conditions for minors.

The Strasbourg Court reiterated the need for an individual risk assessment and for the establishment of genuine and additional guarantees before the transfer. This must be treated with the utmost caution, especially when the protection of minors and family unification are at stake.

Although the direct effects that the ECHR case law has on the modification of the Dublin Regulation cannot be rejected, the indirect effects cause major modifications and changes. These modifications occur primarily on the law of the Member States under the Convention. The ECHR case law is reflected in the domestic law of the States and then these modifications can also be felt in regional law. The ECHR case law conditions the granting of minimum protection and national laws and European institutions must align themselves with these requirements. We acknowledge the modification that occurred on the impossibility of having automatic transfers due to state trust, the need for an individual and extensive verification of the "real risk" and the obligation to request additional guarantees before the transfer from the destination State, if there are suspicions that the standards of the Convention are not being applied.

4. The Role of Testing Vulnerable People Through ECtHR Jurisprudence Before Expulsion

With advances in technology, the complexity of jurisprudence has increased. The desire for greater protection has increased and the Strasbourg Court has been confronted with various types of increasingly complex cases, sometimes forcing these judges to come up with new interpretations and new definitions[26].

Our view is that, for a transparent and secure increase in protection, a procedure for identifying vulnerable persons is needed. In this regard, we intend to create a Cumulative Test to be used by courts, government authorities and individuals. Its purpose is to detect vulnerable individuals entering Europe primarily via illegal border crossings.

However, it is not the passage through an unauthorized place that grants the status of a non-vulnerable person, but the reasons for which he passed in this

[26] European Court of Human Rights, *Soering v. the United Kingdom*, app. no. 14038/88, judgment of July 7, 1989, https://hudoc.echr.coe.int/eng?i=001-57619; *N.D. and N.T. v. Spain*, apps. nos. 8675/15 and 8697/15, Grand Chamber, judgment of February 13, 2020, https://hudoc.echr.coe.int/eng?i=001-201353; and *Ireland v. the United Kingdom*, app. no. 5310/71, judgment of January 18, 1978, https://hudoc.echr.coe.int/eng?i=001-57506.

way. The authorities are obliged to maintain human protection throughout this time, regardless of the disadvantages.

The main elements of this test are illegal entry, the use of force and violent conduct, verification of real means of access to the new European state and the existence of a minimum procedure for assessing persons before expulsion. We may have cases where refugees and migrants have vulnerable ages, various medical conditions, and even signs of torture, they will fall under the scope of human rights protection according to the European protection mechanism.

Regarding irregular entry, the verification must aim at whether newly arrived persons have bypassed the border due to a well-founded fear, threats, or in connection with the commission or risk of victimization through dual criminal offenses. This analysis must be individual and rapid in finding the criteria of vulnerability: minors, sick, tortured persons, etc.

With respect to the use of force or violent behavior, a detailed, individualized analysis is required. We may have cases in which violence is linked to an intention to affect the state's national security. However, it would not be excluded that aggressive behavior may be determined by panic, trauma or the desire to enter the new territory more quickly. In these situations, the newcomer's desired completion does not carry a hostile connotation toward the state. Having said that, an automatic presumption cannot be given to this element. An interpretation correlated with other elements and a preliminary assessment of vulnerability is needed.

The border must be effective and adequately signposted. There must be competent authorities at the border to provide minimal support to newcomers. Including access to emergency medical assistance, interpretation and legal assistance, so that entry through a legal border is not purely theoretical, but practically accessible.

The points provided for in (3) and (4) are based on a minimum assessment procedure. This procedure considers the competence of the state authorities responsible for identifying a group of people at the border. Before implementing an expulsion measure, each case is examined individually and quickly. The most sought-after signs are: age, unaccompanied children, signs of trauma, traces of torture and medical problems. Once these people are found, they are separated from the rest of the group, and the international protection procedure is initiated. For the group, expulsion may be implemented in accordance with due respect for rights and guarantees.

A concise example is when several individuals of different ages are identified attempting to cross the border through an unauthorized crossing point. The authorities of the respective states stop the boat and briefly analyze the causes, individually: unaccompanied minors, sick people and those with visible signs of torture are removed from the group and the asylum procedure, respectively international protection, is initiated, simultaneously with the provision of the necessary support. For others, the expulsion procedure is initiated. This procedure must

be recorded in a verifiable form, so that the measures can be subject to administrative or judicial control and the procedural guarantees are respected.

In parallel, we note that if this group had crossed the border through a permitted area, while maintaining civil conduct and submitting a request for protection, an official protection procedure would be initiated. The assessment of vulnerability would serve as a protective measure rather than a procedural obstacle.

This test aims to address the needs of Member States in the screening procedure. For this reason, its use can be made by the state, competent courts but also by interested people in formulating applications before national and European courts. The test thus supports the status of a vulnerable person and the implicit activation of specific additional procedural guarantees.

5. The Measures Taken by Greece and Belgium in the Case *M.S.S v Belgium and Greece*

Given the significant impact of M.S.S v Belgium and Greece on domestic and regional legislative systems, we consider it necessary to explain the trajectory of modification.

Firstly, Greece had at that time a poverty legislative system[27] in this context, a new reform was needed in migration and asylum politics. The first modification refers to the enactment of new and complex legislation to the detriment of the Presidential Decree (2005)[28] and the Law on Asylum and Migration (2010)[29]. These two laws were transposed into the actual law of migration and asylum[30].

Greek legislation is complex and well-structured, covering protection against a range of forms of abuse. Two new institutions were established to assist Greek authorities with crisis migration: Independent Asylum Service and First

[27] European Council on Refugees and Exiles (ECRE), "European Court of Human Rights: Lack of Access to the Asylum Procedure from 2009 to 2012 in Greece Violated the Applicants' Fundamental Rights," March 16, 2018, https://ecre.org/european-court-of-human-rights-lack-of-access-to-the-asylum-procedure-from-2009-to-2012-in-greece-violated-the-applicants-fundamen tal-rights/.
[28] Greece, Law No. 3386/2005, Entry, Residence and Social Integration of Third-Country Nationals in the Hellenic Territory, Government Gazette A 212/23.08.2005, https://www.refworld.org/legal/legislation/natlegbod/2005/en/98138.
[29] Greece, Presidential Decree No. 114/2010, Establishment of a Uniform Procedure for Granting Refugee or Subsidiary Protection Status, https://www.refworld.org/legal/decreees/natlegbod/2010/76136.
[30] Greece, Law No. 3907/2011, Establishment of an Asylum Service and a First Reception Service and Transposition of Directive 2008/115/EC, January 26, 2011, https://www.refworld.org/legal/legislation/natlegbod/2011/78894.

Reception Service. This independent asylum service has a procedure for fingerprinting asylum seekers according to Eurodac[31] and for registering asylum applications, this procedure being carried out for a maximum of 6 months[32].The first reception system created a guardianship system targeting unaccompanied minors and people with various conditions, while also preventing educational dropout and attempting to integrate newcomers into the Hellenistic socio-economic-cultural system[33].

Secondly, the Belgian legislative system needed to check supplementary and, precisely[34], the way in which a person is proposed to be refouled can be treated in another state after the transfer. The judges of the Belgian Court were mandated to restructure the decisions and their motivations in accordance with ECHR and ECtHR Jurisprudence.[35] The Belgian authorities suspended certain transfers to Greece and became involved in the extension of a Belgian legislation, which prioritizes human rights.

It is necessary to mention that the modifications of legislation that were produced by this cause were felt in an indirect way in Belgian legislation. The indirect effects were transposed in the interpretation and application of legislation. In 1980, the Belgian authorities adopted the Law for Strangers, the main objective of which was to regulate the residence of foreigners and their protection[36]. As the ECtHR case law has developed, especially after the M.S.S. decision, the practical provisions and application of the Aliens Law have been progressively adapted. The new reforms have been reflected mainly in the reception conditions and the strengthening of procedural guarantees in the field of asylum - each document is verified using technological means by the competent authorities[37].

We believe that the significant changes felt in the Greek legislative and

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[31] Regulation (EU) No. 603/2013 of the European Parliament and of the Council of June 26, 2013 (Eurodac Regulation), OJ L 180 (June 29, 2013): 1–30, https://eur-lex.europa.eu/eli/reg/2013/603/oj/eng.

[32] Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013, on Common Procedures for Granting and Withdrawing International Protection, art. 31(3), OJ L 180 (June 29, 2013): 60–95, https://eur-lex.europa.eu/eli/dir/2013/32/oj/eng.

[33] Greece, Law No. 4939/2022, Code of Legislation on the Reception and International Protection of Third-Country Nationals and Stateless Persons, arts. 50, 80, and 138–47, Government Gazette A 111/10.06.2022, https://rimap.unhcr.org/node/43114.

[34] Violeta Moreno-Lax, "Dismantling the Dublin System: M.S.S. v. Belgium and Greece," *European Journal of Migration and Law* 14, no. 1 (2012): 1–31, https://doi.org/10.1163/157181612X627652.

[35] Patricia Mallia, "Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation," *Refugee Survey Quarterly* 30, no. 3 (2011): 107–28, https://doi.org/10.1093/rsq/hdr008.

[36] Belgium, Law of December 15, 1980, on Access to the Territory, Residence, Establishment and Removal of Foreign Nationals, https://dofi.ibz.be/en/documentation/legislation.

[37] Meltem Ineli-Ciger and Nikolas Feith Tan, "Algorithms for Group Recognition? Ensuring Lawful and Rights-Based Use of New Technologies in Group Refugee Recognition," *Computer Law & Security Review* 59 (2025): 106222, 7–9, https://doi.org/10.1016/j.clsr.2025.106222.

administrative system are not exclusively due to the precarious system and reception conditions not fully compliant with the Convention. These changes have been further amplified due to the geographical position of Greece. Greece is a country of first entry for non-European migrant flows, especially from Asia, which also attracts large numbers of arrivals over short periods. The Greek authorities are under constant pressure to provide protection of rights, ensure specialized medical assistance and defend the Greek state from possible weakening of national security that could be created by socio-political tensions at the borders.

6. The Relationship Between Strasbourg Law and Brussels Law

The European institutions (the European Court of Human Rights and the European Court of Justice) share a common objective: the protection of individuals in accordance with the rights and freedoms enshrined in the European protection mechanism. The significant difference between them lies in their modes of perception.

ECtHR interprets the ECHR like a living instrument; the judges adapt the Convention to contemporary society's problems. The Brussels Court takes this interpretation and transcribes it into their own legislation: Directive and other related legislation. In this way, the Charter of Fundamental Rights of the European Union was born.

As for EU law, it was created for economic and social prosperity[38], not as an instrument of human rights protection in the classical sense. With the evolution of European society, the EU's desire to develop its own protective set of rights began to take shape, thus the Charter of Fundamental Rights of the European Union was born and the EU's entry as an organization into the ECHR mechanism was initiated.

The European Union, due to the political and institutional changes consolidated towards the end of the 20th century, began to approach the ECHR mechanism and effectively accede to it. In its case law, the CJEU has recognized since 1979 the importance of an organization's accession to this European protection mechanism and has initiated accession negotiations. A few years later, the issue of accession to the ECHR was finalized for the first time by Opinion 2/94[39], which held that, at the then stage of Community law, there was no real competence for the accession of the European Community to the ECHR, and amendments to the Treaties were necessary.

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[38] Chris Rumford and Didem Buhari, "European Union," in *The Wiley Blackwell Encyclopedia of Globalization*, 2nd ed., ed. George Ritzer (Wiley-Blackwell, 2016), 1–4, https://doi.org/10.1002/9780470670590.wbeog188.pub2.

[39] Court of Justice of the European Union, Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, March 28, 1996, EC LI:EU:C:1996:140, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994CV0002.

The Lisbon Treaty came into force in 2009, and Article 6 (2) TEU consecrated the obligation of the EU to become an ECHR member.[40] No EU institution's competence is changing. The accession negotiations continued at the beginning of the XXI century. In 2014, the Brussels Court issued a negative opinion, stating that accession is not possible based on its interpretation of the Treaties[41].

The main reason at that time was the principle of autonomy and the specific characteristics of the Union's legal order. In practice, once the EU was a party to the ECHR mechanism, there would be external control over the Union by the Strasbourg Court, which would lead to a diminution of the autonomy of EU law and the independence of the CJEU.

Currently, the EU is not an integral part of the ECHR mechanism, which is why it cannot be directly invoked before the Court's judges to defend itself. The judges of the Court can currently control EU law by evaluating and drafting judgments and decisions issued against EU Member States. A possible accession of the EU would lead to direct verification and effective control over the EU and would diminish the role of the CJEU[42].

7. The Protection of Vulnerable People: Migrants and Refugees Under the European Union Law

As previously mentioned, the EU provisions are closely related to the previous systems of rights protection. Due to the context of globalization and the increasingly widespread digital culture that has produced the phenomenon of digital nomads and the contexts of contemporary hybrid wars: Ukraine-Russia and Israel-Hamas, the international protection granted by the EU has been finalized.

Subsidiary protection is a measure taken in 2004 by the EU institutions for people who do not meet the criteria issued by the Geneva Convention. In February 2022, when the conflict between Ukraine and Russia began, European representatives interpreted the granting of this procedure in extension, so that subsidiary protection is granted to groups of people, automatically and quickly to the detriment of a case-by-case observation procedure and the need for additional documentation[43]. Every Ukrainian who enters the EU member states benefits

[40] Sionaidh Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon," *Human Rights Law Review* 11, no. 4 (2011): 645–82, https://doi.org/10.1093/hrlr/ngr038.

[41] Court of Justice of the European Union, Opinion 2/13, *Accession of the European Union to the ECHR*, December 18, 2014, ECLI:EU:C:2014:2454, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CV0002.

[42] Jasper Krommendijk, "EU Accession to the ECHR: Completing the Complete System of EU Remedies?," in *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'*, ed. Melanie Fink (Cambridge: Cambridge University Press, 2024), 177–206, https://doi.org/10.1017/9781009373814.012.

[43] European Commission, "Fleeing Ukraine: Your Rights in the EU," accessed December 25, 2025, https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-assistance-ukraine/information-people-fleeing-war-ukraine/fleeing-ukraine-your-rights-eu_en.

from a series of rights conferred by this protection: housing, information, education, a job, and medical services[44]. EU representatives have extended the validity of this group protection several times; the most recent extension runs until spring 2027, with the possibility of further extension depending on how the situation on the front line evolves.

The New Pact on Migration and Asylum, established under EU Law, will take effect in the second half of 2026, with the primary objective of enabling EU member states to support one another in times of crisis. The clearest example is when an EU border state, Italy, receives more newcomers. Before this pact, the Italian state was solely responsible[45] and had to take safety measures. With this pact, the remaining states have several solidarity options: they can take in people and integrate them into their system or provide support in other forms, including a financial solidarity contribution[46].

Regarding the relationship between this pact and the conflict in Israel, it is more legally correct to say that geopolitical tensions have contributed, at a political level, to the emphasis on the need perceived by states for a more coherent European framework regarding migration, asylum and the securing of external borders[47].

The main difference between the conflict in Ukraine and the conflict in Israel from the perspective of this pact lies in the granting of subsidiary protection. While in Ukraine this protection is given on a group basis, for newcomers from the conflict zone in Israel, the standard procedure of verifying the causes individually is applied. This is due to the geopolitical situation in the Middle East[48].

The geopolitical tensions affecting the Middle East have generally led to increased demand for external border security and more complex screening to prevent the entry of individuals who may pose risks into the European space. The Pact expressly provides clearer screening and procedural rules at the border, with legal guarantees. At the same time, the collection and use of relevant data at EU level, Eurodac, is being intensified with a view to stricter monitoring and management of people entering the EU, within the limits of the applicable legal

[44] European Commission, "Temporary Protection," accessed December 25, 2025, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu/temporary-protection_en.
[45] Council of the European Union, "Pact on Migration and Asylum," accessed August 1, 2026, https://www.consilium.europa.eu/en/policies/eu-pact-migration-asylum/.
[46] Council of the European Union, "The Council Adopts the EU's Pact on Migration and Asylum," press release, May 14, 2024, https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/.
[47] European Commission, "Pact on Migration and Asylum," accessed August 1, 2026, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.
[48] Regulation (EU) 2024/1348 of the European Parliament and of the Council of May 14, 2024, Establishing a Common Procedure for International Protection in the Union, art. 43, OJ L, 2024/1348 (May 22, 2024), https://eur-lex.europa.eu/eli/reg/2024/1348/oj/eng.

framework[49].

This pact has some disadvantages. Most of them are in the infrastructure system. First, all states need to adapt their legislative and institutional systems to enable the competent authorities to integrate the Pact into domestic legislation. These elements are deadlines, remedies, legal and judicial powers, and the practical organization of procedures, from the transition period through the application in 2026. All these changes may conflict with state domestic legislation and constitutional provisions, leading to a lack of internal coherence and to litigation.

Another factor that can cause problems is solidarity. In some conditions, these measures of solidarity[50] can be perceived as a limitation of the appreciation margin in migration and asylum legislation.

Secondary issues that may arise over time concern capacity and technology[51]. It should be borne in mind that many newcomers to a limited area may contribute to bottlenecks, shortages of qualified personnel[52] and the need for reallocation to areas with sufficient medical care and interpretation facilities.

The pact is a welcome one, it responds to the needs of contemporary society but assumes that all states have modern resources.[53] and infrastructure and are already prepared, it does not consider the existence of limitations in the systems of the member states.

8. Conclusion

We conclude this paper by noting that the three legal systems have distinct provisions and interpretations, and in some situations, the relationship between the two courts may be strained. However, all three systems share the same objective: the protection of individuals, particularly refugees and migrants.

The Geneva Convention is the cornerstone of the concept of refugees. It implemented a well-defined definition that today applies without geographic limitation. It established the principle of non-refoulement and the possibility of requesting additional guarantees when appropriate. The ECHR mechanism took over the Geneva provisions and interpreted them in its own, superior system.

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[49] European Commission, "Setting Out a Plan to Put the Migration and Asylum Pact into Practice," June 12, 2024, https://commission.europa.eu/news-and-media/news/setting-out-plan-put-migration-and-asylum-pact-practice-2024-06-12_en.

[50] Regulation (EU) 2024/1351 of the European Parliament and of the Council of May 14, 2024, on Asylum and Migration Management, OJ L, 2024/1351 (May 22, 2024), https://eur-lex.europa.eu/eli/reg/2024/1351/oj/eng.

[51] Platform for International Cooperation on Undocumented Migrants (PICUM), "The EU Migration Pact: A Dangerous Regime of Migrant Surveillance," April 11, 2024, https://picum.org/blog/the-eu-migration-pact-a-dangerous-regime-of-migrant-surveillance/.

[52] Caritas Europa, "What's Wrong with the EU's Pact on Migration?," April 9, 2024, https://www.caritas.eu/whats-wrong-with-the-eus-pact-on-migration/.

[53] International Rescue Committee, "What Is the EU Pact on Migration and Asylum?," October 27, 2023, updated July 23, 2024, https://www.rescue.org/eu/article/what-eu-pact-migration-and-asylum.

These were transposed into the mentions of Article 3.

The principle of non-refoulement gradually emerged from this article, and the absolute nature envelops both the article and the related principle. The judges of the ECtHR and the drafters of the ECHR did not develop their own definitions of the concepts of refugee and migrant. Still, they granted the superior protection conferred in the first phase by Geneva, through its absolute character, which was only a relative character in the Geneva system. While EU law introduced a new dimension: the creation of subsidiary protection for persons who do not fall within the concept of refugee, as defined in the Geneva system, EU law does not have a "live" of the provisions, as in the ECHR, but instead transposes them into its own mechanism.

The conflict between the three systems is viewed not through the lens of protection but through the lens of their logic and evolutionary trajectory, the way the issue is addressed, and the steps taken to achieve greater protection.

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The Right to Water: Comparative Constitutional Trends in Latin America

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Abstract

The objective of this study is to examine the legal evolution of the right to water as a third-generation human right, specifically focusing on its constitutional recognition within Latin American jurisdictions. As contemporary legal systems face increasing ecological pressures, this research explores how certain nations have elevated water access from a mere policy goal to a fundamental, enforceable right. The research employs a comparative legal methodology, analyzing constitutional texts and landmark judicial decisions from countries such as Bolivia, Ecuador, and Colombia, while contrasting these with international human rights standards. The results indicate that Latin American constitutionalism effectively bridges the gap between indigenous legal traditions and modern environmental governance, creating a "green" constitutional identity. The study concludes that these regional developments have significant implications for the global discourse on social rights, offering a transformative model for public law. By prioritizing human dignity over privatization, the Latin American approach provides a legal blueprint for addressing the contemporary challenges of water scarcity and social inequality in the 21st century.

Keywords: *right to water, third-generation human rights, Latin American constitutionalism, comparative public law, environmental justice.*

1. Introduction

The global water crisis has moved beyond environmental science to become one of the most pressing legal challenges of the 21st century. As climate change accelerates and hydrological stress deepens, traditional liberal legal frameworks – which emphasize property rights and market-based distribution – are proving inadequate to ensure fair access to essential resources. The central issue examined hire lies in the legal ontologization of water: the tension between its role as a commodity and its recognition as a fundamental human right inseparable from human dignity.[2] This research identifies a key novelty compared with existing doctrinal approaches; while European scholarship often views water rights through administrative law and service obligations, this paper analyzes the *"Constitutionalism of Life"* emerging from the Global South. This approach treats the right to water not merely as a derivative of the right to health, but as an

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[2] Peter H. Gleick, "The Human Right to Water," *Water Policy* 1, no. 5 (1998): 487–503, https://doi.org/10.1016/S1366-7017(99)00008-2.

autonomous, third-generation human right defined by solidarity and ecological sustainability.[3]

The research structure provides a board comparative analysis: following this conceptual grounding, the paper explores the theoretical framework of solidarity rights, moves into a comparative study of Latin American constitutional texts (specifically Uruguay, Bolivia, and Ecuador), and ends with an analysis of judicial enforcement mechanisms. The methods include a formal-dogmatic analysis of constitutional norms, a comparative legal evaluation of regional protection models, and a case-law review of key judicial decisions. The solutions proposed here advocate for the explicit constitutionalization of water access and the adoption of the *"Minimum Vital"* doctrine as a safeguard against privatization and inequality. By prioritizing human consumption over industrial exploitation through public law mechanisms, the Latin American model offers a transformative guide for modern legal systems. The aim is to shoe that the right to water is no longer just an aspirational but a legally enforceable pillar of contemporary public law connecting legal tradition with modern demands.[4]

2. The Theoretical Framework: Third-Generation Human Rights and the Principle of Solidarity

The theoretical foundation of the right to water is rooted in the evolving classification of human rights, a concept developed by *Karel Vasak*, who divided rights into three *"generations"* inspired by the values of the French Revolution. While first-generation rights focus on civil and political liberties, and second-generation rights address socio-economic claims, third-generation rights – often called as *"solidarity rights"* – respond to collective challenges of the late 20th and early 21st centuries.[5] In public law, this generation marks a shift from individual entitlements to rights that depend on collective action and international cooperation, such as the right to a healthy environment, the right to peace, and the right to water. The legal nature of water as a third-generation right means its protection is not only a duty of the State toward an individual, but a communal necessity for human survival and ecological preservation.

From a public law perspective, integrating the right to water into this category challenges traditional administrative doctrines. Unlike classic social rights

[3] Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, and Ximena Soley, eds., *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford: Oxford University Press, 2017), https://doi.org/10.1093/law/9780198795919.001.0001.

[4] Malcolm Langford and Anna F. S. Russell, eds., *The Human Right to Water: Theory, Practice and Prospects* (Cambridge: Cambridge University Press, 2017), https://doi.org/10.1017/9780511862601.

[5] Karel Vasak, "A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights," *UNESCO Courier* 30, no. 11 (1977): 28–32, https://unesdoc.unesco.org/ark:/48223/pf0000048067.

often seen as *"programmatic"* or tied to available resources, the right to water is increasingly viewed as a *"precondition"* for exercising all other rights.[6] This idea calls for a move away from the *"market-service"* model toward a *"human-rights-based"* public utility framework. In Latin American thought, this is expressed through the principle of social solidarity, where the State's role is redefined: it is not just a neutral regulator of water markets, but the main guarantor of a common good (*res communis*). This theoretical shift helps explain why Latin American constitutions have moved toward the *"de-commodification"* of water, establishing it as a public trust beyond ordinary commercial alienation.[7]

3. Comparative Constitutional Analysis: The Latin American Laboratory

The constitutional landscape of Latin America has experienced a paradigm shift often described as *"Neo-constitutionalism,"* marked by the expansion of fundamental rights and the direct enforceability of constitutional norms. Within this framework, the right to water has evolved from an implied necessity to an explicit, supreme legal mandate. This section examines the approaches taken by Uruguay, Bolivia, and Ecuador, which together rform a laboratory for public law innovation, focusing on the shift from *"administrative regulation"* to *"constitutional guarantee."*

The Uruguayan Pioneer Model and the Defense of Public Domain. The constitutional history of water rights in the region began in 2004, when Uruguay became the first nation to constitutionalize the right to water through a popular referendum. The amendment to Article 47 of the Uruguayan Constitution declared that access to safe water and sanitation is a fundamental human right. More importantly, from a public law perspective, it required that *"public water and sanitation services must be provided exclusively and directly by public legal entities."*[8] This was not simply a social policy, but a reaffirmation of the *Public Domain Doctrine.* By raising water to a constitutional status, Uruguay protected the resource from international investment treaties and private arbitration, asserting that the state's duty to provide essential services outweighs commercial contractual obligations.[9]

Bolivia: Plurinationalism and the Decolonization of Public Law. The 2009 Constitution of the Plurinational State of Bolivia represents a deeper inte-

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[6] Inga T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Oxford: Hart Publishing, 2012), https://www.bloomsbury.com/us/human-right-to-water-9781849462839/.

[7] Langford and Russell, *Human Right to Water*.

[8] Uruguay, *Constitución de la República Oriental del Uruguay*, art. 47, https://www.impo.com.uy/bases/constitucion/1967-1967/47.

[9] Carlos Santos and Alberto Villareal, "Uruguay: Direct Democracy in Defence of the Right to Water," Transnational Institute, revised July 2006, https://www.tni.org/files/wateruruguayrev.pdf.

gration of tradition and modernity. Article 16.I explicitly states that *"every person has the right to water and food,"* but the novelty lies in Article 373, which defines water as a *"fundamental right for life, within the framework of the sovereignty of the people."*[10] From a comparative perspective, Bolivia introduces a distinctive multi-layered governance model. It acknowledges not only state management but also the *"community-based management"* of water by indigenous populations, effectively bringing ancestral traditions into the modern administrative framework. Under this system, water is a *"strategic resource,"* meaning that the state has a non-transferable duty to manage it for the collective good, forbidding private appropriation or profit-making from the basic human need for hydration.[11]

Ecuador: Biocentrism and the Rights of Nature (Pacha Mama). Ecuador's 2008 Constitution offers perhaps the most advanced doctrinal contribution to comparative law by recognizing Nature as a legal subject. Article 12 establishes the *"human right to water"* as *"inalienable, imprescriptible, and essential for life,"* while Article 318 bans all forms of water appropriation.[12] The distinctive feature of the Ecuadorian approach is the link between human rights and the Rights of Nature (Articles 71-74). This creates a new hierarchy in public law: the protection of the hydrological cycle becomes a matter of national public order. In practice, if an industrial project threatens a water source, the state can invoke the constitutional "Precautionary Principle" to stop it, regardless of existing private investment permits. This represents a *"modern modernity"* where ecological preservation becomes the foundation of all social rights.[13]

4. Judicial Enforcement and the "Minimum Vital" Doctrine: From Theory to Practice

The formal constitutionalization of the right to water in Latin America would remain a *"symbolic"* victory without the active role of constitutional and supreme courts. In public law, judicial activism has served as the main mechanism for turning abstract programmatic goals into enforceable rights. This shift

[10] Bolivia, *Constitución Política del Estado*, arts. 16, 20, and 373, https://www.oas.org/dil/esp/ constitucion_bolivia.pdf.

[11] Nancy Postero and Nicole Fabricant, "Indigenous Sovereignty and the New Developmentalism in Plurinational Bolivia," *Anthropological Theory* 19, no. 1 (2019): 95–119, https://doi.org/10.1177/1463499618779735.

[12] Ecuador, *Constitución de la República del Ecuador*, arts. 12, 71–74, and 318, https://www.oas.org/juridico/pdfs/mesicic4_ecu_const.pdf.

[13] Craig M. Kauffman and Pamela L. Martin, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail," *World Development* 92 (2017): 130–42, https://doi.org/10.1016/j.worlddev.2016.11.017; Lourdes Aguas Gonzalez, "The Rights of Nature Meaning-Making Experiments in Ecuador: A Pragmatist Inquiry" (PhD diss., University at Albany, State University of New York, 2025), https://scholarsarchive.library.albany.edu/etd/285/.

has been led by the *"Minimum Vital" (Minimum Life) doctrine*, which holds that the State and utility providers have a non-delegable duty to guarantee a basic amount of safe water necessary for human dignity, regardless of ability to pay.[14]

The Colombian Constitutional Court and the *Tutela* Mechanism. The Constitutional Court of Colombia has become a global leader in protecting socio-economic rights. Through the *tutela* – an informal and expedited constitutional remedy – the Court has handled thousands of cases where water access was threatened. In the landmark *Sentencia T-740/11*, the Court reasoned that while the sustainability of the public service system requires payment from users, this fiscal interest cannot override the *"Minimum Vital"* of vulnerable populations.[15] The Court identified specific *"protected subjects,"* such as the elderly, single mothers, and displaced persons, for whom water disconnection is strictly prohibited. Furthermore, in *Sentencia T-270/07*, the Court expanded this protection by stating that even if a household is in arrears, the provider must ensure a minimum daily supply. This jurisprudence subordinates private contract law to the constitutional principle of *Human Dignity*, requiring redistribution of administrative costs within the state budget to support those in extreme poverty.[16]

Argentina: Broad Interpretation and the Defense of Public Health. In Argentina, where the right to water is not explicitly stated in the 1853 Constitution, the judiciary has relied on a *"block of constitutionality"* to derive this right from international treaties and the right to health. The landmark case *Kersich, Juan Gabriel y otros c/ Aguas Bonaerenses S.A. (2014)* marked a major step in collective redress. The Supreme Court of Justice of the Nation upheld an injunction requiring a water utility to provide potable water to the city of 9 de Julio after arsenic levels exceeded safety standards.[17] The Court's reasoning was twofold: first, it recognized the right to water as a fundamental *"implicit right"* under Article 33; second, it applied the *Precautionary Principle* of environmental law, stating that the lack of scientific certainty about long-term harm does not excuse the state from ensuring safe water. This case led to a reorganization of municipal infrastructure spending, showing that judicial power can shape public law priorities in the face of administrative neglect.[18]

Regional Standards: The Inter-American Court of Human Rights. The judicial landscape is further strengthened by the *Inter-American Court of*

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[14] Vanessa Suelt Cock and Leonardo Güiza Suarez, "Rights of Nature and Water in Colombia: Challenges for Environmental Justice in Latino-America," *Revista Internacional Consinter de Direito* 11, no. 20 (2025): 177–94, https://doi.org/10.19135/revista.consinter.00020.06.

[15] Corte Constitucional de Colombia, Sentencia T-740/11, October 3, 2011, https://www.corteconstitucional.gov.co/relatoria/2011/t-740-11.htm.

[16] Corte Constitucional de Colombia, Sentencia T-270/07, April 17, 2007, https://www.corteconstitucional.gov.co/relatoria/2007/t-270-07.htm.

[17] Corte Suprema de Justicia de la Nación (Argentina), *Kersich, Juan Gabriel y otros c/ Aguas Bonaerenses S.A. y otros s/ amparo*, Fallos 337:1361, judgment of December 2, 2014, https://sj.csjn.gov.ar/homeSJ/suplementos/suplemento/42/documento.

[18] Corte Suprema de Justicia de la Nación, *Kersich*, Fallos 337:1361.

Human Rights (IACHR), whose rulings are binding for most Latin American states through the *"Control of Conventionality."* In the case of *Indigenous Communities of the Lhaka Honhat Association v. Argentina (2020)*, the Court issued a historic judgment explicitly recognizing the autonomous right to water, food, and a healthy environment.[19] The Court stressed that for indigenous peoples, the right to water is tied to their ancestral lands and cultural identity. This ruling is a milestone for public law because it requires states not only to provide water but also to protect the *natural sources* of water from industrial pollution. The IACHR's standard obliges states to take *"positive measures"* to ensure access, moving beyond a simple *"non-interference"* model to a proactive state duty.[20]

The Principle of Non-Regression as a Judicial Shield. A final key element of judicial enforcement in the region is the *Principle of Non-Regression* (*prohibición de regresividad*). As developed by the Brazilian and Argentine courts, this principle prevents the executive or legislative branches from passing laws that reduce existing levels of water protection. For instance, if a state has established a subsidy for the *"Minimum Vital,"* it cannot abolish it during an economic crisis without proving that all other fiscal options were exhausted.[21] This doctrine effectively *"constitutionalizes"* administrative progress, ensuring that the right to water remains a lasting and expanding part of the social state, shielded from political cycles.[22]

5. Public Law vs. Privatization: The Crisis of Concessions and the Remunicipalization Trend

The clash between public interest and private investment is one of the most contentious *"contemporary challenges"* in Latin American legal history. During the late 20th century, influenced by the *"Washington Consensus,"* many states adopted neoliberal policies, handing water management to multinational corporations through concession contracts. However, the resulting social crises – most notably the *Cochabamba Water War (2000)* in Bolivia – sparked a deep re-evaluation of administrative law governing public utilities. From a public law

[19] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations and Costs, judgment of February 6, 2020, Series C No. 400, https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf.

[20] Inter-American Court of Human Rights, *Lhaka Honhat*, Series C No. 400; Margret Carstens, "Lhaka Honhat Association v. Argentina: Landmark Decision on Direct Justiciability of Article 26 ACHR and the Autonomous Right to a Healthy Environment," *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 53, no. 4 (2020): 492–506, https://www.jstor.org/stable/27284027.

[21] Lynda Margaret Collins, "Principle of Non-Regression," in *Essential Concepts of Global Environmental Governance*, 2nd ed., ed. Jean-Frédéric Morin and Amandine Orsini (London: Routledge, 2020), 205, https://doi.org/10.4324/9780367816681-83.

[22] Rodrigo Uprimny, "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges," *Texas Law Review* 89, no. 7 (2011): 1587–1609, https://www.corteidh.or.cr/ tablas/r27168.pdf.

standpoint, this conflict is not only about service quality, but a foundational debate over the legal nature of water: can a life-essential resource be treated under the same contractual rules as ordinary goods?[23]

The Failure of Private Concessions and the "Public Order" Argument. In the case of Cochabamba, the privatization of water through the company *Aguas del Tunari* led to steep price hikes that made access impossible for the poorest sectors. The legal response was a nationwide uprising that forced the state to cancel the contract. This event set a precedent in regional administrative law: the *Social Function of Property and the Public Order* (*ordre public*) can justify the unilateral termination of administrative contracts by the state when fundamental human rights are at risk.[24] Unlike private contracts governed by the strict principle of *pacta sunt servanda*, administrative concessions in the water sector are increasingly viewed through the lens of *clausula rebus sic stantibus*. This means that when a contract becomes an obstacle to the fulfiling the right to water – a supreme constitutional value – the State not only has the power but the duty to act. This *"socialization"* of administrative contracts marks a change in public law doctrine, moving from the sanctity of the contract toward to sanctity of human dignity.[25]

The Conflict with International Investment Law and the ICSID Crisis. The move from private to public management (often called *"remunicipalization"*) has created friction between national constitutional mandates and international investment treaties (BITs). When states like Bolivia or Argentina ended water concessions to protect the right to water, corporations often filed arbitration claims before the *International Centre for Settlement of Investment Disputes (ICSID)*, alleging *"indirect expropriation."*[26] This produces a *"chilling effect"* on public law, as states may hesitate to implement social protections due to the threat of costly penalties. Yet a doctrinal shift is underway: modern public law now supports the *"Human Rights-Based Approach to Investment Law."* This view holds that international arbitrators must consider the state's human rights obligations (such as the right to water) as part of the applicable law. In this sense, the right to water acts as a *"counter-limit"* to the protection of foreign investments, affirming that a state cannot be punished for prioritizing its population's survival

[23] Karen Bakker, "The 'Commons' versus the 'Commodity': Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South," *Antipode* 39, no. 3 (2007): 430–55, https://doi.org/10.1111/j.1467-8330.2007.00534.x.

[24] Vandana Shiva, *Water Wars: Privatization, Pollution and Profit* (Cambridge, MA: South End Press, 2002), https://openlibrary.org/books/OL8254079M/Water_Wars.

[25] Paul Craig, "Global Administrative Law: Challenges," in *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge: Cambridge University Press, 2015), 671–808, https://doi.org/10.1017/CBO9781316408865.009.

[26] Yulia Levashova, "The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond," *Utrecht Law Review* 16, no. 2 (2020): 110–24, https://doi.org/10.36633/ulr.572.

over corporate profits.[27]

Towards a "Sovereign Water Administration" and Remunicipalization. The crisis of privatization has led to a *"remunicipalization"* trend across the region, where water management returns to public or community-based entities. This shift is defined by a new administrative model: *Sovereign Water Administration.* Under this approach, water is managed not for profit, but to fulfill the *"Minimum Vital."*[28] This requires advanced public law tools, such as *"Cross-Subsidization"* mechanisms and *"Non-Profit Tariffs."* This model strengthens the idea that in a constitutional democracy, the legitimacy of the administrative state depends on its ability to ensure the basic conditions of life. The return to public water management is not a revival of inefficient state monopolies but a forward-looking *"Modern Publicness"* combining democratic participation, transparency, and the prioritization of human needs over commercial gain.[29]

6. Discussion: Lessons for Global Governance and Comparative Law

The Latin American *"constitutional laboratory"* offers lessons that go beyond regional boundaries, providing a potential roadmap for the evolution of public law amid global environmental crises. The main question is whether the biocentrism and judicial activism seen in countries like Colombia and Ecuador can be adapted to other legal traditions, such as the European civil law system. This study argues that we are witnessing a *"normative migration"* where Global South legal innovations challenge traditional Eurocentric dominance in human rights discourse. The *"Minimum Vital"* doctrine, for example, represents a universal administrative standard aligning with the growing recognition of social rights within the European Union, especially under the revised Drinking Water Directive (2020/2184). This Directive requires Member States to improve access for vulnerable and marginalized groups, effectively adopting a *"pro-poor"* administrative stance that mirrors the Latin American judicial experience.[30]

Moreover, the discussion must address the *"Contemporary Challenges"* mentioned in the workshop call, particularly the tension between international trade obligations and domestic social protections. The Latin American experience

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[27] Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, eds., *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), https://doi.org/10.1093/acprof:oso/9780199578184.001.0001.

[28] David A. McDonald and Greg Ruiters, eds., *Alternatives to Privatization: Public Options for Essential Services in the Global South* (New York: Routledge, 2012), https://doi.org/10.4324/9780203147061.

[29] Emanuele Lobina, *Water Remunicipalisation as a Global Trend: Calling for Progressive Policies* (London: Public Services International Research Unit, University of Greenwich, 2016), https://gala.gre.ac.uk/15995/3/15995%20LOBINA_Madrid_Water_Remunicipalisation_2016.pdf.

[30] Directive (EU) 2020/2184 of the European Parliament and of the Council of December 16, 2020, on the Quality of Water Intended for Human Consumption, OJ L 435 (December 23, 2020): 1–62, https://eur-lex.europa.eu/eli/dir/2020/2184/oj/eng.

shows that the right to water can serve as a *"Constitutional Shield"* (*Escudo Constitucional*), allowing states to redefine their public service duties without breaching the Rule of Law. By treating water as a *"Strategic Public Good"* rather than a commodity, these nations are advancing a new form of *"Ecological Constitutionalism."* This shift demands a rethinking of the *"Administrative Discretion"* of the State: it is no longer optional to provide water, but a constitutional duty limiting the executive's fiscal and contractual freedom.

The findings suggest that the most effective way to protect this third-generation right is through a layered approach: combining explicit constitutional text with active judicial enforcement and a citizen-centered administrative model. This regional trend marks a broader change in comparative law, where the Global South becomes an active creator of transformative legal solutions for the challenges of the Anthropocene.[31]

7. Conclusions and Exploitation of Results

This research shows that the right to water has evolved from a programmatic aspiration into a fundamental, enforceable, and central pillar of modern public law in Latin America. The comparative analysis reveals that the explicit constitutionalization of water – as seen in Uruguay, Bolivia, and Ecuador – offers the strongest protection against privatization and exclusion. The study concludes that judicial activism, especially through the *"Minimum Vital"* standard and the principle of non-regression, has been decisive in making these rights enforceable. Without this *"Judicial Shield,"* constitutional promises would remain *"dead letters"* (*cartas muertas*) under economic pressure. The Latin American model demonstrates that the *"socialization"* of public law is not a threat to the Rule of Law, but its fullest expression in a century defined by resource scarcity.

The findings and theoretical frameworks developed here hold potential for application across multiple areas of legal science and governance. Beyond its academic contribution to comparative constitutionalism, the research offers a concrete legal structure for transforming administrative law in the 21st century. One main avenue for the applying these results lies in legislative and regulatory policy. The *"Minimum Vital"* doctrine and the social prioritization mechanisms examined in the Latin American context can serve as a model for lawmakers worldwide when drafting public service regulations. These results show that it is legally possible to integrate *"Human Rights Impact Assessments"* into public utility contracts, ensuring that financial and operational sustainability remains secondary to the demands of human dignity.[32]

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[31] Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Oxford: Hart Publishing, 2016), https://www.bloomsbury.com/us/global-environmental-constitutionalism-in-the-anthropocene-9781509907588/.

[32] César Rodríguez-Garavito, "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America," *Texas Law Review* 89, no. 7 (2011): 1669–1705,

Furthermore, the research provides tools for judicial practice and strategic litigation. The review of the Colombian *tutela* system and the Inter-American Court's standards offers a set of precedents for constitutional courts and human rights practitioners globally. By applying the *"Standard of Non-Regression"* identified here, judicial bodies can develop stricter scrutiny of state actions, preventing the rollback of social protections during fiscal austerity or political change. This ensures that the right to water is seen not as a discretionary policy goal, but as a permanent and expanding component of the public order binding all branches of government.[33]

Finally, the theoretical reflections on the *"Ecologization of the Constitution"* contribute to a wider doctrinal shift in comparative public law. By linking social rights and environmental protection, this study provides a roadmap for the developing *"Transformative Constitutionalism."* These results can be used by scholars to further examine how third-generation rights – often criticized for their supposed lack of enforceability – can be successfully integrated into the core of administrative law. Ultimately, the application of this research supports a move toward a more resilient and human-centered legal order, where the right to water stands as the cornerstone of a renewed global social contract, ensuring that the essential conditions for human life are protected from the instability of the global market.[34]

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[34] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012), https://doi.org/10.1093/acprof:oso/9780199644674.001.0001.

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Minority Rights Under International Legal Standards and Vietnamese Law: Recommendations for Improvement in Vietnam

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Abstract

Minority rights refer to the rights that protect groups who are smaller in number and different in terms of ethnicity, language, religion, or culture from the majority population. Under international human rights law, these rights are widely recognized and protected, including the rights to preserve their culture, follow their religion, and speak their own language without discrimination. In Vietnam, minority rights are guaranteed by the Constitution and supported by various laws and policies promoting equality among ethnic groups and socio-economic development in minority areas. This paper examines international legal standards and Vietnamese law on minority rights, employing a doctrinal legal analysis combined with a comparative approach to assess the consistency between international norms and domestic regulations. The findings suggest that, despite significant legal recognition in Vietnam, certain gaps remain in legal clarity and implementation. The paper, therefore, recommends improving legal frameworks, strengthening enforcement mechanisms, and enhancing minority participation in decision-making processes to better alignment with international standards and ensure more effective protection of minority rights in Vietnam.

Keywords: *international legal standards, minority rights, recommendations, Vietnamese law.*

1. Introduction

In the context of globalization and deeper international integration, the protection of minority rights has become an important issue in both international law and domestic legal systems. Minority groups can be found in all countries around the world. Every state includes at least one such group. These groups may be based on differences in culture, ethnicity, language, politics, religion, or social life[2], which are smaller in number and different from the majority, often face disadvantages in social, economic, and political life. Without effective legal protection, these groups may experience discrimination, inequality, and limited access to development opportunities. Therefore, ensuring the rights of minorities is not only a legal obligation of states but also a key condition for sustainable development, social stability, and national unity.

The first part of this discussion on minority rights, which are recognized

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[2] Javaid Rehman, *International Human Rights Law*, 2nd ed. (Harlow, England: Pearson Longman, 2010), 433, https://books.google.com/books/about/International_Human_Rights_Law.html?id=vGqoGUUXP8oC.

as an integral part of human rights, will explore a theoretical definition of *"minorities"* under the international law, although there is no widely accepted definition of minority in international instruments[3]. This part of the present article will offer a brief overview of the international legal standards of the minority protection, which set out basic principles and fundamental provisions to protect minority communities.

Regarding Vietnam, which is a multi-ethnic nation with 54 recognized ethnic groups, including 53 ethnic minority groups[4]. In the second part of the article will examine the current Vietnamese legal system in accordance with the rights of minorities. This part will introduce the Constitution and relevant laws of Vietnam that affirm the principle of equality among all ethnic groups and provide policies aimed at supporting socio-economic development in ethnic minority. Vietnam, moreover, has implemented many programs to improve living standards, education, healthcare, and infrastructure for minority communities. However, some challenges remain, particularly in ensuring effective implementation of legal provisions, narrowing development gaps, and helping minorities participate actively in decision-making processes. Those challenges will be explored in the next part of this study before proposing recommendations.

Based on the content of minority rights under international legal standards and analyzes the legal framework of Vietnam concerning the protection of minority rights, the third part of this research will examines the certain gaps in minority rights' protection between international law and Vietnamese law, and then offers several suggestions to further improve the legal system and strengthen the protection of minority rights in Vietnam in line with international instruments and national conditions. To this end, understanding international legal standards can help evaluate existing policies and provide useful ideas for improving minority protection in Vietnam.

2. The International Legal Standards on Minority Rights

Human rights are a core concept in modern legal systems and international law. They offer a basic framework to protect individuals and groups from abuses and for upholding human dignity and core freedoms. As stated by the United Nations *(hereinafter 'UN')*, human rights are guaranteed by legal rules, protecting people and groups from actions that affect their fundamental freedoms and dignity[5]. In this regard, human rights law obliges governments and other

[3] Antonija Petričušić, "The Rights of Minorities in International Law," *Croatian International Relations Review* 11, no. 38/39 (2005): 48, https://hrcak.srce.hr/6628.

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duty-bearers to perform specific actions and restricts them from engaging in others[6]. This definition highlights the central role of the state in respecting, protecting, and fulfilling human rights. When they, nowadays, are recognized as a universal value and a common standard for measuring the development of countries, the international human rights law requires states to fully implement the treaties they have joined. This implementation should be ensured through appropriate legislative, executive, judicial, and other necessary measures.

Legally, this principle is commonly recognized in international law and the obligation to implement international human rights treaties is binding on member states, particularly as per article 27 of the Vienna convention on the law of treaties 1969 states that *"A party may not invoke the provisions of its internal law as justification for its failure to perform"*[7]. This principle clearly means that when a State accepts international treaties, it must fulfill its obligations in good faith, even if its domestic laws are not fully consistent with those obligations. States therefore have a duty to adjust their national laws and policies to comply with international commitments. This rule is of particular importance in the field of human rights, where international standards aim to protect, including vulnerable individuals and groups, are mentioned as *"minorities"*.

Within the UN, the goal of minority protection is to encourage peace and safety while also safeguarding human rights[8]. From a historical and conceptual perspective, the progress of human rights is closely associated with human self-awareness. If human rights emerged when people first became aware of their own dignity, then the rights of minorities were formed when people began to develop a sense of ethnicity or group identity. In this context, minority rights are an important part of human rights law as well as protecting minority rights becomes a clear legal responsibility of states, which are required not only to recognize minority rights in international instruments, but also to ensure their effective implementation through domestic laws, institutions, and policies. Respecting minority rights is thus a significant component of fulfilling international human rights obligations.

Inasmuch as for a long time, the international community has faced difficulties due to the absence of a clear definition of *"minority"*, and despite ongoing efforts, there is still no globally accepted definition of the concept concept[9].

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[6] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (New York and Geneva: United Nations, 2006), 8, https://www.ohchr.org/en/publications/special-issue-publications/frequently-asked-questions-human-rights-based-approach.

[7] United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, art. 27, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[8] Felix Ermacora, "The Protection of Minorities before the United Nations," *Recueil des cours de l'Académie de droit international de La Haye* 182 (1983): 250, https://doi.org/10.1163/1875-8096_pplrdc_A9789024730698_03.

[9] Noémi Nagy and Balázs Vizi, "Conceptualisation and Operationalisation of Minorities in International Law: Past Experiences and New Avenues," *Hungarian Journal of Legal Studies* 65, no. 4

It is submitted that a generally accepted definition of minorities is necessary for several reasons. Initially, one cannot meaningfully discuss the protection of minorities without specifying the subject-matter, as any attempt otherwise would have no practical point of reference. Moreover, the lack of a definition is inevitably leading to dangerous unilateral interpretations by states, organizations or groups[10]. Despite the challenges in defining *"minorities",* the definition widely considered authoritative was provided by Francesco Capotorti, a Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1977. He was tasked with preparing a study under article 27 of the 1966 International Covenant on Civil and Political Rights *(hereinafter 'ICCPR'),* which serves as the main international instrument for safeguarding minority rights. Among all proposed definitions, Capotorti's has received the greatest recognition and is often treated as the starting point for discussions on the topic. He described a minority group as follows: *"A group 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"*[11].

At the international level, it must be emphasized that minority rights constitute a fundamental aspect of international human rights law and are recognized in international instruments. First of all, the 1948 Universal Declaration of Human Rights[12] *(hereinafter 'UDHR'*) provides a common standard of achievement for all people and nations. The UDHR is considered a foundational document in the field of human rights. It includes a preamble and 30 articles that outline the basic rights and freedoms of all human beings. For the first time ever, basic human rights were formally articulated and protected at the global level. The UDHR's preamble acknowledges that the inherent dignity and equal, inalienable rights of all members of humanity constitute the cornerstone of freedom, justice, and peace across the world. Furthermore, the UDHR emphasizes the commitment of UN member countries must work to advance and protect fundamental human rights and freedom. The Declaration has had a significant influence on countries within the international community, particularly in moral and political terms. In addition, the core values and standards established in the UDHR are widely

(2024): 378–80, https://doi.org/10.1556/2052.2024.00546.

[10] Vassilios Grammatikas, "The Definition of Minorities in International Law: A Problem Still Looking for a Solution," *Hellenic Review of International Law* 52, no. 2 (1999): 324, https:// www.researchgate.net/publication/315786913_The_Definition_of_Minorities_in_International_Law_A_Problem_still_Looking_for_a_Solution.

[11] Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (New York: United Nations, 1979), para. 568, https://digitallibrary.un.org/record/10387.

[12] United Nations General Assembly, "Universal Declaration of Human Rights," Resolution 217 A (III), December 10, 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

shared by members of the global community. It should also be noted that: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"* (Article 1) and *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty"* (Article 2). Although the UDHR does not directly provide specific provisions on minority rights, it establishes the fundamental principles of international human rights law, which provide the basis for protecting minorities, particularly the principles of equality and non-discrimination. These principles support the realization of the fundamental rights and freedoms outlined in the Declaration. They are especially crucial for recognizing and safeguarding vulnerable groups, including members of ethnic minorities.

In 1992, the UN General Assembly unanimously approved the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities[13] under resolution 47/135. This document serves as the primary international reference for the protection of minority rights, Article 1 declares that: *"States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. States shall adopt appropriate legislative and other measures to achieve those ends"*. This is also an important separate UN document that clearly defines the rights belonging to minority groups. It is evident that, in its first article, the UN Minorities Declaration confirms that states are responsible for protecting the existence and the national, ethnic, cultural, religious, and linguistic identity of minorities[14]. The Declaration does not impose legally binding obligations on member states, but it mainly relies on countries following it voluntarily.

More specifically, Article 2 of the Declaration addresses several key aspects of minority rights, recognizing that persons belonging to minorities are entitled to: (i) freely enjoy their culture, practice their religion, and use their language, both in private and in public, without interference or discrimination; (ii) take part effectively in cultural, religious, social, economic, and public life; (iii) participate meaningfully in decision-making at the national and, where appropriate, regional levels concerning their minority or the regions in which they live, in

[13] United Nations General Assembly, "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities," Resolution 47/135, December 18, 1992, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-persons-belonging-national-or-ethnic.

[14] Asbjørn Eide, *New Approaches to Minority Protection* (London: Minority Rights Group, 1993), 8, https://minorityrights.org/app/uploads/2024/03/newapproachesminorityprotectionmrg.pdf.

ways that comply with national law; (iv) establish and maintain their own associations; and (v) maintain, without discrimination, peaceful and free contacts with other members of their group, with members of other minorities, and across borders with citizens of other states to whom they have national, ethnic, religious, or linguistic ties.

Although the Declaration is not legally binding, it holds considerable moral authority. It represents an important step in the development of norms regarding minority rights and has played a significant role in shaping and guiding the evolution of emerging theories on minority rights[15]. The UN Minorities Declaration 1992 was largely inspired by the 1966 ICCPR[16], which can be seen as an extension of the UDHR, translating the rights stated in the Declaration into more detailed and legally binding provisions. One notable feature of the ICCPR is the addition of a specific article focused on protecting the rights of minority groups, especially Article 27, which provides 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 practice their own religion, or to use their own language".* This article is widely recognized as a key legal foundation for safeguarding minority rights. It guarantees that individuals belonging to minorities have the right to maintain their national, ethnic, religious, or linguistic identity, either individually or in combination. The article also affirms their right to preserve and promote their cultural and social characteristics they choose to uphold. Although the article refers to minorities within States where they exist, the protection it provides does not depend on whether a State officially recognizes a minority group. States that have formally approved the Covenant are therefore required to make sure that every person within their jurisdiction is able to fully enjoy these rights, which may involve taking special measures to address inequalities experienced by minority groups.

Furthermore, under Article 25 (a) and (b) declares that every citizen has both the right and the chance: *"To take part in the conduct of public affairs, directly or through freely chosen representatives; To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".* This article is particularly important because it guarantees the right of all citizens to participate in public affairs and to participate in elections without discrimination or unreasonable restrictions. These provisions are essential for dem-

[15] Natan Lerner, "The 1992 UN Declaration on Minorities," in *Israel Yearbook on Human Rights, Volume 23 (1993)*, ed. Yoram Dinstein and Mala Tabory (Leiden: Brill | Nijhoff, 1993), 128, https://doi.org/10.1163/9789004423077_006.

[16] United Nations General Assembly, "International Covenant on Civil and Political Rights," Resolution 2200A (XXI), December 16, 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

ocratic governance and for ensuring that all groups in society, including minorities, enjoy the opportunity to be involved in political life.

At the same time, although the 1966 International Covenant on Economic, Social and Cultural Rights[17] *(hereinafter 'ICESCR')* does not contain a specific provision on the rights of persons belonging to minorities, as the ICCPR does, it still highlights that the rights established in the Covenant must be ensured according to the principle of non-discrimination. Under Article 2 (2), explicitly provides that: *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*. Similarly, the central principle of minority rights is non-discrimination[18], based on Article 1 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination[19] *(hereinafter 'ICERD')* defines discrimination: *"Any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".* The Convention reaffirms the principles of equality and non-discrimination as recognized in the Charter of the UN and the UDHR. Its main focus is on measures that place responsibilities on States Parties to eliminate all forms of unfair treatment based on race. The Convention requires States must condemn racial discrimination and, without delay, implement policies by all suitable means to eliminate racial discrimination in every form.

More specifically, the 1989 Convention on the Rights of the Child [20] *(hereinafter 'CRC')*. Article 28 of the Convention guarantees the right to education based on equal opportunities. This can be interpreted as strengthening the position of children belonging to minorities, particularly because Article 29 emphasizes that one of the objectives of education should be to respect cultural identity. Additionally, Article 30 of the Convention provides specific protection for minorities, similar to the provisions of Article 27 of the ICCPR[21], particularly

[17] United Nations General Assembly, "International Covenant on Economic, Social and Cultural Rights," Resolution 2200A (XXI), December 16, 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[18] Dieter Kugelmann, "The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity," *Max Planck Yearbook of United Nations Law Online* 11, no. 1 (2007): 243, https://doi.org/10.1163/18757413-90000007.

[19] United Nations General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination," Resolution 2106 (XX), December 21, 1965, https://www.ohchr.org/en/ instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial.

[20] United Nations General Assembly, "Convention on the Rights of the Child," Resolution 44/25, November 20, 1989, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

[21] Kugelmann, "Protection of Minorities and Indigenous Peoples," 243.

provides that *"In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language".* The article guarantees that children from ethnic, religious, or language minority groups, including indigenous communities, have the right to preserve their cultural identity and speak their own language, and practice their religion within their community. This protection is vital as minority children often face discrimination or pressure to abandon their traditions. By safeguarding these rights, the Convention helps children maintain their cultural identity and stay connected to their communities.

3. Minority Rights Under Vietnamese Law

Throughout history, human rights have developed as a result of the bloody and tearful struggle, the development and progress of human rights has reflected the development and progress of society and they are the expression of human values. Insurance and protecting human rights is always one of the key tasks that countries must implement in order to promote the nation's stability and growth and this is also a premise for peace and prosperity of human[22]. In Vietnam, there are 54 officially recognized ethnic groups coexisting peacefully in a multi-ethnic society. It is also important to stress that ethnic groups in Vietnam form a unified community characterized by diverse values, cultural identities, customs, traditions, and languages. However, their intermixing, uneven distribution, and concentration in mountainous, remote, and isolated areas with differing levels of development present significant challenges within the country's ethnic structure. Throughout thousands of years of nation-building and defense, the Vietnamese people have stood united, working together to resist foreign invasions, overcome natural disasters, and contribute collectively to the development of the country[23]. Among them, the Kinh people constitute the majority of the population, while the other 53 ethnic groups are recognized as minorities, with a total population of over 14.4 million, living in approximately 1,516 communes across 32 provinces and cities following the recent restructuring of local administration[24]. These mi-

[22] Toan Trung Tran, "Assurance of Ethnic Minorities' Cultural Rights in Vietnam—The Important Basis for Equality among Ethnic Groups," in *Proceedings of the 13th International Conference on Socio-Economic and Environmental Issues in Development* (2021), 1581, https://khoamoitruongdothi.neu.edu.vn/vi/proceedings/proceeding-of-13th-international-conference.

[23] Nguyen Quoc Suu and Ngo Van Nhan, "Some Urgent and Fundamental Issues to Complete Laws and Policies on Ethnic Minorities in Mountainous Regions of Vietnam," *International Journal of Management* 11, no. 12 (2020): 21, https://doi.org/10.34218/IJM.11.12.2020.003.

[24] VietnamPlus, "PM Orders Stronger Push on Minority, Mountainous Region Development," August 13, 2025, https://en.vietnamplus.vn/pm-orders-stronger-push-on-minority-mountainous-region-development-post324533.vnp.

nority groups mainly live in mountainous, border, remote, and disadvantaged areas, and they contribute greatly to the cultural diversity, national identity, and historical development of Vietnam.

Each ethnic group is characterized by its own language, customs, traditions, beliefs, and culture, which together form a rich and unique Vietnamese culture. In this regard, the protection of minority rights has consistently been a major policy priority of the Vietnamese State. From the early days of the country's establishment, the State has emphasized equality, solidarity, and mutual support among ethnic groups and the reason why the phrase *"ethnic minorities"* is officially used in the system of legal, administrative documents, rather than the general term *"minorities"* as well as the concept of *"indigenous peoples"* doesn't utilized, reflecting the recognition of ethnic groups in the Vietnamese context. Furthermore, ethnic minorities in Vietnam are officially understood as individuals holding Vietnamese nationality who reside within the country but do not share the identity, language, and cultural traits of the Kinh majority[25].

To date, ensuring human rights and citizens' rights in general, as well as promoting equality and solidarity among ethnic groups, has remained an important issue and has been clearly enshrined in the 2013 Constitution of Vietnam. It shows a high level of compatibility with existing international standards concerning the rights of ethnic minorities. In particular, the constitution directly addresses human rights and citizens' rights in chapter II, comprising 35 articles. Among these, 9 articles provide for equality and non-discrimination (Articles 5, 7, 16, 24, 26, 35, 36, 38, and 59), while 16 articles directly refer to ethnic minority communities (Articles 5, 9, 15, 18, 37, 42, 58, 60, 61, 70, 74, 75, 77, 82, 84, and 103). More specifically, it is clearly stressed that the following are identified as major provisions, remarkably in regard to minority rights:

- Article 5: *"The Socialist Republic of Vietnam is a unified nation of all ethnicities living together in the country of Vietnam. All the ethnicities are equal and unite with, respect and assist one another for mutual development; all acts of discrimination against and division of the ethnicities are prohibited. The national language is Vietnamese. Every ethnic group has the right to use its own spoken and written language to preserve its own identity and to promote its fine customs, practices, traditions and culture. The State shall implement a policy of comprehensive development and create the conditions for the minority ethnicities to fully utilize their internal strengths and develop together with the country";*

- Article 42: *"A citizen has the right to determine his or her ethnicity, use his or her mother tongue and choose his or her language of communication"*;

- Article 58: *"The State and society shall make investments to further the protection of and care for the People's health, implement the universal health insurance, and adopt policies to prioritize health care for ethnic minority people*

[25] Erik Friberg, "Masters of Their Own Destiny: Minorities' Right to Effective Participation in Public Life in Vietnam" (master's thesis, Lund University, 2002), 33, https://lup.lub.lu.se/student-papers/record/1557596/file/1564374.pdf.

and people living in mountainous areas, on islands, and in areas that have extremely difficult socio-economic conditions";

- Article 61: *"The State shall prioritize the development of education in mountainous areas, on islands, in ethnic minority areas, and in areas that have extremely difficult socio-economic conditions; prioritize the employment and development of talented people; and create the conditions for people with disabilities and poor people to receive education and vocational training"*[26].

In addition to the main legislative act as the Constitution of Vietnam referred to above, specific provisions on minority rights are also set down in sector-specific legislative acts, for instance, the civil code, the civil procedure code, the law on Vietnamese nationality, the law on marriage and family, the law on residence, the law on civil status, the law on investment, the law on enterprises, the law on election of deputies to the national assembly *(hereinafter 'NA')* and people's councils, the law on organization of the NA, the law on organization of local government, the land law, the labor code, the law on employment, the law on education, the law on social insurance, and the law on health insurance… Specially, the decree no. 05/2011/ND-CP of the Prime Minister on ethnic affairs on January 14, 2011 is the only subordinate legal instrument that specifically and comprehensively regulates ethnic affairs in Vietnam.

According to the definition offered by this Decree: *"Ethnic minorities"* refer to ethnic groups that have a smaller population than the majority group within the territory of the Socialist Republic of Vietnam, while the *"majority ethnicity"* is defined as the group whose population makes up more than 50% of the country's total population, according to national population surveys[27]. It sets out the fundamental principles guiding the State's ethnic policies and affirms the State's obligation to ensure equality, solidarity, mutual respect and development among ethnic groups, and defines the state management framework for ethnic affairs, including the duties of ministries, sectors and local authorities in implementing ethnic policies. Overall, the Constitution of Vietnam and many legal documents clearly state that all ethnic groups are equal, are entitled to preserve their cultural identity, and are protected from discrimination. These principles reflect Vietnam's commitment to ensuring human rights and the promotion of social justice for all individuals, including ethnic minorities.

Similarly, it is important to keep in mind that, in many international treaties, declarations and conventions ratified by Vietnam such as ICCPR (1982), ICESCR (1982), ICERD (1982), CRC (1990) and voted for the approval of the UN Declaration on the Rights of Indigenous Peoples (2007), the UN Declaration

[26] Vietnam, *Constitution of the Socialist Republic of Vietnam*, November 28, 2013, https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx.
[27] Government of Vietnam, "Decree No. 05/2011/ND-CP on Ethnic Affairs," January 14, 2011, https://thuvienphapluat.vn/van-ban/Van-hoa-Xa-hoi/Nghi-dinh-05-2011-ND-CP-cong-tac-dan-toc-117534.aspx.

on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). Specially, during its 2023-2025 term as an active member of the UN human rights council *(hereinafter 'UNHRC'),* Vietnam has completed its duties, showing its ability, prestige, and responsibility. This provides a strong basis for continuing its progress and preparing for re-election for the 2026-2028 term[28], which further strengthens its commitment.

More specifically, the integration of the UN sustainable development goals *(hereinafter 'SDGs')* into national policy is most clearly and comprehensively reflected through decision no. 1719/QD-TTg on October 14, 2021, the Prime Minister approved the national target program for socio-economic development in ethnic minority and mountainous areas for 2021-2030, with phase I covering 2021-2025[29]. This comprehensive socio-economic development program has 12 key objectives, inter alia, encouraging the potential of ethnic minority and mountainous regions to boost economic growth, guarantee social welfare, reduce poverty, developing human resources, preserving cultural identity, and ensuring national security and national unity. According to the above-mentioned program, it directly addresses the multidimensional challenges faced by ethnic minority communities and corresponds to core SDGs, for instance, SDG 1 (No Poverty); SDG 3 (Good Health and Well-being); SDG 4 (Quality Education); SDG 10 (Reduced Inequalities); and SDG 16 (Peace, Justice, and Strong Institutions). It can be observed that, currently, protecting human rights in Vietnam, especially those of ethnic minorities, has been implemented continuously and is increasingly being strengthened. The system of overall policies and laws not only reflects compatibility with international human rights standards but also clearly demonstrates an orientation toward developing specific policies that place people and their comprehensive development, including ethnic minority communities, at the center of national development strategies.

4. Some Recommendations for Vietnam on Protecting Minority Rights

In recent year, Vietnam has made significant efforts to protect and promote the rights of ethnic minority communities. It is important to pay attention to Vietnamese legal system generally reflects many of these international principles. As mentioned above, the Constitution of Vietnam affirms that all ethnic commu-

[28] VietnamPlus, "Vietnam Affirms Role as Active, Responsible, Constructive Member of UN Human Rights Council," October 14, 2025, https://en.vietnamplus.vn/vietnam-affirms-role-as-active-responsible-constructive-member-of-un-human-rights-council-post330443.vnp.

[29] Prime Minister of Vietnam, "Decision No. 1719/QD-TTg Approving the National Target Program on Socio-Economic Development in Ethnic Minority and Mountainous Areas, 2021–2030," October 14, 2021, https://english.luatvietnam.vn/decision-no-1719-qd-ttg-dated-october-14-2021-of-the-prime-minister-approving-the-national-target-program-on-socio-economic-development-in-ethnic-mi-211004-doc1.html.

nities in Vietnam are equal, unite, respect, and support each other for mutual development. The Constitution also guarantees ethnic groups are entitled to use their own languages and preserve their cultural identities and traditions. Additionally, the Vietnamese government has enacted policies and national programs designed to improve the socio-economic conditions of ethnic minority communities, particularly those residing in mountainous and remote regions. These policies focus on poverty reduction, education, healthcare, infrastructure development, and cultural preservation, demonstrating the State's commitment to ensuring equality and development for all ethnic groups. Despite these positive developments, certain differences and challenges remain in Vietnam under the mirror of international standards.

First, one of the primary concerns involves the degree of legal specificity. International legal instruments, particularly the ICCPR, clearly define minority rights and emphasize the protection of their cultural, linguistic, and religious identities. In contrast, Vietnamese legal provisions on minority rights are often expressed in general principles within the Constitution and are implemented through various policies and programs rather than through a single comprehensive legal structure. Therefore, the protection of the rights of minorities in Vietnam may sometimes lack detailed legal guidance or consistent application across different sectors and regions. Nevertheless, the lack of a specific law on ethnic minorities in Vietnam remains a matter of concern. Although a draft has been prepared, it has not yet received government approval. Two main reasons have been put forward to explain this situation. First, the Vietnamese Constitution already affirms the principle of equality for all citizens, and any form of ethnic discrimination is considered unconstitutional, which reduces the perceived need for a separate law on minority rights. Second, there are concerns that adopting such a law could lead to numerous claims, such as those related to land and cultural rights, that may be difficult to manage[30]. International instruments generally set out basic rights for minority groups without always explicitly recognizing them, whereas national laws formally acknowledge these differences and establish specific measures, often based on international standards, aimed at minority communities. In addition to national legal frameworks, it is often necessary for states to adopt positive measures to safeguard the identity of minorities and to ensure that their members can enjoy and develop their culture and language, as well as freely practice their religion[31]. Due regard must, therefore, it is very crucial to pay attention that Vietnam could formulate and promulgate a specific act to ensure the protection of minority rights.

Indeed, research on international experience shows that several countries with large ethnic minority populations have enacted laws on ethnic groups that

[30] Sonia Palmieri, *Representation from the Top: Ethnic Minorities in the National Assembly of Viet Nam* (Geneva: Inter-Parliamentary Union, 2010), 11–12, https://archive.ipu.org/splz-e/chiapas10/vietnam.pdf.
[31] Petričušić, "Rights of Minorities in International Law," 54–55.

provide support for minority communities. Examples include the Czech Republic's Law on Ethnic Minorities 2001, Croatia's Ethnic Minority Rights Act 2002, Ukraine's Law on Ethnic Minorities 1992, Poland's Law on National and Ethnic Minorities and Regional Languages, Hungary's Law on the Rights of National and Ethnic Minorities 1993, and the Philippines' Republic Law No. 8371 in 1997, which recognizes, protects, and promotes the rights of indigenous cultural communities and established the National Commission on Indigenous Peoples, along with mechanisms for implementation and budget allocation. As a result, the situation of ethnic minorities in these countries has generally remained stable, with communities cooperating and supporting each other in development[32]. From this, Vietnam could learn from the experiences of these nations and consider adopting a special minority rights act that clearly regulates key areas such as language use, education, cultural autonomy, and representation mechanisms, similarly following Hungarian Law as a good model, which is currently known as Hungary's cardinal Act, the Act CLXXIX of 2011 on the rights of national minorities, for example. Hungary protects national minorities by ensuring the preservation of their cultures and the use of their mother tongues, as well as providing education in their native languages. It also guarantees the right to use personal names in their own languages and to participate collectively in public affairs. In addition, Hungary promotes the development of cultural autonomy and ensures the right of minority communities to self-administration and self-governance[33]. Drawing from Hungary's experience, such a law could combine both individual and collective rights, while remaining consistent with Vietnam's constitutional principles of national unity and equality among ethnic groups. Thus, a comprehensive law would strengthen legal certainty and improve the effectiveness of minority rights protection.

Besides, it is clearly stressed that the year 2025 marks a major turning point in institutional reform, administrative reform, and digital transformation in Vietnam. One important change related to the provision of e-government services is the integration of all online public service platforms into a single National Public Service Portal. This means that localities will no longer maintain separate provincial-level public service portals as of July 1, 2025. This decision is also an important step to support the two-tier local government model following the restructuring and consolidation of provincial-level administrative units, resulting in a reduction from 63 to 34 provinces, eliminating district-level governments, and decreasing the number of commune-level units from more than 10,000 to 3,321 communes, wards, and special administrative areas. In addition, the Government has committed to further simplifying administrative procedures in order to reduce the burden on citizens and businesses in this new context[34].

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[32] Suu and Nhan, "Urgent and Fundamental Issues," 25.

[33] Hungary, "Act CLXXIX of 2011 on the Rights of National Minorities," December 21, 2017, https://njt.hu/jogszabaly/en/2011-179-00-00.

[34] Institute for Policy Studies and Media Development, *Summary Report: 2025 User Evaluation of*

The Party and the State have also implemented numerous policies and programs aimed at improving infrastructure and living conditions in mountainous areas. In particular, attention should be given to the national target program on socio-economic development for ethnic minority and mountainous areas for the 2021–2030 period[35], which seeks to utilize local potential, promote innovation and economic growth, ensure social welfare, achieve rapid and sustainable poverty reduction, and gradually reduce the development gap between ethnic minority regions and the national average. As a result, the program has provided residential land support to 10,549 households, housing assistance to 42,567 households, direct production land support to 13,387 households, and vocational transition support to 54,899 households. In addition, decentralized domestic water supply support was provided to 479,358 households, and 809 centralized clean water facilities were constructed. Population planning, resettlement, and stabilization were implemented for 25,056 households in areas where such measures were necessary. Local authorities supported forest protection contracts covering 1,478,962 hectares of special-use and protection forests, benefiting 323,769 households. A total of 403 projects supporting value-chain-based production were implemented, with a total value of 306 billion VND, along with 383 livestock and crop production projects involving 36,654 households. The program also supported the construction of 6,018 rural transport works, comprising 8,673 kilometers of paved or upgraded roads; 442 electricity supply infrastructure project; 90 commune-level broadcasting relay stations; and 1,787 community cultural houses. In the health and education sectors, 183 commune health stations were renovated, 118 were provided with medical equipment, 225 commune health stations and 629 school and classroom facilities met national standards. In terms of human resource development, 1,901 vocational training models were supported with the participation of 115,575 workers. Moreover, 5,385 workers received support for skills training, foreign language training, and procedures for overseas employment under contracts; 37,718 workers were provided with counseling and job placement support for overseas employment; and 8,424 officials and grassroots communicators were trained to support overseas labor programs. At the local level, investment support was provided for the construction and preservation of 48 villages and hamlets, as well as 69 typical traditional tourism destinations of ethnic minorities. A total of 4,409 cultural houses and sports infrastructure were built, equipped, renovated, or restored in ethnic minority and mountainous regions[36].

Provincial Public Service Portals and Recommendations for the Transition Process (2025), 1, https://papi.org.vn/wp-content/uploads/2025/06/VIE_B%C3%A1o-c%C3%A1o-t%C3%B3m-t%E1%BA%AFt_Final.pdf.

[35] Prime Minister of Vietnam, "Decision No. 1719/QD-TTg."

[36] Việt Anh, "Enhancing the Effectiveness of the National Target Program for Ethnic Minority and Mountainous Areas," *Agriculture and Environment News*, August 13, 2025, https://nongnghiepmoitruong.vn/nang-cao-hieu-qua-chuong-trinh-muc-tieu-quoc-gia-vung-dong-bao-dan-toc-thieu-so-va-mien-nui-d767475.html.

In terms of health care and access to medical services, Vietnam has made significant progress in the healthcare system, with particular focus on strengthening and expanding the primary healthcare network, including in remote, mountainous, and ethnic minority areas. Increased overall investment in the health sector has facilitated the construction, upgrading, and renovation of healthcare infrastructure, as well as the provision of medical equipment for most healthcare facilities in particularly disadvantaged areas, with 183 commune health stations were renovated, upgraded, 118 commune health stations were provided with medical equipment, and build 225 standard commune health stations[37]. Ethnic minority communities have access to medical examinations and treatment and benefit from comprehensive health insurance policies. They can use primary healthcare services, especially for the poor and ethnic minorities, and enjoy the outcomes of national development. In addition, the preservation of valuable traditional healing practices and customs of ethnic minority communities are encouraged.

About the education, Vietnam has adopted various education policies for ethnic minority communities. Thanks to the implementation of various supportive policies at both central and local levels for ethnic minority students across all educational stages, including boarding and semi-boarding support schemes such as rice and meal provision, scholarships, tuition fee exemptions, study cost assistance, direct admission to higher education, and preferential recruitment after graduation, ethnic minority pupils and students today enjoy improved learning conditions[38]. Special education programs, such as bilingual education and local curriculum content, are also implemented. In addition, the State invests in teacher training as well as upgrades school facilities and teaching equipment in ethnic minority regions. Meanwhile, organizing 4,752 training and literacy classes with the participation of 95,033 people; and 93 training and refresher courses for managers, teachers, and personnel involved in literacy programs, with a total of 4,670 participants. As of 30 June 2025, a total of 238,958 ethnic minority people had received vocational training support; 1,679 people were supported to work abroad; capacity-building support was provided to 11,908 officials; and 140,024 people received job counseling and employment referral services, of whom 19,136 workers successfully signed labor contracts after counseling and job placement[39]. The standard of general education in ethnic minority communities

[37] Ministry of Construction of Vietnam, "Tens of Thousands of Essential Infrastructure Projects for Ethnic Minority and Mountainous Regions," September 4, 2025, https://moc.gov.vn/tl/tin-tuc/87843/hang-chuc-ngan-cong-trinh-ha-tang-thiet-yeu-cho-vung-dong-bao-dan-toc-thieu-so-va-mien-nui.aspx.

[38] Nguyen Duy Quy, "Law on Right to Education of Ethnic Minorities in Vietnam," *International Journal of Social Science and Human Research* 5, no. 8 (2022): 3686–87, https://doi.org/10.47191/ijsshr/v5-i8-47.

[39] Tô Công, "Education in Ethnic Minority Areas Is Showing Positive Progress," *Lao Động*, October 6, 2025, https://laodong.vn/giao-duc/giao-duc-vung-dong-bao-dan-toc-thieu-so-dang-khoi-sac-1586618.ldo.

and mountainous regions has continued to improve. School enrollment rates remain high, while dropout rates have decreased. Over the past five years, about 98% of ethnic minority children aged five have attended preschool. The enrollment rate of ethnic minority primary school students has exceeded 97%. Graduation rates at secondary and high school levels in ethnic minority communities are close to the national average, 98.24% and 98.16%[40] respectively.

Due to these regards, another important aspect concerns the implementation of minority rights in practice. In Vietnam, although many policies have been introduced to support ethnic minority communities, disparities in social and economic progress between ethnic minority communities and more developed areas still exist. Some ethnic minority groups continue to face difficulties related to access to education, healthcare, employment opportunities, and public services. These challenges indicate that further efforts are needed to improve policy implementation, monitoring mechanisms, and resource allocation to make sure that minority rights are effectively protected. Persistent implementation gaps, especially in remote minority areas, continue to limit equal access to basic services and the effective protection of rights[41]. Therefore, particular attention should be given, inter alia, Vietnam should continue and enhance targeted development policies, focusing on sustainable livelihoods, job creation, infrastructure, and market access, the development of policies needs to consider geographical regions and levels of development, together with new rural development and the promotion of commodity production[42]. Also, Vietnam should strengthen policies on cultural preservation by supporting community-based cultural activities, bilingual education, and the transmission of traditional knowledge. Greater attention should be given to protecting minority languages, cultural spaces, as well as non-material cultural heritage. Concurrently, Vietnam should enhance worldwide cooperation, learn from the experiences of other countries such as Hungary referred to as a model, and apply good practices in minority development, poverty reduction, and cultural preservation as well as safeguarding cultural diversity, so as to support inclusive and long-term development for ethnic minority communities.

By contrast, international legal standards stress the significance of involving minorities in public affairs and decision-making. Minority groups should have the chance to participate in policies and decisions that have a direct impact on their social, cultural, and economic interests. In Vietnam, ethnic minorities are

[40] Hiếu Nguyễn and Mạnh Nguyễn, "Developing Education and Training in Ethnic Minority and Mountainous Areas to Meet New Requirements," *Giáo Dục & Thời Đại*, August 25, 2025, https://giaoducthoidai.vn/phat-trien-gd-dt-vung-dan-toc-thieu-so-mien-nui-dap-ung-yeu-cau-moi-post745837.html.

[41] Do Van Trai, Pham Hong Trang, and Nguyen Thi Thu Trang, "Essential Problems in Sustainable Development of Ethnic Minority in Vietnam," *Social Work & Society* 18, no. 2 (2020): 16, https://e-journals.bib.uni-wuppertal.de/index.php/sws/article/view/623/1203.

[42] Minh Phu Nguyen, "Policy and Laws on Ethnic Minorities for Sustainable Development in Vietnam," *E3S Web of Conferences* 210 (2020): 16003, 8, https://doi.org/10.1051/e3sconf/202021016003.

represented in certain bodies. It is clearly that ethnic minority deputies in the NA of Vietnam across the terms, except for the Term I, when the NA election took place in a special political context as Vietnam had just gained independence, the proportion of ethnic minority deputies reached 10.2%, with 34 out of 333 members. In the following period, during Terms II and III, this proportion increased significantly (15.6% and 16.7%, respectively), and the highest rate in this period was recorded in Term IV (1971-1976), reaching 17.3%. During the 1976-1992 period, due to numerous political and economic fluctuations in the country, the proportion of ethnic minority NA deputies decreased to just around 14%. From 1997 to 2011, the percentage of ethnic minority deputies in three consecutive terms exceeded 17%, peaking at 17.65% in Term XII (2007-2011). In Term XIII (2011–2016), the proportion reached only 15.6%, but in Term XIV (2016-2021) it rose again to 17.3%[43]. In Term XV (2021-2026), it reached 17.8%[44], with 89 out of 499 deputies from 32 different ethnic groups elected. In general, Vietnam has made continuous efforts to ensure the rights to participate in political life, such as voting rights and the right to participate in elections as a candidate, for ethnic minorities, with the aim of securing appropriate and balanced representation of ethnic groups in the NA and people's councils at all tiers of government, especially in recent years, clearly demonstrate Vietnam's consistent policy of promoting equality and solidarity among ethnic groups, preventing discrimination, and creating chances for all ethnic groups to engage in and make contributions to the country's overall development. These efforts also reflect Vietnam's commitment to fulfilling its responsibilities based on the international conventions it is a party to.

However, their level of participation and influence in policymaking processes may still be limited, particularly at higher levels of governance. In practical terms, the proportion of ethnic minority representatives in state management bodies, as it will be mentioned above, is still relatively low compared to their population size. This situation may affect the extent to which the interests and needs of minority communities are fully reflected in national policies. More specifically, although the Vietnamese government has promulgated various legal documents, policies, and specific action programs to incorporate and operationalize the principles of gender equality, the Constitution enshrines the principles of equality and non-discrimination in article 26 as following: *"Male and female citizens have equal rights in all fields. The State shall adopt policies to guarantee the right to and opportunities for gender equality; The State, society and family shall create the conditions for women to develop comprehensively and to advance*

[43] Bình Phước Provincial Portal, "Ethnic Minority Deputies across the Terms of the National Assembly of Vietnam," December 18, 2023, https://binhphuoc.gov.vn/vi/stttt/thong-tin-doi-ngoai/dai-bieu-dan-toc-thieu-so-qua-cac-khoa-quoc-hoi-viet-nam-1890.html.

[44] National Assembly of the Socialist Republic of Vietnam, "Members of the National Assembly across the Terms," https://dbqh.quochoi.vn/thong-tin-bau-cu/XV.aspx.

their role in society; Gender discrimination is prohibited"[45]. This principle shows the compatibility of Vietnamese law with relevant international human rights standards. Accordingly, these principles have been adopted as guiding frameworks for the development of policies and regulations concerning ethnic minorities in Vietnam[46]. Also, the participation of women from ethnic minority groups is even more limited in public life, since in ethnic minority communities, women and girls often face limited access to opportunities and resources, and their voices are frequently not heard or taken into consideration. They commonly experience discrimination on the basis of both gender and ethnicity, which places them at risk of marginalization. In addition, ethnic minority women and girls are disproportionately affected by, and are sometimes targets of, certain traditional practices such as child marriage, consanguineous marriage, and bride kidnapping[47].

This reality indicates that, although legal provisions formally guarantee equal political participation, further efforts are needed to promote more inclusive representation, particularly for ethnic minorities and especially minority women, in public life and policymaking processes. It is thus necessary to raise the representation of minority groups in state institutions, particularly, Vietnam could consider adopting specific policies or quotas to ensure a more proportionate presence of ethnic minorities in elected bodies. This would help ensure that minority perspectives are adequately reflected in national policymaking processes. At the same time, the State should strengthen the role and institutional capacity of the Ethnic Minority Committee and the Ethnic Council system within the NA of Vietnam, as well as enhance empowerment and participatory capacity-building for ethnic minorities to enable their effective participation and leadership in decision-making processes.

Likewise, it is important to recognize that the State should implement policies to develop the qualifications and skills of female ethnic minority officials so they can hold positions in the political system and socio-political organizations[48] as well as raising awareness to transform community mindsets and implementing measures to reform traditional gender norms, so as to create an enabling environment for the participation and leadership of ethnic minority women[49]. A sine qua non, in democratic states that are committed to human rights, the accommodation of diversity through the protection of minority rights represents a significant matter of policy and law. Failure to strike an appropriate balance may give rise to inter-ethnic tensions and conflicts[50]. In this regard, by strengthening

[45] Vietnam, *Constitution*.
[46] Nguyen Thi Hong Yen and Nguyen Toan Thang, "The Right to Political Participation of Ethnic Minority Women in Vietnam: Barriers and Challenges," *Asia-Pacific Journal on Human Rights and the Law* 23, no. 3 (2022): 300, https://doi.org/10.1163/15718158-23030001.
[47] Yen and Thang, "Right to Political Participation," 296–301.
[48] Yen and Thang, "Right to Political Participation," 313.
[49] Trai, Trang, and Trang, "Essential Problems," 16.
[50] Petričušić, "Rights of Minorities in International Law," 55.

mechanisms that encourage and facilitate minority participation would help ensure that their perspectives and needs are more adequately reflected in national development policies.

5. Conclusion

The protection of minority rights constitutes a fundamental element of the international human rights framework and plays a crucial role in advancing equality, social justice, as well as sustainable development. International legal instruments, establish important principles including equality, non-discrimination, and protecting the cultural, linguistic, and religious identities of minority groups. These international standards provide a legal foundation for states to formulate national laws and policies designed to protecting minority communities.

In Vietnam, the legal system for protecting minority rights has been gradually developed and strengthened, particularly through the Vietnam's Constitution and policies aimed at demonstrate the general commitment to the protection of minority rights and aligns with many international principles. However, in the mirror of international standards, further improvements may be needed in terms of legal clarity, policy implementation, and the effective participation of minority communities in governance. These issues provide an important framework for formulating recommendations intended to fostering the protection of minority rights, as well as supporting inclusive and long-term development in Vietnam.

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From Domestic Legal Systems to International Law: The Prohibition of Abuse of Rights as a General Principle of Law

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Abstract

This article examines the prohibition of abuse of rights and its evolution from domestic legal systems to international law through a comparative legal approach. It first analyses the conceptual foundations of the doctrine as an expression of the principle of good faith, emphasizing its role in limiting the exercise of rights when such exercise contradicts their purpose or causes harm to others. The study then evaluates the treatment of doctrine in civil law and common law systems, highlighting both explicit codifications and implicit doctrinal developments. Building on this comparative framework, the article explores the emergence of the doctrine in international law, focusing on its relationship with good faith, equity, and reasonableness, as reflected in the jurisprudence of international courts and tribunals and the work of the International Law Commission. It further examines how the functions attributed to the doctrine in domestic legal systems have been adapted within the international legal order. The article concludes that, although the prohibition of abuse of rights has not been comprehensively codified, it operates as a general principle of law that guides the exercise and interpretation of rights, contributes to the resolution of normative conflicts, and balances competing interests in international law.

Keywords: *abuse of rights; general principles of law; good faith; domestic legal systems; international law.*

1. Introduction

The idea that legal rights are not absolute and that every legally recognised power must be exercised consistently with the purpose for which it was conferred is a widely accepted principle of contemporary legal systems. One of its clearest manifestations is the prohibition of abuse of rights, which has assumed different forms across various branches of law and has gradually come to be recognised as a general principle of law in many domestic legal systems. By contrast, there remains no consensus regarding its legal status, scope, and implications in international law. Although the prohibition has not been expressly codified, the jurisprudence of international courts and tribunals, arbitral practice, and the work of the International Law Commission demonstrate its growing significance as a normative benchmark governing the exercise of States' rights and powers.

Much of the existing scholarship has focused on establishing the exist-

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ence of the prohibition in international law or identifying its manifestation in particular judicial decisions. In domestic legal systems, however, the doctrine serves not only to limit the exercise of rights but also to ensure that rights are exercised consistently with their purpose, balance competing interests, and give concrete expression to the principles of good faith. The extent to which these functions have been carried over into international law, adapted to its distinctive characteristics, and applied to constrain the exercise of States' rights remains insufficiently explored. Examining how a general principle originating in domestic legal systems operates within international law therefore contributes to a fuller understanding of both the legal nature and the scope of application of the prohibition of abuse of rights.

Against this background, this article traces the evolution of the prohibition of abuse of rights from domestic legal systems to international law. It first examines the development of the doctrine in domestic legal systems before analysing its legal basis, scope of application, and functions in international law in the light of the jurisprudence of international courts and tribunals, arbitral practice, and the work of the International Law Commission. It argues that, while the doctrine retains its traditional functions of ensuring that rights are exercised consistently with their purpose, balancing competing interests, and giving effect to good faith, it has also evolved into a general principle of law that limits the exercise of States' rights and powers and facilitates the settlement of international disputes.

2. The Concept of the Prohibition of Abuse of Rights

The prohibition of abuse of rights is essentially one of the manifestations of the principle of good faith. According to Cheng, good faith requires that one party be able to rely on the representations of the other party in the sense that a reasonable person would have understood them under the circumstances. The prohibition of abuse of rights is therefore closely connected with good faith and may even be regarded as the other side of the same coin.[2] Compared with other manifestations of good faith, such as *pacta sunt servanda* and estoppel, the prohibition of abuse of rights has received considerably less attention in the jurisprudence of international courts, while doctrinal discussions remain relatively limited. This may be explained by the fact that the prohibition of abuse of rights is inherent in the principle of good faith itself, functioning, as it were, as its "reverse side."

Hersch Lauterpacht produced one of the most comprehensive analyses of the prohibition of abuse of rights in international legal scholarship. According to

[2] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006), 121, https://books.google.com/books?id=qE52nTaD20C.

Lauterpacht, the essence of the doctrine lies in the proposition that rights conferred by society cannot be exercised contrary to the interests of society; that an otherwise lawful exercise of a right becomes unlawful when it amounts to an abuse of that right; and that sacrificing a more important social or individual interest for the sake of a less important individual right is detrimental to the general interests of society.[3] Where legal developments fail to keep pace with social change, the exercise of rights existing under the law may gradually become harmful and intolerable. In such circumstances, the recognition of new rights limiting previously existing freedoms becomes necessary. In the international community, where no legislative authority exists to adapt the law to changing circumstances, Lauterpacht argues that the acceptance of the prohibition of abuse of rights provides both the opportunity and the necessity for the development of new categories of wrongful acts.[4]

The prohibition of abuse of rights precludes the exercise of rights in a manner that causes harm to others or to society, or that serves a purpose other than that for which those rights were conferred. The principle is essentially concerned with the purpose underlying the exercise of a right that causes harm to others. It therefore encompasses acts that, although ostensibly consistent with the letter of the law, pursue an ulterior purpose, such as achieving an improper objective or causing harm to another.[5]

3. The Prohibition of Abuse of Rights in Domestic Legal Systems

The prohibition of abuse of rights has been recognised in different ways across civil law systems. The German Civil Code provides that *"The exercise of a right is impermissible where its sole purpose is to cause harm to another person."*[6] Similarly, Article 2 of the Swiss Civil Code states that *"Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right shall not be protected by law."*[7] The Italian Civil Code likewise provides that *"The owner cannot perform acts which have no other purpose than that of harming or causing annoyance to others."*[8]

Although the concept of abuse of rights is not expressly recognised in the

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[3] Hersch Lauterpacht, *The Function of Law in the International Community*, 2nd ed., with an introduction by Martti Koskenniemi (Oxford: Oxford University Press, 2011), 294, https://doi.org/10.1093/actrade/9780199608812.001.0001.

[4] Lauterpacht, *Function of Law*, 295.

[5] B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law," *Harvard International Law Journal* 16, no. 1 (1975): 48.

[6] German Civil Code (Bürgerliches Gesetzbuch), § 226, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

[7] Swiss Civil Code, art. 2, https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en.

[8] Italian Civil Code, art. 833, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1942-03-16;262.

French Civil Code, French courts have interpreted Articles 1382 and 1383 so as to restrict the abusive exercise of rights or powers in areas such as labour law, property law, the law of obligations, contractual obligations, and legal transactions, while imposing liability on the person causing the harm. As a result, the doctrine has been developed primarily through the jurisprudence of the French courts.[9] One of the earliest cases in which the French courts expressly applied the principle of abuse of rights concerned the owner of a plot of land and the house built upon it, who constructed a chimney on the roof solely to injure his neighbour, despite having no legitimate or serious interest in doing so.[10] Furthermore, in French administrative law, the concept of *détournement de pouvoir*, which sanctions the exercise of discretionary powers for purposes other than those for which they were conferred, is closely related to the prohibition of abuse of rights.[11]

The prominence of the prohibition of abuse of rights in civil law systems has also meant that the concept has not been embraced to the same extent in other legal traditions.[12] Indeed, the prohibition of abuse of rights has traditionally been regarded as foreign to English law. English tort law contains decisions demonstrating both the irrelevance of motive in the exercise of a right and the rejection of a general prohibition of abuse of rights. In *Allen v. Flood*,[13] the House of Lords held that it is not unlawful for a person, whatever his motive, to persuade or induce another to do something that is not prohibited by law, provided that no unlawful means are employed.[14] In reaching this conclusion, the court attached no significance to the motive underlying the defendant's conduct. Likewise, in *Mayor of Bradford v. Pickles*,[15] the House of Lords held that it was not unlawful for a landowner to sink a well, not for the purpose of obtaining water for himself, but solely to deprive his neighbour of water and thereby compel the sale of the neighbouring land at a higher price. According to the House of Lords, an exercise

[9] H. C. Gutteridge, "Abuse of Rights," *The Cambridge Law Journal* 5, no. 1 (1933): 31–35, https://doi.org/10.1017/S0008197300128521.

[10] In affirming the principle, the Colmar Court of Appeal emphasized that, although the right of ownership is in principle an absolute right, its exercise is subject to the requirement of pursuing a legitimate and serious interest. The court further observed that considerations of morality and equity preclude legal protection for acts motivated by bad faith or malice that serve no legitimate benefit to their author while causing substantial harm to others. See Ahmed Mohsen El Far, "Abuse of Rights in International Arbitration" (PhD diss., Queen Mary University of London, 2018), 32, https://qmro.qmul.ac.uk/xmlui/handle/123456789/44689.

[11] Iluyomade, "Scope and Content," 55.

[12] Iluyomade, "Scope and Content," 49.

[13] *Allen v. Flood* [1898] AC 1 (HL).

[14] Iluyomade, "Scope and Content," 57.

[15] *Mayor of Bradford v. Pickles* [1895] AC 587 (HL). In this case, the defendant dug a well on his land, thereby substantially reducing the flow of water from an underground reservoir to the plaintiffs' springs. Although the excavation conferred no direct benefit on the defendant, there was considerable evidence that it had been undertaken solely to deprive the plaintiffs of their water supply. The plaintiffs therefore sought an injunction against this malicious conduct.

of property rights that is lawful in itself does not become unlawful merely because it is motivated by an improper or malicious purpose.

Although the prohibition of abuse of rights has not been expressly recognized in common law systems, some scholars, contrary to the position reflected in English case law, argue that the doctrine has played a fundamental role in the development of tort law. For example, one study contends that the doctrine is, in substance, reflected in a range of areas of American law, including nuisance, duress, good faith, economic waste, public policy, copyright and patent misuse, the lack of a business purpose in tax law, and extortion. The same study further argues that the absence of an explicit recognition of the doctrine has resulted in injustice in cases falling outside any of these established categories.[16] Although the existence of the doctrine in the private law of common law jurisdictions remains controversial, there is little doubt as to its existence in public law. For instance, it has been argued that, in English law, its counterpart is found in the principle that discretionary powers conferred upon public authorities for a specific purpose must not be exercised for any purpose other than that for which they were granted.[17]

According to Lauterpacht, the law of torts, as shaped by judicial decisions and legislation in different legal systems, largely encompasses wrongs arising from situations regarded as abuses of rights and continues to evolve with the increasing complexity of social relations. Since every legal system inherently contains a general principle prohibiting the abuse of rights, this process allows for the emergence of new categories of torts and causes of action.[18] He therefore considers it difficult to draw a clear distinction between abuse of rights and tort, viewing a substantial part of the law of torts as a reaffirmation of the prohibition of abuse of rights.[19] In his view, the decisive issue is not the bad faith of the person exercising the right, but whether the exercise of that right unjustifiably interferes with a legally protected interest. Accordingly, the law may restrict the exercise of a right even where it is formally lawful, regardless of the motive behind it.[20] For Lauterpacht, this demonstrates the inadequacy of theories maintaining that the

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[16] Joseph M. Perillo, "Abuse of Rights: A Pervasive Legal Concept," *Pacific Law Journal* 27, no. 1 (1995): 40, https://scholarlycommons.pacific.edu/mlr/vol27/iss1/6. In Australia, John G. Fleming regards the tort of abuse of process as a clear illustration of what civil lawyers refer to as the doctrine of abuse of rights. See John G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Company, 1992), 623.

[17] Iluyomade, "Scope and Content," 59.

[18] Lauterpacht, *Function of Law*, 303–5.

[19] Lauterpacht, *Function of Law*, 303.

[20] Lauterpacht, *Function of Law*, 304. Lauterpacht further observes that the expression *abuse of rights* may itself be regarded as a misnomer, since it is difficult to conceive of a right that is initially lawful but may subsequently be exercised in a manner prohibited by law. In this context, he refers to Marcel Planiol's view in *Traité élémentaire de droit civil*, according to which the notion of abuse of rights is incompatible with legal logic, as the same act cannot simultaneously be lawful and unlawful.

exercise of a legal right can never, under any circumstances, constitute an unlawful act.

Other scholars who have examined the doctrine likewise maintain that, regardless of the terminology employed, the same underlying general principle is at issue. However, they also contend that it is impossible to formulate a definition capable of encompassing all its manifestations. Otherwise, the practical value of the doctrine would be significantly diminished in legal systems in which rights are defined in precise or qualified terms.[21]

4. The Prohibition of Abuse of Rights in International Law

4.1. Doctrine

In the context of territorial sovereignty, the doctrine of abuse of rights prohibits a State from exercising a right for a purpose other than that for which it was conferred and in a manner that causes harm to another State.[22] This prohibition is commonly expressed by the maxim *sic utere tuo ut alienum non laedas*. In Roman law, this maxim required a person to use his or her property in a manner that would not cause harm to the property of another. In international law, it signifies that a State may not use its territory in a way that causes harm to another State. By contrast, the maxim *neminem laedit qui jure suo utitur* embodies the principle that a person acting within the scope of his or her legal right is not regarded as causing legal injury to others.[23] However, this traditional view, according to which the exercise of a right can never give rise to responsibility, has been considered inadequate by a number of scholars.[24] In this respect, the maxim *sic utere tuo ut alienum non laedas* is regarded as a fundamental principle underlying the doctrine of abuse of rights, requiring that individual rights be exercised in a manner that does not cause harm to others.[25] Indeed, some authors have argued

[21] Michael Byers, "Abuse of Rights: An Old Principle, a New Age," *McGill Law Journal* 47, no. 2 (2002): 397, https://lawjournal.mcgill.ca/article/abuse-of-rights-an-old-principle-a-new-age/.

[22] Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme* (The Hague: Kluwer Law International, 2002), 56, https://doi.org/10.1163/9789047403203. The doctrine of abuse of rights should not be confused with *ultra vires* acts by a State. The latter implies that the State lacks the authority or legal right to perform the act in question. Accordingly, a clear violation of an existing obligation cannot, in itself, constitute an abuse of rights, since the State has acted beyond the limits of its rights. See Alexandre C. Kiss, "Abuse of Rights," in *Encyclopedia of Public International Law*, ed. Rudolf Bernhardt, instalment 7 (Amsterdam: North-Holland, 1984), 1; Iluyomade, "Scope and Content," 49.

[23] Kuokkanen, *International Law and the Environment*, 57.

[24] Louis Josserand, *De l'abus des droits* (Paris: A. Rousseau, 1905), 1, https://catalog.hathitrust.org/Record/010463225. As the author further observes, the legal recognition of a right should not be understood as rendering its exercise immune from limitation in every circumstance. Otherwise, abstract legal concepts would be detached from the realities of social relations and elevated to a virtually sacrosanct status.

[25] Kiss, "Abuse of Rights," 1.

that no principle has become more firmly established in legal science than the maxim requiring a property owner to *sic utere tuo ut alienum non laedas*.[26]

According to Friedmann, the principle of abuse of rights requires a balancing between the interests of the individual and those of society or of persons adversely affected by the exercise of the right. Irrespective of whether the principle constitutes a general principle of international law, it serves, much like the principle of equity, as a means of interpreting legal rights and obligations and determining their limits.[27] The prohibition of abuse of rights does not alter the content or scope of a particular right; rather, it requires that the anti-social effects resulting from the exercise of that right should not outweigh the legitimate interests of the right holder.[28] Lauterpacht likewise maintains that the determination of whether a right has been abused essentially depends upon a balancing of interests: where the interest adversely affected is more significant than the right being exercised, the exercise of that right is no longer entitled to legal protection. Accordingly, the application of the doctrine presupposes the existence of substantial harm.[29]

The doctrine has generally been explained from two complementary perspectives. One emphasizes the role of good faith in limiting the exercise of rights, whereas the other focuses on balancing competing interests. According to another classification, the abuse of rights may arise in three distinct legal situations. Under the classification proposed by Kiss, the first occurs where a State exercises its rights in a manner that prevents another State from exercising its own rights and thereby causes it harm.[30] he second arises where a right is deliberately exercised for a purpose other than that for which it was conferred and in a manner that causes harm. This corresponds to the concept of *détournement de pouvoir* in administrative law. The significance of this concept has become increasingly apparent in international law, particularly because the powers conferred upon international organizations and their organs may be exercised for purposes other than

[26] John Westlake, *International Law*, pt. 2, *War*, 2nd ed. (Cambridge: Cambridge University Press, 1913), 313, https://books.google.com/books?id=6W4wAAAAIAAJ. Westlake maintained that the right of sovereignty does not extend to the use of means that are foreseeably capable of killing or injuring innocent foreigners and that, where such harm occurs, the injured foreign State need not establish that the use of those means is expressly prohibited by a positive rule of international law.
[27] Wolfgang Friedmann, "The Uses of 'General Principles' in the Development of International Law," *American Journal of International Law* 57, no. 2 (1963): 288, https://doi.org/10.2307/2195982. The roles of abuse of rights and equity in international law are distinct: while abuse of rights refers to a wrongful act capable of giving rise to State responsibility, equity generally serves as a means of achieving justice. See Iluyomade, "Scope and Content," 53.
[28] Friedmann, "Uses of 'General Principles,'" 288.
[29] Lauterpacht, *Function of Law*, 294, 298, 310.
[30] Kiss, "Abuse of Rights," 1. To illustrate the first category, Kiss refers to the imprudent use of a shared natural resource, such as an international watercourse. He argues that the existing rights and legitimate interests of the States concerned must be balanced and that an abuse of rights may arise where the harm suffered by one State outweighs the benefit derived by another from the exercise of its rights.

those for which they were granted.[31] The third situation arises where a State causes harm to other States through arbitrary conduct without expressly violating any legal right. In such cases, neither bad faith nor an intention to cause harm is required; it is sufficient that the exercise of the right is inconsistent with the social considerations that should govern its exercise.[32]

Iluyomade considers State practice to be of decisive importance in determining the status of the prohibition of abuse of rights as a principle of international law. An examination of such practice may dispel doubts concerning its recognition as a general principle of law. He further argues that the most comprehensive evidence of such practice is found in the written pleadings submitted to international courts and the oral arguments presented before them.[33] In this regard, it has been suggested that, although the prohibition of abuse of rights was not expressly invoked, the claim advanced by the United Kingdom against Belgium in the *Oscar Chinn* Case[34] may, in substance, be regarded as an allegation of abuse of rights.[35]

The prohibition of abuse of rights first emerged at the international level in 1920 during the deliberations of the Advisory Committee of Jurists responsible for drafting the Statute of the Permanent Court of International Justice (PCIJ), in connection with the provision later incorporated into Article 38(1)(c) of the Statute of the International Court of Justice (ICJ). During these deliberations, the Italian member of the Committee, Arturo Ricci-Busatti, referred to the prohibition of abuse of rights, together with the principle of res judicata, as one of the general principles of law.[36] Subsequent scholarship has examined the widespread recognition of the prohibition across domestic legal systems in order to assess its status as a general principle of law. While some scholars regard its recognition in nu-

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[31] Kiss, "Abuse of Rights," 1. According to Iluyomade, *détournement de pouvoir* and the doctrine of abuse of rights are closely related concepts that perform similar functions in different areas of law. See Iluyomade, "Scope and Content," 52, 61.

[32] Kiss, "Abuse of Rights," 1.

[33] Iluyomade, "Scope and Content," 70.

[34] *Oscar Chinn* (United Kingdom v. Belgium), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, 81–82, 87, https://www.icj-cij.org/pcij-series-a-b.

[35] Iluyomade, "Scope and Content," 67. Iluyomade further suggests that the Italian claim in the *Phosphates in Morocco* case may likewise be understood in terms of the prohibition of abuse of rights. In that case, it was alleged that the Moroccan authorities had achieved the same result as would have followed from the monopolistic or discriminatory practices prohibited by the Algeciras Act of 1906 and the Franco-German Convention of 1911, without resorting directly to such prohibited measures. See *Phosphates in Morocco* (Italy v. France), Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74, https://www.icj-cij.org/pcij-series-a-b.

[36] League of Nations, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920, with Annexes* (The Hague: Van Langenhuysen, 1920), 315, https://archive.org/details/procsverbauxof00leaguoft. At the fourteenth meeting, on July 2, 1920, Arturo Ricci-Busatti referred to disputes concerning the breadth of the territorial sea as an example, emphasizing that the task was not to create new rules but to apply existing general principles, including the prohibition of abuse of rights, *res judicata*, and principles of equity and justice.

merous legal systems as supporting that status, others argue that it does not constitute an autonomous rule but merely reflects the application of principles such as good faith, reasonableness, good neighbourliness, and equity.[37] This debate has been conducted within the framework of Article 38(1)(c) of the ICJ Statute, which refers to the "general principles of law recognized by civilized nations." Although such principles are generally regarded as one of the primary sources of international law,[38] identifying a truly common principle remains difficult because of differences in the content and application of domestic legal systems and the view that a principle must exist in all legal systems before it can attain general recognition. Consequently, it has been suggested that analogies drawn from domestic legal systems should be employed to transform common domestic approaches into rules capable of application in international law.[39]

4.2. The Work of the International Law Commission

It is not yet possible to conclude that the prohibition of abuse of rights has acquired a settled content or a clearly defined sphere of application in international law. Nor has the principle been codified by the International Law Commission (ILC) as an autonomous rule. Nevertheless, the Commission's references to the doctrine in the course of its work demonstrate that the principle has been taken into consideration in international law. Indeed, in its commentary to Article 3 of the Draft Articles on the International Regulation of Sea Fisheries, submitted to the General Assembly in 1953, the Commission relied upon the prohibition of abuse of rights. According to the Commission, a State that, while invoking the principle of the freedom of the seas, refuses without valid justification to cooperate in the adoption of reasonable measures for the conservation of marine resources abuses a right conferred upon it by international law. The Commission further observed that, insofar as the prohibition of abuse of rights constitutes a general principle of law recognized by civilized nations, it provides the legal foundation for the draft provision and cannot be regarded as representing a departure from the established principles of international law.[40]

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[37] Kiss, "Abuse of Rights," 2. It has been argued that the doctrine of good neighbourliness is an expression of the principle of good faith and that its unjustified violation constitutes an abuse of rights. The concept reflects a State's obligation to respect the legitimate interests of neighbouring States. See Kuokkanen, *International Law and the Environment*, 60.

[38] General principles of law may be derived either from domestic legal systems or from the international legal system. Traditionally, however, international courts and tribunals have identified them by reference to principles common to a large number of domestic legal systems.

[39] Iluyomade, "Scope and Content," 54. Citing Gutteridge, Iluyomade explains that insisting on exact uniformity among the rules of all legal systems would amount to demanding the impossible and would undermine, or at least substantially diminish, the value of resorting to private-law sources and analogies. See H. C. Gutteridge, "Comparative Law and the Law of Nations," *British Year Book of International Law* 21 (1944): 5, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/byrint21&section=5.

[40] International Law Commission, "Report of the International Law Commission Covering the

In his Fifth Report of 1960, Special Rapporteur Francisco García-Amador examined the doctrine of abuse of rights and argued that it may give rise to international responsibility.[41] He observed that most scholars considered the doctrine applicable to international relations and maintained that its application was already reflected in international practice.[42] Drawing in particular on the jurisprudence of international courts and claims commissions, García-Amador likewise concluded that the prohibition of abuse of rights was applicable in international relations. In his view, its principal function is to limit the exercise of rights whose scope has not been precisely defined under either general international law or the legal instruments conferring those rights.[43]

In 1970, Special Rapporteur Arnold J. P. Tammes argued that the issue of abuse of rights should be addressed within the framework of State responsibility, particularly where the boundaries between rights and obligations are not clearly defined. In his view, such disputes should be resolved on the basis of general rules requiring a reasonable balance between the interests of the parties and due regard for their respective interests. The principle performs a particularly important function in areas where the limits of rights remain uncertain, such as the freedom of the seas, the exploration of the Moon, and activities capable of endangering humanity or the environment. Although more specific legal rules would gradually emerge, Tammes maintained that, until then, the issue of abuse of rights should not be disregarded in the context of State responsibility.[44] This approach suggests that the principle serves a supplementary function in the law of State responsibility and that responsibility need not be confined exclusively to the breach of a specific primary obligation.[45]

In its work on State responsibility, the ILC did not incorporate the doctrine of abuse of rights into the Draft Articles, as its focus was on the secondary

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Work of Its Fifth Session," UN Doc. A/2456, *Yearbook of the International Law Commission* 1953, vol. 2, para. 100, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1953_v2.pdf. The Commission further observed that, pending general acceptance of the proposed regime, States were under at least an imperfect legal obligation not to encourage or permit conduct amounting to an abuse of rights resulting in the destruction of natural resources. It also considered the proposed approach consistent with established principles of international law, notwithstanding the progressive character of the draft articles.

[41] Francisco V. García-Amador, "Fifth Report on International Responsibility," UN Doc. A/CN.4/125, *Yearbook of the International Law Commission* 1960, vol. 2, paras. 70–78, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v2.pdf.

[42] García-Amador, "Fifth Report," para. 70.

[43] García-Amador, "Fifth Report," para. 75.

[44] International Law Commission, "1075th Meeting," *Yearbook of the International Law Commission* 1970, vol. 1, para. 40, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1970_v1.pdf.

[45] In the same year, Nagendra Singh noted that many ILC members considered the doctrine of abuse of rights to warrant further study and emphasized its importance in an era when lawful scientific activities in one State could readily cause harm to another. See International Law Commission, "1079th Meeting," *Yearbook of the International Law Commission* 1970, vol. 1, para. 29, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1970_v1.pdf.

rules governing the scope and consequences of responsibility arising from the breach of an international obligation.[46] Nevertheless, the foregoing analysis demonstrates that the abuse of rights may constitute a basis for State responsibility. Recognizing the principle as a general principle of international law may prevent States and international organizations from justifying acts that exceed the limits of their legal powers solely on the ground that such acts are based on a legal right.[47]

4.3. International Legal Practice

4.3.1. General Considerations

The status of the prohibition of abuse of rights as a general principle of international law remains a matter of debate, notwithstanding its widespread recognition in domestic legal systems and its application in the jurisprudence of international courts and arbitral tribunals. One of the main reasons for this debate is the absence of a uniform definition and clearly delineated contours.[48] Nevertheless, many States, judges, and scholars have accepted the prohibition either as a general principle of law or as part of customary international law.[49] References to the doctrine in the jurisprudence of international courts likewise support this view. In its Draft Conclusions on General Principles of Law, the ILC observed that decisions of international courts and tribunals constitute a subsidiary means for determining the existence and content of general principles of law, and that decisions of domestic courts may likewise be taken into account for this purpose.[50]

Certain treaty provisions require that the rights conferred upon the parties be exercised in good faith and in a manner that prevents their abuse. In this respect, it may be argued that the obligations set out in Article 2 of the Charter of the United Nations, together with the principle of *pacta sunt servanda* enshrined

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[46] Byers, "Abuse of Rights," 404.

[47] Kiss, "Abuse of Rights," 4.

[48] Carla Cosentino, "Prohibition of Abuse of Rights: From Rule to Principle," *Comparazione e Diritto Civile*, no. 3 (2018): 145, https://www.comparazionedirittocivile.it/data/uploads/archivio-volumi/201803.pdf.

[49] In the *International Status of South West Africa* case, Judge McNair observed that, when confronted with concepts resembling those of private law, international courts should look to domestic legal systems for guidance. He emphasized that Article 38(1)(c) of the ICJ Statute does not permit the direct transplantation of private-law institutions into international law; rather, such concepts should be regarded as broader legal principles capable of guiding its development and application. *International Status of South West Africa*, Advisory Opinion, Separate Opinion of Sir Arnold McNair, 1950 I.C.J. 128, 148, https://www.icj-cij.org/case/10. On the other hand, it may also be questioned whether the existence of a principle in several, or even all, domestic legal systems is, by itself, sufficient to justify its transposition into international law.

[50] International Law Commission, "Draft Conclusions on General Principles of Law," draft conclusion 10, UN Doc. A/CN.4/L.982 (2023), https://legal.un.org/docs/?symbol=A/CN.4/L.982.

in Article 26 of the Vienna Convention on the Law of Treaties, are closely connected with the prohibition of abuse of rights. Some treaties also contain express provisions prohibiting the abuse of powers.[51] The clearest example, however, is found in Article 300 of the 1982 United Nations Convention on the Law of the Sea, which requires States Parties to exercise the rights, jurisdiction, and freedoms recognized under the Convention in a manner that does not constitute an abuse of rights.[52]

4.3.2. The Permanent Court of International Justice and the International Court of Justice

Although international courts and arbitral tribunals have not expressly based their decisions on the prohibition of abuse of rights, they have adopted a cautious approach in assessing allegations concerning its violation in a number of disputes. Nevertheless, the principle has not, to date, been relied upon as an autonomous legal basis for the settlement of an international dispute. Allegations of abuse of rights have arisen in a wide range of fields, including, most notably, the law of the sea and transboundary pollution, as well as international trade, nationality, the treatment of aliens, the property rights of aliens, and expulsion.

The issue of abuse of rights arose before the PCIJ in the *Certain German Interests in Polish Upper Silesia Case*. The Court held that Germany retained the power to dispose of its property until sovereignty was transferred and that the burden of proving an abuse of that power rested upon the party alleging it.[53] It nevertheless found that the ordinary limits of the administration of public property had not been exceeded and therefore concluded that no abuse of rights had occurred.[54]

In the *Free Zones of Upper Savoy and the District of Gex* Case, the PCIJ referred to the principle of abuse of rights in a cautious manner. While recognizing France's authority to enforce its fiscal legislation and maintain its customs cordon in the frontier zones, the Court observed that the abuse of rights might

[51] Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140, art. 33; Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, art. 173; Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167, art. 146. See https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-founding.html.

[52] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, art. 300, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[53] *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), Merits, Judgment, 1926 P.C.I.J. (ser. A) No. 7, 30, https://www.icj-cij.org/pcij-series-a. The dispute concerned Germany's power to dispose of property in Upper Silesia between the signing and the entry into force of the Treaty of Versailles, before sovereignty was transferred to Poland. The PCIJ was asked to determine whether Article 256 of the Treaty restricted that power during the intervening period.

[54] *Certain German Interests in Polish Upper Silesia*, 37–38.

arise if those powers were exercised for the purpose of evading obligations assumed under the relevant treaty. Nevertheless, the Court did not presume that an abuse of rights had occurred in the circumstances of the case, emphasizing that any such abuse would have to be established separately.[55]

As these cases demonstrate, in both instances in which the PCIJ referred to the possibility of an abuse of rights, it emphasized that such abuse could not simply be presumed by the Court. This cautious approach is also reflected in Judge Anzilotti's opinion in the *Electricity Company of Sofia and Bulgaria* Case, where he observed that the theory of abuse of rights is an extremely delicate one and should be applied with great caution, particularly in matters concerning the compulsory jurisdiction of the Court.[56]

Although the ICJ has not adopted a definitive position expressly recognizing the prohibition of abuse of rights, neither has it denied the existence of the principle in international law, and it has referred to it in a number of its decisions. In the *Anglo-Norwegian Fisheries* Case, the Court likewise indicated, in the context of its assessment of departures from the general direction of the coast, that a manifest abuse of rights would require separate consideration.[57]

In the *Rights of Nationals of the United States of America in Morocco* Case, the ICJ emphasized that the customs authorities' power of valuation must be exercised in a reasonable, non-discriminatory, and good faith manner.[58] Considered together with the views advanced in the literature, particularly by Cheng, this approach suggests that a failure to exercise rights in good faith may amount to an abuse of rights.

The prohibition of abuse of rights was expressly invoked for the first time in international judicial proceedings in the *Barcelona Traction Case*. Belgium alleged that the Spanish administrative and judicial authorities had arbitrarily and discriminatorily exercised their discretionary powers in relation to the Barcelona Traction company and its subsidiaries in order to transfer control of the company from Belgian nationals to a Spanish group, including by diverting the bankruptcy proceedings from their lawful purpose without compensation. Spain rejected

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[55] *Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, 167, https://www.icj-cij.org/pcij-series-a-b. The dispute concerned France's treaty obligation to exempt goods in certain frontier zones adjoining Switzerland from taxation. While France acknowledged imposing fiscal charges through a customs-control cordon, Switzerland argued that those charges constituted a disguised customs duty and therefore violated the treaty.

[56] *Electricity Company of Sofia and Bulgaria* (Belgium v. Bulgaria), Judgment, Separate Opinion of Judge Anzilotti, 1939 P.C.I.J. (ser. A/B) No. 77, 98, https://www.icj-cij.org/pcij-series-a-b. Judge Anzilotti also referred to the maxim *neminem laedit qui jure suo utitur*, which he considered fully consistent with the spirit of international law, and observed that the principle was particularly applicable in the circumstances of the case.

[57] *Fisheries* (United Kingdom v. Norway), Judgment, 1951 I.C.J. 116, 142, https://www.icj-cij.org/case/5.

[58] *Rights of Nationals of the United States of America in Morocco* (France v. United States), Judgment, 1952 I.C.J. 176, 212, https://www.icj-cij.org/case/11.

these allegations, maintaining that its authorities had not breached any international obligation through conduct amounting to an abuse of rights or discrimination.[59]

Although international courts have referred to the principle of abuse of rights on various occasions, they have not expressly clarified its place in international law. Nevertheless, the principle has frequently been endorsed in separate and dissenting opinions. In his separate opinion in the *Corfu Channel Case*, Judge Alvarez, one of the principal proponents of the doctrine in international law, argued that the approach adopted in domestic legal systems should likewise be extended to international law. According to Alvarez, allowing States to exercise the rights deriving from their sovereignty without limitation could give rise to disputes and even threaten international peace.[60]

Judge Alvarez reiterated this position in his dissenting opinion in the *(Second) Admissions Case*. Observing that the doctrine was well established in private law and that changing international conditions required its counterpart in international law, he maintained that the principal organs of the United Nations, particularly the Security Council, the General Assembly, and the ICJ, could determine the limits of States' rights and assess whether they had been abused within their respective spheres of competence. He further suggested that, where a permanent member of the Security Council had abused its veto power, the General Assembly should determine the existence of such abuse and, if confirmed, allow the procedure to continue without a Security Council recommendation.[61]

In the *Nottebohm* Case, Judge Read observed that an allegation of abuse of rights necessarily presupposes the existence of a right capable of being abused. He further maintained that the doctrine of abuse of rights should not be invoked against a State exercising a right conferred by international law unless the exercise of that right causes harm to another State.[62]

In his separate opinion in the *South West Africa – Voting Procedure concerning Reports and Petitions* Advisory Opinion, Judge Lauterpacht observed that the continued exercise by a State of a discretionary power conferred upon it, despite the clear and repeated will of the international organization concerned,

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[59] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, Judgment, 1970 I.C.J. 3, 17, https://www.icj-cij.org/case/50. In his separate opinion, Judge Ammoun likewise regarded abuse of rights as an international wrongful act and a reflection of a general principle common to domestic legal systems. He further observed that the concept closely resembles *détournement de pouvoir* in domestic administrative law, emphasizing that, in international law, the question is whether abuse of rights protects an objective right or interest distinct from the State's subjective right or interest. Separate Opinion of Judge Ammoun, 1970 I.C.J. 286, 324, para. 32.

[60] *Corfu Channel* (United Kingdom v. Albania), Merits, Judgment, Separate Opinion of Judge Alvarez, 1949 I.C.J. 4, 48, https://www.icj-cij.org/case/1.

[61] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, Dissenting Opinion of Judge Alvarez, 1950 I.C.J. 4, 20, https://www.icj-cij. org/case/9.

[62] *Nottebohm* (Liechtenstein v. Guatemala), Second Phase, Judgment, Dissenting Opinion of Judge Read, 1955 I.C.J. 4, 37, https://www.icj-cij.org/case/18.

might cross the line between the lawful exercise of discretion and arbitrariness, and between the legitimate exercise of a right and its abuse.[63]

In the *Gabčíkovo-Nagymaros Project* Case, Judge Weeramantry, in discussing the elements of sustainable development, regarded the prohibition of abuse of rights as one of the established fields of international law, alongside human rights, State responsibility, environmental law, equity, territorial sovereignty, and good neighbourliness.[64] This approach indicates that the principle is regarded as an established part of international law.

4.3.3. International Arbitration

The doctrine of abuse of rights also finds support in international arbitral awards. In this regard, the reference to the principle of good faith in the *El Triunfo* Arbitration of 1902 is of particular significance.[65] The *The Tattler* Arbitration of 1920 is often regarded as illustrating the doctrine of abuse of rights. The significance of the Tattler Arbitration lies in the Tribunal's recognition that a licensing power conferred for one purpose could not lawfully be exercised for another. The dispute arose after Canadian authorities refused to issue a licence yet subsequently detained the vessel for lacking one. The Tribunal held that such detention could not be justified and upheld the claim for compensation.[66]

The *Trail Smelter* Arbitration constitutes another important illustration of the application of the prohibition of abuse of rights. The dispute arose from a complaint by the United States that fumes emitted from the Trail Smelter in British Columbia had caused damage in the State of Washington. Pursuant to a Convention concluded between the United States and the Dominion of Canada in 1935, the Tribunal held in 1941 that no State has the right to use or permit the use

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[63] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, Advisory Opinion, Separate Opinion of Judge Lauterpacht, 1955 I.C.J. 67, 120, https://www.icj-cij.org/case/24.

[64] *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. 7, 95, https://www.icj-cij.org/case/92. In the same case, Judge Parra-Aranguren observed that Slovakia could incur liability towards Hungary for the continued operation of Variant C only if a manifest abuse of rights were established. Dissenting Opinion of Judge Parra-Aranguren, 1997 I.C.J. 204, 231, para. 22.

[65] The Tribunal observed that persons conducting activities in a foreign State are expected to comply with its laws and submit in good faith to the jurisdiction of its domestic courts. It nevertheless indicated that a different assessment may be warranted where a State arbitrarily terminates private contracts to the detriment of investors acting in reliance on good faith and fair dealing. *Claim of the Salvador Commercial Company (El Triunfo Company)*, Award, May 8, 1902, 15 R.I.A.A. 455, 477, https://legal.un.org/riaa/cases/vol_XV/455-479.pdf. The Tribunal awarded compensation after finding that bankruptcy proceedings had been fraudulently manipulated to transfer control of the company from American investors to Salvadoran nationals.

[66] *Owners of the Tattler* (United States v. Great Britain), 6 R.I.A.A. 48, 50–51, https://legal.un.org/riaa/cases/vol_VI/48-51_Tattler.pdf.

of its territory in a manner causing serious injury by fumes to the territory, property, or persons of another State where such injury is established by clear and convincing evidence. It further observed that scientific developments should be taken into account and that the solution adopted should be equitable to all parties, ultimately holding Canada internationally responsible for the activities of the *Trail Smelter*.[67] The award demonstrates the importance of damage in the application of the prohibition of abuse of rights. It confirms that responsibility arises only where the damage is serious and established by clear and convincing evidence, and that the exercise of rights may be scrutinised internationally where private activities cause transboundary harm. A similar approach can be seen in the *Nottebohm* Case and the *Rights of Nationals of the United States of America in Morocco* Case.

In the 1986 *Case concerning Filleting within the Gulf of St. Lawrence* (*La Bretagne* Arbitration), the Tribunal held that rights conferred by treaty could not be exercised without limitation. Emphasizing that a legal regime conferring concurrent rights within the same geographical area requires proportionality and cooperation in the exercise of those rights, the Tribunal held that the fishing rights granted to French vessels had to be reconciled with Canada's regulatory authority over fishing activities and that both parties were required to exercise their rights reasonably.[68]

The World Trade Organization expressly referred to the prohibition of abuse of rights in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998). The Appellate Body observed that good faith, as both a general principle of law and a general principle of international law, limits the exercise of treaty rights by States and that one manifestation of this principle is the doctrine of *abus de droit*. Accordingly, treaty rights must be exercised *bona fide* and reasonably; where a Member abuses its rights, this may result not only in the impairment of the treaty rights of other Members but also in a breach of its own treaty obligations.[69] The decision thus illustrates the close relationship between the prohibition of abuse of rights and the principle of good faith.[70]

5. The Legal Functions of the Doctrine of Abuse of Rights

5.1. Functions in International Law

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[67] *Trail Smelter* (United States v. Canada), Decisions of April 16, 1938, and March 11, 1941, 3 R.I.A.A. 1905, 1965, https://legal.un.org/riaa/vol_3.shtml.

[68] *Case Concerning Filleting within the Gulf of St. Lawrence (La Bretagne)* (Canada/France), Award, July 17, 1986, 19 R.I.A.A. 225, 242, para. 28, https://legal.un.org/riaa/cases/vol_XIX/225-296.pdf.

[69] World Trade Organization, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 158 (October 12, 1998), adopted November 6, 1998, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.

[70] El Far, "Abuse of Rights," 141.

The function of the doctrine of abuse of rights in international law should be assessed in light of the role of general principles of law within the international legal system. According to Draft Conclusion 10 of the ILC's Draft Conclusions on General Principles of Law, general principles are primarily invoked where other rules of international law do not fully or partially resolve a particular issue. In addition, general principles contribute to the coherence of the international legal system, assist in the interpretation and supplementation of other rules of international law, and provide a foundation for primary and secondary obligations as well as procedural rules.[71]

In this respect, the doctrine of abuse of rights performs a similar function within the international legal order, irrespective of whether it is characterized as a general principle of law or as part of customary international law. The doctrine contributes to filling normative gaps, balancing competing interests, and protecting common interests by imposing limits on the exercise of rights.[72] This function essentially reflects the role performed by the doctrine in domestic legal systems. As in domestic law, the doctrine in international law functions as a supplementary mechanism that preserves the integrity of the legal order by ensuring that rights are exercised in accordance with good faith, fairness, and equity, rather than by denying their existence.

According to Lauterpacht, the doctrine of abuse of rights performs an important function in international law, where legislative capacity is more limited than in domestic legal systems. This approach is based on the view that the source of rights lies not in the absolute will of States but in the common legal order of the international community.[73] In his view, as the international community developed and interdependence among States increased, the individualistic conception of rights gradually gave way to an approach founded on justice and social solidarity.[74] Consequently, a right initially regarded as lawful may, under changing social conditions, come to be exercised abusively. In the absence of an effective international legislative mechanism, Lauterpacht regards the doctrine as a means of filling gaps in international law, enabling judicial bodies to develop the law in accordance with the needs of the international community without legislative intervention.[75] This demonstrates that the doctrine's function of limiting and balancing the exercise of rights in domestic legal systems finds a similar expression in international law.

5.2. Burden of Proof

The effect of the doctrine of abuse of rights is not limited to imposing

[71] International Law Commission, "Draft Conclusions," draft conclusion 10.
[72] Byers, "Abuse of Rights," 389.
[73] Lauterpacht, *Function of Law*, 306.
[74] Lauterpacht, *Function of Law*, 306–7.
[75] Lauterpacht, *Function of Law*, 308.

substantive limits on the exercise of rights. The doctrine also has important implications for the assessment of allegations of abuse of rights in international disputes and for determining which party bears the burden of proof. In this regard, some scholars have observed that one of the practical functions of the doctrine is to determine the allocation of the burden of proof.[76] This approach has been illustrated by reference to the *Bering Sea* Arbitration, in which the presumption was that Great Britain had exercised the freedom of the seas in good faith. Accordingly, the burden rested on the United States to establish that the seal hunters had intentionally destroyed the seal herds and the sealing industry and that their conduct was attributable to Great Britain.[77] Since the prohibition of abuse of rights is a general principle prohibiting the exercise of rights that causes harm, the existence of the conduct and the resulting harm giving rise to the application of the principle must be assessed in light of the circumstances of each individual case. The starting point for this assessment is the presumption that States act in good faith. Accordingly, the burden of proof rests upon the party alleging that the other party has abused its rights.[78]

Where the claimant is able to establish that the respondent knew or ought to have known the consequences of its conduct for the claimant's interests, the respondent must provide a justification for that conduct. However, it is not sufficient merely to argue that the conduct consisted in the exercise of an existing right.[79] For example, the exercise of sovereign authority does not constitute an absolute defence for the respondent State. Where the respondent is unable to justify its conduct by relying on one of the circumstances precluding wrongfulness recognized under international law, it may be concluded that there has been an abuse of rights.[80] The doctrine thus performs the function of guiding the allocation of the burden of proof in the assertion and assessment of allegations of abuse of rights and, in this respect, contributes to the settlement of international disputes.

6. Conclusion

The prohibition of abuse of rights originated in domestic legal systems and has gradually acquired increasing significance in international law. Although it has neither been expressly codified nor precisely defined, the jurisprudence of international courts and tribunals, arbitral practice, and the work of the ILC demonstrate that it performs an important normative function within the international legal order.

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[76] Kuokkanen, *International Law and the Environment*, 61.
[77] *Bering Sea Fur Seals Arbitration* (United States v. Great Britain), Award, August 15, 1893, 28 R.I.A.A. 263, https://legal.un.org/riaa/cases/vol_xxviii/263-276.pdf.
[78] See *Certain German Interests in Polish Upper Silesia*, 30.
[79] Kuokkanen, *International Law and the Environment*, 61.
[80] Kuokkanen, *International Law and the Environment*, 62.

The comparative analysis undertaken in this article shows that the doctrine has not been mechanically transplanted from domestic legal systems into international law. Rather, it has been adapted to the distinctive structure of the international legal order. While, in domestic legal systems, the doctrine primarily ensures that rights are exercised consistently with their purpose, gives effect to good faith, and balances competing interests, in international law it limits the exercise of States' rights and powers, contributes to the settlement of disputes, and guides the interpretation and application of legal rules.

The judicial decisions and arbitral awards examined in this study further demonstrate that the prohibition of abuse of rights is closely connected with, but not reducible to, the principle of good faith. They also indicate that the lawful exercise of a right does not automatically preclude international responsibility where that right is exercised for an improper purpose, disproportionately, or in a manner that unjustifiably interferes with the legitimate interests of others. The doctrine likewise performs a procedural function by influencing the allocation of the burden of proof in disputes concerning the abuse of rights.

As international law continues to evolve in response to increasing interdependence among States and the emergence of new areas of regulation, including environmental protection, shared resources, and outer space activities, the importance of the prohibition of abuse of rights is likely to become even more pronounced. Accordingly, the doctrine should be understood not merely as a concept inherited from domestic legal systems but as a dynamic general principle of law that strengthens the coherence, fairness, and legitimacy of the international legal order by ensuring that States exercise their rights and powers in accordance with the underlying purposes of international law.

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Clashing First-Order *Jus Cogens*: How the ICJ and ILC Draft Conclusions Have Left Unanswered the Hierarchy Between Conflicting *Jus Cogens* Norms

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Abstract

Jus cogens norms are considered superior norms from which no derogation is allowed. Initially, their existence was debated but the International Law Commission's 2022 Draft Conclusions provided the most authoritative restatement, stating that they are "fundamental values of the international community". According to Kolb and others, jus cogens are in two orders, namely, first order norms (substantive) and second order norms (procedural). The ICJ (International Court of Justice) in its judgments has distinguished and decided on conflicts involving substantive and procedural jus cogens, but has avoided answering, let alone providing a hierarchy, when there is a clash between two substantive jus cogens. This has created a legal lacuna, especially when there is a clash between the prohibition on the use of force and the prohibition on genocide. This paper employs a doctrinal and historical analysis of the jus cogens norms concept and the shift of international law towards human security to illuminate this gap. It highlights how this gap is conspicuously avoided by the ILC (International Law Commission) and ICJ due to political sensitivities and/or the potential abuse of a hierarchy. Nevertheless, these justifications are not satisfactory, especially during a veto-gridlock; this paper proposes a hierarchy prioritising the protection of civilians from severe irreversible harm.

Keywords: *jus cogens norms; peremptory norms; prohibition on genocide; prohibition on the use of force; hierarchy of jus cogens.*

1. Introduction

Identifying the Problem. Contemporary international law does not address what happens when there is a clash of first-order *jus cogens* norms, namely, between the prohibition on the use of force and the prohibition on genocide. For example, in an instance where a state is commiting a genocide against its population and the United Nations Security Council (UNSC) due to a veto grid-lock cannot authorise a Chapter VII intervention, it is not clear if state B, who has a duty to prevent a genocide in terms of the Genocide Convention,[2] and the *Bosnia v Serbia* case,[3] is able to intervene. If state B intervenes, then it

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[2] Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 UNTS 277, https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf.

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Provisional Measures, Order of

will be upholding the prohibition on genocide while violating the prohibition on the use of force. The opposite is also true, if state B does not intervene then the prohibition on the use of force is upheld but a genocide will be committed. The court highlighted in *Bosnia v Serbia* that intervention must be within the law, does that mean that the prohibition is placed above the prohibition on genocide? It is not clear.

Novelty Compared to Existing Doctrinal Approaches. Usually when scholars are discussing this problem we find those who are liberal interventionalists who are for humanitarian intervention,[4] or we find legal positivists who are against humanitarian intervention and see it as an erosion of the prohibition on the use of force.[5] Others who speak of illegal but legitimate interventions[6] or the responsibility to protect (R2P).[7] As helpful as those arguments are, they do not address the situation. They are primarily focused on the United Nations Charter (UNC) and its provisions thereof. They do not address the *jus cogens* question i.e., a conflict between two first order *jus cogens.* Those that have written about *jus cogens* address the hierarchy compared to other legal rules but come short of addressing the internal hierarchy within the *jus cogens* framework itself.[8] The International Law Commission (ILC) had the opportunity to do so with its Draft Conclusions[9] but failed, and thus, the gap is still open.

Research Structure. The research starts off by providing the background to the study in order to give the context of why this gap must be closed. It then follows with the history of *jus cogens* norms how these norms were developed and later accepted by the international community and then by the international tribunals. Thereafter, the definition and nature of *jus cogens* will be

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September 13, 1993, 1993 ICJ 325, para. 100, https://www.icj-cij.org/case/91.

[4] Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), 255, https://doi.org/10.1017/CBO9780511755996.

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[9] International Law Commission, "Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), with Commentaries," in *Report of the International Law Commission: Seventy-Third Session*, UN Doc. A/77/10 (2022), chap. IV, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf.

provided and the controversies that surround it. Furthermore, the typology of *jus cogens* will be discussed and how it provides the framework to discuss the hierarchy within the internal framework of *jus cogens.* We will then highlight the main aspect of this research i.e., conflict between two *jus cogens* (the prohibition on the use of force and the prohibition on genocide) and then we will provide a solution to this conflict based on the historical basis of *jus cogens* and the general projection of international law towards human security also highlighting the potential objections to our proposal and then a conclusion will be provided.

Research Methods Used. This paper employs a doctrinal and historical analysis of the *jus* cogens norms concept and the shift of international law towards human security to illuminate this gap. It looks at the doctrinal conflicts concerning the nature of *jus cogens* norms compared to other rules and how historically the concept came to be accepted. Nevertheless, there is much that is not understood about these norms. The ILC Draft Conclusions brought some clarity but still left a lacuna which is conspicuously avoided by the ILC and International Court of Justice (ICJ) due to political sensitivities and/or the potential abuse of a hierarchy. This lacuna is a hierarchy within the *jus cogens* framework when they are in conflict.

Solutions Proposed. This paper proposes a hierarchy of *jus cogens* norms that prioritises the protection of civilians from severe-irreversible harm. It takes into consideration that genocide can be weaponised through misinformation, like Russia did with Ukraine,[10] so it insists that this hierarchy should satisfy the requirements of the Genocide Convention.

2. Background

Contemporary international law has experienced multiple shifts since the end of the cold war era. It has moved from a bi-polar era to a uni-polar era (with the United States of America being the international hegemon)[11] and now towards a multipolar era and the rise of the global south. There has also been a change in the nature of conflicts, after World War two (WWII) the international community was concerned with regulating interstate conflicts or international armed conflicts (IACs)[12] and regulating regional organisations from using force without UNSC authorisation, both through the prohibition on the use of force.

Nevertheless, the nature of conflicts changed, there was a proliferation of

[10] Jens David Ohlin, "#Genocide: Atrocity as Pretext and Disinformation," SSRN working paper (2022), 103–4, https://doi.org/10.2139/ssrn.4218005.

[11] Adriana Erthal Abdenur, "UN Peacekeeping in a Multipolar World Order: Norms, Role Expectations, and Leadership," in *United Nations Peace Operations in a Changing Global Order*, ed. Cedric de Coning and Mateja Peter (Cham: Palgrave Macmillan, 2019), 47–48, https://doi.org/10.1007/978-3-319-99106-1_3.

[12] Rogier Bartels, "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts," *International Review of the Red Cross* 91, no. 873 (2009): 35–67, https://doi.org/10.1017/S1816383109990191.

intrastate state conflicts or non-international armed conflicts (NIACs),[13] mostly civil wars and the rise of non-state actors.[14] The decade that really illuminated the seriousness of this shift was the nineties, where the Rwandan genocide,[15] the mass killings in Somalia and Liberia[16] shook the consciousness of the international community. In Africa, especially, there was a fundamental shift in the region's peace and security architecture.[17] The erstwhile Organisation of African Unity (OAU) with its principle of non-interference, was replaced by the African Union (the AU) with its principle of non-indifference[18] and the controversial provision - article 4(h) of the AU's Constitutive Act, 2000, which gives the AU the right for the AU to intervene if a member state is committing either, a genocide, a crime against humanity, a war crime or ethnic cleansing.[19] This and the evolution of UN peacekeeping operations which shifted from being passive to being more robust and aggressive through its protection of civilians mandates.[20] These new operations sometimes go against traditional UN peacekeeping elements of consent, impartiality and the non-use of force except for self-defence,[21] and show a progression towards the prioritising of human security above state security.[22] This is consistent with the philosophy of the responsibility to protect, which redefines state sovereignty from being absolute to being a state's responsibility to protect its civilians.[23] Though the legal foundations of R2P are debated, it received universal acceptance in the 2005 World Summit and was adopted in the World Summit Outcomes document.[24]

This general progression in international law can be found also in the

[13] Bartels, "Timelines, Borderlines and Conflicts," 36.
[14] Jonathan Fisher and Nina Wilén, "Constructing a New Identity as a Peacekeeper," in *African Peacekeeping* (Cambridge: Cambridge University Press, 2022), 129–63, https://doi.org/10.1017/9781108582179.005.
[15] Theo Neethling, "Maintaining International Peace and Security: Reflections on Peace-Support Operations in Africa," *Scientia Militaria: South African Journal of Military Studies* 28, no. 1 (1998): 122, https://doi.org/10.5787/28-1-202.
[16] Neethling, "Maintaining International Peace and Security," 122.
[17] Fisher and Wilén, "Constructing a New Identity," 129–63.
[18] Fisher and Wilén, "Constructing a New Identity," 137.
[19] Constitutive Act of the African Union, July 11, 2000, art. 4(h), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.
[20] Alex J. Bellamy and Charles T. Hunt, "Twenty-First Century UN Peace Operations: Protection, Force and the Changing Security Environment," *International Affairs* 91, no. 6 (2015): 1278–79, https://doi.org/10.1111/1468-2346.12456.
[21] Bellamy and Hunt, "Twenty-First Century UN Peace Operations," 1277.
[22] Odoemena and Nwodo, "Assessment of the UN Security Council," 160–83; Fisher and Wilén, "Constructing a New Identity," 137.
[23] Ibrahim J. Wani, "United Nations Peacekeeping, Human Rights, and the Protection of Civilians," in *The State of Peacebuilding in Africa: Lessons Learned for Policymakers and Practitioners*, ed. Terence McNamee and Monde Muyangwa (Cham: Palgrave Macmillan, 2021), 92–93, https://doi.org/10.1007/978-3-030-46636-7_6.
[24] United Nations General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, October 24, 2005, paras. 138–40, https://docs.un.org/en/A/RES/60/1.

domain of *jus cogens* norms as many prohibitions that protect civilians from severe irreversible harm have been recognised. This includes the (a) The prohibition of aggression; (b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law;[25] amongst others show and the protection of civilians to be the key drives of contemporary development of international law.

Nevertheless, there are still factors that negatively impact this progression, namely, the veto-gridlock that affects the UNSC's functions as the primary organ responsible for the promoting and maintaining international peace and security.[26] The weaponisation of genocide, like Russia did with Ukraine, to use force against the territorial integrity of a sovereign state.[27] The rise of non-state actors that pose a threat to civilians.[28] Legal gaps, like conflicting *jus cogens* norms that have not been addressed.

3. History of *Jus Cogens* Norms

The development of *jus cogens* is mostly owed to the work of scholars, but their general acceptance is owed to the work of the International Law Commission and the recognition of international courts/tribunals.

The concept of *jus cogens* norms may be said to be brought to the fore by jurists like Alfred Verdross.[29] He conceptualised them from Roman private law - where from a natural law perspective[30] there were laws which were permissive and could be modified (*jus dispositivum*) and those that were mandatory and allowed no derogation (*jus cogens*).[31] Verdross was of the view that international law also needed a similar set of rules i.e., *jus cogens,* hence their name. Furthermore, Verdross wanted for there to be an ethical minimum that would render "forbidden" treaties void.[32]

There are other classical writers who had a similar idea namely Christian Wolff and Emmerich de Vattel saw the need for there to be "necessary law of nations".[33] The premise behind this is for there to be laws that the members of the

[25] International Law Commission, "Draft Conclusions on Peremptory Norms," annex.
[26] Charter of the United Nations, June 26, 1945, 1 UNTS XVI, arts. 24–25, https://www.un.org/en/about-us/un-charter/full-text.
[27] Ohlin, "#Genocide," 103–4.
[28] Fisher and Wilén, "Constructing a New Identity," 129–63.
[29] Carlos G. Ramaglia Mota, "The Hierarchical Implication of Jus Cogens: An Analysis of Schwarzenberger and Kelsen on the Recognition of the Prohibition of Torture and Genocide as Peremptory Norms," *Buffalo Human Rights Law Review* 30 (2024): 1–100, https://digitalcommons.law.buffalo.edu/bhrlr/vol30/iss1/1/.
[30] Mota, "Hierarchical Implication of Jus Cogens," 28.
[31] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008), 8, https://doi.org/10.1093/acprof:oso/9780199546114.001.0001.
[32] Mota, "Hierarchical Implication of Jus Cogens," 13.
[33] Orakhelashvili, *Peremptory Norms*, 36.

international community cannot argue out of and thus exempt themselves.[34] That would bring about much stability in the international community. Thus, *jus cogens* norms are immutable laws of the international community. The nature of these norms is rigid and one might even say forceful as they produce immutable legal effects that states cannot negotiate out of.

The idea was not without resistance, as members of the international community hotly debated the concept for more than twenty years.[35] The works of Hersch Lauterpacht and Sir Gerald Fitzmaurice through the international law commission's (ILC) work on treaty law are what brought his idea into existence, from theory to actual law.[36] The ILC helped move the concept from theory to practice or to the 'mainstream'.[37] Sir Fitzmaurice was the one that introduced the term *jus cogens* into the commissions work, before him the commission did not use it.

This can be seen by Lauterpacht proposed draft article 15 - which was basically the precursor of article 53 of the VCLT - Lauterpacht did not use the term *jus cogens* in the formulation.[38] The various reports, twelve in total, of Fitzmaurice, Lauterpacht, and Wadlock are what brought about the VCLT and more so they led to the codification of *jus cogens* in articles 53 and 64 of the Vienna Convention on the Law of Treaties, 1969 (VCLT).[39] Both articles highlight the relationship between these norms and treaties (or treaty provisions and/or obligations).[40]

This was after the second world war - a period where the international community was trying to bring morality into the law in order to protect fundamental human rights of future generations from the horrors similar to WWII and the holocaust.[41] Article 53 provides a 'definition' of *jus cogens* and also highlights their nature and superior hierarchy compared to other legal rules. Article 64 describes how a new *jus cogens* that comes to has the ability to make an already existing treaty null and void.

However, the VCLT does not really explain nor conceptualise *jus cogens* and how they come about. There was, and there still is, much ambiguity, while it may have been desired from a political perspective but from a legal one it is very

[34] Orakhelashvili, *Peremptory Norms*, 37.
[35] Dire Tladi, *The International Law Commission's Draft Conclusions on Peremptory Norms* (Oxford: Oxford University Press, 2024), 7, https://doi.org/10.1093/law/9780 192846099.001.0001.
[36] Tladi, *ILC's Draft Conclusions*, 6–7.
[37] Tladi, *ILC's Draft Conclusions*, 7.
[38] Tladi, *ILC's Draft Conclusions*, 7.
[39] Tladi, *ILC's Draft Conclusions*, 7.
[40] Mota, "Hierarchical Implication of Jus Cogens," 12.
[41] Catherine Maia, "Jus Cogens and (In)Application of the 1969 Vienna Convention on the Law of Treaties in the Jurisprudence of the International Court of Justice," in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, ed. Dire Tladi (Leiden: Brill Nijhoff, 2021), 345, https://doi.org/10.1163/9789004464124_014.

problematic.[42] It also does not state the types nor if there is a hierarchy between them. Issues were even found with their definition - that it is descriptive, if it defines *jus cogens* by their effect and does very little on how to identify them.[43]

International Courts, namely, the ICJ seemed initially hesitant to adopt the notion of *jus cogens*[44] even preferring to avoid using the term in its judgments.[45] It preferred using terms like 'intransgressible principles' or 'obligations *erga omnes*'.[46] The situation changed in 1998 during the International Criminal Tribunal for the Former Yugoslavia (ICTY) during the *Prosecutor v Furundžija*,[47] case - where the court declared the prohibition on torture to have *jus cogens* status.[48] This is said to have opened the door for a wider acceptance of *jus cogens.*[49]

It took the ICJ eight more years after that case to finally explicitly recognise the norms in the 2006, *Congo v Rwanda* case.[50] In the case the court officially confirmed that the prohibition on genocide was a *jus cogens.*[51] Later on in the article we will discuss the ICJ dealing with two conflicting *jus cogens.*

The ILC continued to play a huge role in the development of these superior norms. It produced one of the most authoritative restatements of *jus cogens* in contemporary international law with the 2022 Draft Conclusions.[52]

Though these Draft Conclusions do not settle the debates concerning *jus cogens* they do provide guidance and even authority on the international community's acceptance and understanding of *jus cogens* norms. The undertaking of going about these conclusions, as Dire Tladi highlights in his commentary, may have been considered imprudent, but it was clearly necessary.[53]

Two levels of authority - customary international law (CIL) and treaty

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[42] Maia, "Jus Cogens and (In)Application," 345.
[43] Maia, "Jus Cogens and (In)Application," 345.
[44] Matthew Saul, "Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges," *Asian Journal of International Law* 5, no. 1 (2015): 37, https://doi.org/10.1017/S2044251314000058.
[45] Saul, "Identifying Jus Cogens Norms," 38.
[46] Patrícia Galvão Teles, "Peremptory Norms of General International Law (Jus Cogens) and the Fundamental Values of the International Community," in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, ed. Dire Tladi (Leiden: Brill Nijhoff, 2021), 52, https://doi.org/10.1163/9789004464124_004.
[47] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (ICTY Trial Chamber, December 10, 1998), https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.
[48] *Furundžija*, paras. 153–54.
[49] Maia, "Jus Cogens and (In)Application," 358–59.
[50] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 ICJ 6, paras. 64, 78, https://www.icj-cij.org/case/126.
[51] *Armed Activities (DRC v. Rwanda)*, 2006 ICJ 6, paras. 64, 78.
[52] International Law Commission, "Draft Conclusions on Peremptory Norms."
[53] Dire Tladi, "The International Law Commission's Draft Conclusions: Setting the Scene," in *The International Law Commission's Draft Conclusions on Peremptory Norms* (Oxford: Oxford University Press, 2024), 2, https://doi.org/10.1093/law/9780192846099.003.0001.

law - CIL forms the primary basis of *jus cogens* and then the formal recognition was article 53 of the Vienna Convention on the Law of treaties. These are the two out of three primary sources of international law that come into play. This is considered as double *opinio juris*.[54] Firstly, recognition as a norm of international law and also the acceptance of the international community that said norm has a non-derogable character.[55]

4. Definition and Nature of *Jus Cogens*

The definition of *jus cogens* norms is found in article 53 of the VCLT. Though this definition was for treaty law it has been widely accepted by the international community. Article 53 defined *jus cogens* norm (or peremptory norm - the terms are used interchangeably) like this: '*For the purposes of this present Convention, a peremptory norms of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*.'[56]

There are structural problems with this definition which have led to some debates. Firstly, it seems like this definition is only for the VCLT. This contextual understanding would then limit the application of *jus cogens* to the parties of the Vienna Convention and thus strip it of its universal character.[57] There are scholars who have taken this view.[58] However, others are of the view that the VCLT did not create *jus cogens* but only recognised the concept - ILC essentially confirmed their existence.[59]

Another issue, as highlighted above, is that the definition does not really identify *jus cogens* but describes them by their effect. Ulf Linderfalk highlights that the definition 'does not say anything about the particular properties of *jus cogens* norms.'[60] This has led to disputes about the identifying criteria of these norms.[61] One camp says such a criteria does not exist while another holds it does.[62]

From the literature there are about five characteristics that describe the

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[54] Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think about the Consequences?," *European Journal of International Law* 18, no. 5 (2007): 862, https://doi.org/10.1093/ejil/chm044.
[55] Linderfalk, "Effect of Jus Cogens Norms," 862.
[56] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, art. 53, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
[57] Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Cheltenham: Edward Elgar, 2020), 7–8, https://doi.org/10.4337/9781786439512.
[58] Linderfalk, *Understanding Jus Cogens*, 8.
[59] Linderfalk, *Understanding Jus Cogens*, 8.
[60] Linderfalk, *Understanding Jus Cogens*, 10.
[61] Linderfalk, *Understanding Jus Cogens*, 10.
[62] Linderfalk, *Understanding Jus Cogens*, 10.

nature of *jus cogens* namely, i) hierarchical superiority;[63] ii) non-derogability,[64] iii) universality;[65] and iv) the protection of fundamental values of the international community.[66] Hierarchical superiority highlights that *jus cogens* are at the apex of the international legal system. They prevail above all other rules, norms and laws be it treaties, international customary laws, and international resolutions.[67] Any rule, norm or resolution that is contrary to them is void *ab initio.*[68] That includes UNSC resolutions. That highlights the superiority of these norms.

5. Typology of *Jus Cogens* Norms

Typifying *jus cogens* is not an easy task and has been a product of much scholarly work. There is an understanding of the general nature of *jus cogens* but there are debates on how to categorise them. *Jus cogens* can be categorized hierarchically,[69] functionally, logically,[70] geographically[71] or morals/human rights.[72]

Robert Kolb has been very influential in this domain and has helped scholars and the international community to think deeply about the nature of these norms. The general (or dominant) understanding of *jus cogens* is that they are to protect the fundamental interests of the broader international community.[73] Kolb differs and states that *jus cogens* are more than just 'substantive super-norms' but can take different forms. The other forms he discovers are public utility *jus cogens* and logical *jus cogens.*[74] His theory is considered to be the functional typology of *jus cogens.*

Geographical categorisation classifies *jus cogens* according to their geographical application. According to this theory there are universal *jus cogens*

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[63] Robert Kolb, "Peremptory Norms as a Legal Technique Rather than Substantive Super-Norms," in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, ed. Dire Tladi (Leiden: Brill Nijhoff, 2021), 31, https://doi.org/10.1163/9789004464124_003.
[64] Kolb, "Peremptory Norms as a Legal Technique," 31.
[65] Galvão Teles, "Peremptory Norms and Fundamental Values," 51.
[66] Galvão Teles, "Peremptory Norms and Fundamental Values," 51.
[67] David S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine," *Duke Journal of Comparative & International Law* 15, no. 2 (2005): 228–29, https://scholarship.law.duke.edu/djcil/vol15/iss2/2/.
[68] Orakhelashvili, *Peremptory Norms*.
[69] This classification reflects the dominant account of jus cogens described in the sources cited above.
[70] Dire Tladi, "Disquisitions and Disputations," in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, ed. Dire Tladi (Leiden: Brill Nijhoff, 2021), 3–4, https://doi.org/10.1163/9789004464124.
[71] See section 6 below.
[72] Yuri Mantilla, "ISIS's International Crimes and Jus Cogens Norms: The Protection of Human Rights in Times of Global Terrorism," *Liberty University Law Review* 11, no. 2 (2016): 469–70, https://digitalcommons.liberty.edu/lu_law_review/vol11/iss2/6/.
[73] Galvão Teles, "Peremptory Norms and Fundamental Values," 52.
[74] Kolb, "Peremptory Norms as a Legal Technique," 21–43.

and there are regional *jus cogens*.[75] The former is consistent with the dominant understanding of *jus cogens.* Regional *jus cogens* basically highlights that there are *jus cogens* that apply to certain regions and not others.[76] We can call these regional types, *jus cogens* lite - we will not really focus on them as they lack that universal characteristic of the dominant understanding of *jus cogens.*

For the purposes of this article, we will adopt a hierarchical typology of *jus cogens.* This is because it is consistent with the dominant understanding of *jus cogens* norms; which is the approach adopted by the ICJ, ILC, virtually all states and their domestic courts[77] The key ideas of the dominant approach to *jus cogens* is that they are to protect the fundamental values of the international community, they enjoy hierarchical superiority above other norms and they have universal applicability.[78]

According to this view, *jus cogens* can be separated into two orders of norms, first order and second order norms.[79] First order norms are substantive *jus cogens,* these highlight the substance of the norms they define, for example, action that is prohibited.[80] Examples are the prohibition on the use of force, the prohibition of genocide, etc.[81] Second order norms - highlight the legal consequences that arise from the elevation of norms to *jus cogens* status.[82] These are said to be the rules for the rules.

6. Conflicting *Jus Cogens*

It is clear that *jus cogens* have a nature that sets them apart from normal international law rules/laws. It has been discussed extensively that they enjoy hierarchical superiority over all the other international law rules that do not have the same nature. It has also been highlighted that these rules cannot be easily amended but can be only amended by a different norm of the same nature.[83]

Above, it was discussed that there are two orders of *jus cogens* norms. There are first order norms and then there are second order norms. These two orders are fundamentally different, with the second order being the consequence of the first. The former is substantive and the latter is somewhat procedural. If one is not careful then they can make the mistake of finding conflicting between

[75] Tladi, "Disquisitions and Disputations," 3–4.
[76] Tladi, "Disquisitions and Disputations," 3–4.
[77] Tladi, "Disquisitions and Disputations," 3–4.
[78] Kolb, "Peremptory Norms as a Legal Technique," 22.
[79] Ulf Linderfalk, "The Emperor's New Clothes—What If No Jus Cogens Claim Can Be Justified?," *International Community Law Review* 22, no. 2 (2020): 141, https://doi.org/10.1163/18719732-12341425.
[80] Linderfalk, "The Source of Jus Cogens Obligations and No-Competences," in *Understanding Jus Cogens*, 74–75, https://doi.org/10.4337/9781786439512.
[81] International Law Commission, "Draft Conclusions on Peremptory Norms," annex.
[82] Linderfalk, "Emperor's New Clothes," 141.
[83] Vienna Convention on the Law of Treaties, art. 53.

these two norms when there is none. This was the case concerning the apparent conflict between the prohibition on genocide and state immunity in the case *Germany v Italy*.[84]

The case concerned jurisdictional immunity of a state. This was after Italian courts allowed civilian claims against Germany for crimes committed during the Nazi regime. This clearly was in contravention of the international customary law rule of state immunity. The case involved Germany and the Nazi regime - they wanted the state to be brought to justice for the atrocities that took place - namely the Holocaust. Two fundamental international law norms/rules were at odds - the prohibition on genocide and state immunity. The court differentiated between the two and showed that they were not at odds. The prohibition on genocide was a substantive rule while state immunity was a procedural rule on where to sue a state.

This case was very crucial in helping us understand the difference between substantive norms versus procedural ones. What this article is concerned with is what happens when there is a conflict between two substantive, i.e., first order, *jus congens* norms at the same time. Namely, the prohibition on the use of force and the prohibition on genocide. Both of these prohibitions are first order norms and are not procedural. The *Germany v Italy* case did not address this situation, nor did the ILC Draft Conclusions.

This is not an argument for humanitarian intervention but a call for better understanding. In normal circumstances, the international collective security system has the UNSC at the center.[85] The international community has waived its right to use force and has centralised it to the UNSC.[86] However, due to politics and the abuse of the veto it is trite that the UNSC is not always able to fulfill its functions.[87] Now the question stands that when there is a genocide taking place and the two prohibitions are in conflicting which one is to be catered for? If the UNSC is not able to act then will the international community stand and witness another Rwandan genocide.

It is not clear what takes precedence when state security and human security are in conflict. As previously stated, in the international arena there has been a great move from state security to human security. Even despite these strides there are debates on the applicability and even desirability of this

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[84] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 ICJ 99, paras. 92–97, https://www.icj-cij.org/case/143.

[85] Dimpho Deleglise, "Trends in SADC Mediation and Long-Term Conflict Transformation," in *The State of Peacebuilding in Africa: Lessons Learned for Policymakers and Practitioners*, ed. Terence McNamee and Monde Muyangwa (Cham: Palgrave Macmillan, 2021), 227, https://doi.org/10.1007/978-3-030-46636-7_13.

[86] Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory, Law and Practice* (Cambridge: Cambridge University Press, 2013), 18–19, https://doi.org/10.1017/CBO9781139058 506.

[87] Mateja Peter, "UN Peace Operations: Adapting to a New Global Order?," in *United Nations Peace Operations in a Changing Global Order*, ed. Cedric de Coning and Mateja Peter (Cham: Palgrave Macmillan, 2019), 1–22, https://doi.org/10.1007/978-3-319-99106-1_1.

progress.[88] Is there a way to highlight a clear priority? Instinctually, human security should mean more than state security and one may even argue that the need for state security is to ensure human security. However, a radical shift towards human security can lead to an undesirable result.

As will be discussed below, misinformation and the weaponisation of genocide may be used to abuse a system that is heavily inclined towards human security. That seems to be an argument for what the law *ought to be* but not what the law is. It is safe to say that when the prohibition on genocide and the prohibition on the use of force are in conflicting then there is a stale mate. This stale mate is dangerous for the victims of genocide.

7. Hierarchy Based on Human Security and the Deterrence of Severe, Irreversible Harm

Above we discussed that *jus cogens* aim to protect the fundamental interests of the international community. A look into international law treaties and the discourse by tribunals it is easy to see what those interests might be. Looking at the issue of international crimes - which have achieved basically universal condemnation - we are able to see that there is a hierarchy amongst them, with genocide at the apex, termed to be 'the crime of crimes' by the tribunal in *Prosecutor v Kambanda*.[89] As it leads to the most severe, irreversible harm that can be inflicted on people/groups.

Furthermore, as indicated in the introduction, the Bosnia v. Serbia case highlights that the crime of genocide creates a serious obligations on states to prevent it from taking place. We also take note that from the literature there is a trend towards the protection of human security. That state sovereignty is no longer absolute but now a responsibility and that the international community as a whole has a responsibility to protect. This hierarchy therefore provides a legal basis for R2P rather than it being a political theory. It states that if there is a conflict the responsibility to prevent genocide enjoys hierarchical superiority over other first-order jus cogens norms as it will ensure that civilians from the most severe-irreversible harm. This can be clearly seen when the two prohibitions are placed side by side. Allowing a genocide does more irreversible harm than violating the territorial integrity of a sovereign state to prevent a genocide.[90][91]

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[88] For restrictive approaches to the use of force, see O'Connell, "True Meaning of Force," 141–42; Erika de Wet, "The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force," *European Journal of International Law* 26, no. 4 (2015): 979–80, https://doi.org/10.1093/ejil/chv055.

[89] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence (ICTR Trial Chamber I, September 4, 1998), para. 16, https://unictr.irmct.org/files/case-documents/ictr-97-23/ trial-judgements/en/980904.pdf.

[90] *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, 1993 ICJ 325, para. 100.

[91] Fisher and Wilén, "Constructing a New Identity," 137.

This hierarchy is not like article 4(h) of the AU's Constitutive Act - which gives the AU the right to intervene.[92] It does not create a right but a responsibility to protect but one that is only limited to the crime of crimes. It is clear that there can be a slippery slope to this argument as other severe violations of human security deserve similar treatment. The danger with that is that it will erode the prohibition. Thus, this hierarchy must be limited to the 'crime of crimes' or crimes covered by the doctrine of R2P. This is in line with what the main aims of R2P as highlighted by its key designer, Gareth Evans.[93]

Another objection is the weaponisation of genocide. Taking the Russia v Ukraine war as our primary example. Powerful states can use the term genocide to violate the territorial integrity of a state and violate the prohibition the use of force. It is important to note that this was political rhetoric from Russia without any legal or factual basis. There was no proof of *dolus specialis* i.e., the intention to commit genocide by Ukraine, in line with the requirements of the genocide convention.[94] For one to use the hierarchy proposed in this article, the intervener must satisfy that a genocide as defined by the Genocide Convention and interpreted by international courts and tribunals is satisfied. Thus, proper authority must be able to confirm there is a genocide. Furthermore, such intervention should always be the last resort as indicated by the R2P doctrine.

8. Conclusion

This paper has examined the nature, historical development, and function of *jus cogens* norms within the international legal order. Although these norms are generally regarded as hierarchically superior, universally applicable, and non-derogable, significant uncertainties remain concerning their operation. The 2022 ILC Draft Conclusions offered an important and authoritative clarification of the identification and legal consequences of peremptory norms, yet they did not address the possibility of a direct conflict between two substantive, or first-order, *jus cogens* norms.

The central argument of this paper is that such a conflict may arise between the prohibition of the use of force and the prohibition of genocide. Both norms protect fundamental values of the international community, and neither can ordinarily be displaced by a rule of lower hierarchical status. Nevertheless, an exceptional situation may occur where a state is committing genocide against its own population, while the United Nations Security Council is unable to authorize collective action because of political disagreement or the exercise of the veto. In such circumstances, compliance with one peremptory norm may

[92] Constitutive Act of the African Union, art. 4(h).
[93] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution Press, 2008), 139, https://www.brookings.edu/books/the-responsibility-to-protect/.
[94] Convention on the Prevention and Punishment of the Crime of Genocide, arts. 2–3.

appear to entail the violation of the other: intervention may prevent genocide but infringe the prohibition of the use of force, whereas non-intervention may preserve territorial sovereignty while allowing genocidal violence to continue. The jurisprudence of the ICJ has clarified apparent conflicts between substantive and procedural rules, as illustrated by the distinction drawn between the prohibition of international crimes and the procedural rule of state immunity. However, neither the Court nor the ILC has established a method for resolving a genuine conflict between two substantive peremptory norms. This absence of guidance creates a serious legal lacuna, particularly where institutional paralysis prevents the collective security system from responding effectively to mass atrocities.

This paper has therefore proposed a limited hierarchy within the category of first-order *jus cogens*, based on the protection of human security and the prevention of severe and irreversible harm. According to this approach, where the prohibition of genocide and the prohibition of the use of force are genuinely in conflict, the duty to prevent genocide should prevail. The justification for this priority lies in the distinctive nature of genocide, which seeks the physical or biological destruction of a protected group and therefore produces harm that cannot subsequently be repaired. The proposal is also consistent with the broader evolution of international law from an exclusively state-centred conception of security towards one that increasingly recognizes the protection of individuals and communities as a fundamental concern of the international legal order.

This hierarchy should not, however, be understood as creating a general or unrestricted entitlement to humanitarian intervention. Such an interpretation would risk undermining the prohibition of the use of force and enabling powerful states to invoke humanitarian language as a pretext for military action. The proposed priority must therefore remain exceptional and confined to situations in which the legal elements of genocide, as defined by the Genocide Convention and interpreted by international courts and tribunals, are demonstrably satisfied. Allegations of genocide must be supported by credible evidence, including evidence of the specific intent required for the commission of that crime. Moreover, any action taken on this basis must remain a measure of last resort and should comply with the requirements of necessity, proportionality, and the protection of the affected civilian population.

The proposed hierarchy should consequently be interpreted together with the Genocide Convention and the principles underlying the responsibility to protect. These legal and institutional safeguards are essential to prevent the concept from becoming a justification for unilateral political action or from producing a broader erosion of the prohibition of the use of force.

Ultimately, the paper does not suggest that the prohibition of the use of force has lost its central position in international law. Rather, it argues that the international legal order cannot remain normatively indifferent when rigid adherence to that prohibition would result in the unchecked commission of

genocide. Recognizing a narrowly defined priority for the prevention of genocide would fill an important doctrinal gap and bring the internal operation of *jus cogens* norms into closer alignment with their underlying purpose: the protection of the most fundamental values of the international community and the prevention of the gravest forms of irreversible harm.

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CRIMINAL JUSTICE, PUNISHMENT AND CORPORATE CRIMINAL LIABILITY

Criminal Liability of Legal Persons in Comparative Law: Conditions of Liability in Romanian and Italian Law

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Abstract

The recognition of the criminal liability of legal persons represents one of the most significant developments in contemporary criminal law, prompted by the growing complexity of economic activities and the need to combat corporate, economic, and financial crime more effectively. Although most European legal systems currently allow collective entities to be sanctioned for offences committed within their organizational framework, the legal nature, scope, and conditions of such liability vary considerably between jurisdictions. This article provides a comparative analysis of the liability of legal persons under Romanian and Italian law, taking into account the relevant European legal framework and the autonomous concept of a "criminal charge" developed in the case law of the European Court of Human Rights. Using doctrinal and comparative legal methods, the study examines the categories of entities and offences covered, the relationship between the conduct of natural persons and the liability of the legal entity, the applicable methods of imputation, organizational fault, and the legal relevance of compliance programmes. The analysis shows that Romanian law establishes a broad and autonomous model of criminal liability, applicable in principle to any offence, but does not expressly regulate liability for failure to prevent offences or provide an effective compliance-based defence. By contrast, the Italian system, established by Legislative Decree No. 231/2001, is limited to specifically enumerated predicate offences, while placing greater emphasis on organizational fault, supervisory duties, and preventive compliance models. The article concludes that a more balanced regulatory model could combine the broad scope and autonomy of Romanian law with the preventive and compliance-oriented mechanisms developed under Italian law.

Keywords: *criminal liability, legal persons, corporate crime, organizational fault, compliance programmes, comparative law, Romanian law, Italian law.*

1. Introduction

The criminal liability of legal entities represents one of the most important and controversial developments in criminal law, at a global level, posing significant controversy from the time the issue became relevant following the new social and economic realities.

In the European Union the issue of criminal liability of legal entities poses a significant challenge as on the one hand general tendencies for legislation is to unite and convene the criminal systems, especially in terms of criminal law collaboration, but on the other hand the principles and views of liability of legal

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entities vary on a fundamental level.

In the European Union, states have adopted legislation ranging from an autonomous criminal liability of legal entities to not recognizing any criminal liability. It is in this spectrum that through the present research we will analyze the conditions, similarities and differences of two different systems – the Romanian system and the Italian system that regulates criminal liability under different conditions.

The differences of the two systems chosen are a reflection of distinct judicial tradition, optic and criminal policy in each state, as a result of vast doctrinal and jurisprudence.

2. Short Historical Aspects

Criminal liability of legal entities was subject to debate starting with the end of the 19th century and beginning of the 20th century in the United Kingdom and United States of America. For example, in Britan, concerning the of liability for worker's unions, the supreme court decided that a union may be criminally liable taking into consideration the reason that if the law has admitted the capacity to possess assets, it must admit the capacity to be liable for the offences committed during the management of its assets[2].

In 1929 in Bucharest, the 2nd Congress of the International Criminal Association took place, one of the topics being debated and settled upon was the possibility for the liability of moral persons. In this event it was concluded that the liability of a legal entity does not exclude the liability of the natural person.

Nevertheless, the majority of continental European criminal systems remained dedicated to the principal of *societas delinquere non potest* according to which legal entities cannot be subject to criminal liability.

Only at the end of the 20th century and beginning of the 21st century the institution began to be regulated, under different forms in Europe.

In Romania, the first legislation passed was through law 299/2004 concerning the criminal liability of legal entities for crimes of counterfeiting coins and other values. This first step has limited the applicability of criminal liability to certain offences, as mentioned above. Later, this legislation was revoked through law. 278/2006 that modified the Romanian Criminal Code and introduced the criminal liability of legal entities for all offences. Later the New Romanian Criminal Code came into force on the 1st of February 2014 which maintained the broad applicability of liability for legal entities and established the legal conditions, as we will analyze in the following chapters.

In Italy, legislation was kept under the principal of *societas delinquere*

[2] *Taff Vale Railway Co. Ltd. v. Amalgamated Society of Railway Servants*, [1901] UKHL 1, [1901] AC 426, https://www.bailii.org/uk/cases/UKHL/1901/1.html; cited in Florin Streteanu and Radu Chiriță, *Răspunderea penală a persoanei juridice*, 2nd ed. (Bucharest: C.H. Beck, 2007), 155, https://www.beckshop.ro/raspunderea-penala-a-persoanei-juridice-editia-2.

non potest until the adoption in 2001 of Legislative Decree no. 231/2001 that although was named as *administrative liability of legal entities, companies and associations with or without legal personality,* as we will explain in the following chapters, the liability is considered and acted on as a criminal one. The specific of the Italian system, relevant to the current analysis is that liability may be withheld only for the offences expressly mentioned in the act.

3. The European Union Perspective

The EU passed legislation in multiple areas in which it looked to enforce and strengthen the legal framework and struggle against certain areas such as drug trafficking, corruption or the environmental protection.

In 1988 the Council of Europe issued Recommendation no. R(88)18 in the criminal liability of corporate bodies, it was recommended to all members states that given the increasing number of crimes produced in the activities of enterprises, legal entities have to be able to be held liable for the offences committed under their activity or in their benefit. [3]

Regarding drug trafficking the 2004/757/JHA Council Framework Decision was passed concerning the minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking drug trafficking in which liability of legal entities is mentioned.[4]

With respect to corruption, through the Criminal Law Convention on Corruption, the member states adopted the liability of the legal persons in case of criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention.[5]

In the environmental sector, first in Directive 2008/99/EC, it was established that liability is applicable to any person, the issue being amended later, in Directive 2009/123/EC, in which the liability of legal entities was expressly mentioned.[6]

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[3] Council of Europe, Committee of Ministers, Recommendation No. R (88) 18 concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities, adopted October 20, 1988, https://rm.coe.int/16804c5d71.

[4] Council Framework Decision 2004/757/JHA of October 25, 2004 Laying Down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking, art. 6, *Official Journal of the European Union* L 335 (November 11, 2004), https://eur-lex.europa.eu/eli/dec_framw/2004/757/oj/eng.

[5] Council of Europe, *Criminal Law Convention on Corruption*, ETS No. 173, January 27, 1999, art. 18, https://rm.coe.int/168007f3f5.

[6] Directive 2008/99/EC of the European Parliament and of the Council of November 19, 2008 on the Protection of the Environment through Criminal Law, art. 6, *Official Journal of the European Union* L 328 (December 6, 2008), https://eur-lex.europa.eu/eli/dir/2008/99/oj/eng; Directive 2009/123/EC of the European Parliament and of the Council of October 21, 2009 Amending Directive 2005/35/EC on Ship-Source Pollution and on the Introduction of Penalties for Infringements, art. 8b, *Official Journal of the European Union* L 280 (October 27, 2009), https://eur-lex.europa.eu/eli/dir/2009/123/oj/eng.

Nevertheless, in all cases, the criminal liability of a legal entity was mentioned only as a possibility and not as a mandatory step the states need to take.

Taking into consideration on one hand that the adopted European legislation is a result of the negotiations of all member states and on the other hand that each member state holds a different position on the issue at hand, it is only natural to understand why the resulted legislation did not impose a precise obligation to hold legal entities liable from a criminal point of view.

In all cases, the liability of the legal entity is linked to criminal offences committed in their benefit, by natural persons that act on their behalf as a legal representative of who holds a high rank within the entity, case in which the guilt of the natural person and the legal person is the same – intent. Also, the legal entity is held liable for the case of lack of supervision in case a criminal offence is committed by someone under their control, case in which the guilt of the legal person comes under the form of fault.

4. European Court of Human Rights Perspective. Notion of Criminal Accusation

In the view of the European Court of Human Rights, the notion of criminal accusation is an autonomous institution, the characters of which have been established by the court's consistent jurisprudence. Thus, in order for an accusation to have a criminal nature and to attract the applicability of Article 6 of the ECHR, the Court established by its decision in the case of Engel and Others v. the Netherlands, 1976, that the starting point in the analysis of the applicability of the criminal aspect of Article 6 of the Convention lies in the following criteria: a) the inclusion in domestic law, b) the nature of the offence, c) the seriousness of the punishment that the person in question risks receiving.[7]

As regards the first condition, it was established on the one hand that the criminal nature of the act analyzed, as defined by domestic law, namely whether domestic law defines an accusation as having a criminal nature, will be considered. Where domestic law does not expressly provide for the criminal nature of the charge, the Court will take into account what lies beyond the national framework, examining the substantive reality of the proceedings in question.

As regards the second condition, the Court has held in its jurisprudence that in order to define a charge as criminal in nature, the following aspects need to be verified, among others: a) whether the procedure is initiated by a public authority on the basis of legal enforcement powers, b) whether the legal rule has a repressive or dissuasive function c) whether the legal rule aims to protect the general interests of society generally protected by criminal law, d) whether a conviction for any type of penalty depends on a finding of guilt, e) the way in which

[7] *Engel and Others v. the Netherlands*, applications nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, judgment of June 8, 1976, Series A no. 22, para. 82, European Court of Human Rights, https://hudoc.echr.coe.int/eng?i=001-57479.

comparable proceedings are classified in other member States of the Council of Europe

As regards the third condition by which the criminal nature of the charge is determined, it concerns the maximum penalty possible under the applicable law, which, according to the Court's interpretation, does not need to be a prison sentence.

Applying the above criteria, the Court has retained the incidence of Article 6 of the ECHR in matters such as disciplinary investigations, administrative procedures, tax, customs and competition law controls and sanctions, as well as in the case of sanctions for minor offences, such as traffic on public roads.

5. Legal Conditions for Criminal Liability in Romania

In the Romanian system, the criminal liability of legal entities is mentioned in article 135 and following of the Criminal Code[8], through which the conditions and limitations of liability are being drawn.

First of all, it is important to notice the general characteristics of the legal provision and criminal liability, namely:

- There is no limitation on the nature of the entity with the exception of the state, public authorities and part of public institutions, as we will show and expressly mentioned in the legal text,
- There is no limitation on the nature of the offence for which the legal entity may be held liable,
- There is no condition or limitation on any link between the offence and action of the natural person and the legal entity,
- There is no legal limitation on the position held by the natural person involved.
- There is no legal remedy for the legal entity to adopt in order to prevent liability.

Taking into consideration the above we find that the Romanian legal system is an open one, the legal entity may be held liable for any action or omission regulated as a criminal offence, if all other conditions are met. In this regard, the only limitations are the natural and logical ones, that by its nature the participation of a legal entity is excluded.

Also, the Romanian system is an autonomous one, as it does not condition the liability of the legal person to the liability of a natural person, having the possibility for one or the other to be prosecuted and one or the other to be condemned. The criminal liability of the legal entity is possible regardless of the liability of the natural person.

[8] Romania, Law No. 286/2009 on the Criminal Code, art. 135, *Monitorul Oficial*, Part I, no. 510 (July 24, 2009), https://legislatie.just.ro/Public/DetaliiDocument/109855.

According to the mentioned legal text the conditions for the criminal liability of a legal entity are: a) legal capacity of the entity; b) the legal entity must not be excepted by law; c) the offence was committed in the legal entity's name, interest of object of activity; d) legal guilt of the legal entity.[9]

Legal Capacity. Although not expressly mentioned in the legal texts, doctrine and jurisprudence have concluded that the first condition for the liability of a legal entity is that legal capacity exists, being given according to the legal framework that establishes each type of legal person. Only the legal entity that is recognized with legal capacity, as a bearer of rights and obligations, is subject to criminal liability.

Per a contrario, organisations or groups that do not have their legal capacity recognized cannot be subject to criminal liability.[10]

Legal Entities Excepted by Law. The exceptions are expressly mentioned in the legal text, similar to most EU legislation, as criminal liability is inapplicable for the state and state authorities.

It is important to note that state authorities are not equivalent to public institutions but refers to the authorities expressly mentioned in the Constitution of Romania – the Presidency, the Government and its ministries, Parliament, judicial courts and local government. In all cases these cannot be subject to criminal liability.

The third mention of the legal text regards public institutions which are noted to be excepted from criminal liability only if the offense is committed in the exercise of an activity that cannot be the subject of the private domain. *Per a contrario*, whenever an offence is committed by a public institution in an activity that may be subject of private domain, criminal liability is possible against the said institution.[11]

The Legal Entity's Name, Interest of Object of Activity. According to mentioned legal text, criminal liability of the legal person may be applicable in any of the mentioned cases, namely in the legal entity's name, in its interest or in its object of activity.

An offence committed in the legal entity's name, according to doctrine, involves that a person acting as its representative, legal or conventional, or appointed such, in the illicit activity subject to liability.[12]

As mentioned before, there is no required capacity of the natural person to hold, in order for the liability of the legal person to apply, the Romanian model

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[9] Constantin Duvac, Norel Neagu, Niculae Gamenț, and Vasile Băiculescu, *Drept penal. Partea generală* (Bucharest: Universul Juridic, 2019), 747, https://www.ujmag.ro/drept/drept-penal/drept-penal-partea-generala-2019.

[10] Andra-Roxana Trandafir (Ilie), *Răspunderea penală a persoanei juridice*, 3rd ed. (Bucharest: C.H. Beck, 2023), 57, https://www.ujmag.ro/drept/raspunderea-penala-a-persoanei-juridice-editia-3.

[11] Laura Maria Stănilă, *Răspunderea penală a persoanei juridice* (Bucharest: Hamangiu, 2012), 99, https://www.hamangiu.ro/raspunderea-penala-a-persoanei-juridice.

[12] Duvac et al., *Drept penal*, 750.

for liability being an extensive one, expressly looking to avoid limitations on the categories of natural persons that may incur liability.[13] An important mention is order for a natural person to act in the name of a legal entity it is not required to formalize the quality, this aspect being a probation matter, being admissible for a person that doesn't hold any official position in the legal entity to act in its name. The object of activity of the legal entity is considered its scope, at the time of its incorporation, or as modified later, whether that scope is a lucrative one or not. The object of activity is expressed through its articles of incorporation. For the criminal liability to be possible it is necessary that the offence takes place in the limits of the scope or in relation to it.

An important aspect is that for this condition to be fulfilled, it is not necessary for all three of the above to be met, but any of them, representing alternative cases in which liability is withheld. Also, in case any of the three conditions are fulfilled, there is no condition that an actual benefit is brought to the legal entity by the offence committed.

Guilt. For the criminal liability of legal entities, it is necessary that the legal person act in committing the offence with the form of guilt required for each offence. In other words, to hold a legal person accountable it is necessary for an identity between the form of guilt (intention/fault) with which the entity acted and the one required in the incriminating legal text of each offence.

The Romanian system, unlike the recommendations and model set by European legislation does not include a criminal liability for the actions of the persons under their supervision or control that it failed to prevent. It is not possible to hold the legal entity responsible, when acting in fault for failure to prevent and intentional action of a natural person under its control, when that intentional act only constitutes an offence when its committed with intent, as the guilt form has to be identical with the incriminating legal text.

In this regard Romania has not implemented any legal provision to criminally sanction the legal entities for failure to prevent. In direct connection to this lack of regulation is the fact that the system does not have any provision to impose control, prevention or exonerating circumstances in case it is proven that all measures have been taken by the legal entity.

6. Legal Conditions for Criminal Liability in Italy

In Italy, liability of legal entities has been traditionally subject to the principle *societas delinquere non potest* (legal persons cannot commit crimes). Following the shift in European and international legislation, in 2001 the Legislative Decree no. 231/2001 on the *administrative liability of legal entities, companies and associations with or without legal personality.*

[13] Trandafir (Ilie), *Răspunderea penală*, 251.

The Decree, under article 1[14] and article 5[15], sets the conditions needed to be met for the liability of legal entities and in articles 24 – 25[11] the offences for liability is possible.

In general terms, for the liability in Italian system we can observe:

- There is no limitation on the nature of the entity with the exception of the state, public authorities and part of public institutions, as we will show and expressly mentioned in the legal text,
- The offences for which liability is possible is expressly mentioned,
- There is no condition or limitation on any link between the offence and action of the natural person and the legal entity,
- The quality of natural persons that acts is expressly regulated,
- Remedies are expressly regulated.

Nature of Liability. First of all, it is necessary to clarify the nature of liability in the Italian system, as it is subject to doctrinal controversy. In this regard many authors concluded that the liability is only an administrative one**[16]**, the system continuing to be under the *societas delinquere non potest* principal, even if it departs from the general rule. In this view the criminal aspect is given by the proceedings in which the liability is being applied and not the sanctions and nature of the liability itself. In this regard, the sanctions are perceived to be less serious and, therefore, are not stigmatizing, even when imposed by criminal courts. Thus, lacking *the stigma* as part of the sanction, the nature of the sanction remains administrative.[17] Other authors considered the liability and the system itself to be quasi-criminal.[18]

On the other hand, other authors, which we agree and rally with, consider that although the given name of the liability is administrative, in fact this is an "etiquette fraud" as in reality it is a criminal liability, being a consequence of committing an offence and applied in criminal proceedings.[19]

The problem was also debated on the jurisprudential ground as the Italian

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[14] Italy, Legislative Decree No. 231 of June 8, 2001, art. 1, *Gazzetta Ufficiale* no. 140 (June 19, 2001), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-06-08;231.

[15] Italy, Legislative Decree No. 231/2001, art. 5, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-06-08;231.

[16] Jennifer Schöberlein, *Prosecuting Corporate Corruption in Europe: An Analysis of Legal Frameworks and Their Implementation across Selected Jurisdictions* (Transparency International, May 14, 2019), https://knowledgehub.transparency.org/helpdesk/prosecuting-corporate-corruption -in-europe-an-analysis-of-legal-frameworks-and-their-implementation-across-selected-jurisdictio ns.

[17] Cristina de Maglie, "Models of Corporate Criminal Liability in Comparative Law," *Washington University Global Studies Law Review* 4, no. 3 (2005): 547–66, https://openscholarship.wustl.edu/law_globalstudies/vol4/iss3/4/.

[18] Laura Stănilă, "Articolul 151 Cod Penal – O încălcare a principiului personalității răspunderii penale?," *Analele Științifice ale Universității „Alexandru Ioan Cuza" din Iași: Științe Juridice* 68, no. 2 (2022): 211–38, https://doi.org/10.47743/jss-2022-68-3-13.

[19] Giovanni Fiandaca and Enzo Musco, *Diritto penale: Parte generale*, 4th ed. (Bologna: Zanichelli, 2001), 146, https://www.zanichelli.it/ricerca/prodotti/diritto-penale-parte-generale-fiandaca-musco-003; cited in Streteanu and Chiriță, *Răspunderea penală*, 125.

Supreme Court was invested with this problem in the case of *ThyssenKrupp*[20] which involved the criminal proceedings against executives and top management of a power plant as well as against the company itself. In this case the court stated that despite the administrative label, the legislation introduces a new type of liability which is connected to criminal responsibility. [21]

In this context, the interpretation of the European Court of Human Rights is also relevant, as previously explained, which defines an criminal accusation based on the nature of the offence, internal legislation framework and the punishment applicable, all constituting an autonomous institution in view of the Court and all being met in the Italian system, as the Court established in the case of Engel and others vs. The Netherlands.[22]

Legal Capacity. In the Italian system, legal capacity is expressly mentioned in the legal text, having a broader specter than the Romanian system. As such, in article 1 of the Decree it is mentioned that it is applicable to corporate entities and companies and associations including those which are not bodies corporate. Taking this into consideration, we conclude that legal capacity is not a requirement for the application of criminal liability in the case of legal persons and legal entities that both entities that have their capacity recognized and those that don't, may be held liable.

Legal Entities Excepted by Law. As in most EU legislation and national frameworks, the state and its territorial bodies cannot be held accountable in the Italian system.

The solution is expressly mentioned in article 1 of the Decree, extending impunity on non-economic bodies or to bodies holding constitutionally significant attributions.

Following the limitations set in the legal text we conclude that criminal liability is possible in case of all kids of companies, including state companies as their scope is an economic one, any private legal entity, regardless of their legal capacity and economic or non-economic purpose, economic public institutions as they fall outside the non-economic scope and any association whether they have their legal personality recognized.

In the category of bodies that are performing significant constitutional activities doctrine has included political parties and unions.[23]

Offences That Fall Under the Scope of the Decree. As mentioned be-

[20] Italian Supreme Court, Joint Criminal Divisions, Judgment No. 38343, April 24, 2014 (deposited September 18, 2014), *Espenhahn and Others (ThyssenKrupp)*, https://www.giurisprudenzapenale.com/wp-content/uploads/2019/04/SSUU-Thyssenkrupp.pdf.

[21] Francesca Cucchiara, Giacomo Cremonesi, and Maddalena Neglia, with Jonathan Kaufmann, *Italian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislation?* (FIDH, HRIC, and ECCJ, November 2019), 7, https://www.business-humanrights.org/documents/2953/report_231_2001_ENG.pdf.

[22] *Engel and Others v. the Netherlands*, para. 82.

[23] Streteanu and Chiriță, *Răspunderea penală*, 126.

fore, the Italian framework is a limited one, a specialized one, expressly mentioning the offences for which criminal liability may be held.

In the Decree, articles 24 – 25[11] the offences are mentioned and they include: IT-related felonies and unlawful processing of data; Offences committed by criminal organizations; Undue inducement to give or promise an advantage and bribery; Forgery of money, money values having legal tender or revenue stamps and instruments or identification signs; Felonies against industry and commerce; Corporate offences; Felonies committed for purposes of terrorism or felonies designed to subvert democracy; Mutilation of women's genitals; Offences against individual's freedoms; Market abuse; Manslaughter or serious bodily harm committed with breach of laws governing the safeguarding of workplace health and safety; Handling stolen goods, laundering and use of money, assets or benefits whose origin is illegal; Offences regarding breach of copyright; Inducements not to make statements or to make false statements to the courts; Environmental crimes.

Analyzing the list of offences, we conclude that these are focused on economic aspects, democratic values and Italian social values. Any other offence that falls outside the express list will not attract the criminal liability of a legal entity.

Qualified offence perpetrator. Articles 5[24] and 7[25] of the Decree expressly limit the possibility of liability for the legal entity to acts committed by natural persons that hold specific, top management positions in the mentioned entity.

In this regard the Decree mentions persons serving as representatives or holding administrative or senior executive positions and persons serving under the supervision of such senior positions.

Liability is also possible when the offence is committed by a person that does not hold a senior position, but the action was possible due to lack of means of noncompliance or oversight requirements, compliance being in the hands of top management.

Thus, in all the considered cases, there is an indication of a special subject (*reati propri*), the capacity that the natural person must hold for the liability of the entity to be withheld.[26]

It is important to note that, as in the Romanian System, also in the Italian Decree, (where is expressly mentioned), formalizing the position is not required, as liability may be held for the actions of a person that acts and actually exercises management and control.

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[24] Italy, Legislative Decree No. 231/2001, art. 5, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-06-08;231.

[25] Italy, Legislative Decree No. 231/2001, art. 7, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-06-08;231.

[26] Georgy Rusanov, "Perpetrators of Corporate Crimes in Commercial Organizations in Italy and Russia," *Journal of Financial Crime* 28, no. 1 (2021): 121, https://doi.org/10.1108/JFC-02-2020-0025.

An important mention is that in the Decree, under article 8[27], it is expressly mentioned (unlike the Romanian system) that the board or entity is still liable in case the natural person was not identified or, for other circumstances is not held liable.

Offence in the Entities Interest or Benefit of the Legal Entity. The Decree imposes as a condition for the liability of the legal person, that the offence be committed in the interest or benefit of the legal entity. It is specifically mentioned that the legal entity will not be liable if the natural person acted on its own interest.

The interest is assimilated to the scope of the offence[28], the result which the natural person aims to obtain. For the establishment and probation of interest and benefit, it is important to adequately separate and establish the interest of the entity which is independent and separate from the interest and benefit of the individual, the natural person acting on its own.[29]

The scope followed by the natural person may be common, case in which the liability of the legal person is still withheld. Also, the way the interest and scope are established it is relevant to the sanction that is to be determined as in article 12[30], of the Decree it is stated that in case the perpetrator followed primarily its own interest, the sanctions may be reduced.

Guilt. The entire Italian system regarding criminal liability of the legal entity is built on the concept of corporate fault. For this reason, doctrine has established that in case the offence is committed by a senior management person, with intent, that intent is retained to the legal entity. In this case doctrine has stated that there is a presumption of guilt for the legal entity.[31] This simple presumption may be overturned by the legal entity by providing evidence that it has taken measures for prevention, in the conditions set in the Decree, as we will analyze in the following chapters.

In case the offence is committed by a person under the control and supervision of senior management, then the concept of corporate responsibility acts, the legal entity is held liable for failing to prevent, case in which guilt takes the form of fault.

Thus, it is important to note, that in the Italian system, guilt of the perpetrator – natural person and guilt of the legal entity do not necessarily converge

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[27] Italy, Legislative Decree No. 231/2001, art. 8, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-06-08;231.

[28] Streteanu and Chiriță, *Răspunderea penală*, 128.

[29] Marek Kordík, Katarína Bartalská-Duchoňová, and Jakub Ľorko, "Criminal Responsibility of Legal Persons in Italy and in the Slovak Republic," *Archivio Penale*, no. 1 (2023): 1–67, https://archiviopenale.it/criminal-responsibility-of-legal-persons-in-italy-and-in-slovak-republic-di-marek-kordik-katarina-bartalska-duchonova-jakub-lorko/contenuti/21520.

[30] Italy, Legislative Decree No. 231/2001, art. 12, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001-06-08;231.

[31] Fiandaca and Musco, *Diritto penale*, 123; cited in Streteanu and Chiriță, *Răspunderea penală*, 128.

and may not be common. The natural person may be prosecuted for acting with intent, while the legal person may be held liable for failure to act, or acting in fault.

Prevention System. The Italian system expressly regulates the remedies for legal entities to adopt in order to avoid liability under the Decree. In article 6[32] of the Decree is stated that if the entity demonstrated that it adopted and effectively implemented a corporate model aiming at preventing offences within its scope.

Thus in order to avoid liability the entity has to prove that it has adopted and implemented a model that is aimed to prevent the type of offence that is subject to prosecution in that case, it has established responsibilities and delegated control on the said model to persons empowered to act, the offence is a result of breaking said model and internal regulation and there is no fault of the entity by lack of control or supervision in the implementation of the model or in its verification.

The legislation goes further into expressing and defining a successful model and even involving state authority with the verification and validation of the said model.

It is not sufficient for an entity to only adopt any corporate governance or model as it must be 'tailor-made', duly adopted and sufficiently implemented to be effective[33]. Thus, effectiveness is a key condition for the legal entity to be exonerated.

The system is more than exceptional in encouraging corporate governance, internal regulation, internal control and a general preventive approach for each legal entity. Therefore, it results in precise and clear actions that legal entities have the possibility to take to avoid liability, actions that of course do not reflect only in this matter, but on the entire activity of the entity.

7. Summary of Analysis. Strengths and Weaknesses

Comparing the Romanian and Italian systems, we can conclude that both have particularities, reason, strengths and weaknesses for each condition in regard to the criminal liability of legal entities. A summary of these conditions is given in **Table 1**.

Table 1. The conditions of criminal liability in Italy and Romania

[32] Italy, Legislative Decree No. 231/2001, art. 6, https://www.normattiva.it/uri-res/N2Ls? urn:nir:stato:decreto.legislativo:2001-06-08;231.

[33] Kordík, Bartalská-Duchoňová, and Ľorko, "Criminal Responsibility of Legal Persons."

No.	Condition of liability	Romania	Italy
1	Legal capacity	Mandatory	Not mandatory
2	Sphere of offences	General. Not limited	Limited
3	Entities excepted from liability	State, public authorities, public institutions with state monopoly activity	State, public authorities, non-economic state bodies, bodies that perform constitutional duties
4	Liability of the natural person, a condition for liability of the legal entity	Not mandatory	Not mandatory
5	Acting in the interest or benefit of the legal entity	Alternative with acting in the name of the legal entity or in its activity.	Mandatory
6	Position of natural person within the legal entity	Not mandatory	Senior management. Person under direct supervision of senior management.
7	Guilt	Form of guilt of natural person and legal entity are converged	Form of guilt may be converged or not. Fault in prevention.
8	Organizational fault	Not regulated or relevant.	Mandatory
9	Compliance exoneration from liability	Not regulated.	Regulated.
10	Nature of liability and sanctions	Criminal	Criminal - Administrative

Source: *author's own processing following the analysis in this article*

On the legal capacity, we believe that the Italian system, although aimed at broadening the applicability of liability, when dealing with groups or entities that do not poses or have recognized their legal capacity raises serios problematics on applying sanctions or even earlier, to insure effective due process for the legal entities, separate from the guarantees of the natural persons involved. In the same regard, enforcing sanctions may pose serios difficulties after liability has been established. In this case, we believe that the Romanian system is more able

to achieve the scope of liability.

Regarding the legal entities that are excepted by law, the Italian system offers more protection to entities that are not public but do serve an important role in society, namely a constitutional activity. In the Romanian system such entities may be liable. A solution may be a specialization of offences that certain vulnerable entities (political parties/unions etc.) may be liable for.

When it comes to the condition that liability of the legal entity is conditioned by the liability of the natural person, both systems have the possibility to hold liable only the legal entity, especially in case legal or other circumstances exclude liability of the natural person. Of course, this does not mean that the natural person is not at least partially identified and other conditions do not apply. It means that the liability of the legal entity is not conditioned by holding the natural person liable. In this regard both systems are similar.

Concerning the condition that the natural person has to act in the interest of the legal entity, or its benefit, according to the Italian legislation, or the alternatives of the Romanian system, in the entities name or in its activity, we believe that broadening the spectrum of applicability is a more accurate regulatory with the scope of legal entity liability and offers possibility to adapt to criminal activity realities. Nevertheless, the exception mentioned by Italian legislation according to which liability is excluded in case the natural person acts on its own interest or benefit should be regulated, as we consider it to be an important part of protection of legal entities and establishing guilt.

Regarding the position held by the natural person, we believe that the Romanian legislation, in which no remark is made and liability may be drawn from the actions not only of top management and persons under direct supervision offers broad possibility and applicability. In connection with the possibility to exonerate in case of compliance policies, not qualifying the author could represent an incentive to properly regulate internal processes at all levels.

On the condition of guilt, we believe that the Romanian system completely lacks the possibility to attract liability based on lack of prevention and organizational fault. We believe it to be the most important flaw and one that could easily be implemented based on the Italian model.

The same conclusion is to be drawn regarding the exoneration due to compliance policies, where the Romanian systems lack any kind of possibility to actively prevent criminal liability of the legal entity in case of an offence committed by a natural person. In this regard, existence of internal regulation does not in any way prevent liability, whatever the level and effectiveness of the policy.

Regarding the nature of liability and the difference between the two systems, we believe that this aspect is a purely theoretical one and does not raise practical issues.

8. Conclusions

The comparative analysis of the Romanian and Italian systems demonstrates that the liability of legal persons remains a complex and evolving area of criminal law. Although both jurisdictions seek to respond to the increasing involvement of collective entities in economic, financial, environmental, and other forms of criminal activity, they rely on different mechanisms of attribution and prevention. Neither system offers a perfect regulatory model, but each contains elements that could contribute to the improvement of the other.

Romanian law establishes a broad and autonomous model of criminal liability. In principle, a legal person may be held liable for any offence committed in the performance of its activities, in its interest, or on its behalf, without the liability being limited to acts committed by particular categories of natural persons. Moreover, the liability of the legal person does not depend on the conviction of the individual offender. These features give the Romanian system considerable flexibility and allow it to respond to the diverse forms that corporate criminality may take. At the same time, however, this broad scope is not accompanied by sufficiently developed rules concerning organizational fault, failure to prevent offences, or the legal relevance of internal compliance measures.

By contrast, the Italian system established by Legislative Decree No. 231/2001 is more restrictive regarding the offences capable of triggering the liability of an entity, since it is based on a closed list of predicate offences. Nevertheless, it provides a more elaborate framework for assessing the manner in which the entity is organized and supervised. In particular, the Italian model distinguishes between offences committed by senior managers and those committed by persons subject to their direction or supervision. It also recognizes the importance of effective organizational and management models designed to prevent criminal conduct. Consequently, compliance programmes may have a significant role in excluding or limiting the liability of the entity, provided that they were properly adopted, effectively implemented, and adequately supervised. The most important weakness of the Romanian framework is therefore the absence of an express mechanism linking criminal liability to organizational deficiencies and failure to prevent unlawful conduct. The mere adoption of internal policies currently does not provide the legal person with a clearly regulated defence, irrespective of the quality and effectiveness of those measures. Introducing such a mechanism could encourage legal persons to develop genuine systems of prevention, monitoring, internal reporting, and control. However, liability based on organizational fault should be carefully regulated in order to avoid transforming the criminal liability of legal persons into a form of strict liability.

A balanced model could combine the principal strengths of the two systems. Liability should generally apply only to entities whose legal capacity is

recognized, while maintaining the justified exceptions concerning the state and public authorities. It should not necessarily be confined to a limited list of offences, as corporate criminality may arise in a wide variety of fields. At the same time, the law should expressly regulate liability for failure to prevent offences committed within the organization and should allow the entity to demonstrate that it adopted and effectively implemented all reasonable measures capable of preventing the unlawful conduct.

Such a model should preserve the autonomy of the legal person's liability while ensuring a sufficiently clear connection between the offence, the activity of the entity, and its organizational shortcomings. It should also respect the principles of legality, culpability, proportionality, and individualization of sanctions, together with the procedural safeguards applicable to criminal charges under Article 6 of the European Convention on Human Rights.

Ultimately, the purpose of regulating the liability of legal persons should not be limited to imposing sanctions after an offence has been committed. An effective system must also encourage corporate self-regulation, responsible governance, and the development of a genuine culture of compliance. From this perspective, the Romanian and Italian models should not be regarded as mutually exclusive, but as complementary sources of legislative solutions capable of supporting a more coherent, preventive, and equitable framework for the liability of legal persons.

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Organizational Fault as a Distinct and Autonomous Basis of Corporate Criminal Liability: A Comparative Analysis of the US, German and EU Models

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Abstract

The expansion of corporate criminal liability has produced divergent attribution models reflecting different conceptions of institutional responsibility. This paper addresses the central question whether organizational fault constitutes an autonomous foundation of corporate criminal liability or merely a point of convergence between derivative and structural models of attribution. Adopting a functional and normative comparative methodology, the study examines three influential frameworks: the US doctrine of respondeat superior, the German discourse on organizational responsibility and Verbandssanktionen, and the European Union model linking liability to lack of supervision or control by leading persons. The analysis focuses on how each system allocates institutional blame and reconciles enforcement effectiveness with rule of law guarantees. The paper argues that organizational fault represents a distinct and conceptually autonomous basis of liability, grounded in defective governance structures, compliance failures and systemic breakdowns in internal control. It contends that a principled model of corporate criminal liability must articulate clear criteria for identifying organizational failure while safeguarding proportionality, legal certainty and procedural fairness in transnational enforcement contexts.

Keywords: *organizational fault; corporate criminal liability; comparative law; institutional culpability; compliance failures; rule of law.*

1. Introduction. The Problem of Founding Corporate Criminal Liability

"Criminal liability" refers to the obligation of an offender to undergo punishment (or sanctions) for acts that have been characterized as crimes under criminal law. Criminal law is inherently concerned with crimes and punishments; it encompasses the body of rules that define, on the one hand, criminal offences and, on the other, the penalties attached to them, as well as the conditions under which criminal liability is activated. In the Greek Penal Code, for example, a crime is defined as "an unlawful act attributable to its perpetrator and punishable by law" (Art. 14). The act thus constitutes the core of the criminal offence and renders the perpetrator accountable; however, for such an act to amount to a "complete crime," culpability must additionally be attributable to the actor.

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This classical architecture of criminal liability presupposes human conduct as the external manifestation of the actor's inner mental world. Culpability is the object of a normative judgment — a reproach — referring to the mental attitude of the acting subject, while attribution expresses the evaluative conclusion that culpability exists in the specific case. In judicial proceedings, the subject of attribution is the judge; the object is the offender's culpability; and the final outcome is the imposition of punishment. Historically, this doctrinal construction is associated with the emergence of individual criminal responsibility and with the transition from collective or clan-based criteria of liability to an individualized and act-based conception of blameworthiness.[2]

However, in the "post-modern" era of globalization of social and economic relations, as well as networks, a new tendency becomes apparent: the concept of culpability begins to expand. Criminal liability is increasingly recognized in respect of legal persons, and the focus shifts from individual responsibility to a broader assessment of organizational conduct and operation. This approach is particularly significant in relation to large and complex organizations, where unlawful outcomes often result from conduct diffused across multiple levels and cannot be directly attributed to a single individual.

This shift raises a fundamental doctrinal problem. Objections to the recognition of corporate criminal liability invoke classical dogmatic difficulties, centering on the argument that such liability conflicts with the concept of the act, insofar as a legal person does not "act"; with the meaning of attribution, insofar as a legal person lacks the capacity for culpable conduct; and ultimately with the conceptual content of punishment itself, since a legal person is not, in the traditional sense, a bearer of penal suffering. This debate is inseparably linked to the theoretical understanding of legal personality — either as an "artificial" construct under the fiction theory, or as a real collective organism under the organic theory, endowed with its own will, formed and expressed through its governing organs.[3]

At the level of comparative law, the heterogeneity of attribution models becomes evident. In the United States, criminal liability is established on the basis of the conduct of any agent who, acting within the scope of his or her authority, violates criminal law with the intent of benefiting the legal person. This approach is known as the theory of vicarious liability and essentially transposes the civil doctrine of *respondeat superior* into criminal law. By contrast, English law developed the identification theory, according to which directing minds and senior officers are deemed to embody the corporation itself; they "represent the will and the directing mind of the company," such that the offence is considered to have

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[2] Nikolaos K. Androulakis, *Criminal Law: General Part*, vol. 1 (Athens–Komotini: Ant. N. Sakkoulas, 1991), 54, https://www.lawspot.gr/nomika-nea/o-synigoros-kai-oi-provoleis-ton-meson-koinonikis-diktyosis/.

[3] Nikos A. Paraskevopoulos, *The Foundations of Criminal Law*, 2nd ed. (Athens: Sakkoulas, 2020), 193–203, https://www.sakkoulas.gr/en/editions/n-paraskevopoulos-ta-themelia-tou-poinikou-dikaiou-2i-ekd-2020/.

been committed by the corporation.

Concurrently, international instruments such as the United Nations Convention against Corruption and the OECD Convention introduce obligations to establish liability of legal persons, recognizing, inter alia, the "lack of adequate supervision or control by senior management" as a criterion of responsibility. This approach significantly broadens the scope of liability and shifts the focus from the mere transference of individual culpability to the assessment of organizational deficiencies.[4]

In light of the foregoing, the central research question of this article may be formulated as follows: Does organizational fault constitute an autonomous normative foundation of corporate criminal liability, or does it represent a functional point of convergence among heterogeneous models of attribution? In other words, is it a doctrinally self-standing form of institutional culpability, or merely a technique for reconstructing traditional individual blame at the collective level?

The methodology adopted is a functional and normative comparative approach. It is functional insofar as it examines how each attribution system responds to the need for effective prevention and repression of organizational criminality. It is normative insofar as it evaluates the compatibility of the respective models with the principles of culpability, attribution, and the rule of law. The comparative analysis focuses on Anglo-American and continental paradigms, as well as on supranational regulatory interventions.

The article is structured into eight distinct yet interrelated parts. It begins by setting out the theoretical framework for attribution models, systematically distinguishing between derivative models (*respondeat superior* and the identification doctrine) and structural or organizational approaches (organizational liability and compliance-based liability). This distinction serves to clarify the concept of "organizational fault" and differentiate it from the mere attribution of an individual's *mens rea* to the legal person. It then proceeds to analyze the American model and its underlying logic of enforcement effectiveness, addressing both its doctrinal foundations and its broad scope of attribution, as well as criticisms concerning over-expansion and the absence of genuine institutional culpability, together with the latent shifts toward organizational criteria through compliance programs and sentencing guidelines. The German framework of *Verbandssanktionen* is subsequently examined, where organizational deficiency and the concept of *Aufsichtspflichtverletzung* (breach of supervisory duty) operate as the basis for sanctions and signal a transition from administrative reaction to substantive institutional reproach. The European Union model of liability for lack of supervision is analyzed as a hybrid construction, in order to assess whether and to what extent it functionally converges toward a model of organizational fault.

[4] Alexandros Dimakis, "The Criminal Liability of the Company: Introduction to the Problem," in *Contemporary Issues of Corporate Liability: Proceedings of the 12th Panhellenic Conference of Greek Commercial Lawyers* (Athens: Nomiki Bibliothiki, 2003), 228–32, https://www.law.uoa.gr/prosopiko/didaskontes_alfabitika/alexandros_dimakis.

The ensuing comparative evaluation—based on criteria such as the locus of blame, the type of culpability, and the degree of institutional autonomy — leads to an explicit normative position as to whether organizational fault constitutes an autonomous category of institutional culpability or merely a technical device of attribution. On the basis of this conclusion, the article proposes a normative framework for identifying organizational failure — structural inadequacy, deficient compliance architecture, and systemic tolerance of risk — in conjunction with the principles of proportionality, legal certainty, and due process. The article concludes with a concise restatement of its central thesis and an outline of avenues for further research.

2. Theoretical Framework: Models of Attribution and Conceptual Distinctions

2.1. Derivative Models (Derivative Liability)

a) *Respondeat Superior* – Vicarious Liability. According to the view adopted in the United States of America at the federal level, and particularly since the decision in New York Central and Hudson River Railroad Company, corporate criminal liability is established on the basis of the conduct of any perpetrator (whether an officer, a simple employee, or an agent in general) who — acting within the scope of his or her authority — violates criminal law with the intent of conferring a benefit upon the legal entity. This approach is referred to as the 'theory of vicarious liability' and essentially transposes into criminal law the civil law rule of the principal's liability for acts of the agent (*respondeat superior*).

Furthermore, "the theory of vicarious liability, drawing upon arguments from the field of the economic analysis of law, is said to promote the efficient allocation of risk and cost. Through this model, corporations are compelled to monitor and regulate the conduct of their employees, thereby reducing the social cost of unlawful behaviour."

b) *Identification Doctrine*. It is characteristically stated that the relevant persons "represent the will and the directing mind of the company." Consequently, in cases where the offence is committed by such individuals, the corporation is not merely attributed the criminal conduct of third parties. Rather, the offence is considered to have been committed by the corporation itself. This theory, known as the "identification theory," or alternatively the "alter ego" doctrine, equates the corporation with specific senior officers. This formulation bears significant similarities to Article 71 of the Greek Civil Code, concerning the liability of a legal person for acts or omissions of the organs that represent it.[5]

[5] Dimakis, "Criminal Liability of the Company," 228–32.

2.2. Structural and Organisational Models

a) *Organisational Responsibility.* Corporate liability is conceptualised as the product of deficiencies in supervision and control exercised by directors auditors and other responsible officers the culpability of the legal person being inevitably located in its operation and organisational structure and more specifically in the absence of adequate self regulatory rules capable of preventing the relevant offence or in the lack of an effective internal control mechanism ensuring compliance with such rules thus amounting to a failure in corporate governance and operational management In this perspective references to the criminal liability of legal persons are not to be equated with the introduction of strict liability into criminal law but rather denote attribution grounded in organisational fault rather than mere transference of individual wrongdoing.[6]

b) *Compliance Based Liability.* Within this framework particular emphasis is placed on necessary preventive and compliance measures including internal control mechanisms regulatory compliance systems employee training and the cultivation of a culture of transparency The implementation of structured internal monitoring systems together with systematic training initiatives may function as organisational safeguards capable of neutralising criminogenic factors precisely because they are embedded in the internal architecture of the enterprise Accordingly liability is normatively linked to the existence or inadequacy of structured prevention and control mechanisms which constitute intrinsic elements of the organisational functioning of the legal person.[7]

2.3. The Concept of "Organisational Fault"

Organisational fault seeks to confer doctrinal autonomy upon corporate criminal liability by relocating the focus of attribution from individual conduct to institutional structure. Unlike derivative models, in which the liability of the legal person is constructed through the transference of the act and culpability of a natural person, organisational fault is grounded in deficiencies of governance, supervision and internal control. The normative reproach is directed not at a specific bearer of intent, but at the corporate entity itself, insofar as its organisational configuration failed to establish adequate mechanisms capable of preventing or detecting criminal conduct. In this sense, liability is anchored in structural inade-

[6] Stratos Georgoulas, "From White-Collar Crime to State-Corporate Crime," in *Crimes of the Powerful: Corruption, Economic and Organized Crime*, ed. Sofia Vidali, Nikolaos Koulouris, and Charis Papacharalambous (Athens: Hellenic Open University Press, 2019), 48–49, https://www.soc.aegean.gr/ext-files/en/cv/en-cv-georgoulas.pdf.

[7] Georgios N. Triantafyllou, *The Criminal Law of the Enterprise: Individual Criminal Liability in Large Corporations* (Athens: P. N. Sakkoulas, 2021), 63–71, https://www.sakkoulas.com/product/19053-to-poiniko-dikaio-tis-epicheirisis/.

quacy and defective risk management rather than in mere associative responsibility.

Doctrinally, organisational fault presupposes an evaluative judgment concerning the adequacy of corporate organisation in light of foreseeable risks inherent in complex business operations. It does not amount to strict or objective liability. Rather, it requires the identification of a blameworthy organisational failure, such as insufficient compliance architecture, inadequate internal monitoring systems or systemic weaknesses in supervisory arrangements. The corporation is reproached because it did not organise itself in a manner consistent with legally expected standards of prevention and control.[8]

The distinction between organisational fault and the simple transference of mens rea is conceptually decisive. In vicarious or identification-based models, the mental state of a natural person is attributed to the corporation through mechanisms of representation or identification. Corporate culpability thus derives from, and remains dependent upon, individual intent. Organisational fault, by contrast, does not operate through psychological imputation. It does not ask whose mens rea can be transplanted to the corporate entity, but whether the organisational structure itself created, tolerated or failed to mitigate a criminogenic environment.

The central inquiry therefore shifts from the subjective mental state of an identifiable actor to the systemic characteristics of the corporate framework. Liability emerges not because a particular individual acted with intent or negligence, but because the institutional configuration rendered the offence foreseeable and preventable. Organisational fault thus represents a structural mode of attribution, analytically independent from individual culpability.[9]

Under this perspective, organisational fault approximates the notion of institutional culpability. Culpability is no longer confined to a psychological assessment of a human agent but is reconceptualised as a normative evaluation of collective organisational conduct. The reproach directed at the corporation is grounded in its failure to establish and implement effective systems of supervision, compliance and risk management. The criminal act becomes symptomatic of systemic dysfunction rather than merely the deviant behaviour of an individual.

Institutional culpability does not negate the foundational principles of criminal law. On the contrary, it seeks to preserve the principle of blameworthiness by adapting it to the realities of complex corporate structures. By conceptualising fault at the level of organisational design and operational integrity, this approach offers a theoretically coherent basis for corporate criminal liability that reconciles enforcement effectiveness with the normative demands of culpability,

[8] Linnéa Strand, "The Bad Apples' Influence on the Organizational Members: A Qualitative Case Study Exploring Individuals' Experiences" (bachelor's thesis, Kristianstad University, 2021), 11, https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1586739.
[9] Dimakis, "Criminal Liability of the Company," 228–32.

proportionality and rule-of-law guarantees.[10]

3. The American Model: *Respondeat Superior* and the Logic of Effectiveness

According to the approach adopted in the United States of America at the federal level, and in particular since the decision in *New York Central and Hudson River Railroad Company*, corporate criminal liability is established on the basis of the conduct of any individual actor (whether an officer, an ordinary employee, or an agent more generally) who — acting within the scope of his or her authority — violates criminal law with the intent of securing a benefit for the legal entity. This approach is referred to as the theory of "vicarious liability" and essentially applies the civil law doctrine of *respondeat superior* to the field of criminal law.

The above doctrinal choice entails that the corporation may be held liable for the acts of any of its organs or employees, provided that they acted within the scope of their duties and for the benefit of the legal person. This model of attribution extends beyond senior managerial officials and encompasses even lower-level employees or agents, thereby demonstrating the breadth of the objectification of liability within the American framework.

An initial examination of the principal models of liability developed internationally may reveal their inherent tensions and structural weaknesses. In particular, the American scheme, grounded in the transposition of individual conduct to the legal person, exposes doctrinal difficulties linked to the premise that a legal entity is not capable of acting culpably in its own right and is not, in the strict sense, a bearer of penal blame. These concerns have fueled sustained criticism that the model lacks an autonomous conception of institutional culpability and instead rests upon a functional extension of individual fault.

Notwithstanding its ostensibly derivative structure, the practical operation of the model must be situated within the broader context of criminal policy and its cultural underpinnings, in which the effectiveness of sanctioning legal persons is closely connected to the adoption of necessary preventive measures and penalties aimed at combating corruption. Within this framework, compliance mechanisms and sentencing guidelines have developed in such a way that they implicitly introduce evaluative criteria relating to the internal organisation and functioning of the corporation. This development signals a gradual shift from the mere transfer of individual conduct to an assessment of corporate organisational structures and governance.[11]

While the doctrine of *respondeat superior* remains formally derivative,

[10] Paraskevopoulos, *Foundations of Criminal Law*, 193–203.

[11] John R. Lott Jr., "Corporate Criminal Liability," in *Encyclopedia of Law and Economics*, ed. Boudewijn Bouckaert and Gerrit De Geest, vol. 5 (Cheltenham: Edward Elgar, 2000), 492, https://reference.findlaw.com/lawandeconomics/8600-corporate-criminal-liability.pdf.

the evolution of compliance expectations and sentencing practices reveals a subtle but significant structural transformation. The increasing emphasis placed on effective compliance programs, internal monitoring systems and corporate culture introduces evaluative criteria that no longer concern solely the conduct of individual agents. Instead, courts and enforcement authorities assess the quality of the organisation itself. This latent structuralisation of attribution signals an implicit move toward organisational fault, even within a formally derivative framework. The corporation is no longer treated merely as the passive recipient of transferred mens rea, but as a normative actor whose internal governance architecture becomes the object of scrutiny.

In practical terms, the mitigation or aggravation of sanctions based on the robustness of compliance mechanisms reflects a gradual relocation of the locus of blame. Although liability is initially triggered by individual wrongdoing, the ultimate evaluative focus concerns whether the enterprise maintained adequate systems of prevention and control. The American model thus exhibits an internal tension: it retains a derivative doctrinal structure, yet increasingly operates through organisational criteria. This dynamic confirms that the logic of institutional assessment has penetrated even those systems traditionally resistant to autonomous conceptions of corporate culpability.

4. The German Framework: *Verbandssanktionen* and Organisational Liability

German law long subscribed to the maxim *"societas delinquere non potest"*, so that corporations cannot bear criminal *Schuld*. Instead, German companies are subject only to regulatory fines (Bußgelder) under the *Gesetz über Ordnungswidrigkeiten* (OWiG) when misconduct occurs. In practice these fines hinge on faults in corporate organisation – especially failures of oversight by management – rather than on an intrinsic notion of corporate guilt. However, recent legislative efforts (e.g. the failed 2020 *Verbandssanktionengesetz* draft) indicate a shift toward treating companies as institutions with their own duties and sanctions (i.e. substantive institutional accountability).[12]

Theoretical Debate on Corporate Guilt. German criminal doctrine traditionally denies that legal persons can have *Vorsatz* or *Schuld*. As one scholar notes, classical codes (such as the Bavarian Penal Code of 1813) explicitly refuted corporate criminal liability, reflecting the view that "the concept of guilt and punishment was perceived to be geared towards the individual".[13] The post-war OWiG entrenched this approach: it distinguishes criminal offences (for

[12] Klaus Tiedemann, *Wirtschaftsstrafrecht: Einführung und Allgemeiner Teil mit wichtigen Rechtstexten*, 3rd ed. (Cologne: Carl Heymanns, 2010), https://www.isbn.de/buch/9783452272 621/wirtschaftsstrafrecht.

[13] Bavaria, *Strafgesetzbuch für das Königreich Baiern* (Munich: Allgemeines Regierungsblatt, 1813), art. 49, https://www.digitale-sammlungen.de/en/details/bsb11086639.

persons) from regulatory offences (for legal entities) and imposes only administrative fines on companies. Thus, Germany has no corporate "mens rea" doctrine comparable to other countries. In recent years, however, debate has revived. Some commentators concede that corporations might be held liable only by imputing an agent's intent or by identifying an "organisational fault" in the company.[14] For example, one analysis observes that corporate liability must currently be grounded on either (a) vicarious liability (transferring an officer's culpability to the firm) or (b) a failure of the firm's internal organisation – and notes that neither approach is wholly convincing in abstract terms. A full-fledged *Verbandsstrafrecht* (corporate criminal law) would thus require rethinking traditional notions of actus reus and culpability. Until then, German scholars agree that corporate sanctions are limited to proxy mechanisms. In sum, the historical "no guilt of association" rule continues to frame German views on corporate punishment, even amid calls for reform.[15]

The Organisational Deficit as a Basis for Sanctioning. Under current German law, the company itself faces sanctions only via supervisory-duty violations, not via direct commission of an offence. In other words, the organisational deficit (*mangelnde Unternehmensorganisation*) is the predicate for any corporate fine. In practice, this means that the company is liable when a person in a leadership position commits a crime for the benefit of the enterprise (triggering §30 OWiG), and – crucially – when an underlying offence by an employee could have been prevented by proper oversight (triggering §130 OWiG). As one commentary explains, *"a fine can be issued against a corporation when a manager has committed a criminal or regulatory offence by which a related corporate duty was violated."* Moreover, this typically reflects a breach of supervisory obligations under §130 OWiG, which "is violated when an employee of the corporation commits a corporate-related crime or regulatory offence which could have been prevented or impeded by sufficient monitoring.". In other words, German corporate sanctions rest on the business's organisational failures – especially failures of its duty to supervise subordinates – rather than on an abstract corporate intent. In this sense the firm's inadequate compliance system or lax control structure becomes the basis of liability, rather than any corporate-minded *mens rea*. (In sentencing, courts then impose a Bußgeld against the company usually up to 10 million euros, which must exceed any illicit gain.)[16]

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[14] Edward B. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure," *Yale Law Journal* 118, no. 1 (2008): 126–76, https://doi.org/10.2307/20454705.

[15] Claus Roxin and Luís Greco, *Strafrecht Allgemeiner Teil*, vol. 1, *Grundlagen: Der Aufbau der Verbrechenslehre*, 5th ed. (Munich: C.H. Beck, 2020), https://cdn-assetservice.ecom-api.beck-shop.de/product/inhaltsverzeichnis/20115320/inhaltsverzeichnis-roxin-greco-strafrecht-allgemeiner-teil-bd-1-grundlagen-aufbau-verbrechensleh.pdf.

[16] Germany, *Gesetz über Ordnungswidrigkeiten* (OWiG), §§ 30, 130, https://www.gesetze-im-internet.de/owig_1968/.

The Concept of *Aufsichtspflichtverletzung*: The *Aufsichtspflichtverletzung* ("breach of duty of supervision") is the statutory linchpin of organisational liability. Section 130(1) OWiG provides in effect that *"whoever, as owner of a business or enterprise, intentionally or negligently omits the supervisory measures required to prevent violations of duties binding on the owner, and such a violation occurs that would have been prevented or significantly impeded by due supervision, commits an administrative offence."*. In plainer terms: if a company's owner or executive fails to take necessary oversight measures, and as a result an employee violates a duty of the firm (breaching the law), then the owner/executive is liable. The statute explicitly transfers the personal element "owner" to a legal person's responsible officer (e.g. the managing director). In short, German law treats supervisory duty as a guarantee: business leaders must police the firm's activities, and will be fined if their failure to do so enables illegal acts. For example, the well-known interpretation is that an owner may be fined (and thereby the company effectively fined) if "– facilitated by the company's deficient organisation – an employee has committed an offence that would at least have been considerably more difficult with proper supervision". The fine imposes the cost of the illicit gain on the firm. Notably, no corporate fine can be imposed absent this nexus: mere breach of duty by a manager triggers liability only insofar as a preventable offence by staff occurred. Thus, *Aufsichtspflichtverletzung* encapsulates the organisational gap that makes corporate sanction possible.[17]

The concept of *Aufsichtspflichtverletzung* should not be understood merely as a technical gateway for the imposition of administrative fines, but as the normative hinge through which organisational inadequacy is transformed into institutional reproach. Although formally addressed to the business owner or managerial organ, the breach of supervisory duty operates structurally: it presupposes that the corporate entity failed to configure its internal control architecture in a manner capable of preventing foreseeable violations. The reproach therefore transcends the individual omission and attaches to the enterprise as an organised system. In this respect, *Aufsichtspflichtverletzung* functions as a proxy for institutional culpability, insofar as it evaluates the adequacy of organisational design rather than solely the subjective fault of a natural person.

The transition from administrative sanction to substantive institutional reproach. Until very recently, Germany's approach was strictly *administrative*: companies faced only OWiG "Verbandsgeldbußen" (association fines) – essentially monetary penalties on economic beneficiaries of misconduct. No formal corporate criminal charge exists.[18] However, legislative debates of the past few years signal a shift toward treating corporate wrongdoing as an institutional

[17] Germany, *Gesetz über Ordnungswidrigkeiten* (OWiG), §§ 30, 130.
[18] Deutscher Bundestag, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft*, BT-Drs. 19/23568, October 21, 2020, https://dserver.bundestag.de/btd/19/235/1923568.pdf.

offence. In 2019–2021 the government drafted a *Verbandssanktionengesetz* ("Corporate Sanctions Act") to introduce sanctions beyond fines, including compliance-related orders and broader liability for corporations. That project ultimately "collapsed in the summer of 2021" under criticism (especially of its internal-investigation rules), but it demonstrated a concrete move to reframe corporate fault. The new ruling coalition has expressly called the old OWiG-only regime "unsuitable and outdated" and pledged to revise corporate liability rules.[19] Coalition documents mention protecting law-abiding firms from unfair competition, revising sanction levels, and clarifying compliance duties and internal investigation rights.[20] In effect, lawmakers are considering governance-based criteria (akin to the U.S. focus on compliance programs) to measure a company's institutional culpability. If implemented, this would mark a transition from punishing only an *administrative offence* to addressing a substantive corporate wrongdoing. In sum, Germany appears set to reinforce sanctions on enterprises themselves (not just their officers), effectively recognizing corporate entities as bearers of duties and reproach – even if not under the traditional banner of *Strafrecht*.[21]

Even within the formal confines of the OWiG framework, the German model implicitly acknowledges that liability is triggered not simply by the commission of an offence within the company, but by a structurally deficient configuration of supervision. The decisive normative question is whether the enterprise organised itself in accordance with legally expected standards of risk prevention. In this sense, the German approach approximates a substantive theory of organisational fault: the sanction expresses not merely a reaction to delegated misconduct, but an assessment of institutional failure. The administrative character of the sanction does not negate this underlying logic; rather, it conceals a deeper evaluative structure that aligns closely with the concept of institutional blame developed in this study.

5. The EU Model: Liability Based on Lack of Supervision

EU Directives and the "Lack of Supervision or Control" Standard. At the level of European Union law, the liability of legal persons is generally grounded either in the commission of an offence by a person holding a leading position within the undertaking or in the "lack of supervision or control" on the part of such persons, where that deficiency has made possible the commission of

[19] Sijad Allahverdiyev and Marvin Othman, "'Verbandssanktionengesetz'—Corporate Liability for Germany?," *German Law Journal* 23, no. 4 (2022): 637–49, https://doi.org/10.1017/glj.2022.37.
[20] CDU, CSU, and SPD, *Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land*, coalition agreement for the 19th legislative term, February 7, 2018, https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1.
[21] Allahverdiyev and Othman, "'Verbandssanktionengesetz,'" 647–49.

an offence by a subordinate. This standard, which appears in a range of EU directives concerning corruption, fraud, and organised crime, shifts the centre of gravity from the mere transposition of an individual act to an assessment of the enterprise's internal organisation. The "lack of supervision" does not operate merely as a technical rule of attribution, but as an indication of organisational inadequacy, thereby rendering the legal person the bearer of an autonomous form of liability.[22]

Hybrid Character. The EU model displays hybrid characteristics, as it combines elements of derivative and organisational attribution. On the one hand, it preserves the nexus with the conduct of a natural person, particularly where a person in a leading position act for the benefit of the undertaking. On the other hand, it expressly introduces organisational fault, in the form of insufficient supervision or control, as an independent basis of liability. This dual structure does not simply reduce corporate responsibility to a transfer of individual culpability; rather, it incorporates evaluative criteria relating to the quality of corporate governance and internal control mechanisms. In this way, the Union constructs a framework that operates as a bridge between Anglo-American derivative models and Continental organisational approaches.[23]

Convergence Toward Organisational Fault? The systematic reference to "lack of supervision or control" reveals a functional convergence toward the concept of organisational fault. Where liability is triggered by the failure of the enterprise's structure to prevent criminal conduct, the reproach is directed at the organisational functioning of the entity itself rather than exclusively at the natural person involved. Although the EU model does not explicitly articulate a theory of institutional culpability, its evaluation of the adequacy of supervisory and compliance mechanisms substantially approximates the normative proposition that a legal person may bear responsibility for structural deficiencies. In this sense, the evolution of EU law suggests a gradual shift from purely derivative liability toward a framework that, at least functionally, recognises a form of institutional blameworthiness linked to organisational failure.[24]

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[22] Mihai Jiganie-Șerban and Anca Elena Toma, "Navigating Criminal Liability Risks for Generative AI Companies," *Lexology*, January 23, 2025, https://www.lexology.com/library/detail.aspx?g=e39c70f5-f207-4def-9692-6b40dc2f5bb7.

[23] Athena Sahoulidou, "The Liability of Legal Persons and Entities for Bribery Offences: Presentation and Critical Review of Articles 134–135 of Law 5090/2024," *Poinika Chronika*, no. 8 (October 2024): 561, https://www.sakkoulas.com/pinika-chronika/i-efthyni-nomikon-prosopon-kai-ontotiton-gia-adikimata-dorodokias/.

[24] Christopher T. Lowenkamp, Francis T. Cullen, and Travis C. Pratt, "Replicating Sampson and Groves's Test of Social Disorganization Theory: Revisiting a Criminological Classic," *Journal of Research in Crime and Delinquency* 40, no. 4 (2003): 351–52, https://doi.org/10.1177/0022427803256077.

6. Comparative Assessment: Autonomous Foundation or Functional Convergence?

The Criteria of Comparison are:

– *locus of blame*. A comparative evaluation of the models under consideration presupposes, first and foremost, the identification of the locus of blame. In the American paradigm, the center of gravity remains in the act and culpability of the natural person, which is imputed to the legal entity through vicarious attribution. By contrast, in the German and European Union frameworks, the reproach shifts toward the organisational functioning of the enterprise, particularly where deficiencies in supervision or structural shortcomings are identified. The locus of blame thus ceases to coincide exclusively with the individual act and is instead located within the structure and governance of the organisation.

– *type of culpability*. A second criterion concerns the type of culpability grounding liability. The derivative model relies on the transfer of the individual's mens rea, without developing an autonomous conception of corporate guilt. Organisational models, by contrast, seek culpability at the level of corporate structure, namely in failures of supervision, deficient compliance systems, or inadequacies in internal control mechanisms. Liability no longer derives from the psychological state of a natural person but from an evaluative judgment concerning structural deficiency.

– *degree of institutional autonomy*. A third criterion is the degree of institutional autonomy attributed to the legal person as a bearer of responsibility. In derivative models, the corporation functions as a vehicle for the transmission of individual culpability. In organisational and EU-based schemes, however, there is a gradual conceptual shift toward viewing the legal entity as an autonomous holder of normative obligations, whose organisational adequacy is assessed independently.

Analysis of Convergence and Divergence. The comparative inquiry reveals clear doctrinal divergences with respect to the foundation of liability, alongside significant functional convergences. The American model remains formally derivative; yet, through compliance programs and sentencing guidelines, it introduces an evaluative dimension concerning corporate organisation. The German and EU frameworks, although linking liability to the conduct of natural persons, ground reproach in organisational fault. The convergence lies in the fact that all three systems, to varying degrees, ultimately assess the quality of corporate structure and internal control mechanisms.

Normative Position. In light of the foregoing, organisational fault cannot be reduced to a merely technical device of attribution nor to an indirect transfer of individual culpability. Rather, it constitutes an autonomous category of institutional blameworthiness, insofar as the reproach is directed at the organisational configuration and normative culture of the legal person itself. Liability is triggered when the enterprise's structure fails to meet the duties of prevention and

supervision imposed by law. Consequently, organisational fault operates as a normative foundation of corporate criminal liability, providing a coherent answer to the research question as to whether it represents an autonomous basis or merely a point of functional convergence.[25] Organisational fault should thus be understood as analytically distinguishable from derivative models, insofar as it grounds liability in the adequacy of corporate governance structures rather than in the transference of individual mental states. Its distinctiveness does not depend on conceptual abstraction, but on the locus of normative assessment: the institutional configuration of the enterprise.

7. Proposal of a Normative Framework: Criteria for Identifying Organisational Failure

The determination of organisational fault cannot be exhausted by a general invocation of a "lack of supervision"; rather, it must rest upon specific, normatively determinable criteria that allow for a structured assessment of corporate organisation. The proposed normative framework seeks to systematise those instances in which organisational failure becomes the bearer of institutional reproach.

– *Criteria of structural deficiency.* Structural deficiency refers to the absence of a clear allocation of responsibilities, the lack of effective reporting and control lines, and the failure to integrate risk-prevention procedures into the operational structure of the enterprise. The omission to establish adequate self-regulatory rules, or the existence of organisational gaps rendering the commission of criminal offences foreseeable, constitute indicators of structural inadequacy. The assessment focuses on the overall corporate architecture rather than on an isolated act of a natural person.

– *Criteria of deficient compliance architecture.* Particular weight must be accorded to the existence and substantive functioning of compliance mechanisms. The absence of internal control systems, inadequate staff training, the lack of whistleblowing or reporting procedures, or the merely formal adoption of codes of conduct without effective implementation, constitute elements of deficient compliance architecture. Liability is triggered where such mechanisms are incapable of preventing or timely detecting unlawful conduct, thereby revealing organisational weakness.

– *Criteria of systemic risk tolerance.* Beyond structural and regulatory adequacy, a decisive criterion is the presence of systemic tolerance toward unlawful practices. Where corporate culture directly or indirectly incentivises the pursuit of economic objectives at the expense of legal obligations, or where there

[25] Diane Laflamme, "Moral Coding and Programming as Evolutionary Achievements," *Journal of Sociocybernetics* 6, no. 2 (Winter 2008): 69–83, https://sociocybernetics.org/850-2/journal-of-sociocybernetics.

is sustained inaction in the face of repeated violations, organisational failure acquires qualitative features of institutional blameworthiness. Risk tolerance thus becomes a normative element in the evaluation of corporate functioning.

– *Connection with the principles of proportionality, legal certainty, and due process*. The formulation of criteria for organisational failure must comply with the principles of proportionality, legal certainty, and due process. Liability cannot be grounded on indeterminate evaluations but requires clear and foreseeable standards of conduct. At the same time, sanctions must stand in reasonable proportion to the gravity of the organisational deficiency and take into account preventive and remedial measures adopted by the enterprise. In this sense, the proposed framework renders organisational fault not merely a mechanism of attribution, but a structured instrument of institutional assessment, responding to the need for a more precise articulation of the study's original contribution.

8. Conclusions

Concise Answer to the Research Question. This article set out to determine whether organisational fault constitutes an autonomous normative foundation of corporate criminal liability or merely a functional point of convergence among heterogeneous attribution models. The comparative and normative analysis undertaken demonstrates that organisational fault cannot be reduced to a technical device for transferring individual culpability to the collective level. While the American doctrine of *respondeat superior* remains formally derivative, and the German and EU frameworks preserve a structural nexus with the conduct of natural persons, all three systems ultimately engage—explicitly or implicitly—in an evaluative assessment of corporate organisation.

However, functional convergence does not exhaust the doctrinal significance of organisational fault. The decisive shift lies in the relocation of the locus of blame: from the psychological state of an identifiable individual to the institutional configuration of the enterprise. Where liability is grounded in structural deficiencies, failures of supervision, defective compliance architecture, or systemic tolerance of risk, the reproach is directed at the corporate entity as an organisational system.

The analysis supports the conclusion that organisational fault constitutes an autonomous normative basis of corporate criminal liability. It embodies a reconceptualisation of culpability at the institutional level rather than a derivative reconstruction of individual blame.

Confirmation of the Autonomous Nature of Organisational Fault. The autonomy of organisational fault rests on three interrelated elements. First, it presupposes an independent evaluative judgment concerning the adequacy of corporate governance structures in light of foreseeable risks inherent in complex economic activity. Secondly, it grounds liability in the breach of legally expected

standards of prevention and supervision, thereby transforming corporate organisation into a normative object of assessment. Thirdly, it preserves the principle of blameworthiness by adapting it to collective entities without collapsing into strict or objective liability.

In this sense, organisational fault emerges as a category of institutional culpability. The corporation is reproached not because it passively mirrors the intent of a natural person, but because its organisational design failed to establish and implement effective systems of control. The offence becomes symptomatic of structural dysfunction. This doctrinal construction reconciles enforcement effectiveness with rule-of-law guarantees, as liability is anchored in identifiable organisational deficiencies rather than in abstract notions of collective guilt.

The normative framework proposed in Chapter 6 further consolidates this autonomy. By articulating criteria of structural deficiency, deficient compliance architecture, and systemic risk tolerance—within the constraints of proportionality, legal certainty, and due process—the study moves beyond descriptive comparison and provides a structured model for identifying organisational failure. Rather than presenting organisational fault as an architectonic or foundational transformation of criminal doctrine, it is more precise to describe it as a structured mode of attribution tailored to the realities of complex corporate activity. Its significance lies not in rhetorical innovation but in its analytical capacity to identify and evaluate institutional deficiencies according to normatively determinable criteria. The emphasis therefore shifts from theoretical proclamation to methodological clarification.

Prospects for Further Research. The recognition of organisational fault as an autonomous foundation of liability opens several avenues for further inquiry. First, comparative research may explore how different jurisdictions operationalise the proposed criteria in judicial practice, particularly in transnational enforcement contexts. Empirical examination of case law could clarify how courts concretely assess structural deficiency and systemic risk tolerance without undermining procedural safeguards.

Secondly, further theoretical work is required to refine the relationship between organisational fault and individual responsibility. The coexistence of institutional and personal culpability raises complex questions concerning attribution, evidentiary standards, and the distribution of sanctions within corporate hierarchies.

Thirdly, the increasing digitalisation and algorithmic governance of enterprises invite reconsideration of organisational fault in technologically mediated environments. As decision-making processes become automated and diffused across digital infrastructures, the concept of structural deficiency may require recalibration to address new forms of systemic risk.

Finally, the development of supranational regulatory regimes —particularly within the European Union — calls for continued reflection on the harmo-

nisation of standards of organisational liability. A principled theory of organisational fault may contribute to the construction of coherent transnational enforcement mechanisms that respect fundamental guarantees while ensuring effective accountability of complex corporate actors.

By reconceptualising blame at the level of corporate structure and governance, it provides a theoretically coherent and practically operational foundation for modern corporate criminal liability.

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Reasonable Doubt as a Standard of Legitimacy. A Comparative Analysis of Judicial Reasoning in Criminal Proceedings

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Abstract

The research focuses on three different jurisdictions, namely United Kingdom, Italy and Romania, that have three different epistemic systems: jury-based system, sitting judge-based system, and the mixed tension generated by the standard's integration in the Italian legal framework. As such, the objective is to separate the concept from a vague and elusive field and to point out and describe the way it is used, be it by using a probabilistic reasoning, a criterion for coherent narrative of the chronological facts, or a rhetorical formula. Also, we intend to verify if the standard operates as a judicial methodology for analysis and deduction for proof evaluation, or, on the contrary, as a post factum legitimization standard. The conclusion is that, despite identical legal naming in all three legal jurisdictions, it does not yet fully provide an evident and concrete reasoning methodology for the judiciary, in order to move from evidence to conviction. Furthermore, across all three jurisdictions, the judiciary tend to use it more as a mechanism of legitimacy of the court's findings, post factum, than as a structured epistemic instrument, which points toward the need for a more explicit theory of evidentiary reasoning as a distinct direction for future doctrinal research.

Keywords: *beyond reasonable doubt; epistemic standard; legitimation; judicial reasoning; comparative criminal procedure; evidentiary methodology.*

1. Introduction. A Standard Without a Method

The standard "beyond any reasonable doubt" seems, at first glance, especially from a judicial point of view, to be one of the very few genuinely settled questions in criminal procedure. This is because all scholars defend it and every system invokes it or the use of it. Also, courts apply it, or, at least, act as they do. This being said, if the question "what the standard actually requires of the judge or juror in very concrete terms" arises, the answers become surprisingly elusive and vague.

Taking this into consideration, we could say that reasonable doubt is the doubt that a rational person cannot set aside, and this thesis, which comes in many forms across many jurisdictions, gets repeated so often that it starts to feel like a definition. But a very critical thinking will show the contrary, because the definition replaces one undefined concept – beyond any reasonable doubt – with another. Thus, now we need to go a little deeper and establish what makes a person "rational", and what makes a doubt one that cannot be "set aside". Larry

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Laudan takes a different approach and argues that *reasonable doubt is too elastic and subjective to function as a stable evidentiary threshold*. So, in fact, the difficulty is not really about the words.[2]

A court examines the evidence and weighs credibility, in order to reach a conclusion, but the process of judicial reasoning, as it actually operates, rarely proceeds through an explicit model of inference or ways of deduction from this known information. The step that is almost never made visible is the one that matters most and it concerns the way the court moved from what the evidence showed to what it decided, to the conclusion. Although the standard is always used at the end of this reasoning process, the court does not structure it at all. We can argue that there is a meaningful difference between invoking a standard and applying one, and we can confidently affirm that, in most jurisdictions, most of the time, what happens is the former.

The statement is generally valid and cannot be directed to one jurisdiction in particular, because the deficiency is a structural one. Starting with the common law jurisdictions, we noticed that the standard reaches the jury through instructions given by the judge, that deliberately avoid reducing deliberation to a formula.[3]

In continental systems, where an actual career judge must produce written reasons, the situation looks different only on the surface, because, fundamentally, there aren't many differences. It is considered as satisfying the formal requirement a judgment that declares the evidence convincing, even doing so without confronting the alternative hypotheses, which the standard would obviously need to have excluded. A separate and unasked question is whether it has done anything more.

Mirjan Damaška, a well-known author concerning evidence theory and a former Yale professor, states that, at present, evidence law is unable to articulate and highlight a stable relationship between procedural form and epistemic ambition.[4]

Ho Hock Lai pressed the point even further, saying that the evaluation of evidence is irreducibly epistemic, whether or not the law acknowledges it, and in many cases it does.[5]

The problem, then, consists in the fact that the frameworks needed to make those standards operational are largely missing, that is to give them traction

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[2] Larry Laudan, "Is Reasonable Doubt Reasonable?," *Legal Theory* 9, no. 4 (December 2003): 295–331, https://doi.org/10.1017/S1352325203000132.

[3] John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012), 230–35, https://doi.org/10.1017/CBO9781139093606.

[4] Mirjan R. Damaška, *Evidence Law Adrift* (New Haven, CT: Yale University Press, 1997), 3–6, https://yalebooks.yale.edu/book/9780300206043/evidence-law-adrift/.

[5] H. L. Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008), 45–60, https://global.oup.com/academic/product/a-philosophy-of-evid ence-law-9780199228300.

in the actual reasoning of courts, and not that standards are absent.

This study argues that the gap is more specific than it might appear. In the United Kingdom, Italy, and Romania, the standard "beyond reasonable doubt" functions predominantly as a mechanism of legitimation of judicial decisions, by ratifying the court's conclusions, and not the other way around, by generating them. Although the differences between these three systems are real, the differences consist only in how the standard is embedded institutionally, and do not resolve the underlying problem. And the problem, as Section VI will show, runs deeper still. Before asking whether or not courts correctly apply the standard, one must ask whether they previously had constructed and tested competing factual hypotheses at all, which, often, they do not.

Comparing the three legal systems, we notice that in the United Kingdom, the standard is addressed to a jury, as an instruction about how to deliberate, and not an account of how to reason about evidence,[6] while in Italy, it was introduced by the legislative reform in 2006, and grafted onto a procedural tradition, which had developed without it. Still, the tension has never been fully resolved.[7]

Concerning Romania, the standard exists at the normative level, but, and this is emphasized by a sitting judge, its operational presence in judicial reasoning is another matter.

None of this is an argument for abandoning the standard, because the point we are trying to state is more precise, as follows: a standard that is supposed to govern criminal proceedings, but cannot be observed in the judicial reasoning, cannot function as a guarantee. If the case is that reasonable doubt is not identified and tested as a concrete possibility arising from the evidence, then it becomes a vague formula, which is stated after the verdict, rather than a condition that was meant to shape it. So, this article argues precisely the distinction between a standard that structures reasoning and one that post factum validates outcomes.[8]

2. "Reasonableness", as a Threshold Between Epistemic Criterion and Rhetorical Formula

The notion of "reasonable doubt" appears, at first sight, to offer a suffi-

[6] Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (June 2023; updated February 2024), chap. 5, https://www.judiciary.uk/wp-content/ uploads/2023/06/Crown-Court-Compendium-Part-I-June-2023-updated-Feb-2024.pdf.

[7] Italy, *Legge 20 febbraio 2006, n. 46: Modifiche al codice di procedura penale, in materia di inappellabilità delle sentenze di proscioglimento*, Gazzetta Ufficiale no. 44 (February 22, 2006), https://www.normattiva.it/atto/caricaDettaglioAtto?atto.codiceRedazionale=006G0061&atto.dataPubblicazioneGazzetta=2006-02-22&bloccoAggiornamentoBreadCrumb=true&classica=true&dataVigenza=&generaTabId=true&qId=&tabID=&tipoDettaglio=originario&title=lbl.dettaglioAtt.

[8] *Taxquet v. Belgium* [GC], no. 926/05 (ECtHR, November 16, 2010), https://hudoc.echr.coe.int/eng?i=001-101739; *Boldea v. Romania*, no. 19997/02 (ECtHR, Third Section, February 15, 2007), https://hudoc.echr.coe.int/eng?i=001-79497.

cient criterion for distinguishing a conviction from an acquittal judgment. In reality, matters are less stable, mainly because it operates on two distinct levels that are not always explicitly separated, and not so much because the standard is inherently ambiguous, which it is.

So, "reasonableness" refers to as an epistemic criterion, which means that reasonable doubt arises when, after evaluating the evidence, an alternative hypothesis still persists and cannot be justifiably excluded. Moreover, the standard requires a genuine exercise of testing competing scenarios in which, for example, it is not enough for the prosecution's hypothesis to be plausible or coherent, but it must withstand comparison with the alternatives.[9]

On the other hand, the same notion frequently functions as a rhetorical formula, in which the standard "beyond any reasonable doubt" no longer guides the analysis of evidence. On the contrary, it appears at the end of the reasoning as a label validating the conclusion the court has already reached. The difference is subtle and essential, because in the first case, the standard structures the evaluation, meanwhile in the second one, it merely accompanies it.

This duality reflects, ultimately, the difficulty law faces in operating with epistemic concepts, without transforming them into simplified normative formulas and, therefore, cannot be an accident. As Ho Hock Lai argues in his work, the evaluation of evidence inevitably involves judgments of an epistemic nature, concerning probability, coherence, and explanation, even when these are not explicitly articulated in legal discourse.[10]

Traditionally, the law prefers to operate with general standards, leaving the concrete mechanism of inference in an implicit area, whether it is left to a judge or to a jury.

Surprisingly, the problem is not that this mechanism remains implicit, but that, in this way of implementation, it cannot be verified. A typical example is that of judgments in which the court finds that "the body of evidence leads to the conclusion of guilt", but without indicating to what extent that body of evidence excludes the alternative and plausible hypotheses. In this kind of situation, the standard only appears to be respected and reasonable doubt is, formally, and only formally, overcome. And yet, the devil's advocate would argue, and he would be justified, that it is not clear how, because the reasoning is not demonstrated, but only asserted. Thus, this kind of reasoning can be qualified as an epistemic one only to the extent that it previously identifies the relevant alternative hypotheses and explicitly states the reasons for which they are excluded from the critical reasoning. In the absence of this exercise, the analysis does not rise above the level of a simple assertion stated by the courts.

The very next important consequence is that if "reasonableness" is not

[9] Laudan, "Is Reasonable Doubt Reasonable?," 310–13, https://doi.org/10.1017/S1352325203000132.

[10] Ho, *Philosophy of Evidence Law*, 89–110, https://global.oup.com/academic/product/a-philosophy-of-evidence-law-9780199228300.

anchored in an explicit and critical process of evaluation, then it risks being defined, objectively speaking, by the very result it is supposed to justify. In this way, doubt is simply absent from the moment the court simply declares that it does not exist, and is no longer analyzed. This circularity has been consistently criticized in the doctrine, particularly in the work of Larry Laudan, when showing that the standard tends to function more as a post factum validation instrument, rather than an effective decision criterion.[11]

These being said, the consequence of this approach is not only methodological, but also institutional. In the absence of a verifiable criterion of application, the standard will merely act as a formula validating a conclusion already formed, and will no longer function as a guarantee against judicial error. From this perspective, the difference between the two levels, one epistemic and the other rhetorical, ceases to be purely conceptual and becomes, thus, essential for assessing the legitimacy of the act of judicial reasoning.

This tension appears, in different forms, across all three systems examined. First, in English law, the instructions addressed to the jury deliberately avoid defining reasonable doubt too precisely, precisely so as not to rigidify deliberation.[12]

In one case, the judge explicitly refused to define for the jury what that standard "beyond any reasonable doubt" means, because, as stated by that court, the notion is a common one and needs not to be explained. In continental systems, where the emphasis falls especially on the reasoning of the judgment, the problem is not the absence of explanation, but its frequently descriptive and vague character. So, the judge starts by stating what evidence exists, and finishes by simply stating that it is convincing enough to overcome the standard. Less often is it shown by the courts why the alternatives no longer hold merit. At this point, the difference between the two ways of understanding "reasonableness" becomes visible, as it is in the way that it is used, not in definitions.

The present study uses this distinction as a starting point. Then, it employs it as a comparative analytical tool. So, the question is how the standard functions in practice, and not whether the standard exists, because the standard is present and relatively identical in all analyzed jurisdictions. In a more concrete approach, the essential question is, thus, how the standard functions, whether as a mechanism for evaluating evidence or, on the contrary, as a formula for legitimizing the outcome. As a useful instrument, the analysis will present an understanding of the standard as an epistemic instrument and will treat its exclusively rhetorical use as incompatible with the requirements of a fair trial.

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[11] Ronald J. Allen and Larry Laudan, "Deadly Dilemmas," *Texas Tech Law Review* 41 (2008): 65–92, https://ttu-ir.tdl.org/items/d520443b-7caa-4f84-8987-edb72d1bc3f1.

[12] Jackson and Summers, *Internationalisation of Criminal Evidence*, 233–38, https://doi.org/10.1017/CBO9781139093606.

3. Different Epistemic Configurations

The analysis of each system is conducted according to two criteria: first, how the notion of reasonable doubt is constructed within the institutional or legal framework, and second, the mechanism through which it is communicated to the adjudicator and the extent to which its application is externally verifiable by a third and objective party. These criteria reveal that the three legal systems differ in procedural design – and this is naturally to be so –, but, more importantly, they generate structurally distinct methodologies of operationalizing the standard.

3.1. United Kingdom

In the common law tradition, the standard "beyond reasonable doubt" is addressed to a jury, which is a group of laypeople who deliberate in private and return a verdict without reasons. The standard is not addressed to a sitting judge, who is required to explain his reasoning in writing. This legal construction has a direct consequence for how the standard functions, which operates as a behavioral instruction, and not as an inferential methodology.

The Crown Court Compendium, which governs judicial directions to juries in England and Wales, illustrates this clearly. It states that the standard is explained through analogy and ordinary language, in which jurors are told to be "sure" of guilt, a phrase which was deliberately chosen over more technical alternatives. So, the emphasis falls here on the quality of the juror's state of mind, and not on the structure of the critical reasoning that will produce it. Moreover, it is neither formally required nor externally verifiable whether the juror has systematically tested alternative hypotheses or not.[13]

The absence of written reasons compounds this problem, consistent with the fact that in a system where the verdict is a single word, guilty or not guilty, there is, nor can be, any textual or evidentiary record of how the standard was applied. So, appellate review cannot examine the reasoning, because there is no reasoning to examine whatsoever, and the standard is structurally insulated from external scrutiny. It functions, but, peculiarly enough, it cannot be observed functioning.

3.2. Italy

The Italian case is distinct because the standard did not develop organically within the system, because it was introduced by legislative intervention through Law no. 46 of 20 February 2006, which inserted the formula *oltre ogni ragionevole dubbio* into article 533 of the Code of Criminal Procedure, requiring,

[13] Judicial College, *Crown Court Compendium*, chap. 5, https://www.judiciary.uk/wp-content/ uploads/2023/06/Crown-Court-Compendium-Part-I-June-2023-updated-Feb-2024.pdf.

thus, acquittal whenever reasonable doubt persists. The transplant was explicit and deliberate in the Italian law.[14]

The tension this generated has not been fully resolved yet. Italian criminal procedure evolved within an inquisitorial tradition, in which the judge plays an active role in fact-finding and is required to produce detailed written reasoning. The legal insertion into the legal framework of a standard developed in a jury-based and adversarial context created a genuine tension. This is because the formula arrived without its institutional features that in the original setting gave it meaning. So, while in common law, the standard is communicated to a jury and verified through the deliberation process, in Italy, it must be operationalized by a professional judge in a written judgment, which is a fundamentally different cognitive and institutional exercise. Thus, this results in a displacement of the standard, moving it from a decision rule to a justificatory constraint, within written reasoning.

Italian courts have attempted to integrate the standard into existing reasoning structures, with some judgments of the Corte di Cassazione developing guidance on what the standard requires in terms of hypothesis-testing. These efforts are significant, but still they have not produced a uniform methodology. What follows is a standard that is present, formally speaking, but applied in variable ways, and its meaning negotiated case by case, rather than anchored in a stable inferential framework.[15]

3.3. Romania

Romania presents a different configuration, because the standard "beyond reasonable doubt" is recognized in Romanian criminal procedure in article 103 par. 2 of the Code of Criminal Procedure, which establishes that conviction requires the court to be convinced of guilt beyond reasonable doubt. So, the normative foundation exists, but the operational question is what happens to it, and how it is applied within the structure of judicial reasoning.

Romanian judgments are required to be reasoned, and the formal struc-

[14] Italy, *Legge 20 febbraio 2006, n. 46*, https://www.normattiva.it/atto/caricaDettaglioAtto?atto.codiceRedazionale=006G0061&atto.dataPubblicazioneGazzetta=2006-02-22&bloccoAggiornamentoBreadCrumb=true&classica=true&dataVigenza=&generaTabId=true&qId=&tabID=&tipoDettaglio=originario&title=lbl.dettaglioAtto.

[15] Italy, Corte Suprema di Cassazione, Sez. IV pen., sent. June 17, 2011, no. 30862, deposited August 3, 2011, CED Cass., Rv. 250903, https://it.vlex.com/vid/corte-di-cassazione-penale-578861538; Italy, Corte Suprema di Cassazione, Sez. II pen., sent. April 8, 2022, no. 25016, deposited June 30, 2022, https://canestrinilex.com/risorse/prova-indiziaria-e-ragionevole-dubbio-cass-2501622. For doctrinal analysis, see Giulio Ubertis, *Principi di procedura penale europea: Le regole del giusto processo*, 2nd ed. (Milan: Raffaello Cortina, 2009), 87–102, https://www.raffaellocortina.it/scheda-libro/ubertis-giulio/principi-di-procedura-penale-europea-9788860302229-707.html.

ture of a criminal judgment includes sections dedicated to the evaluation of evidence. In practice, however, this evaluation tends to be descriptive, rather than inferential, as the court presents the evidence, witness testimony, expert reports, documentary proof, and then affirms that it is convincing enough. In fact, the explicit confrontation with alternative hypotheses is consistently absent and more precisely, the standard is solely attached to the conclusion as a label, and not treated as a threshold that must be reached through a structured process of exclusion. In this configuration, the standard "beyond any reasonable doubt" appears as an axiom, and not as a criterion guiding the evaluation of evidence, as it should be.

This gap has also been identified and highlighted at the level of the European Court of Human Rights, where, in cases concerning Romania, the Court has found violations of Article 6 of the Convention, on grounds of insufficient reasoning. The Court has found judgments that affirm conclusions without demonstrating the inferential path that led to them, in which the standard is invoked, but the methodology it presupposes is not applied.[16]

4. The Procedural Actor and the Architecture of Reasoning

The distinction between jury-based and sitting judge-based adjudication is an epistemic one, and so, not merely institutional, referring to the procedural actor. Thus, the question of who applies the standard "beyond reasonable doubt" determines, in large part, what the standard can require and how its application can be assessed.

In jury-based systems, the standard consists in instructions delivered by the trial judge before deliberation. After this, although the jurors receive the standard as a directive, as a description of the mental state required for conviction, they will apply it collectively, in private, without any obligation to explain how the standard was reached or what evidence was decisive. So, the reasoning process, which is by design invisible or opaque, emerges with a verdict, a conclusion, and not an account or a reasoning of how the verdict or the conclusion were reached.

This architecture has serious consequences, because collective deliberation does not follow in any way the logic of individual inference, which must be more complex and analytical. Thus, a jury of twelve peers reaches its conclusion through a social process, through discussion or persuasion, through the negotiation of competing perceptions, a process that is structurally different from the sequential reasoning of a single adjudicator working through a written judgment. Applied in this context, the standard cannot require what neither the institutional nor the legal framework permits, that is a structured, externally verifiable account

[16] *Boldea v. Romania*, no. 19997/02 (ECtHR, Third Section, February 15, 2007), https://hudoc.echr.coe.int/eng?i=001-79497; *Albina v. Romania*, no. 57808/00 (ECtHR, Second Section, April 28, 2005), https://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122732.

of inferential steps.

The sitting judge operates differently. However, the difference is not as large as it might appear, because a well-reasoned judgment creates the appearance of transparency, without necessarily exposing the inferential structure, which produced the specific conclusion. So, the obligation to give reasons requires that the conclusion be explained, that the evidence be described, its credibility assessed, and the outcome justified. Thus, it does not require, at least not explicitly in any of the three systems examined, that the judge demonstrate how competing factual hypotheses were identified, tested, and, therefore, excluded. A crucial observer would say that the reasoning may be coherent without being inferentially complete, that is, without identifying competing hypotheses and demonstrating why they are excluded.

This produces a common structural issue, as in jury systems, the standard appears to be applied, but cannot be verified, while, on the other hand, in sitting judge-based systems, the reasoning is sought and recorded, but the standard's application within the critical reasoning remains mostly implicit. The two adjudicating configurations generate different kinds of problems, but also share a common deficit, consistent with the fact that neither framework requires the adjudicator to make explicit the inferential mechanism – that is to show, step by step, how the evidence was measured against the standard and why the result was conviction rather than doubt.

The significance of this structural issue becomes clear only when the standard is understood solely as an epistemic instrument, rather than a rhetorical formula. To be more precise, if the "beyond reasonable doubt" standard requires very concrete and applied hypothesis-testing, consisting of the identification and systematic exclusion of alternative accounts, then neither the jury instruction, nor the reasoned judgment, as currently structured, fully satisfy this requirement. This is because either the instruction reaches the jury too late and too generally to structure the evaluation of evidence. Or, either the judgment records the conclusion of a reasoning process whose internal logic remains partly hidden.

The comparison reveals that the standard operates differently across the different moments of the adjudicative process, and not only across systems. So, it is introduced at the deliberation stage in jury systems and it surfaces, in written form, at the judgment stage in sitting judge systems. In neither case is it embedded in the earlier stages of fact-finding, respectively in the construction and testing of factual hypotheses, where, from an epistemic point of view, it would need to be operative, in order to function as a true criterion of evaluation. As such, this dimension of the problem will be developed in Section VI.[17]

In this sense, the adjudicators fail to really use and apply the standard,

[17] Damaška, *Evidence Law Adrift*, 74–90, https://yalebooks.yale.edu/book/9780300206043/evidence-law-adrift/. For the distinction between jury instructions and the obligation to give reasons in continental systems, see also Jackson and Summers, *Internationalisation of Criminal Evidence*, 245–60, https://doi.org/10.1017/CBO9781139093606.

because it is structurally incapable of functioning as a fully operative epistemic criterion, within the existing procedural frameworks, and not in any way because it is undefined.

5. Reasoning as a Proxy for the Standard

As it should be, the standard "beyond reasonable doubt" cannot be observed directly, as it describes mainly an internal state, respectively the absence of a doubt of a certain quality in the mind of the adjudicator, which is eminently subjective and has no independent existence outside the reasoning process that produced it. Still, the only point at which the standard becomes externally accessible and visible is in the written judgment, when the court explains, in terms that can be read, reviewed, or assessed, why it reached a certain conclusion. Therefore, the reasoning of the judgment is the only available proxy for the standard itself, as the best next thing which can be evaluated and subject to criticism, not merely evidence of how the standard was applied. So, if reasoning is the only proxy for the standard, the consequence is that an absent or inadequate reasoning entails that the standard itself cannot be externally verified.

If the standard can only be assessed throughout the reasoning that embodies it, then, logically, the quality of that reasoning becomes the measure of whether the standard was really applied or not. This methodological result is rarely made explicit. So, we will consider that a judgment that invokes the standard, but without demonstrating each inferential step that led to conviction, has not applied the standard and only named it. The difference between one and the other is significant and like the difference between a guarantee and a declaration.

The European Court of Human Rights has approached this problem from a related, but distinct angle. So, the Court's case law on the obligation to give reasons, developed across a substantial body of judicial judgments concerning multiple member states, establishes that Article 6 of the Convention requires courts to indicate, with sufficient clarity, the specific grounds on which they based their decisions. This obligation serves the function of enabling appellate review, of demonstrating to the parties that their arguments have been heard, and, most relevantly for present purposes, of making the reasoning process visible to external scrutiny. It is clear from this that the need to present reasons is not merely a procedural one.[18]

In cases against Romania, the ECHR has found violations of Article 6 precisely on grounds of insufficient reasoning, consistent with the fact that the national courts affirmed guilt without adequately and critically demonstrating the path which led them from evidence to conclusion. The conclusions confirm, from an external institutional perspective, the gap identified earlier, in Section III, respectively that the standard is formally present in Romanian criminal procedure,

[18] *Taxquet v. Belgium*, §§ 90–92, https://hudoc.echr.coe.int/eng?i=001-101739.

but its application is not consistently reflected in the structure of written judgments.[19]

The Italian and United Kingdom contexts present different versions of the same underlying problem. So, in Italy, the obligation to reason is well-established in the legal framework. Moreover, judgments are typically detailed from this point of view, which excludes the issue of the absence of reasoning, but still leaves the inferential quality one. For the standard to truly operate, it has to be established whether the judgment firstly identifies competing hypotheses and then explains why they are excluded on the basis of the evidence.[20]

In the United Kingdom, the problem is more structural and less qualitative, because the absence of written jury reasoning means that the proxy is simply unavailable. Therefore, there is no direct reasoning to assess, no reasoning to review, and no record, from which the application of the standard can be inferred.[21]

This comparison will reveal that the proxy function of reasoning operates very differently across the three systems. In Romania, the proxy exists, but is frequently inadequate or used in a descriptive or vague way. In Italy, the proxy is formally sufficient, but inferentially incomplete in the sense developed in Section IV. And last, in the United Kingdom, the proxy is absent by design. But, consistently, in all three jurisdictions, the result is the same and the standard cannot be truly verified as having been applied in its epistemic sense, as an essential criterion that conducts the movement from evidence to conviction.

This convergence across jurisdictions that are structurally different is significant and tends to suggest that the inadequacy of the proxy is a structural characteristic of how criminal adjudication is organized across legal traditions, and not a contingent feature of any particular jurisdiction. While the standard is present everywhere, the methodology that would make its application visible, and therefore verifiable, is not systematically articulated in any of the examined systems.

6. The Absence of an Explicit Inferential Methodology

The preceding sections have already established that the standard "be-

[19] *Boldea v. Romania*, https://hudoc.echr.coe.int/eng?i=001-79497; *Albina v. Romania*, https:// hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122732.

[20] Cass. pen., Sez. IV, no. 30862/2011, https://it.vlex.com/vid/corte-di-cassazione-penale-578861538; Cass. pen., Sez. II, no. 25016/2022, https://canestrinilex.com/risorse/prova-indiziaria-e-ragionevole-dubbio-cass-2501622.

[21] *Taxquet v. Belgium*, §§ 83–92, https://hudoc.echr.coe.int/eng?i=001-101739. See also Stephen C. Thaman, "Should Criminal Juries Give Reasons for Their Verdicts? The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium," *Chicago-Kent Law Review* 86, no. 2 (2011): 613–68, https://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/8/.

yond reasonable doubt" is formally recognized across all three examined systems, that it is delivered differently depending on the procedural actor, and that its application can only be assessed through the reasoning it is supposed to generate. However, a more fundamental question still remains to be examined, namely whether the conditions for the standard's application exist at all, because we already stated that the correctness of its application varies.

The argument developed here is that they frequently do not, because, before a court can determine whether guilt has been established beyond reasonable doubt, it must first have constructed a clear account of the competing factual hypotheses. The judge must establish what, precisely, might have happened, and what the evidence says about each possibility. This is a prior and distinct cognitive operation, and not part of applying the standard. Without this prior operation, the standard cannot function as a criterion of evaluation, because the set of alternatives it is meant to exclude has not been truly defined. Without an explicit mapping of competing hypotheses, the standard operates in a vacuum: it is invoked at the end of the judicial reasoning process, which never identified what needed to be excluded in the first place.

It is important to say that this prior operation, namely the systematic construction and testing of competing factual hypotheses, is not explicitly required or systematically structured within any of the procedural frameworks of all three examined systems. None of the three codes of criminal procedure examined prescribes a methodology for how the adjudicator should identify, formulate, or evaluate competing accounts of the facts before reaching a conclusion. Moreover, none of them have explicit references to the possible competing factual hypotheses. The legal frameworks concerning the evaluation of evidence are regulated in more primitive ways from an epistemic point of view, in terms of admissibility and weight, but the inferential architecture that would connect evidence to hypothesis, and hypothesis to conclusion, is left to the unarticulated judgment of the adjudicator.[22]

The consequences are significant and follow directly from the structure of the problem, respectively if the adjudicator does not explicitly map competing hypotheses, then there is no basis on which to assess whether those hypotheses have been genuinely excluded or not. We can confidently state that a judgment that concludes that guilt is established beyond reasonable doubt without having identified the alternative accounts that the standard requires to be excluded has not applied the standard, but merely has assumed the conclusion the standard was meant to test. So, the standard becomes circular and it is considered satisfied by the very act of conviction it was designed to constrain.

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[22] Damaška, *Evidence Law Adrift*, 16–20, https://yalebooks.yale.edu/book/9780300206043/evidence-law-adrift/; Craig R. Callen, "Cognitive Strategies and Models of Fact-Finding," in *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*, ed. John Jackson, Máximo Langer, and Peter Tillers (Oxford: Hart Publishing, 2008), 165–78, https://toc.library.ethz.ch/objects/pdf/z16_978-1-84113-682-0_01.pdf.

In the United Kingdom, the jury instruction communicates the standard as a description of a required mental state, but provides no guidance on the prior question of how competing accounts of the facts should be constructed and evaluated before that mental state is reached, which we consider to be a sine qua non requirement which needs to be necessarily established.[23]

Meanwhile, in Italy, the post-reform jurisprudence of the Corte di Cassazione has developed criteria for analyzing the logical adequacy of reasoning about alternative hypotheses. Still, these criteria have important temporal limitations, because they operate at the level of appellate review and they identify defective reasoning after the first court's decision, without prescribing a methodology for sound reasoning before it.[24]

In Romania, the structure of the criminal judgment consists of a format in which evidence is described and then assessed, from which is missing the explicit identification of competing factual hypotheses and the demonstration of why each one is excluded. Besides the fact that these requirements are not a formal requirement, they rarely are present in the judicial practice.[25]

So, a standard that requires the exclusion of reasonable doubt presupposes in the first place that doubt has been articulated and so that the alternative possibilities have been named, examined, and found to be without sufficient support in the evidence. Where this kind of articulation is absent, the standard cannot truly perform its epistemic function, and can only perform its rhetorical one, by announcing, at the conclusion of the judgment, that the required threshold has been reached.

This is the point at which the distinction between the epistemic and rhetorical models of the standard, developed previously in Section II, acquires its full analytical force. Essentially, the absence of an explicit inferential methodology is a structural feature of how criminal adjudication is organized across different legal traditions, and not a contingent failure of individual judges or particular systems. Although the standard is present, the methodology that would make its application meaningful is not systematically articulated in any of the examined systems. As a result and in consequence, in the judicial practice, the rhetorical model emerges as the dominant mode of operation, where the standard functions as a formula of conclusion rather than as an instrument of reasoning.

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[23] Judicial College, *Crown Court Compendium*, chap. 5, https://www.judiciary.uk/wp-content/uploads/2023/06/Crown-Court-Compendium-Part-I-June-2023-updated-Feb-2024.pdf.

[24] Cass. pen., Sez. IV, no. 30862/2011, https://it.vlex.com/vid/corte-di-cassazione-penale-578861538; Luca Marafioti, "Italian Criminal Procedure: A System Caught Between Two Traditions," in *Crime, Procedure and Evidence in a Comparative and International Context*, ed. John Jackson, Máximo Langer, and Peter Tillers (Oxford: Hart Publishing, 2008), 81–98, https://toc.library.ethz.ch/objects/pdf/z16_978-1-84113-682-0_01.pdf.

[25] Romania, *Codul de procedură penală*, Law no. 135/2010, Monitorul Oficial, Part I, no. 486 (July 15, 2010), art. 103, https://legislatie.just.ro/Public/DetaliiDocumentAfis/120611; *Boldea v. Romania*, https://hudoc.echr.coe.int/eng?i=001-79497.

7. The Standard as a Mechanism of Legitimation

The arguments presented until now lead to the strong conclusion that in all three examined legal frameworks, the standard "beyond any reasonable doubt" does not consistently function as an epistemic instrument, as a criterion that governs the evaluation of evidence and structures the movement from proof to conviction. In fact, the standard acts as a formula that ratifies conclusions reached through reasoning processes that the standard itself was never asked to govern, functioning solely as a post factum mechanism of legitimation.

The consequence is a specific form of institutional failure. This is because when a standard of proof operates as a mechanism of legitimation rather than as a criterion of evaluation, it loses its capacity to function as a guarantee against erroneous conviction or against conviction based on a descriptive reasoning. And, as it is known, the lack of the reasoning in the court's decision is contrary to Article 6 of the Convention. So, a guarantee must be capable of being applied and of being seen to be applied. Also, a formula that is invoked after the conclusion has been reached provides neither, because it validates, but does not constrain.

This dynamic is visible across all three systems, although in different ways of manifestation. In the UK, the standard is delivered to the jury as behavioral instructions. Thus, it cannot be directly observed in any reasoning that follows from it. The verdict legitimizes itself through the institutional authority of the jury, not through a demonstrable application of the standard.[26]

Italy has the standard present in the written judgment, but the tension between its Anglo-Saxon origin and the inquisitorial tradition of the system has produced a jurisprudence that treats it primarily as a criterion of appellate review rather than as a structuring principle of first-instance reasoning. This results in a displacement of the standard from a decision rule to a justificatory constraint within written reasoning.[27]

In Romania, the standard appears in the final part of judgments as a stated conclusion, but not demonstrated, confirming the pattern identified in Sections III and VI.[28]

We argue that the costs of this configuration are not merely theoretical, because, where the standard operates as a legitimating formula rather than as an

[26] Judicial College, *Crown Court Compendium*, chap. 5, https://www.judiciary.uk/wp-content/ uploads/2023/06/Crown-Court-Compendium-Part-I-June-2023-updated-Feb-2024.pdf; *Taxquet v. Belgium*, §§ 83–92, https://hudoc.echr.coe.int/eng?i=001-101739.

[27] Cass. pen., Sez. IV, no. 30862/2011, https://it.vlex.com/vid/corte-di-cassazione-penale-57886 1538; Marafioti, "Italian Criminal Procedure," 81–98, https://toc.library.ethz.ch/objects/pdf/z16_ 978-1-84113-682-0_01.pdf.

[28] Romania, *Codul de procedură penală*, art. 103, https://legislatie.just.ro/ Public/DetaliiDocument Afis/120611; *Boldea v. Romania*, https://hudoc.echr.coe.int/eng?i=001-79497.

evaluative criterion, the risk of erroneous conviction is not reduced by the standard's invocation. On the contrary even, it is concealed by it. So, the appearance of compliance with a demanding threshold substitute for actual compliance. Moreover, this substitution is structurally produced, which means it cannot be corrected by improving the quality of individual judicial reasoning alone. Therefore, it cannot be remedied without reconfiguring the role of the standard within the reasoning process itself. The structural lack requires a more fundamental reconsideration concerning how the standard is embedded in the architecture of criminal adjudication.[29]

8. Toward a Methodology of Evidentiary Reasoning: A Normative Direction

The findings of this study do not point toward legislative reform. Moreover, the problem identified is not even that the standard "beyond reasonable doubt" is incorrectly defined in any of the three examined systems. On the contrary, the main issue is that the standard lacks the methodological infrastructure that would make its application meaningful. So, the normative direction that follows from this diagnosis is accordingly methodological, and not a legislative one.

What is required is a theory of evidentiary reasoning, which is a structured account of the cognitive operations that must always precede the application of the standard. Such a theory would need to address, at minimum, three connected requirements, as we will argue. First, and maybe the most important one, the explicit identification of competing factual hypotheses. This is to say, before the standard can be applied, the adjudicator – judge or jury – must articulate the alternative accounts of the facts which the evidence makes available.

Second, the systematic evaluation of each hypothesis against the available evidence. This has to be a structured examination of what the evidence supports, what it excludes, and what it leaves open, always comparing with each hypothesis. A global assessment of whether the prosecution's account is convincing does not constitute sufficient systematic evaluation.

Third, and here the standard will be more obvious, the explicit demonstration of why the alternatives have been excluded from the judicial reasoning. So, the adjudicator has to show all the inferential steps through which each alternative was found to be without sufficient evidentiary support, and therefore, an assertion that doubt has been overcome is not sufficient enough. Without these elements, the standard cannot function as a criterion of proof, because it lacks the structure required to guide the evaluation of evidence.[30]

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[29] Allen and Laudan, "Deadly Dilemmas," 65–92, https://ttu-ir.tdl.org/items/d520443b-7caa-4f84-8987-edb72d1bc3f1.

[30] Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006), 28–55, https://doi.org/10.1017/CBO9780511617515; Ho, *Phi-*

As we stated previously, this methodological infrastructure is not intended to be a proposal for a new procedural rule, because courts in all three systems already produce reasoning that approximates these requirements in some individual cases. And this is exactly the point, namely that approximation is not enough. Where the requirements are not systematically demanded, as in where their satisfaction is a matter of individual judicial practice rather than institutional obligation, the standard cannot perform its epistemic function with consistency. Therefore, a guarantee that operates only when individual adjudicators choose to apply it rigorously is not, in any meaningful sense, a guarantee at all.[31]

We already stated that these lacks of an explicit inferential methodology are present in all three legal jurisdictions, which cannot be a coincidence, given the structural differences between the three legal systems. And that the issue is about the structural feature of how criminal adjudication is organized across legal traditions. So, what can be done?

We consider that the development of a methodology of evidentiary reasoning is properly a task for comparative legal scholarship, which can use different institutional jurisdictions and reasoning traditions of multiple systems to construct a framework that is both theoretically sound and institutionally adaptable.[32]

The present study does not undertake this kind of construction, given that its contribution is more precisely defined, namely to identify the problem with sufficient analytical clarity to make its resolution possible. Also, it needs to argue and to prove, mainly through comparative analysis, that the gap between the standard's formal presence, already proven, and its operational reality is a structural condition of criminal adjudication as currently organized, and not in any way just an accident of any particular legal tradition. Until these conditions are made explicit, the standard will continue to operate less as a measure of proof, than as a language of justification.

9. Conclusions

In the beginning, this study set out to examine whether the standard "beyond reasonable doubt" acts as a real epistemic instrument or, on the contrary, primarily as a mechanism of legitimation in criminal adjudication. The comparative analysis of three distinct systems, the U.K., Italy, and Romania, has pro-

losophy of Evidence Law, 89–110, https://global.oup.com/academic/product/a-philosophy-of-evidence-law-9780199228300.

[31] Damaška, *Evidence Law Adrift*, 16–20, https://yalebooks.yale.edu/book/9780300206043/evidence-law-adrift/; Jackson and Summers, *Internationalisation of Criminal Evidence*, 245–60, https://doi.org/10.1017/CBO9781139093606.

[32] John Jackson, Máximo Langer, and Peter Tillers, eds., *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Oxford: Hart Publishing, 2008), https://www.bloomsbury.com/us/crime-procedure-and-evidence-in-a-comparative-and-international-context-9781841136820/.

duced arguments and conclusions which are consistent across institutional configurations that are otherwise significantly different.

The central finding of this study is that the standard, in all three systems, operates at the level of formula rather than methodology. It lacks, in each case, the inferential infrastructure that would give the standard operational content, as in the explicit identification of competing factual hypotheses, their systematic evaluation against the evidence, and the demonstrated exclusion of alternatives. In their absence, the standard merely accompanies reasoning, but does not guide it.

The second finding concerns the role of the procedural actor. Although the distinction between jury-based and sitting judge-based adjudication generates structurally different configurations of the problem, the problem still remains. In jury systems, the standard is delivered as a behavioral directive and cannot be externally verified. In bench or sitting judge-based systems, the obligation to give reasons creates the appearance of transparency, but without necessarily exposing the inferential structure that produced the conclusion. Therefore, in both configurations, the standard operates to ratify conclusions, rather than govern the reasoning that leads to them.

The third finding is a methodological one and it concerns the proxy function of judicial reasoning, which is the only available means of assessing whether the standard has been applied. Our conclusions state that the standard operates inadequately across all three systems, though in different ways. For example, in Romania, the proxy exists, but is frequently descriptive, rather than inferential, while in Italy, it is formally present, but inferentially incomplete. Meanwhile, in the U.K., it is structurally absent. So, the convergence of this inadequacy across systems that differ significantly in their procedural architecture suggests that the problem is a structural one, and not contingent.

The fourth and principal finding brings the preceding three into focus, because the standard "beyond reasonable doubt", as currently operationalized by the three jurisdictions, functions predominantly as a mechanism of legitimation, rather than as a criterion of evaluation, and it does not consistently structure the critical and logical movement from evidence to conviction. What it does is to validate that movement after it has occurred.

The implications of these findings extend in two main directions. For legal theory, they suggest that the standard of proof cannot be properly analyzed in isolation from the reasoning framework, within which it is always meant to operate. Therefore, a standard without a methodology is only a formula. Secondly, for comparative legal scholarship, they suggest that the development of a structured theory of evidentiary reasoning, which can prescribe the cognitive operations required before the standard is applied, is both necessary and properly comparative in its scope. No single system provides a sufficient model, because the construction of such a framework requires drawing on the institutional structure and reasoning traditions of multiple legal cultures. The present study has

identified the problem and defined its dimensions, so what remains is to build what is currently missing.

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II. Legislation

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The Supervisory Judge and the Execution of Penal Sentences. A Comparative Analysis Between Romania and Italy

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Abstract

The concern for the legality of serving prison sentences, for ensuring and respecting human rights and dignity in the penitentiary system, materialized in specific international recommendations transposed in national regulations for each country and for each penitentiary system. Both Romania and Italy are Latin countries and they share not only cultural and historical features, but also public policies and regulation, including in the field of criminal law. In the matter of control and legality of penitentiary sentences, both Romania and Italy have established a special jurisdiction institution - the supervisory judge for the penitentiary system, that in Italy is known as "Magistrato di sorveglianza" and in Romania is defined as "Judecătorul de supraveghere". As we can observe, even the title of the institution that supervises prison sentences in these two countries is similar. This paper examines the role of the supervisory judge in the execution of custodial sentences through a comparative analysis between the Italian and Romanian legal systems. It argues that the execution of custodial sentences is not merely an administrative process, but a legal one, in which judicial control plays a decisive role in ensuring the effective protection of inmates' rights. This research recreates the map of imposing and developing the special jurisdiction of the supervisory judge for the penitentiary system and drives a comparative analysis of subsequent regulations and procedures, highlighting similarities, special features and differences, as well as public policies and good practices for both penitentiary systems. The results indicate that, while both systems recognize the importance of judicial oversight, the Italian model reflects a more consolidated and functionally complex structure, whereas the Romanian system remains in a process of institutional consolidation. The paper also emphasizes the necessity of strengthening internal judicial mechanisms in order to transform international human rights standards into concrete realities within imprisonment.

Keywords: *penitentiary system, criminal law, special jurisdiction, human rights, judicial oversight.*

1. Introduction

Although international law does not expressly enshrine the institution of a supervisory judge for the execution of prison sentences, UN standards require the existence of effective, independent and accessible judicial control over detention[2], which makes the institution of a specialized judge the most appropriate and

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[2] United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any*

coherent solution for compliance.

One of the most representative legal instruments that codifies fundamental human rights standards for inmates is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988[3]. It serves as a global benchmark for humane treatment in detention, providing safeguards against arbitrary or abusive practices and aiming to protect the rights and dignity of all detained or imprisoned persons.

By correlating Principle 11 and Principle 32[4], UN sets specific recommendations for a judicial authority to review, as appropriate, the continuance of detention, the right of the inmate to take proceedings before a judicial authority to challenge the lawfulness of his detention and the obligation of the detaining authority to present the inmate before the reviewing authority.

According to Bakulin's research on control and supervision of penitentiaries, which indicates N. P. Kovalyov's models of correctional organization, we can identify at least five institutional models of correctional systems in the world[5]. Apparently, Romania and Italy share the same model, where the correctional system is administered by the Ministry of Justice, it is accessible for control and supervision and therefore judicial control over the execution of sentences is meant to assure the lawfulness of detention for individuals deprived of liberty, as the European Convention on Human Rights establishes through Article 5[6], in relation to the right to liberty and security.

Also, Rule 9 of the Revised Rules and Commentary to Recommendation CM/Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules establishes the importance of independent monitoring of prisons[7] in order to ensure compliance with national law and to protect the rights of inmates, in the same manner as Nelson Mandela Rule 83.2[8] requires.

Form of Detention or Imprisonment, GA Res. 43/173 (December 9, 1988), principle 4, https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention.

[3] United Nations General Assembly, *Body of Principles*, https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention.

[4] United Nations General Assembly, *Body of Principles*, principles 11 and 32, https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention.

[5] Valery Konstantinovich Bakulin, "Control and Supervision over Penitentiary Systems in France and the USA," *Astra Salvensis* 5, no. 10 (2017): 36–37, https://astrasalva.files.wordpress.com/2017/12/astra-salvensis-year-v-no-10.pdf.

[6] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5 (Rome, November 4, 1950), art. 5, https://www.echr.coe.int/documents/d/echr/convention_ENG.

[7] Council of Europe, Committee of Ministers, Recommendation Rec(2006)2-rev on the European Prison Rules, adopted January 11, 2006, revised July 1, 2020, rule 9, https://rm.coe.int/revised-rules-and-commentary-to-recommendation-cm-rec-2006-2-of-the-co/16808d7b5e.

[8] United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res. 70/175 (December 17, 2015), rule 83(2), https://

The European Court of Human Rights frequently rules on cases confirming that national systems must provide effective judicial supervision of detention[9] and this matter is highlighted in the critical analysis report published in December 2023, *European interventions on systemic problems in prison systems*, based on a comparative analysis of nine EU countries[10].

However, despite the existence of these international standards and mechanisms, the effective protection of inmates' rights remains dependent on the capacity of domestic legal systems to ensure their concrete implementation. In this context, the question arises as to what institutional mechanisms are capable of transforming these normative requirements into practical realities within penitentiary systems.

This paper examines the institution of the supervisory judge for the execution of custodial sentences as a possible answer to this challenge, through a comparative analysis of the Romanian and Italian legal systems. It argues that the execution of custodial sentences is not merely an administrative process, but a deeply legal one, in which judicial control plays a decisive role in structuring the experience of detention and ensuring the effective protection of fundamental rights.

The research aims to identify the manner in which this institution has developed in the two systems, to highlight their similarities and differences and to evaluate the effectiveness of the supervisory judge as a mechanism for the internalization of international human rights standards within the penitentiary framework.

2. The Romanian Supervisory Judges' Historic and Legislative Evolution

The first form of supervision model for penitentiary sentences was introduced in Romanian legislation through Law no. 275 *of* 4 July 2006, which established the institution of the delegated judge for the execution of custodial sentences[11].

Article 6 of the aforementioned law establishes that the execution of sentences is carried out under the supervision, control and authority of the delegated judge, designated by the president of the court of appeal annually for each penitentiary located within the territorial jurisdiction of the court of appeal. The

www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

[9] Nicolas Ferran, "La personne détenue encore à la recherche de son juge en France," *Déviance et Société* 38, no. 4 (2014): 470–72, https://doi.org/10.3917/ds.384.0469.

[10] European Prison Litigation Network, *European Interventions on Systemic Problems in Prison Systems: A Critical Analysis* (December 2023), 5–10, https://www.prisonlitigation.org/wp-content/uploads/2023/12/d8_research-report-1.pdf.

[11] Romania, Law No. 275/2006 on the Execution of Sentences and Measures Ordered by Judicial Bodies during Criminal Proceedings, Monitorul Oficial, Part I, no. 627 (July 20, 2006), https://legislatie.just.ro/Public/DetaliiDocument/73604.

power conferred to the delegated judge by the aforementioned law includes resolving detainees' complaints regarding the establishment and change of the regime for the execution of custodial sentences, the exercise of legal rights and the disciplinary sanctions applied by the penitentiary administration. Also, conditional release can be granted, always in accordance with the procedure provided for in the Code of Criminal Procedure, and the proposal for conditional release can be made by a special commission inside the penitentiary, with the participation of the delegated judge as chairman.

This initial legislative framework reflects a first attempt to introduce judicial oversight in the execution of custodial sentences, although the role of the delegated judge remained functionally limited and closely connected to the administrative structure of the penitentiary system[12].

Law no. 254 *of* 19 July 2013[13] clarifies a series of issues raised in the practice of applying the previous regulations on the execution of sentences and redefines the way in which the judge supervises the deprivation of liberty. The new law gives to the delegated judge for the execution of custodial sentences a new, more concise and suggestive name – *supervisory judge for custodial sentences* – and establishes a more clearly defined jurisdiction over penitentiaries, detention and pre-trial detention centers, as well as educational and detention centers.

Also, the aforementioned legislative act contains regulations regarding the designation of substitutes and clerks and includes a list of all the powers conferred to the supervisory judge, clearly delimiting administrative activity from the administrative-jurisdictional one. The institution of the supervisory judge for custodial sentences thus contributes to consolidating an efficient control of the execution of custodial sentences and measures[14].

This legislative reform marks a transition from a predominantly administrative model of supervision to a more structured and legally defined form of judicial control, strengthening the position of the supervisory judge within the penitentiary system.

In exercising his legal authority, the supervisory judge may now hear any person, may request information or documents from the prison administration, may conduct on-site checks and has access to the individual files of detainees, as well as to records and other relevant documents.

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[12] Alexandru Șerban, "Judecătorul delegat pentru executarea pedepselor privative de libertate: statut, atribuții, acte," *Revista de Științe Juridice*, no. 3 (2009): 47–49, https://drept.ucv.ro/RSJ/images/articole/2009/RSJ3/A04SerbanAlexandru.pdf.

[13] Romania, Law No. 254/2013 on the Execution of Sentences and Measures of Deprivation of Liberty Ordered by Judicial Bodies during Criminal Proceedings, Monitorul Oficial, Part I, no. 514 (August 14, 2013), https://legislatie.just.ro/Public/DetaliiDocument/150699.

[14] Lorena Alexandra Avram and Adrian Fanu-Moca, "Jurisdicția specială administrativă a judecătorului de supraveghere a privării de libertate," *Universul Juridic*, 2023, web version published August 23, 2024, https://www.universuljuridic.ro/jurisdictia-speciala-administrativa-a-judecatorului-de-supraveghere-a-privarii-de-libertate/.

These competences illustrate the gradual expansion of the supervisory judge's role, confirming the tendency of the Romanian system to move towards a more active and interventionist model of judicial oversight[15].

3. The Italian Supervisory Judges' Historic and Legislative Evolution

Article 144 of the Criminal Code[16] was enacted by decree and published in 1930, and it regulated the judiciary's oversight of prison sentences, entering into force on 1 July 1931.

The prison supervisory judge's first legal form was created by the 1931 Regulations for Prevention and Penal Institutions[17]. Administrative functions were performed by the supervisory judge under the Ministry of Justice, which included inspection, deliberation and consultation. The supervisory judge was also granted the ability to apply security measures.

At this early stage, the supervisory judge's role was primarily administrative, reflecting a model in which judicial control over the execution of sentences was still limited in scope and closely connected to the executive authority[18].

Although the initial prison reform bill was introduced in 1960, it was not until the 1970s that the process of establishing a jurisdictional framework for the execution of sentences began. A key moment in this process was the Constitutional Court's ruling no. 204 of 27 June 1974[19]. According to the Court, Article 27 paragraph 3 of the Constitution sets a mandatory obligation for the legislator to take into account not only the rehabilitative purpose of punishment, but also to provide all the appropriate means and legal guarantees necessary to achieve it.

This decision played a fundamental role in redefining the legal nature of the execution of sentences, emphasizing its judicial dimension and the necessity of effective guarantees for inmates' rights[20].

One year later, the promulgation of Law No. 354 of 26 July 1975[21], also

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[15] Șerban, "Judecătorul delegat," 48–49, https://drept.ucv.ro/RSJ/images/articole/2009/RSJ3/A04SerbanAlexandru.pdf.

[16] Italy, Regio Decreto 19 ottobre 1930, n. 1398, *Approvazione del testo definitivo del Codice penale*, Gazzetta Ufficiale no. 251 (October 26, 1930), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1930-10-19;1398.

[17] Italy, Regio Decreto 18 giugno 1931, n. 787, *Regolamento per gli istituti di prevenzione e di pena*, Gazzetta Ufficiale no. 147 (June 27, 1931), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1931-06-18;787.

[18] Daniela Ronco, "The Italian Supervisory Court's Professional Culture and Practices: Among Legal Norms, Bureaucratization, and Prison Moral Environment," *Oñati Socio-Legal Series* 15, no. 4 (2025): 1323–24, https://doi.org/10.35295/osls.iisl.2037.

[19] Italy, Corte costituzionale, Sentenza no. 204, decided June 27, 1974, deposited July 4, 1974, https://giurcost.org/decisioni/1974/0204s-74.html.

[20] Ferran, "La personne détenue," 469–70, https://doi.org/10.3917/ds.384.0469.

[21] Italy, Legge 26 luglio 1975, n. 354, *Norme sull'ordinamento penitenziario e sulla esecuzione*

known as the Prison Administration Act, established both a single-judge body and a collegiate body: the supervisory judge and the supervisory court. The supervisory court was composed of two honorary judges and two supervisory judges, one of whom had to be the supervisory judge with jurisdiction over the convicted or interned person involved in the proceedings. The section operated logistically and administratively from the supervisory office located in the district capital, enjoyed functional autonomy, had exclusive jurisdictional functions and, in particular, was responsible for deciding on alternative measures to detention.

This reform represents a decisive step in the institutionalization of judicial control, introducing a dual structure that combines monocratic and collegial functions, a feature that distinguishes the Italian system from other models[22].

Law No. 1 of 12 January 1977[23] concerned amendments to the Prison Administration Act and granted the supervisory judge accounting autonomy, supporting the idea that the supervisory office is a judicial office distinct from ordinary courts.

Law No. 663 of 10 October 1986[24], also known as the Gozzini Law, reaffirmed the status of the supervisory judge as a specialized judge, and the President of the Supervisory Court was granted the ability to assign magistrates and administrative staff to the supervisory offices. The same law also replaced the term "supervisory court" with "supervisory tribunal". The Gozzini Law established that the supervisory judge could issue ordinances or decrees, which are typically jurisdictional acts. This eliminated the previous uncertainty regarding the role of the supervisory judge as either a body of the penitentiary administration or a jurisdictional body.

Through this reform, the supervisory judge was clearly positioned within the judicial sphere, consolidating its status as an independent authority responsible for the legality of the execution of sentences[25].

More recent legislation is re-evaluating the role of the single-judge body of the supervisory judge by attributing to it significant new judicial powers, such as the ability to grant early release, to order expulsion, to suspend the execution of sentences or to temporarily apply house arrest.

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delle misure privative e limitative della libertà, Gazzetta Ufficiale no. 212 (August 9, 1975), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1975-07-26;354.

[22] Mary Rogan, "Prison Inspection and Monitoring: The Need to Reform European Law and Policy," *European Journal on Criminal Policy and Research* 27 (2021): 286–87, https://doi.org/10.1007/s10610-019-09420-8.

[23] Italy, Legge 12 gennaio 1977, n. 1, *Modificazioni alla legge 26 luglio 1975, n. 354, sull' ordinamento penitenziario, e all'articolo 385 del codice penale*, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1977-01-12;1.

[24] Italy, Legge 10 ottobre 1986, n. 663, *Modifiche alla legge sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*, Gazzetta Ufficiale no. 241 (October 16, 1986), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1986-10-10;663.

[25] Eva Aizpurua and Mary Rogan, "Rights Protection in Prisons: Understanding Recommendations-Making by Prison Inspection and Monitoring Bodies in the European Union," *Punishment & Society* 23, no. 4 (2021): 456–57, https://doi.org/10.1177/14624745211020818.

This evolution demonstrates the continuous expansion of the supervisory judge's competences, confirming the transformation of this institution into a central actor of judicial control in the execution of custodial sentences[26].

4. Comparative Aspects of the Supervisory Judge in Italy and Romania

A comparative analysis of the main features and historical evolution of the supervisory judge in Italy and Romania has the potential to reveal both structural convergences and significant functional divergences between the two systems.

While both legal frameworks recognize the necessity of judicial oversight in the execution of custodial sentences and assign the supervisory judge a central role in safeguarding inmates' rights, the institutional development and operational scope of this function differ considerably, as will be highlighted in the following analysis**.**

In Italy, a supervisory court was created in each district of the Court of Appeal by the Gozzini Law of 1986. The decree of 22 September 1988 approving the Code of Criminal Procedure, which entered into force on 24 October 1989, established that the court is composed of all the supervisory judges in the district offices and honorary judges (experts in psychology, social work, pedagogy, psychiatry, clinical criminology, or professors of criminal sciences), appointed for renewable three-year terms by the Superior Council of the Judiciary in a number adequate to the needs of the service, upon recommendation of the President of the supervisory court.

In this judicial framework, the Italian judging panel is composed of the President, a second supervisory judge and two experts. In the event that the President is absent or incapacitated, he or she is replaced by the supervisory judge who follows him or her in terms of judicial functions and, in the event of equal functions, in terms of seniority. Decisions are made by order in chambers and, in the event of a tie, the President's vote prevails. The supervisory court performs exclusively jurisdictional functions both in first instance and in appeal proceedings[27].

In first instance, the supervisory court decides on granting conditional release, admission to house arrest, admission to semi-liberty, as well as on the revocation or declaration of termination of sentence reduction for early release.

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[26] Ciara O'Connell and Mary Rogan, "Monitoring Prisons in Europe: Understanding Perspectives of People in Prison and Prison Staff," *Law & Social Inquiry* 48, no. 1 (February 2023): 206–7, https://doi.org/10.1017/lsi.2021.86.

[27] Italy, Decreto del Presidente della Repubblica 22 settembre 1988, n. 447, *Approvazione del codice di procedura penale*, Gazzetta Ufficiale no. 250 (October 24, 1988), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1988-09-22;447; Ronco, "Italian Supervisory Court's Professional Culture," 1324–25, https://doi.org/10.35295/osls.iisl.2037.

The supervisory court also decides on appeals against the decisions of the supervisory judge.

At this stage of the analysis, the Italian system already appears as a consolidated and structurally complex model of judicial supervision[28]. The Italian system reflects a consolidated institutional and procedural framework, while the Romanian system had not yet developed a comparable specialized mechanism of judicial supervision in the execution of custodial sentences.

According to the article[29] published by Dr. Alexandru Șerban, the first entitlement used in Romanian legislation for the supervisory judge – the delegated judge for the execution of custodial sentences – could easily generate confusion with the delegation provided for in art. 57 of Law no. 303/2004 on the status of judges and prosecutors, and induces the idea of a judge delegated by penitentiaries. In reality, these judges are designated to carry out specific tasks within the judiciary system and are not part of the public authorities whose acts they supervise and control in terms of compliance with the law. According to their constitutional and legal status, Romanian delegated judges are part of the judicial power and fulfill special duties regulated by the law on the execution of sentences.

The Romanian delegated judge was granted specific attributions such as resolving complaints of inmates, resolving requests and notifications regarding the change of execution regimes, hearing inmates, proposing or ordering legal measures in cases of food refusal, receiving information on the application and lifting of immobilization measures, and chairing the penitentiary commission in the internal procedure for conditional release.

In comparison, this initial Romanian model reflects a more limited and predominantly reactive form of judicial involvement in the execution of prison sentences.

The Romanian model for the supervision of prison sentences initially developed under the form of a delegated judge reflected a more limited and functionally narrower approach compared to the already structured Italian system.

The second entitlement used in Romanian legislation, according to Law no. 254/2013, is the supervisory judge of deprivation of liberty. The Romanian supervisory judge is appointed by the president of the court of appeal in whose territorial jurisdiction the penitentiary is located. One or more supervisory judges are appointed annually, together with one or more substitute judges. In order to ensure the performance of the activity, the president of the court of appeal also appoints clerks and deputy clerks. The law imposes on the penitentiary administration and on the Ministry of Justice the obligation to provide the space and material means necessary for the proper performance of the activity.

[28] Rogan, "Prison Inspection and Monitoring," 286–87, https://doi.org/10.1007/s10610-019-09420-8.

[29] Șerban, "Judecătorul delegat," 47–49, https://drept.ucv.ro/RSJ/images/articole/2009/RSJ3/A04SerbanAlexandru.pdf.

The Regulation of 23 January 2014 on the organization of the activity of the Romanian prison supervisory judge, issued by the Superior Council of the Judiciary, established the framework for the organization of this activity. In exercising his or her duties, the supervisory judge is independent, impartial, subject only to the law, and cannot carry out other activities at the court to which he or she was appointed. The regulation also establishes that any person, organization, authority or institution is obliged to respect the independence of the supervisory judge and to provide the documents and information requested. The supervisory judge is granted two types of powers: administrative-jurisdictional and administrative. The clerk designated to assist the judge participates in the administrative-jurisdictional activity and supports the judge in the exercise of his or her duties.

This reform indicates a clear tendency towards strengthening the legal nature of the institution and marks a significant step in aligning the Romanian system with European models, bringing it closer, at least structurally, to the Italian supervisory framework[30].

In Italy, supervisory offices are located in fifty-six territorial units corresponding to judicial districts and include judges from courts of appeal, tribunals and, following the amendment introduced by the Gozzini Law, cassation courts. Each office benefits from independent administrative staff. The judges assigned to these offices form part of their organizational structure, while also contributing to the composition of the supervisory court. Offices hosting the supervisory court are responsible for managing its activity.

The Italian supervisory judge performs both monocratic and collegial functions (as a member of the supervisory court). The monocratic functions are both administrative and jurisdictional.

By contrast, although the Romanian supervisory judge also exercises mixed functions, the institutional design remains centered on a single-judge structure, without a fully developed collegial counterpart similar to the Italian supervisory court.

The Italian supervisory judge performs supervisory and control interventions, oversees the organization of penitentiary institutions, communicates institutional needs to the Ministry of Justice, supervises the implementation of rehabilitation treatment and personal security measures, examines complaints submitted by inmates, and conducts visits to places of detention.

Similarly, the Romanian supervisory judge resolves complaints from inmates regarding the exercise of rights, the establishment and change of execution regimes, and the application of disciplinary sanctions. The Romanian supervisory

[30] Romania, Superior Council of Magistracy, Decision No. 89 of January 23, 2014, approving the Regulation on the Organisation of the Activity of the Judge for the Supervision of Deprivation of Liberty, Monitorul Oficial, Part I, no. 77 (January 31, 2014), https://legislatie.just.ro/Public/ Detalii DocumentAfis/154963; Avram and Fanu-Moca, "Jurisdicția specială administrativă," https://www.universuljuridic.ro/jurisdictia-speciala-administrativa-a-judecatorului-de-supraveghere-a-privarii-de-libertate/.

judge also participates in procedures related to food refusal, presides over meetings of the parole commission, and grants approval for the collection of biological samples in specific circumstances.

Thus, while both systems assign the supervisory judge a central role in the protection of inmates' rights, the Italian model appears broader in scope, combining systemic oversight with individual case intervention, whereas the Romanian model remains more focused on individual complaints and administrative procedures.

From the administrative point of view, the Italian supervisory judge approves, by decree, the rehabilitation program of the convicted or internee, authorizes admission to day labor, orders transfer to hospitals or external treatment facilities, and supports the involvement of the external community in the rehabilitation process.

From the jurisdictional point of view, the Italian supervisory judge performs a wide range of functions, including declarations of criminal tendency, verification of social dangerousness, decisions regarding probation, security measures, debt forgiveness, and mental infirmity.

The Italian supervisory judge also issues orders for sentence reduction, reviews social dangerousness, grants permit, decides on complaints related to prison work and discipline, manages alternative sentences, and may order measures such as expulsion of foreign nationals.

This extensive range of competences further reinforces the complexity and maturity of the Italian model.

In Romania, the judicial review of the legality of decisions issued by the supervisory judge is carried out by the court in whose jurisdiction the prison is located, following appeals by inmates or prison administration.

The analysis[31] carried out by Alexandra Avram and Adrian Fanu-Moca highlights the special administrative jurisdiction of the Romanian supervisory judge. The institution operates as a form of administrative jurisdiction, where the judge acts as the main administrative actor, hears petitioners, administers evidence, ensures equality of arms, and issues administrative-jurisdictional acts (conclusions), which may be challenged before the courts.

This confirms the hybrid nature of the Romanian model, positioned between administrative jurisdiction and judicial review, unlike the Italian system, which maintains a clearer judicial character.

Despite its advanced institutional structure, the Italian system also faces practical challenges, particularly regarding the insufficient number of supervisory judges in relation to the prison population, an issue that may affect the effectiveness of judicial supervision[32].

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[31] Avram and Fanu-Moca, "Jurisdicția specială administrativă," https://www.universuljuridic.ro/jurisdictia-speciala-administrativa-a-judecatorului-de-supraveghere-a-privarii-de-libertate/.

[32] Ronco, "Italian Supervisory Court's Professional Culture," 1328–30, https://doi.org/10.35295/osls.iisl.2037; Luisa Cirillo, "Carceri, solo 250 magistrati sorveglianza per oltre 60mila detenuti,"

5. Prison Oversight and Human Rights Implementation

By investigating the connection between international human rights standards and prison oversight mechanisms, we can gain a deeper understanding of the direction in which the supervisory judge should adapt and evolve.

As Aizpurua and Rogan reinforced in the article published in 2021 on rights protection in prisons and prison inspection/monitoring bodies in the European Union, one major development in the oversight of prisons globally is the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[33].

The protocol utilises the premise that regular visits to places of detention by independent bodies can support the prevention of torture and other forms of cruel, inhuman, or degrading treatment or punishment.

The European Prison Rules (Council of Europe, 2020) oblige the members of the Council of Europe to establish independent prison monitors. The 2020 revisions of the European Prison Rules strengthened the powers of prison inspection and monitoring bodies[34], requiring states to guarantee such bodies access to all prisons, records, the opportunity to make unannounced visits, access to all prisoners and the ability to conduct private and fully confidential interviews.

The Council of Europe, under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, established one monitoring body in 1987 – the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT)[35]. The CPT visits places of detention across European member states to examine the treatment and conditions of inmates and collaborates with member states to prevent treatment and conditions that may lead to violations of the European Convention on Human Rights' prohibition on torture and inhuman and degrading treatment.

In this broader international framework, the distinction between different forms of oversight becomes particularly relevant. Rogan highlighted in the article published in 2019 on prison inspection and monitoring, the distinction between governmental inspection and independent monitoring[36]. Governmental inspection regards especially budgetary matters and the efficiency of the operation of

La Magistratura, July 13, 2025, https://lamagistratura.it/primo-piano/carceri-solo-250-magistrati-sorveglianza-per-oltre-60mila-detenuti/.

[33] Aizpurua and Rogan, "Rights Protection in Prisons," 456–57, https://doi.org/10.1177/14624745211020818.

[34] Rogan, "Prison Inspection and Monitoring," 286–87, https://doi.org/10.1007/s10610-019-09420-8.

[35] O'Connell and Rogan, "Monitoring Prisons in Europe," 205–6, https://doi.org/10.1017/lsi.2021.86.

[36] Rogan, "Prison Inspection and Monitoring," 285–86, https://doi.org/10.1007/s10610-019-09420-8.

prisons, even though the 2018 European Committee on Crime Problems recommendations indicate that governmental inspection should not focus only on technical administrative matters but also take into account international law and European prison rules.

Moreover, the effectiveness of these monitoring mechanisms depends not only on their formal powers, but also on their capacity to influence practice[37].

As O'Connell and Rogan described in the article published in 2023 on monitoring prisons in Europe, the CPT uses recommendations to ensure the protection of human rights standards in prisons. The implementation of CPT recommendations is made in cooperation with national authorities, and the value of CPT monitoring depends on the capacity to produce change through dialogue with government and prison authorities.

Beyond the European framework, the role of international human rights law more broadly must also be considered. In the paper published by Malby in 2025, national criminal law dependence on the UN human rights system is obvious, and coordination with international treaties is the natural way to create the national normative framework against which criminalisation and penalties are to be assessed.

In parallel, the jurisprudence of the European Court of Human Rights represents another essential layer of influence on national prison systems. Regarding the impact of the case law of the European Court of Human Rights on the decisions taken by prison administrations of member states, Nicolas Ferran highlights in the article published in 2014 that, through judgments of conviction of France in prison matters, the European Court of Human Rights has recognized, since the mid-1970s, the right of detainees to have access to a judge and has developed a jurisprudence attentive to the respect of fundamental rights and freedoms in detention[38]. Thus, the European Court plays a very important role and obliges the convicted state, first of all, to remedy the violation found, as well as to harmonize domestic legislation in order to avoid further violations.

The European Court has also developed the concept of "pilot judgment" to identify structural problems underlying repetitive cases brought against member states and to request the states concerned to address and resolve these problems by guiding the governments on the necessary corrective measures.

However, the role of international regulation has not been free from criticism. The content and form of international prison regulation were criticised in the article published in 2024 by Kemp and Tomczak on prison ontologies and carceral harms, being classified as justification for prison building and harmful means of control and punishment, and stating that international prison rules

[37] O'Connell and Rogan, "Monitoring Prisons in Europe," 206–7, https://doi.org/10.1017/lsi.2021.86.

[38] Steven Malby, "Beyond Sword and Shield: The UN Human Rights System and Criminal Law," *International Journal of Human Rights* 29, no. 5 (2025): 916–39, https://doi.org/10.1080/13642987.2024.2432953; Ferran, "La personne détenue," 469–70, https://doi.org/10.3917/ds.384.0469.

should rather have the goal of reducing imprisonment rates, taking into consideration the harms of imprisonment produced on inmates[39].

At the same time, concrete practice reveals limitations in the effectiveness of oversight mechanisms. Following an incident of abuse and extreme violence against inmates that occurred in April 2020 at the Santa Maria Capua Vetere Penitentiary, Daniela Ronco described, in her 2025 article, the legal actions taken and the role of the Italian supervisory judge as "unusual and uncommon". In her view, supervisory judges in Italy often tend not to be actively involved in the effective safeguarding of inmates' rights, due to their institutional proximity to prison administrations and the formalistic nature of their activity.

This critical perspective on the effectiveness of supervisory judges highlights the broader issue of how prison oversight functions in practice and the extent to which legal mechanisms are capable of ensuring the protection of inmates' rights.

At the same time, empirical studies provide a more nuanced perspective on how these mechanisms are perceived in practice. The study provided by Valk and Rogan in 2021 on prison monitoring in Ireland found that inmates trust independent monitoring bodies and visits, although they consider that prison regulation has lost its goal of protecting inmates and that policymakers, prison authorities, inspection and monitoring bodies should consult inmates to identify which human rights standards and protocols should be included or prioritised[40].

This discussion also raises important questions regarding the concrete effects of European Court of Human Rights judgments within domestic legal systems.

One of the relevant conclusions for this research, in the article[41] published by María Elósegui Itxaso in 2024, is that the judgments of the European Court of Human Rights do not overturn a judgment already issued, but can indicate a violation and refer to possible appeals in countries that have them regulated. Judgments are binding on the state's parties, but they cannot overturn a final judicial decision, and it is up to the states to choose the means by which to enforce them. Since ECHR judgments do not produce direct effects of annulling domestic judgments, their execution requires the existence of domestic transposition mechanisms, which opens up the functional space for the intervention of

[39] Tom Kemp and Philippa Tomczak, "The Cruel Optimism of International Prison Regulation: Prison Ontologies and Carceral Harms," *Law & Social Inquiry* 49, no. 3 (August 2024): 1683–84, https://doi.org/10.1017/lsi.2023.63.

[40] Sophie van der Valk and Mary Rogan, "Experiencing Human Rights Protections in Prisons: The Case of Prison Monitoring in Ireland," *European Journal of Criminology* 18, no. 1 (2021): 102–3, https://doi.org/10.1177/1477370820960024.

[41] María Elósegui Itxaso, "La revisión de sentencias del Tribunal Europeo de Derechos Humanos de Estrasburgo contra España por el Tribunal Supremo español en estos últimos cinco años (2019–2024). Primera parte: jurisdicción penal," *Revista de Derecho Político*, no. 121 (December 2024): 15–16, https://doi.org/10.5944/rdp.121.2024.43057.

the supervisory judge. It is straightforward to conclude that the prison supervisory judge can be the vehicle for internalizing and concretizing the impact of European Court of Human Rights decisions on national law.

From this perspective, the issue of human rights in detention appears to be less a problem of normative recognition and more one of implementation. Sarah Armstrong, in the article on human rights and sentence management, highlighted the fact that human rights are almost universally accepted as the best available basis for the safe and fair governance of detention and identified the issue of human rights as actually a problem of implementation, mentioning studies where human rights have been insufficiently adopted, enforced or applied. The need for internal institutional mechanisms capable of transforming abstract requirements into concrete legal realities also supports the idea that the problem of human rights does not lie in their normative consecration, but in their effective implementation.

A similar conclusion is reinforced by empirical research[42]. Marco et al. identify, in the research on the effects of imprisonment length on recidivism, the problem of human rights as essentially a problem of implementation. Adopting human rights does not automatically lead to the realization of rights-respecting practices. The execution of a custodial sentence cannot be reduced to the administrative dimension, but inherently includes judicial control of the manner of execution, which conceptually legitimizes the existence of a specialized jurisdiction in this matter. The judicial decision is not limited to verifying legality, but effectively structures the experience of serving the sentence, which allows for the direct integration of the requirements of the Convention into the reality of detention.

6. Conclusion

The execution of custodial sentences cannot be understood as an exclusively administrative process, but rather as a profoundly legal one, in which judicial control plays a decisive role in structuring the experience of imprisonment. According to the specialized literature used in this research, the enshrinement of rights does not guarantee their effective realization. In a similar way, although the jurisprudence of the European Court of Human Rights establishes binding standards and identifies violations, its decisions remain predominantly declarative in nature, leaving to the states the responsibility of ensuring their concrete implementation within domestic legal systems.

[42] Sarah Armstrong, "At Risk of Rights: Rehabilitation, Sentence Management and the Structural Violence of Prison," *Critical Criminology* 28 (2020): 85–105, https://doi.org/10.1007/s10612-020-09503-7; Marco T. C. Stam, Hilde T. Wermink, Arjan A. J. Blokland, and Jim Been, "The Effects of Imprisonment Length on Recidivism: A Judge Stringency Instrumental Variable Approach," *Journal of Experimental Criminology* 20, no. 3 (2024): 974–75, https://doi.org/10.1007/s11292-023-09566-w.

In this context, the need for internal jurisdictional mechanisms becomes evident. Such mechanisms are essential in bridging the gap between normative frameworks and practical realities, transforming abstract legal guarantees into enforceable rights within penitentiary environments. The analysis of international standards, monitoring bodies and European human rights jurisprudence demonstrates that external oversight, while indispensable, is not sufficient in itself to secure effective protection of inmates' rights. These standards' effectiveness is determined by their internalization within national institutions that have direct and continuous control over the execution of sentences.

From this perspective, the penitentiary supervisory judge emerges as a central institutional actor. The supervisory judge is responsible for ensuring that sentences are executed in accordance with legality, proportionality, and respect for fundamental rights, as they are located at the intersection between administrative practice and judicial oversight. The supervisory judge has a direct impact on the legal reality of imprisonment by examining complaints, reviewing administrative measures, and influencing the manner in which detention is carried out.

The comparative analysis between the Italian and Romanian systems further highlights both the potential and the limitations of this institution. While the Italian model reflects a more consolidated and functionally complex form of judicial control, the Romanian system, although more recent and still evolving, demonstrates a clear tendency toward strengthening the role of the supervisory judge as a guarantor of rights. Despite its hybrid nature and limited intervention scope, the Romanian model remains capable of making substantial changes in the execution of sentences.

In this regard, the evolution of the supervisory judge institution appears not only desirable, but necessary, particularly within the Romanian penitentiary system. Strengthening its judicial character, expanding its competences beyond a predominantly reactive role and ensuring a more pronounced capacity to intervene in the organization and functioning of detention regimes represent essential directions for development. At the same time, consolidating the institutional independence of the supervisory judge and enhancing its practical effectiveness through adequate resources and clearer procedural instruments can contribute to transforming this institution into a genuine guarantor of inmates' rights.

Therefore, the supervisory judge can be conceptualized as the key mechanism through which conventional human rights are internalized and made effective within the penitentiary system. In the absence of such a mechanism, the risk remains that human rights standards, no matter how articulated they are at the international level, to remain purely declarative, without producing tangible effects in the daily reality of imprisonment. At the same time, the future development of this institution will determine the extent to which judicial oversight can move from a formal guarantee to an effective instrument of rights protection in practice.

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Conceptualizing the Abstract Victim – The National Financial System as the Primary Injured Interest in Offences of Fraud Against the Financial Interests of the European Union

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Abstract

This paper analyzes the criminological and victimological aspescts of the incrimination of fraud in the national legislation of Republic of North Macedonia, affecting the finacical interests of the European Union.The main objective of the paper is to elaborate how the relevant criminal offenses, targeting EU funds, manifest as economic crimes with the state as primary victim, and the citizens as indirect victims, on the other side. The research applie legal analysis, comparative study of EU and national legislation and review of criminological and victimological aprroach on public-finance related crimes. The findings of the paper indicate involving of complex interaction between the offenders of these offenses, the state control mechanisms and legal frameworks, while highlighting the abstract nature of the victim and the urgent need of preventive and puntitve measures. Recognizing these offenses, through the criminological and victimological aspects is essential for designing effective policy, in order of protectiong the national and the financial interests of the European Union.

Keywords: *economic crime, EU financial interests, fraud, criminology, victimology.*

1. Introduction

The Republic of North Macedonia, as a beneficiary of funds from the European Union, assumes obligations aimed at ensuring an effective fight against fraud affecting EU funds. The establishment of an efficient anti-fraud system primarily entails the harmonization of national legislation with the *EU acquis*. By undertaking commitments through the signing of the Framework Agreement on the Instrument for Pre-Accession Assistance (hereinafter: "IPA")[2], the State commits to coordinated and coherent action by the competent authorities in the prevention, detection, treatment, reporting and monitoring of irregularities and suspected cases of fraud related to the implementation of IPA funds[3]. This, above all

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[2] European Commission and Republic of North Macedonia, *Framework Agreement for Financial Partnership on the Specific Arrangements for Implementation of Union Financial Assistance under the Instrument for Pre-Accession Assistance (IPA III)*, Official Gazette of the Republic of North Macedonia, no. 235 (November 4, 2022), https://portal.mdt.gov.mk/post-body-files/ipa-2021-2027-file-egmZ.pdf.

[3] Republic of North Macedonia, Ministry of Finance, *National Strategy for Combating Fraud and*

implies the establishment of effective and proportionate measures for the protection of the financial interests of the European Union through the national criminal law system[4].

Part of the establishment of such an anti-fraud system is directly linked to the criminalization of the offence "Fraud to the detriment of the financial interests of the European Union." In the Criminal Code[5] of the Republic of North Macedonia this offence is incriminated in Article 249-a, as a subcategory of the offence "Fraud in obtaining a credit or other benefit" under Article 249.

The following paper provides an overview of the victimological and criminological aspect of the criminal offence of fraud to the detriment of EU funds under the Criminal Code, with particular emphasis on its specificity in relation to the victim of this offence. At the same time, it briefly addresses the constitutive elements of the offence and its phenomenological dimension.

It is important to emphasize that European legislation, largely based on harmonization with the PIF Directive[6], in the area of protecting the financial interests of the Union, prescribes several forms of conduct that must be criminalized within the national criminal legislation of EU Member States and candidate countries, as beneficiaries of IPA funds. These criminal offences, in the context of Republic of North Macedonia are incorporated across several chapters of the Criminal Code, thereby encompassing various forms of criminality, however, the victim remains the same the state and the national financial interest.

2. Fraud to the Detriment of the Financial Interests of the European Union, as Criminalized in Article 249-a of the Criminal Code of Republic of North Macedonia

As previously noted, fraud affecting the financial interests of the European Union is criminalized in Article 249-a of the Criminal Code. The incrimination under Article 249-a emphasizes the actus reus of the criminal offence in

Protection of the Financial Interests of the European Union in the Republic of North Macedonia, 2022–2025, adopted June 14, 2022, https://portal.mdt.gov.mk/post-body-files/zakon-i-propisi-file-auoM.pdf.

[4] Wouter Van Ballegooij, "Protecting the EU's Financial Interests through Criminal Law: The Implementation of the 'PIF Directive,'" *eucrim*, no. 3 (2021): 177–81, https://eucrim.eu/articles/protecting-the-eu-financial-interests-through-criminal-law-the-implementation-of-the-pif-directive/.

[5] Republic of North Macedonia, *Criminal Code*, art. 249-a, consolidated text, https://jorm.gov.mk/wp-content/uploads/2016/03/%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B8%D0%BA-%D0%BF%D1%80%D0%B5%D1%87%D0%B8%D1%81%D1%82%D0%B5%D0%BD-%D1%82%D0%B5%D0%BA%D1%81%D1%82.pdf; Law Amending the Criminal Code, Official Gazette of the Republic of North Macedonia, no. 188 (September 7, 2023), art. 29, https://slvesnik.com.mk/Issues/421e4360348c4bb2907899576f7c07bd.pdf.

[6] Directive (EU) 2017/1371 of the European Parliament and of the Council of July 5, 2017, on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law, OJ L 198 (July 28, 2017): 29–41, https://eur-lex.europa.eu/eli/dir/2017/1371/oj/eng.

paragraph 1, which provides that: "*Whoever, by using or presenting false, inaccurate or incomplete statements or documents, or by failing to provide information, unlawfully appropriates, retains, or causes damage to the funds, assets or resources of the European Union, the funds, assets or resources managed by the European Union or managed on its behalf, shall be punished with imprisonment of one to ten years*[7]*."* The remaining paragraphs of Article 249-a also establish criminal liability in cases of misuse of EU funds, as well as liability for the unlawful reduction of the assets and resources of the European Union. Furthermore, the provision prescribes criminal liability for legal persons that may appear as perpetrators of the offence of "fraud to the detriment of the financial interests of the European Union." Both the substantive content of this criminal offence and the prescribed penal policy are fully aligned with the relevant European legislation in this field[8].

Without engaging in a detailed analysis of the incrimination under Article 249-a of the Criminal Code, it may be observed that, although the terminology of the provisions and the penal policy are clearly and precisely defined, the classification of the offence "fraud to the detriment of the financial interests of the European Union" within the category of offences against the property is debatable, particularly from a victimological perspective, i.e., in light of the consequences or harm resulting from the commission of this offence. Namely, as previously mentioned, this criminal offence is situated within the chapter entitled "Criminal offences against property," i.e., the so-called property offences. What renders it particularly relevant for discussion is the fact that, in this case, the victim is the state, that is, the national public interest, in the context of the state's financial interests.

In other words, the commission of fraud to the detriment of EU funds effectively constitutes direct damage to the national budget, given that Republic of North Macedonia, as a beneficiary of IPA funds, bears responsibility for their proper and lawful implementation in accordance with the applicable legal provisions. In instances where damage is caused to IPA funds, Republic of North Macedonia is obliged to reimburse, from its own national budget, the funds that have been misused contrary to the provisions of the Framework Agreement on IPA. This applies even in situations where the perpetrator of the criminal offence is a natural or legal person typically a private economic operator who benefits from state grants supported by IPA funds. Thus, the criminalization of this offence within the Criminal Code primarily serves to protect the state from the ultimate perpetrators of such offences, for which the state is often required to provide reimbursement to the European Union budget even before criminal proceedings are

[7] Vlado Kambovski and Nikola Tupančeski, *Kazneno pravo: poseben del [Criminal Law: Special Part]*, 5th rev. ed. (Skopje: Faculty of Law "Iustinianus Primus," 2011), https://search.worldcat.org/title/960699909.

[8] Directive (EU) 2017/1371, OJ L 198 (July 28, 2017): 29–41, https://eur-lex.europa.eu/eli/dir/2017/1371/oj/eng.

initiated or concluded.

It is well established in criminal law theory that the State may obtain compensation from the perpetrator only on the basis of a final court decision, following the conclusion of criminal proceedings and the exhaustion of ordinary legal remedies. Accordingly, the question arises as to whether, taking into account the nature of the victim, this offence should remain classified within the chapter on criminal offences against property, or whether it would be more appropriately situated within the chapter on criminal offences against payment transactions, public finances and the economy.

This further raises the issue of whether the current classification of this offence within the chapter on property offences is primarily done by its terminology namely, the fact that it is labeled as a form of "fraud" and is therefore placed as a subcategory of the offence under Article 249 ("Fraud in obtaining credit or other benefit"), despite the substantial differences in their legal nature. All the more so, the victimological dimension of this offence calls into question its inclusion among traditional property offences, alongside other forms of fraud.

3. Other Criminal Offences for the Protection of the Financial Interests of the European Union

In addition to the core incrimination of fraud to the detriment of the financial interests of the European Union, the PIF Directive also calls for the harmonization of other criminal offences through whose acts of commission damage may be inflicted upon the EU's financial interests. These include, inter alia, bribery (both giving and receiving), embezzlement in office, tax and customs fraud, falsification and destruction of business records and money laundering[9].

It may be concluded that these criminal offences are classified across different chapters of the Criminal Code, namely within the categories of criminal offences against official duty and criminal offences against payment transactions, public finances, and the economy, while the victim in all such cases is the state, i.e., the public interest.

The criminalization of these offences at the level of EU Member States remains a complex process. This is largely due to the fact that in some Member States there is no clear distinction between criminal offences that harm national financial interests and those that harm the financial interests of the European Union[10].

In light of the foregoing, it may be observed that, although Republic of

[9] Freya O'Brien and Amy Burrell, "The Impact of Property Crime on Victims," in *Property Crime: Criminological and Psychological Perspectives*, ed. Amy Burrell and Matt Tonkin (London: Routledge, 2020), 59–74, https://doi.org/10.4324/9781315208237-5.

[10] Jack Malan, Ivan Bosch Chen, et al., *The Impact of Organised Crime on the EU's Financial Interests* (Brussels: European Parliament, Policy Department for Budgetary Affairs, July 2021), PE 697.019, https://doi.org/10.2861/03879.

North Macedonia is not a Member State of the European Union, its national legislation does establish a distinction between criminal offences affecting national financial interests and those affecting the financial interests of the European Union. This is achieved through the introduction of a specific criminal offence "Fraud to the detriment of the financial interests of the European Union"as well as through other offences that may result in damage to EU funds, in accordance with the PIF Directive.

Within this context, the discussion may also be framed in terms of differing legal perspectives regarding the identification of the ultimate victim in cases involving offences against the financial interests of the Union, particularly in EU Member States. This is due to the fact that in Member States national budgets are significantly more integrated with the EU budget, as these states are, in a sense, co-owners of the Union's budget. By contrast, candidate countries for EU membership are primarily beneficiaries of these funds, subject to strictly defined conditions. Consequently, in EU Member States the EU budget itself is often regarded as the direct victim of property-related crime, whereas in candidate countries the victim is most often the state itself, which bears primary responsibility for reimbursing the EU budget in cases of misuse of funds.

The following sections of this paper will provide a more detailed explanation and elaboration of property and economic crime from a phenomenological and victimological perspective, with the aim of comparing their characteristics to those of the criminal offence "Fraud to the detriment of the financial interests of the European Union," as well as to other incriminations prescribed in the Criminal Code for the protection of both national and European Union financial interests.

4. Victimological and Phenomenological Aspects of Property Crime

The specific criminal offence "Fraud to the detriment of the financial interests of the European Union," in accordance with its placement within the Criminal Code, falls under the chapter on criminal offences against property. Although the protected legal interest, i.e., the victim in this particular offence concerns the funds of the European Union which ultimately results in damage also to the national budget, an extensive interpretation of the relevant provisions indicates that the offence entails causing damage to "the funds, assets or resources of the European Union, the funds, assets or resources managed by the European Union or managed on its behalf." Therefore, it is indisputable that this offence involves damage to property/assets through the undertaking of unlawful acts.

Considering property offences more broadly, it may be emphasized that, regardless of the specific form (theft, aggravated theft, robbery, fraud, or similar offences) the common element underlying all such offences is the financial loss

suffered by the victim[11]. This leads to the conclusion that the object of protection and correspondingly the object of attack in these offences is the property of the victim.

As previously explained, property offences encompass a wide range of criminal acts, differing in their modes of commission. These include offences against property as regulated in the Criminal Code, spanning from Article 235 to Article 263. Such codification of unlawful conduct causing damage to property demonstrates that a variety of actions through which property damage may occur are criminalized within national criminal legislation. In addition to the protected object, it is evident that all these criminal offences produce multiple adverse effects on their victims. Primarily, these include financial harm, physical impact and effects on mental health, i.e., psychological consequences.

It should be noted that these constitute the direct consequences of property offences for the victim. Inevitably, there are also indirect consequences, particularly of a financial nature. In certain offences within the corpus of property crime for example, theft there may also be reputational harm to the victim. Taking into account the consequences produced by this type of criminality, in the specific case where the state appears as the victim, one cannot meaningfully refer to consequences affecting mental health or psychological impact[12]. However, the financial dimension remains clearly identifiable, namely the consequences for the property of the victim (i.e., the funds of the Union and, ultimately, the national budget).

An additional aspect of interest concerns the reputational impact on the victim[13]. In the present case, where the state is the victim of fraud, this raises two significant considerations regarding the state's reputation. On the one hand, it may indicate deficiencies in the system of control, prevention, and protection against fraud involving external sources of funding, including EU funds. This, in turn, places citizens who are the primary contributors to the national budget at a disadvantage and may erode public trust in state institutions. On the other hand, it may weaken the state's position as a candidate for receiving EU funds and undermine its credibility as a country capable of establishing an effective and coordinated system for the proper implementation of funds obtained from the European Union.

[11] William G. Doerner and Steven P. Lab, "Property Victimization," in *Victimology*, 6th ed. (Anderson/Elsevier, 2012), 43–61, https://booksite.elsevier.com/samplechapters/9781437734867/Chapter_3.pdf.

[12] Mark Button, Chris Lewis, and Jacki Tapley, "Not a Victimless Crime: The Impact of Fraud on Individual Victims and Their Families," *Security Journal* 27, no. 1 (2014): 36–54, https://doi.org/10.1057/sj.2012.11.

[13] O'Brien and Burrell, "Impact of Property Crime on Victims," 59–74, https://doi.org/10.4324/9781315208237-5.

5. Victimological and Phenomenological Aspects of Economic Crime

In order to provide a clearer elaboration of the victimological dimension of criminal offences related to fraud to the detriment of the financial interests of the European Union within the state, it is necessary to first offer a brief overview of what constitutes economic crime, how it is defined from a criminological and victimological perspective, which types of conduct it encompasses and how it manifests within the criminal law legislation.

Economic crime, although lacking a universally accepted and unified definition in criminological theory, may generally be described as a form of criminality that disrupts the proper functioning of the economic system. That is, it causes the system to operate contrary to its legal regulation and the fundamental principles of the market and capital, instead functioning in a criminal manner[14]. In this type of criminality, it is evident that the protected legal interest under attack is the economic system itself, i.e., the state or the public interest, while ultimately those harmed are the citizens, as the primary contributors to the state budget.

This form of criminality encompasses activities that enable offenders to benefit from illicit proceeds or to finance further criminal conduct. It undermines the financial system of the state, damages institutional integrity, and poses risks to economic prosperity, national security, and the reputation of the state[15]. Accordingly, considering the protected interest in economic crime, it is indisputable that the victim is the state, i.e., the public interest. This is precisely the point at which the criminological, victimological, and criminal law perspectives converge.

As previously explained, in economic crime, both the object of protection and the victim is the national economy, or in other words the national financial interest. Consequently, it is logical that criminal offences that constitute attacks on the economy and public finances are primarily regulated within the chapter of the Criminal Code addressing criminal offences against payment transactions, public finances and the economy. However, a more in-depth analysis reveals that a comprehensive definition of contemporary economic crime must also include criminal conduct occurring within the sphere of public finances and payment systems[16]. In its operationalization, the criminal law framework extends be-

[14] Ljupčo Arnaudovski, *Kriminologija [Criminology]* (Skopje: 2-ri Avgust S-Štip, 2007), https://books.google.com/books/about/Kriminologija.html?id=qBCoJQAACAAJ.

[15] HM Treasury and Home Office, *Economic Crime Plan 2019–2022* (London: Government of the United Kingdom, July 12, 2019; accessible version updated May 4, 2021), https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022/economic-crime-plan-2019-to-2022-accessible-version.

[16] Arnaudovski, *Kriminologija*, https://books.google.com/books/about/Kriminologija.html?id=qBCoJQAACAAJ.

yond this chapter and it also includes offences contained in the chapters on criminal offences against official duty and criminal offences against property[17].

This broader understanding is also reflected at the level of European legal policy. Through the concept of market freedom and Recommendation No. 81/12 of the Committee of Ministers of the Council of Europe (1981), an effort was made to define economic crime by enumerating a range of punishable acts and shaping a functional definition aimed at assisting law enforcement authorities in identifying and detecting such criminality, as well as distinguishing it from property crime[18].

From a victimological perspective, a notable characteristic of this type of criminality is its latent nature. The immediate consequences are often not readily apparent, and in many cases, the victim may never become aware of the harm suffered. The following features are commonly associated with economic crime:

- These offences are typically non-violent in nature and generate financial gains and/or losses;
- Fraud and dishonesty represent key elements of the modus operandi;
- There is intentional misuse or abuse of otherwise lawful practices and procedures;
- A breach of trust is central, whether embedded in legitimate or fictitious contractual relationships.[19]

Additionally, the identification of the victim in economic crime is particularly complex. Individual victims are often not directly recognized and the number of victims is difficult to determine. For instance, when the state budget is affected, all citizens are indirectly harmed, however, expressing the number of victims as "all citizens" is practically indeterminate. Even when the victim can be identified, establishing a direct causal link between the perpetrator and the victim is exceptionally challenging in this type of criminality.

Taking these characteristics into account, it is not surprising that society and citizens often remain relatively passive in recognizing and responding to economic crime. There is frequently an absence of a clearly identifiable direct victim, despite the paradox that in many cases the citizens themselves are the ultimate victims of such offences.

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[17] Lazar Nanev, "Criminological Aspects of Economic Crime" (PhD diss., Faculty of Law "Iustinianus Primus," Ss. Cyril and Methodius University in Skopje, 2006), https://www.ugd.edu.mk/documents/univerzitetski_bilten/ebilteni/21-25/2023/320/pdf/320-3.pdf.

[18] Council of Europe, Committee of Ministers, Recommendation No. R (81) 12 on Economic Crime, adopted June 25, 1981, appendix, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cb4f0.

[19] Nicholas Lord and Michael Levi, "Economic Crime, Economic Criminology, and Serious Crimes for Economic Gain: On the Conceptual and Disciplinary (Dis)Order of the Object of Study," *Journal of Economic Criminology* 1 (2023): article 100014, https://doi.org/10.1016/j.jeconc.2023.100014.

6. Victimological and Phenomenological Aspects of Fraud to the Detriment of the European Union's Financial Interests in Republic of North Macedonia

As previously explained, under European legislation, specifically the PIF Directive, Fraud to the detriment of the European Union's financial interests in the Republic of North Macedonia is criminalized only through a specific offense, which carries almost the same title: "Fraud affecting the European Union's funds." The aforementioned legislation enumerates, in a taxative manner, the so-called "PIF offenses" listed in Directive (EU) 2017/1371, which include:

- cross-border VAT fraud causing total damage of at least 10 million euros;
- customs and tax fraud;
- corruption that harms or is likely to harm the EU's financial interests;
- misappropriation of EU funds or property by public officials;
- money laundering and
- any other offenses that are inextricably linked to one of the above categories.

Considering these offenses as emphasized in Directive 2017/1371, it is evident that they are also incorporated within the national criminal legislation of North Macedonia. These offenses are codified across several chapters of the Criminal Code and in line with the Directive's provisions, they include, for example, bribery, embezzlement in public office, tax and customs fraud, falsification and destruction of accounting records and money laundering, in addition to the specific offense of fraud affecting EU funds.

Without delving into the detailed elements of these crimes, it can be concluded that they fall within offenses against payment systems, public finances and the economy, offenses against official duties, and offenses against property. In all these cases, the object of protection is clearly the state, that is, the national interest, the state budget and ultimately the citizens. This highlights the victimological aspect of acts classified under fraud affecting the EU's financial interests.

From a victimological perspective, the offense of fraud affecting EU funds, as codified in Article 249-a of the Criminal Code serves as a clear example of how fraud in the implementation of EU funds results in direct harm to the national budget, given that the state must reimburse misused funds to the EU budget. Furthermore, national criminal law provides mechanisms for recovering funds misappropriated by the offender, thereby emphasizing the state's role as the victim. Other offenses capable of harming the EU's financial interests share the same object of protection the national interest whether the damage concerns EU funds (which ultimately also impacts the national budget) or domestic public funds.

Examining this victimological framework, one observes that it closely

mirrors the conceptualization of economic crime: crimes affecting public finances and payment systems, as well as offenses against official duties and property, consistent with the classification in European criminal law as outlined in the Council of Europe's recommendation on economic crime.

A notable common feature of these offenses is the near absence of an immediately identifiable direct victim. The victim is the state and by extension, the national interest and the citizenry. Immediate consequences are rarely apparent and identifying a victim is challenging, since the state functions as an abstract victim. While citizens are indirectly affected whenever public funds are misappropriated, the number of victims cannot be precisely quantified, resulting in public apathy and limited reaction to these offenses even though the populace is ultimately the indirect victim.

The state as a victim, also plays a determinative role in shaping the phenomenology of these crimes and influencing offender intent. The presence of effective detection mechanisms, law enforcement practices and a coherent criminal policy strongly influences offender behavior. In other words, the existence of an efficient control system and effective prosecution and sentencing mechanisms can reduce the incidence of such crimes. Conversely, a weak enforcement system and lenient penalties may incentivize offenders to commit these acts for illicit financial gain at the expense of the national budget.

It is equally important to note that the European Union itself suffers direct harm when its financial interests are affected, a concern reflected in Article 325 TFEU.[20]

Overall, while most offenses typically identify an individual as the victim, in cases of fraud against the EU's financial interests, the state is the primary victim. This abstraction reduces direct empathy from the public[21], since the harm is not immediately tangible to individuals. Nonetheless, these crimes significantly damage the national economy and the public budget, with indirect consequences for citizens. Victimogenic factors for state-as-victim crimes, unlike individual victim cases which are often linked to personal characteristics such as age, gender, religion or ethnicity primarily relate to the effectiveness of institutional mechanisms, control systems and sanctions[22]. Moreover, offenders often rationalize these crimes as taking resources that "belong to no one" or "belong to everyone," diminishing the personal dimension of victimhood.

Ultimately, fraud harming the EU's financial interests and by extension the national budget, represents economic crime with significant repercussions for

[20] Consolidated Version of the Treaty on the Functioning of the European Union, art. 325, OJ C 202 (June 7, 2016): 188–89, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E325.

[21] Arie Freiberg, "The State as a Victim of Crime," *Australian & New Zealand Journal of Criminology* 21, no. 1 (March 1988): 20–30, https://doi.org/10.1177/000486588802100103.

[22] Lokku Suchitha, "Economic Crimes, Types of Economic Crimes in India and Laws Deals with Economic Crimes," *International Journal of Novel Research and Development* 7, no. 12 (December 2022): c15–c21, https://www.ijnrd.org/papers/IJNRD2212203.pdf.

public resources, with the population acting as the indirect victim.

7. Concluding Remarks

The Republic of North Macedonia, as a beneficiary of funds under the Instrument for Pre-Accession Assistance (IPA) assumes the obligation to ensure an effective fight against fraud affecting EU funds. In essence, the State acts as a guarantor of the proper and lawful implementation of IPA funds by the final beneficiaries, while in cases of irregularities or fraud, reimbursement is made from the national budget to the budget of the European Union. Furthermore, in accordance with national criminal legislation, the state seeks recovery of the damage incurred and the breaches of legal obligations in the implementation of IPA funds from the final beneficiaries.

In order to establish such an effective system, it is essential that the state first develops a robust framework of control mechanisms aimed at preventing fraud involving IPA funds, followed by an efficient system of criminal law protection of the national financial interest in cases where such fraud occurs. From a victimological perspective, the state emerges as the direct victim in the commission of criminal offences that damage the financial interests of the European Union. Although the designation of these offences emphasizes harm to the interests of the Union, in practice the damage is ultimately transferred to the national public interest.

Given that criminal offences affecting the financial interests of the European Union are distributed across several chapters of the Criminal Code of the Republic of North Macedonia, while the protected legal interest in all of them is the state, it can be unequivocally concluded that the State constitutes the primary victim. Nevertheless, as previously discussed the victimization of the State is considerably more passive in comparison to the victimization of individuals from a criminological perspective. The national budget, i.e., the public interest, represents an abstract category, often perceived as something that belongs to everyone, yet at the same time to no one in particular. Consequently, it is nearly impossible to identify an individual victim or even a clearly defined category of victims in this type of criminality (economic crime).

It is precisely for this reason that offences such as fraud to the detriment of the financial interests of the European Union, embezzlement in office, money laundering and tax and customs fraud tend to elicit less public empathy and attention compared to offences where the victim is individualized. This is despite the fact that the damage caused may be substantial, and paradoxically, in cases where the state is the primary victim, citizens are in fact the indirect victims.

In light of the foregoing, raising public awareness regarding the seriousness of these criminal offences is of paramount importance, particularly in recognizing that the ultimate victims are the citizens themselves. At the same time,

it is necessary for the State to establish an effective system of measures and controls, as well as adequate and efficient criminal law protection of the national financial interests, given that these factors directly influence the extent of State victimization in this context.

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DIGITAL LAW, ARTIFICIAL INTELLIGENCE AND DATA GOVERNANCE

The Impact of Artificial Intelligence on Sales Contracts

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Abstract

The increasing use of artificial intelligence in the drafting, negotiation, performance, and enforcement of sales contracts is reshaping traditional assumptions of contract law. This article examines how AI-assisted and partially autonomous systems affect the formation and validity of sales contracts, with particular attention to consent, contractual intent, good faith, transparency, the attribution of conduct, and the allocation of liability. It also considers the challenges created by automated decision-making, smart contracts, and cross-border transactions. Using doctrinal, comparative, and deductive methods, the study analyzes the legal approaches adopted in Romania, the European Union, and the United States. The analysis indicates that existing contractual frameworks are not entirely incapable of addressing AI-mediated transactions, but they are coming under increasing pressure as the autonomy and complexity of AI systems develop. Romanian law generally attributes AI-generated actions to the individual or legal entity deploying the system, while the European Union combines traditional contract-law principles with regulatory requirements concerning transparency, risk management, and human oversight. The United States relies primarily on established doctrines of agency, foreseeability, and contractual liability, applied through judicial interpretation. Despite these differences, the comparative analysis identifies several common principles: AI does not possess independent legal personality, human accountability must be preserved, and consent should remain a meaningful expression of contractual will rather than a mere procedural formality. The article concludes that the immediate creation of entirely new legal categories is not necessarily required. Instead, existing frameworks should be clarified and adapted through targeted rules on liability, transparency, human review, and cross-border enforceability. Such an approach can support technological innovation while safeguarding contractual autonomy, legal certainty, fairness, and trust in commercial transactions.

Keywords: *artificial intelligence, sales contracts, contractual consent, contractual liability, automated decision-making, human oversight, comparative contract law, smart contracts.*

1. Introduction

In recent years, the increasing integration of artificial intelligence into commercial activities has begun to reshape the traditional understanding of contractual relationships. What was once a domain governed almost exclusively by human intention and negotiation is now progressively influenced by automated

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systems capable of making decisions, processing data, and even concluding transactions. This transformation is particularly visible in the field of sales contracts, where AI technologies are used to optimize pricing, predict consumer behavior, and facilitate the conclusion of agreements without direct human involvement. While these developments bring undeniable advantages in terms of efficiency and speed, they also raise a series of complex legal questions that cannot be easily answered within the existing doctrinal framework. From a comparative perspective, legal systems appear to respond differently to these challenges. Some jurisdictions tend to adapt existing rules to new technological realities, while others advocate for the creation of specific regulatory frameworks dedicated to artificial intelligence. This divergence highlights the need for a deeper analysis of how fundamental principles of contract law — such as consent, good faith, and liability — are affected by the use of AI. The originality of this research lies primarily in its comparative and interdisciplinary perspective. While much of the existing literature tends to focus on isolated legal systems or on the technical aspects of artificial intelligence, this paper brings together different approaches. It examines how AI affects sales contracts across Romania, the European Union, and the United States, while also considering the interaction between legal norms and technological developments. In this sense, the study does not aim to propose entirely new legal theories, but rather to offer a more integrated understanding of an already evolving phenomenon.

The structure of the paper reflects this approach. Following the introductory section, the analysis begins with a conceptual framework that clarifies the definition and scope of artificial intelligence in contract law, together with its main practical applications. The paper then moves to a comparative analysis of the legal approaches adopted in Romania, the European Union, and the United States. This is followed by a discussion section, where the main risks and opportunities associated with the use of AI in sales contracts are examined. The final section brings together the main findings and outlines possible directions for future development. In terms of methodology, the research combines several complementary methods. The comparative method is used to identify similarities and differences between legal systems, while the doctrinal method focuses on the analysis of legal literature, legislation, and relevant case law. At the same time, an analytical approach is employed in order to better understand the legal implications of emerging technologies and the challenges they generate in contractual practice.

The study also puts forward a number of possible solutions. These include strengthening the role of human oversight in AI-assisted contracting, clarifying the rules on liability in situations involving automated systems, and encouraging greater harmonization at the international level. Such measures do not seek to limit technological development, but rather to ensure that it remains compatible with the fundamental principles of contract law.

2. Main Analysis

2.1. Redefining Contractual Boundaries: A Conceptual Map of the AI Era

The landscape of sales contracts is undergoing a profound transformation as Artificial Intelligence weaves itself into every stage of the agreement's lifecycle — from the initial spark of formation to the complexities of performance and final enforcement. This is no longer a peripheral shift; AI has become an active catalyst that redefines how parties commit to, execute, and uphold their commercial promises. In essence, AI is less about mimicking ‚intelligence' in a biological sense and more about the functional ability of systems to navigate complex cognitive demands — such as autonomous reasoning and experiential learning — that were once considered the exclusive domain of human experts.

In the sphere of contract law, this technological leap does more than just introduce new tools; it actively destabilizes the very pillars upon which the field was built. Traditional doctrines of consent, the mechanics of liability, and the core ideal of contractual autonomy are all being forced into a rigorous period of re-evaluation. As algorithms begin to act with increasing independence, the legal community is grappling with whether our centuries-old frameworks can still hold weight in an era of automated intent[2]. The application of AI in contractual relationships can take various forms, ranging from automated negotiation platforms to AI-driven contract drafting tools and smart contracts on blockchain networks[3]. While these technologies enhance efficiency and reduce transactional costs, they simultaneously introduce uncertainties regarding the legal recognition of AI actions[4]. For instance, when an AI system makes a pricing decision or enters into an agreement autonomously, questions arise about the attribution of intention and responsibility — core concepts in traditional contract law. A comparative lens reveals that legal systems are far from monolithic in their response to these challenges; instead, jurisdictions are forging distinct pathways based on their inherent legal traditions.

There is a notable divide in how legal traditions approach this technology: civil law systems, particularly in continental Europe, often lean toward a flexible interpretation of existing statutes to cover AI-driven acts. In contrast, common law jurisdictions frequently look to established doctrines —such as agency and contractual capacity — to define the status of agreements brokered

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[2] Ryan Calo, "Artificial Intelligence Policy: A Primer and Roadmap," *University of Bologna Law Review* 3, no. 2 (2018): 180–218, https://doi.org/10.6092/issn.2531-6133/8670.

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[4] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Cheltenham: Edward Elgar Publishing, 2015), 55, https://doi.org/10.4337/9781849808774.

by AI. This procedural divergence highlights why any serious inquiry into AI's impact must bridge the gap between theoretical doctrine and real-world application. Furthermore, regulatory initiatives, such as the European Union's proposed Artificial Intelligence Act, emphasize the need for a balanced framework that fosters innovation while safeguarding fundamental legal principles[5]. The conceptual understanding of AI's role in contract law is thus inseparable from its legal, ethical, and practical implications, forming the foundation for subsequent comparative and analytical sections of this study.

2.2. Comparative Analysis of Sales Contracts Under AI: Romania, EU, and the United States

The integration of artificial intelligence into sales contracts poses distinct challenges across different legal systems. Romania's civil-law framework operates through the Civil Code and its traditional concepts of consent, obligations, and liability. These doctrines were framed around acts attributable to legal persons, so their application to autonomous systems requires careful interpretation. Legal accountability therefore remains anchored, under current law, to the human or legal person that deploys the system. This human-centred approach is an important safeguard, although growing operational autonomy may test the adequacy of conventional attribution rules.[6]

Across the European Union, the impending Artificial Intelligence Act represents an ambitious effort to harmonize how these systems are integrated into commercial life. Rather than replacing existing civil law, this regulation acts as a critical layer of oversight, embedding mandatory standards for transparency and risk management directly into the lifecycle of AI-assisted contracts[7]. By enforcing stricter accountability measures, the Act seeks to fortify consumer protection while ensuring that the bedrock principles of contract law remain intact amid rapid technological shifts.[8] Conversely, the American approach is anchored in the pragmatic traditions of common law, where the status of AI is largely mediated through the doctrines of agency and contract formation. Rather than drafting entirely new statutes, the U.S. system relies on the elasticity of established liability rules to determine who — human or corporate — must ultimately answer for a machine's decision. This framework effectively treats AI not as a legal person, but as a digital extension of the user's intent.

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[5] European Commission, *Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)*, COM(2021) 206 final (April 21, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206.

[6] Ioan Adam, *Drept civil: Teoria generală a obligațiilor*, 2nd ed. (Bucharest: C.H. Beck, 2014), https://www.hamangiu.ro/drept-civil-teoria-generala-a-obligatiilor-editia-a-2-a.

[7] European Commission, *Proposal for an Artificial Intelligence Act*.

[8] Hildebrandt, *Smart Technologies*, 110.

In the United States, the judiciary continues to view AI through a traditional lens — treating it as a sophisticated tool rather than a standalone legal entity. Consequently, the burden of liability and contractual duty remains tethered to the humans or corporations that set these algorithms in motion. Recent case law reinforces this stance, with courts scrutinizing automated agreements not based on the ‚machine's logic,' but on the underlying human intent and the foreseeability of the AI's output. This creates a legal environment where deploying a system means accepting full responsibility for its, digital handshakes,' regardless of how autonomous the process might seem.

This comparative analysis brings a fundamental distinction into focus: while civil law jurisdictions tend to favor a doctrinal expansion, meticulously stretching traditional codes to cover the nuances of AI, the U.S. common law system leans toward a more functionalist approach. Instead of re-engineering the doctrine, the American perspective relies on the inherent flexibility of existing legal frameworks to anchor responsibility, treating AI as a sophisticated new variable within established rules of attribution. Regardless of these divergent legal paths, a singular, overarching priority unites all jurisdictions: the need to prevent AI-driven automation from eroding the foundational ethics of contract law. There is a collective urgency to ensure that as processes become more 'intelligent,' they do not hollow out the essential requirements of genuine consent, the mandate of good faith, and the clear attribution of accountability[9].

By establishing this comparative lens, we gain the necessary groundwork to scrutinize the legal friction points created by AI. More than just a theoretical exercise, this framework serves as a strategic roadmap for identifying where traditional rules fail and where harmonized regulatory strategies must step in to stabilize the future of AI-driven commerce.

2.3. AI Applications in Sales Contracts

Artificial Intelligence (AI) is a broad and evolving concept, often described as the ability of machines or computer systems to perform tasks that typically require human intelligence.

At its core, AI is distinguished by its ability to extract meaningful insights from experience and identify intricate patterns that would elude standard algorithms[10]. This capacity for reasoning and autonomous decision-making in volatile contexts marks a significant departure from traditional software. While conventional programs are strictly bound by the 'if-then' logic of their source code, AI

[9] Giovanni Sartor and Andrea Omicini, "The Autonomy of Technological Systems and Responsibilities for Their Use," in *Autonomous Weapons Systems: Law, Ethics, Policy*, ed. Nehal Bhuta et al. (Cambridge: Cambridge University Press, 2016), 39–74, https://doi.org/10.1017/ CBO 9781316597873.003.

[10] Stuart Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach*, 4th ed. (Harlow: Pearson, 2020), 2–5, https://aima.cs.berkeley.edu/.

systems possess a fundamental plasticity. By recalibrating their behavior in response to evolving data streams, they can navigate the complexities of dynamic environments that would otherwise cause static systems to fail[11]. This inherent unpredictability, however, is precisely what challenges our current legal understanding of liability.

Within the realm of sales, the footprint of AI extends far beyond mere digital paperwork. While it certainly streamlines the drafting and negotiation phase through specialized platforms, its true impact is felt in the emergence of smart contracts that self-execute via blockchain[12]. However, these tools offer more than just operational speed; they have become sophisticated partners in strategic decision-making. Today, AI is increasingly trusted to calibrate pricing in real-time, sharpen risk assessments, and maintain a vigilant eye on compliance — tasks that were once the sole, and often labor-intensive, domain of human experts. Far from being a purely algorithmic challenge, the rise of AI in the legal sphere triggers a multi-dimensional shift. We are witnessing a space where the rigidity of contract law meets the fluid ethics of automation and the pragmatic demands of commerce — a trifecta that defines the future of judicial certainty in a digital economy.

A crucial distinction must be maintained: despite their operational sophistication, AI systems remain devoid of legal personality. They do not exist as independent subjects of law; rather, they function as high-level instruments of human agency. This lack of ‚legal selfhood' means that, for all their complexity, these systems cannot be held liable in their own right, ensuring that the chain of accountability always leads back to a recognized legal person—whether an individual or a corporate entity. Under current legal frameworks, AI systems are typically viewed as extensions of their users, with their actions being attributed back to the human or corporate entities that set them in motion. However, as these applications gain a degree of functional autonomy, they begin to fray the edges of traditional legal concepts like intent, consent, and accountability. This evolution forces us to look beyond the code; we must examine AI not merely as a technological breakthrough, but as a disruptive legal catalyst that necessitates a complete re-evaluation of how we assign responsibility in an automated world[13]. Ultimately, AI cannot be understood in a vacuum; its identity is forged at the intersection of technical capability and normative boundaries. To define its scope is to engage in a dual exercise: measuring the sophistication of the algorithm while simultaneously determining the legal and ethical constraints that must govern its impact. Structurally, AI transcends the limits of static programming by exhibiting a form of functional autonomy. This allows it to decode complex patterns and adjust its operational parameters in real-time, effectively navigating the

[11] John McCarthy et al., "A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence," *AI Magazine* 27, no. 4 (2006): 12–14, https://doi.org/10.1609/aimag.v27i4.1904.
[12] De Filippi and Wright, *Blockchain and the Law*, 90.
[13] Hildebrandt, *Smart Technologies*, 61.

friction of dynamic environments. From a normative standpoint, the deepening integration of AI into contractual ties forces a fundamental reckoning: legal systems are no longer just observing a tool, but are tasked with defining the very boundaries of recognition and regulation. This shift raises a critical dilemma regarding how to effectively attribute the fallout of AI-driven actions. We are moving toward a reality where the law must decide whether to treat these systems as mere instruments or to carve out a new category of legal accountability that can accommodate the unpredictability of autonomous algorithms[14].

AI's footprint in commercial transactions has grown steadily, and it's basically changing the rules of the game. The way we draft, negotiate, and close sales deals has been ‚rebooted' for the modern age. This tech has moved from being a simple tool to the very heart of how we manage business partnerships today[15]. Automated drafting is easily the most visible way AI is changing the game. These smart platforms generate legal language in an instant, pulling from deep databases. The result? Fewer mistakes, faster turnaround times, and the ability for companies to scale their contract management almost effortlessly[16].

Smart contracts represent a sophisticated evolution of AI-driven automation, typically anchored within blockchain networks. Unlike traditional agreements, these protocols are inherently autonomous; they trigger the fulfillment of terms as soon as verifiable conditions are met. This shift effectively eliminates the friction of human intermediaries — such as escrow agents or administrative clerks — thereby accelerating performance. For instance, in the shipping industry, a smart contract can automatically release payment to a supplier the moment a GPS-linked sensor confirms the cargo has reached its destination, bypassing days of manual verification[17]. Legal hurdles regarding enforceability and liability allocation often complicate the theoretical reliability of smart contracts. When automated execution fails, the lack of a clear framework for contract formation transforms these efficient tools into significant legal liabilities. The integration of smart contracts introduces a complex array of legal uncertainties that may overshadow their operational benefits. Specifically, the questions of liability and the legal validity of these instruments remain critical points of contention in contemporary law.

Moving past simple operational speed, the real value of AI lies in its capacity to act as an automated guardian for risk management and regulatory compliance. By serving as a continuous, high-precision layer of oversight, these systems can identify subtle anomalies and legal misalignments that a manual audit might overlook. This shift transforms compliance from a reactive, periodic task

[14] Calo, "Artificial Intelligence Policy."
[15] De Filippi and Wright, *Blockchain and the Law*, 88–102.
[16] Calo, "Artificial Intelligence Policy."
[17] Kevin Werbach and Nicolas Cornell, "Contracts Ex Machina: Blockchain, Smart Contracts, and the Future of Law," *Duke Law Journal* 67, no. 2 (2017): 313–382, https://scholarship.law.duke.edu/dlj/vol67/iss2/2/.

into a proactive, real-time defensive strategy that fortifies the contract's legal integrity. By leveraging machine learning, companies can move beyond reactive management; these algorithms serve as a vigilant layer of oversight, pinpointing inconsistencies and flagging potential breaches long before they escalate. This proactive stance does more than just ensure that obligations are met — it functions as a strategic buffer. By identifying contractual friction early, organizations can effectively neutralize financial and legal exposure before it impacts the bottom line. Despite these advantages, the integration of AI into sales contracts is not without challenges. The automated nature of these tools raises questions about the expression of consent, contractual intent, and responsibility, especially in cross-border transactions where legal standards vary.[18]

Consequently, while AI offers transformative opportunities, its use must be carefully aligned with existing legal principles to preserve fairness, accountability, and the integrity of contractual relationships[19].

The integration of artificial intelligence into sales contracts raises complex legal challenges that extend beyond technological considerations. One of the primary concerns is consent and contractual intent. Traditional contract law presupposes that parties consciously and voluntarily agree to the terms of an agreement[20]. When AI systems autonomously draft or negotiate contracts, it becomes difficult to determine whether genuine consent exists, especially if human involvement is minimal or indirect[21].

Liability and accountability constitute another critical issue. In the event of a breach or error caused by an AI system, it is unclear who should bear responsibility. Civil law frameworks generally attribute liability to the individual or organization that deploys the AI, yet this approach may not fully address situations in which AI actions were unpredictable or autonomous[22].

A further challenge concerns contractual autonomy and legal recognition. AI systems may enter agreements without direct human intervention, creating uncertainty about the validity of such contracts under existing legal frameworks[23]. Additionally, cross-border transactions introduce complications, as jurisdictions may differ in their treatment of AI-mediated agreements, potentially leading to conflicts in interpretation and enforcement. Finally, there are broader ethical and regulatory concerns. The deployment of AI in contractual relationships must balance efficiency and innovation with fairness, transparency, and the protection of parties' legal rights. Ensuring that AI operates within acceptable

[18] Adam, *Drept civil*.
[19] Sartor and Omicini, "Autonomy of Technological Systems."
[20] Hildebrandt, *Smart Technologies*, 115–20.
[21] Calo, "Artificial Intelligence Policy."
[22] Adam, *Drept civil*.
[23] De Filippi and Wright, *Blockchain and the Law*, 95.

legal and ethical boundaries is essential for maintaining trust in commercial transactions[24].

AI offers considerable advantages in drafting, negotiating, and executing sales contracts, these benefits must be weighed against the legal challenges it introduces. Addressing issues of consent, liability, and autonomy is critical to integrating AI into contract law in a manner that is both innovative and legally sound. Romanian contract law, rooted in the civil law tradition, emphasizes the principles of consent, good faith, and the binding nature of obligations[25]. Sales contracts are governed primarily by the Civil Code, which requires a clear agreement between parties, the lawful object of the contract, and the observance of mandatory legal provisions[26].

The introduction of artificial intelligence into sales contracts raises questions about how these foundational principles can be applied. In Romania, AI systems do not have legal personality, so any action undertaken by an AI is legally attributed to the human or corporate entity that deploys the system[27]. This attribution principle ensures that parties remain accountable for AI-mediated decisions, yet it also highlights the limitations of existing doctrines when dealing with autonomous or semi-autonomous technologies. Consent and intention present a particular challenge. Traditional civil law relies on the voluntary and conscious expression of the parties' will[28]. When AI performs tasks such as automated contract drafting or negotiation, it may be unclear whether the human party has fully understood or consciously approved all aspects of the agreement. To address this, Romanian scholars suggest that human oversight must remain integral to AI-mediated contracting processes, ensuring that consent and contractual intent are preserved.

Liability is another critical aspect. Romanian law attributes responsibility to the party controlling the AI system, whether for errors, omissions, or contractual breaches. However, the growing complexity and autonomy of AI algorithms make it increasingly difficult to predict all potential outcomes, creating grey areas in accountability. Doctrinal debates are emerging regarding whether liability frameworks should be adjusted to reflect the unique nature of AI-assisted contracts.

In practice, Romanian courts have not yet faced widespread litigation involving AI in contractual contexts, which leaves many questions unresolved. Nonetheless, the existing legal framework provides a foundation that, when combined with human oversight, can accommodate AI applications while upholding

[24] Sartor and Omicini, "Autonomy of Technological Systems."
[25] Adam, *Drept civil*.
[26] Romania, *Civil Code*, Law no. 287/2009, republished in Official Gazette no. 505 (July 15, 2011), arts. 1166, 1170, 1178, 1182, 1225, and 1270, https://legislatie.just.ro/Public/Detalii Document/10 9883.
[27] Hildebrandt, *Smart Technologies*, 62.
[28] Hildebrandt, *Smart Technologies*, 125–30.

the core principles of civil law.

The European Union has taken a proactive stance in addressing the integration of artificial intelligence into commercial and contractual relationships. Unlike individual member states, which adapt existing civil law principles to AI applications, the EU seeks to provide a harmonized framework that ensures legal certainty across borders[29].

One of the most significant initiatives is the proposed Artificial Intelligence Act (AI Act), which aims to regulate high-risk AI systems, including those used in contractual processes.[30]

The Act establishes obligations for transparency, accountability, and human oversight, ensuring that AI does not undermine fundamental rights or contractual fairness. Under this framework, businesses deploying AI in sales contracts must implement risk management measures and maintain mechanisms for human review of AI-generated decisions[31].

Beyond the AI Act, other EU regulations indirectly impact AI-mediated contracts. The General Data Protection Regulation (GDPR), for instance, governs the processing of personal data used by AI algorithms, ensuring that automated decision-making respects privacy and data protection principles.[32] Similarly, the Digital Markets Act and ongoing directives on digital services provide additional layers of legal compliance for AI systems operating in commercial environments. From a comparative perspective, the EU approach differs from Romania's primarily domestic civil law perspective in that it emphasizes cross-border consistency. While Romanian law attributes liability and responsibility to the deploying party, the EU framework introduces specific obligations for risk assessment, auditing, and transparency, thereby promoting trust and reducing uncertainty in international transactions.[33]

The European Union's regulatory approach seeks to balance technological innovation with the protection of legal rights. By establishing clear standards and oversight mechanisms, the EU provides guidance for both member states and businesses, facilitating the safe and efficient use of AI in sales contracts while promoting convergence across national legal systems.[34]

In the United States, contract law is primarily shaped by the common law system, which relies on judicial precedent and case-by-case analysis rather than codified statutes[35]. Sales contracts are governed by a combination of general con-

[29] European Commission, *Proposal for an Artificial Intelligence Act*.
[30] European Commission, *Proposal for an Artificial Intelligence Act*, arts. 6–15.
[31] Hildebrandt, *Smart Technologies*, 125–30.
[32] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 (General Data Protection Regulation), OJ L 119 (May 4, 2016): 1–88, https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng.
[33] Adam, *Drept civil*.
[34] Adam, *Drept civil*.
[35] E. Allan Farnsworth, *Farnsworth on Contracts*, 3rd ed., 3 vols. (New York: Aspen Publishers,

tract principles and the Uniform Commercial Code (UCC), which provides standardized rules for the sale of goods[36].

The application of artificial intelligence to sales contracts in the U.S. raises questions about liability and attribution. Under existing common-law principles, acts performed through an AI system are generally attributed to the person or company that deploys it. Self-executing smart contracts can nevertheless complicate the identification of responsibility when code produces an error or an unintended result. The legal literature therefore treats these systems through established doctrines of contract formation and attribution, while emphasizing that the relevant case law remains limited.[37]

Another critical aspect concerns contract formation and enforceability. U.S. law requires offer, acceptance, and consideration for a contract to be valid. When AI negotiates terms or executes agreements autonomously, legal scholars debate whether these elements are sufficiently satisfied, especially in the absence of direct human intervention. Additionally, cross-border transactions involving AI introduce questions about choice of law, enforceability, and the recognition of AI-mediated contracts in foreign jurisdictions.

Despite these challenges, the U.S. approach is generally flexible, relying on adaptation of existing doctrines rather than creating entirely new legal categories. The emphasis remains on human accountability, risk mitigation, and ensuring that AI tools enhance efficiency without undermining the integrity of contractual relationships.

In conclusion, the common law perspective in the United States focuses on applying established legal principles to emerging AI technologies, balancing innovation with responsibility and enforceability. The U.S. framework offers valuable insights for international comparisons, highlighting both the strengths and limitations of relying on precedent and judicial interpretation in regulating AI-assisted contracts.

A comparative analysis of Romania, the European Union, and the United States reveals both convergences and divergences in the treatment of artificial intelligence in sales contracts. Despite differences in legal traditions — civil law in Romania and the EU versus common law in the United States — certain themes emerge consistently across jurisdictions[38].

First, human oversight and accountability are emphasized in all three contexts. In Romania, AI actions are legally attributed to the deploying party, ensuring that consent and liability remain under human control. The EU strength-

2004), 15, https://lawcat.berkeley.edu/record/215022?ln=en.

[36] American Law Institute and Uniform Law Commission, *Uniform Commercial Code*, art. 2, "Sales," https://www.law.cornell.edu/ucc/2.

[37] American Law Institute and Uniform Law Commission, *Uniform Commercial Code*, art. 2; Werbach and Cornell, "Contracts Ex Machina."; Calo, "Artificial Intelligence Policy."

[38] Hildebrandt, *Smart Technologies*, 115–30.

ens this principle through regulatory instruments such as the AI Act, which mandates transparency, risk management, and human review[39].

Second, consent and contractual intent present a shared challenge. AI systems can automate drafting, negotiation, and execution, but legal frameworks universally require human involvement to preserve the validity of agreements. While Romania and the EU focus on codified rules and regulatory compliance, the U.S. relies on flexible judicial interpretation to assess whether AI-mediated contracts satisfy traditional formation requirements[40].

Third, liability allocation differs in approach. Romanian civil law attributes responsibility directly to the party controlling the AI, while the EU establishes procedural obligations to ensure accountability and minimize risks. In contrast, U.S. common law provides a case-by-case analysis based on agency, foreseeability, and negligence doctrines. These differences influence how cross-border transactions may be evaluated and enforced.

Finally, harmonization and predictability remain central objectives, particularly in the EU context, where member states aim for uniformity. The U.S. approach prioritizes flexibility and adaptation through case law, while Romania relies on domestic civil law principles complemented by EU regulations in international matters[41].

In conclusion, while the legal treatment of AI in sales contracts varies across jurisdictions, certain core principles — human oversight, accountability, and protection of consent — are universally recognized. Understanding these similarities and differences is essential for businesses, legal practitioners, and policymakers engaged in international transactions, and it highlights the need for continued efforts toward convergence in AI regulation[42].

The integration of artificial intelligence into sales contracts presents both significant opportunities and notable risks. Understanding these dimensions is essential for legal practitioners, businesses, and policymakers seeking to leverage AI while minimizing potential liabilities.

AI provides several advantages in contract management. Efficiency and speed are among the most significant benefits, as AI can automate the drafting, review, and negotiation of contract clauses, reducing human error and saving time[43]. Automated systems also allow for handling large volumes of contracts simultaneously, which is particularly useful for multinational corporations and e-commerce platforms[44].

Enhanced risk management and compliance represent another oppor-

[39] European Commission, *Proposal for an Artificial Intelligence Act*, arts. 6–15.
[40] Werbach and Cornell, "Contracts Ex Machina."
[41] European Commission, *Proposal for an Artificial Intelligence Act*, recitals 10–12.
[42] Calo, "Artificial Intelligence Policy."
[43] De Filippi and Wright, *Blockchain and the Law*, 102.
[44] Calo, "Artificial Intelligence Policy."

tunity. AI algorithms can detect inconsistencies, flag potential breaches, and provide predictive insights about contractual performance[45]. This proactive approach helps businesses anticipate problems before they escalate into legal disputes, thereby reducing exposure to financial and reputational harm.

Moreover, smart contracts enable automatic execution of obligations when pre-defined conditions are met, reducing the need for intermediaries and increasing reliability in transactions[46]. Such automation fosters transparency and can enhance trust among parties, particularly in cross-border commercial dealings.

Despite these benefits, AI introduces several legal and ethical challenges. One major concern is consent and contractual intent. When AI autonomously drafts or negotiates agreements, it may be difficult to establish that the human parties fully understood or agreed to all terms[47].

Liability allocation also poses risks. In case of errors or breaches caused by AI, determining responsibility can be complex, especially with autonomous systems. Civil law frameworks attribute liability to the deploying party, while common law relies on principles of agency and foreseeability. In both cases, gaps remain that could lead to legal uncertainty[48].

Cross-border enforceability is another challenge. Differences in national laws regarding AI-mediated contracts, consent, and liability can create conflicts and complicate dispute resolution. The lack of international harmonization may deter businesses from fully embracing AI in contractual processes.

Finally, there are ethical and regulatory considerations. AI must operate transparently, fairly, and within legal boundaries. Overreliance on AI could undermine human judgment, contractual autonomy, and accountability, creating potential for abuse or unintended consequences[49].

Effectively integrating AI into sales contracts requires a balanced approach. Businesses should ensure human oversight, adopt clear risk management protocols, and remain compliant with domestic and international legal frameworks. Policymakers must continue developing regulations that promote innovation while safeguarding contractual integrity and fundamental rights.

In conclusion, while AI offers transformative potential for efficiency, risk management, and automation, careful attention to consent, liability, and cross-border enforceability is essential. Striking the right balance between innovation and legal compliance will determine the success and sustainability of AI in sales contracts.

[45] Sartor and Omicini, "Autonomy of Technological Systems."
[46] Werbach and Cornell, "Contracts Ex Machina."
[47] Hildebrandt, *Smart Technologies*, 115–30.
[48] European Commission, *Proposal for an Artificial Intelligence Act*, arts. 6–15.
[49] Calo, "Artificial Intelligence Policy."

2.4. Validity of Consent in Digital Contracts (Critical Version with Scopus Sources)

The validity of consent, traditionally regarded as a cornerstone of contract law, becomes far less straightforward when examined in the context of digital contracts. Although legal doctrine continues to rely on classical requirements — namely that consent must be freely given, informed, and free from vitiating factors—the realities of the digital environment raise legitimate doubts as to whether these conditions are genuinely satisfied or merely assumed.

A first point of tension concerns the informational dimension of consent. In principle, digital platforms provide users with access to contractual terms, thereby fulfilling formal disclosure requirements. In practice, however, this abundance of information often leads to disengagement rather than understanding. Empirical studies have shown that users rarely read terms and conditions in full, instead relying on quick acceptance mechanisms such as click-wrap agreements[50]. As a result, consent risks becoming a procedural formality rather than a substantive expression of will. Scholars have increasingly questioned whether such practices undermine the very notion of informed consent, transforming it into what has been described as a "ritual of acceptance" rather than a meaningful legal act[51].

The issue of freedom of consent is equally problematic. Digital markets are frequently characterized by strong asymmetries of power, particularly in the case of large online platforms. Users are typically presented with standardized, non-negotiable terms, leaving them with a binary choice: accept or forego access to the service[52]. From a doctrinal perspective, this may still qualify as valid consent. Yet, from a more critical standpoint, such arrangements raise concerns about structural imbalance and the erosion of genuine contractual autonomy.

At the same time, the digital environment facilitates more subtle forms of influence that challenge traditional understandings of vitiated consent. Interface design, algorithmic personalization, and behavioral nudging techniques can shape user decisions without overt coercion or deception[53]. Recent literature highlights the growing impact of so-called "dark patterns," which exploit cognitive biases to steer users toward certain choices.[54] These practices blur the line

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[50] Florencia Marotta-Wurgler, "Does Contract Disclosure Matter?," *Journal of Institutional and Theoretical Economics* 168, no. 1 (2012): 94–97, https://doi.org/10.1628/093245612799440122.

[51] Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, NJ: Princeton University Press, 2014), 3–12, https://books.google.com/books?id=hGqYDwAAQBAJ.

[52] Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (New York: Oxford University Press, 2013), 45–60, https://global.oup.com/academic/product/wrap-contracts-9780199336975.

[53] Hildebrandt, *Smart Technologies*, 120–30.

[54] Harry Brignull, "Dark Patterns: Deception vs. Honesty in UI Design," *A List Apart*, no. 338 (November 1, 2011), https://alistapart.com/article/dark-patterns-deception-vs-honesty-in-ui-design/.

between persuasion and manipulation, suggesting that the legal framework may need to evolve beyond classical categories of fraud or error.

The increasing use of artificial intelligence further complicates the analysis. AI systems are now capable of personalizing contractual offers, automating negotiations, and even predicting user behavior[55]. In such contexts, the process of consent formation becomes partially mediated by algorithmic systems that are not always transparent or fully understood by users. This raises a fundamental question: to what extent can consent be considered valid when it is influenced — or indirectly shaped — by technologies operating beyond the user's awareness?

Taken together, these developments suggest that the traditional framework for assessing consent, while still formally applicable, may no longer be sufficient to capture the complexities of digital contracting. A more nuanced approach is required — one that takes into account not only the formal expression of agreement, but also the technological and behavioral context in which that agreement is produced. Such an approach would better reflect the realities of digital interaction and contribute to a more effective protection of contractual autonomy.

The increasing integration of artificial intelligence into contractual processes raises a fundamental question: what becomes of consent when key stages of contract formation are no longer entirely controlled by human actors? While traditional contract law is built on the assumption of conscious and deliberate agreement, the growing use of automated systems challenges this premise in subtle, but significant ways.

At a basic level, artificial intelligence is already involved in various stages of contractual interaction, from drafting standardized clauses to personalizing offers and facilitating negotiations[56]. In many digital environments, users are no longer presented with neutral contractual terms, but with conditions tailored through algorithmic analysis of their preferences, behavior, and even vulnerabilities[57]. This personalization may increase efficiency and relevance, yet it also complicates the idea of consent as an autonomous and independent act.

A first difficulty arises from the opacity of algorithmic systems. As Karen Yeung has argued, algorithmic decision-making often operates in ways that are not fully transparent or easily understandable to users[58].

When individuals accept contractual terms influenced by such systems, their consent may be based on incomplete knowledge, not only of the contract itself, but also of the mechanisms shaping the offer. This raises the question of whether informed consent can still be meaningfully asserted in contexts where the decision-making environment is partially hidden.

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[55] Karen Yeung, "Algorithmic Regulation: A Critical Interrogation," *Regulation & Governance* 12, no. 4 (2018): 505–523, https://doi.org/10.1111/rego.12158.
[56] Werbach and Cornell, "Contracts Ex Machina."
[57] Hildebrandt, *Smart Technologies*, 127.
[58] Hildebrandt, *Smart Technologies*, 122.

Another concern relates to the gradual displacement of human intention. In some cases, AI systems do not merely assist, but actively participate in the formation of contractual relationships, for example through automated negotiations or smart contracts executed without further human intervention[59]. While the law generally attributes these actions to the human or entity deploying the system, this attribution may appear increasingly artificial as the level of autonomy grows. Scholars such as Werbach and Cornell have noted that smart contracts, in particular, challenge the traditional understanding of agreement, as performance becomes embedded in code rather than dependent on ongoing human consent[60].

At the same time, artificial intelligence can subtly influence user behavior through predictive analytics and behavioral nudging. Research in the field of digital regulation highlights how algorithmic systems are capable of anticipating user decisions and steering them toward certain outcomes[61].

One of the most persistent challenges concerns legal transparency and explainability. Many AI systems operate as "black boxes," making it difficult for users — and sometimes even developers — to understand how decisions are generated[62]. This lack of interpretability becomes particularly problematic in contractual contexts, where parties are expected to give informed consent based on clear and accessible information. Scholars such as Edwards and Veale have emphasized that the so-called "right to explanation" under European data protection law remains largely theoretical when confronted with complex machine-learning systems[63].

A second major issue relates to asymmetries of power between platforms and users. Digital markets are increasingly dominated by large technology companies that control both the infrastructure and the contractual environment[64]. In such settings, users often lack meaningful bargaining power, which raises concerns about the substantive fairness of consent. Even when agreements are formally valid, the conditions under which they are concluded may reflect structural inequality rather than genuine contractual autonomy.

Another emerging concern is the rise of behavioral manipulation through interface design and algorithmic personalization. Research in digital regulation

[59] De Filippi and Wright, *Blockchain and the Law*, 100.
[60] Werbach and Cornell, "Contracts Ex Machina."
[61] Lilian Edwards and Michael Veale, "Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking For," *Duke Law & Technology Review* 16, no. 1 (2017): 18–84, https://scholarship.law.duke.edu/dltr/vol16/iss1/2/.
[62] Joshua A. Kroll et al., "Accountable Algorithms," *University of Pennsylvania Law Review* 165, no. 3 (2017): 633–705, https://scholarship.law.upenn.edu/penn_law_review/vol165/iss3/3/.
[63] Edwards and Veale, "Slave to the Algorithm?," 84.
[64] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: PublicAffairs, 2019), 75–110, https://www.hachettebookgroup.com/titles/shoshana-zuboff/the-age-of-surveillance-capitalism/9781610395694/.

has shown that AI systems are capable of influencing user behavior through subtle nudging techniques that operate below the level of conscious awareness[65]. These mechanisms blur the distinction between persuasion and manipulation, challenging the adequacy of traditional legal categories such as fraud or error.

Looking forward, one of the key developments in this area is likely to be the increasing demand for regulatory harmonization at the international level. As AI-driven contracting crosses national borders, fragmentation of legal regimes creates uncertainty for both businesses and consumers[66]. Comparative legal scholarship suggests that convergence around principles such as transparency, accountability, and human oversight may represent a realistic path forward, even in the absence of full legislative uniformity.

At the same time, there is growing academic consensus that future regulation should move beyond purely formal compliance mechanisms. Instead, it should focus on the governance of socio-technical systems, taking into account not only legal rules but also the design of digital infrastructures themselves[67]. In this sense, law is increasingly required to interact with technology rather than simply regulate it from the outside[68].

3. Conclusions

The present study highlights the growing impact of artificial intelligence on sales contracts, exploring regulatory approaches, legal challenges, and comparative perspectives across Romania, the European Union, and the United States. AI offers substantial opportunities to enhance efficiency, reduce errors, and facilitate contract management, particularly through automation and smart contracts[69].

One of the main findings is that existing legal frameworks are not entirely inadequate, as might sometimes be assumed, but they do appear to be under growing pressure. In many cases, traditional rules can still be applied, although often with a degree of flexibility that was not originally intended. At the same time, the absence of a coherent and unified regulatory approach — especially in cross-border contexts — continues to generate uncertainty, both for legal practitioners and for contracting parties.

From a practical perspective, the results of this study may be relevant in

[65] Karen Yeung, "'Hypernudge': Big Data as a Mode of Regulation by Design," *Information, Communication & Society* 20, no. 1 (2017): 118–136, https://doi.org/10.1080/1369118X.2016.1186713.

[66] Hildebrandt, *Smart Technologies*, 200–215.

[67] Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (New York: Oxford University Press, 2019), 160–185, https://global.oup.com/academic/product/between-truth-and-power-9780190246693.

[68] Werbach and Cornell, "Contracts Ex Machina."

[69] De Filippi and Wright, *Blockchain and the Law*, 95.

several directions. Legal practitioners are increasingly required to navigate contracts influenced by automated systems, which makes human oversight and careful risk assessment more important than ever. For policymakers, the findings suggest that regulatory intervention should not necessarily aim to replace existing frameworks, but rather to clarify and adapt them in light of technological developments. Businesses, in turn, may need to rethink internal processes, ensuring that the use of AI is accompanied by appropriate safeguards and compliance mechanisms.

Looking ahead, it seems reasonable to assume that the role of artificial intelligence in contract law will continue to expand. This makes further research not only useful, but necessary, particularly in areas where legal uncertainty persists. Greater dialogue between legal systems, as well as efforts toward international harmonization, could contribute to a more predictable and stable legal environment.

However, these benefits are accompanied by significant legal and ethical risks. Issues such as consent, contractual intent, liability allocation, and cross-border enforceability remain central concerns. Differences in legal traditions—civil law versus common law — affect how these challenges are addressed, with the EU emphasizing harmonization and regulatory compliance, the U.S. relying on judicial precedent and flexibility, and Romania adapting domestic civil law principles within the EU framework[70].

The comparative analysis demonstrates that, despite these differences, common principles emerge: human oversight, accountability, and protection of consent are universally recognized as essential safeguards when AI is involved in contractual processes. These principles should guide both legislative and business practices to ensure AI supports legal certainty and trust in commercial transactions.

Looking forward, the development of clear regulatory frameworks and international cooperation will be crucial. Policymakers should continue to define standards for transparency, risk management, and ethical AI deployment, while businesses must implement internal protocols for compliance and accountability[71].

AI has the potential to transform sales contracts significantly, but its adoption must be accompanied by careful attention to legal obligations and ethical considerations. Striking a balance between innovation and regulation is essential to maximize the benefits of AI while minimizing potential disputes and liabilities. This study contributes to a better understanding of these challenges and provides a foundation for future research and practical guidance in the rapidly evolving field of AI-mediated contracts[72].

Ultimately, the integration of artificial intelligence into sales contracts

[70] Hildebrandt, *Smart Technologies*, 115–30.
[71] European Commission, *Proposal for an Artificial Intelligence Act*, arts. 6–15.
[72] European Commission, *Proposal for an Artificial Intelligence Act*, arts. 6–15.

should not be viewed exclusively as a challenge, nor purely as an opportunity. Rather, it represents a complex transformation that requires careful adjustment. Maintaining a balance between innovation and legal protection remains essential, especially if trust in contractual relationships is to be preserved in an increasingly digital context.

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To Train or to Protect, That Is the Question. Copyright Challenges in AI Model Training

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Abstract

The development of general-purpose and generative artificial intelligence depends on the use of extensive training datasets, which frequently include works protected by copyright. AI model training may involve the reproduction, extraction, retention, and memorization of protected content, while in certain circumstances the resulting outputs may reproduce elements of the original works. These practices raise a fundamental legal question: to what extent may AI developers and providers use copyrighted works for training purposes without the prior authorization of rightsholders? Using a doctrinal and comparative legal methodology, this article examines the regulatory approaches adopted in the European Union, the United States, and China—three major actors in the global development of artificial intelligence. The analysis focuses on the European Union's text and data mining exceptions, Article 53 of the AI Act and the General-Purpose AI Code of Practice; the application of the fair use doctrine under United States copyright law; and China's evolving framework based on general copyright principles, administrative measures governing generative AI services, and emerging judicial practice. The comparative analysis reveals three distinct models. The European Union permits text and data mining of lawfully accessible works unless rightsholders expressly reserve their rights, although uncertainty remains concerning the appropriate and machine-readable form of such reservations. The United States relies primarily on a case-by-case fair use assessment, taking into account the purpose and character of the use, the amount of the work used, its market effects, and the lawful acquisition of training materials. China continues to apply general copyright rules alongside increasingly detailed administrative obligations, while its judicial approach to AI training remains under development. The article concludes that none of these models has yet achieved a definitive balance between technological innovation and effective copyright protection. Greater legal clarity is therefore required regarding lawful access to training data, licensing, rights-reservation mechanisms, the risks of memorization and reproduction, and the allocation of responsibility for infringing uses.

Keywords: *copyright, artificial intelligence, AI model training, training data, text and data mining, fair use, rights reservation, comparative law.*

1. Introductory Remarks

Artificial intelligence is both a bad dream and a blessing depending on the shoes we are walking in. From the big tech companies' point of view artificial

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intelligence is for sure the next logical step in technological evolution and a new source of profit. On the other, rightsholders and authors fear that artificial intelligence models are nothing more than a means of infringing copyright and an unfair competitor within the industry. All over the world, actors, musician, writers, and other artist are protesting against artificial intelligence models trained on their work, in some cases specifically to replicate their style, voice, appearance, and more broadly, their body of work. To a better understanding of this issue, thousands of actors in France have signed a petition claiming that AI companies are using the voices and likenesses of less known actors to train AI models, which puts professional actors at a disadvantage.[2] The situation is no different across the Pacific Ocean, where Hollywood artists have declared war on artificial intelligence, arguing for fair licensing agreements for the usage of their works.[3] In China, on April 3, 2026 Actors Committee of the China Federation of Radio and Television issue a statement raising similar concerns regarding the trend of artificial intelligence applications being used to create short films or miniseries featuring well-known actors without their consent, using publicly available images of them.[4]

Besides those flagrant violations, there are concerns that copyrighted works included in training dataset could be reproduced by the model after the training phase. This is possible because the AI model unintentionally store the training data. Obviously, this data can be stored without being subsequently reproduced in outputs, however, both memorization and regurgitation raise issues regarding copyright protection. To understand the difference between those two terms „memorization" and „regurgitation" we should note that regurgitation involves the model generating outputs that contain training data, whereas memorization refers to remembering training data, regardless of whether it is subsequently reproduced in the outputs or not. Also, is important to mention that AI models, besides humans, don't deliberately memorize the training data. Thus, memorization is more of a mistake than an intention.[5]

When it comes to the reproduction of a work by artificial intelligence, things are fairly straightforward, but you might wonder how it affects rightsholders if their work is not reproduced. Well, the more training data model stores, the

[2] Renaud Baronian, "« Ce pillage en règle, c'est insupportable » : 4 000 comédiens français alertent sur les dangers de l'IA," *Le Parisien*, February 22, 2026, https://www.leparisien.fr/culture-loisirs/cinema/ce-pillage-en-regle-cest-insupportable-4-000-comediens-francais-alertent-sur-les-dangers-de-lia-22-02-2026-XBQXRXXESJBW3BUBHBRUF5FXQY.php.

[3] MSN, "New Petition: Hollywood Stars Officially Declare War on AI," 2026, https://www.msn.com/en-us/movies/news/new-petition-hollywood-stars-officially-declare-war-on-ai/ar-AA1UHW5p.

[4] Yiru Chen, "China Issues Draft Regulations on AI Copyright Infringement," *Sixth Tone*, April 10, 2026, https://www.sixthtone.com/news/1018405/china-issues-draft-regulations-on-ai-copyright-infringement.

[5] A. Feder Cooper et al., "Report of the 1st Workshop on Generative AI and Law," arXiv:2311.06477 (November 2023), 5, https://arxiv.org/abs/2311.06477.

greater the chances that it will be for an adversarial user to *„extract proprietary information in training data, thereby presenting issues related to trade secrecy"*[6] In an experiment conducted on the Stable Diffusion model, it was found that out of a total of 175 million generated images, only 109 were nearly identical to the training data. In contrast, the Imagen model memorize and reproduced 3 images out of the 500 used as training data.[7] Another study shows that using the Surrogate Conditional Data Extraction (SIDE) method, training data can also be extracted from unconditional models, which were previously considered impervious to data extraction since they are not trained with labels or prompts, but operate on the basis of probabilities.[8]

By using triggers, they „force" the model *„into a state of extreme memorization, turning the backdoor into a reliable channel for data exfiltration rather than content generation.* (…) [which] *demonstrates a potent new extraction vector but also underscores the need for robust detection mechanisms that can account for various types of backdoor exploits, including those specifically tailored for privacy breaches."*[9] Therefore, there is no guarantee that once collected, training data will be stored securely or forgotten.

Training data usually consists of both synthetic data and data collected from public sources or purchased or licensed. To answer the question posed in the abstract of this paper, we must examine how providers of artificial intelligence can access copyrighted works without purchasing or licensing them. To this aim, given the different approaches taken, we will conduct a differentiated analysis tor the European Union, the United States and China, examining the relevant legislation and how it is interpreted by those responsible for enforcing it. But before that, we would like to point out that the copyright laws in force in the jurisdictions under review have followed the idea-expression dichotomy, which protects only the specific form of expression, but not the idea or the style itself, because these are in public domain.[10]

2. The European Union Vision

On June 13, 2024, the European Union adopted Regulation (EU) 2024/1689 on artificial intelligence (hereinafter the AI Act)[11]. Although it is a

[6] Cooper et al., "Report of the 1st Workshop," 12.
[7] Nicholas Carlini et al., "Extracting Training Data from Diffusion Models," in *32nd USENIX Security Symposium (USENIX Security 23)* (Anaheim, CA: USENIX Association, 2023), 5253–54, https://www.usenix.org/conference/usenixsecurity23/presentation/carlini.
[8] Yunhao Chen et al., "SIDE: Surrogate Conditional Data Extraction from Diffusion Models," *Proceedings of the AAAI Conference on Artificial Intelligence* 40, no. 1 (2026): 128–136, https://doi.org/10.1609/aaai.v40i1.36972.
[9] Chen et al., "SIDE," 136.
[10] *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), https://supreme.justia.com/cases/federal/us/537/186/.
[11] Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024

comprehensive piece of legislation, the EU legislature devoted only one provision to copyright compliance by providers of general-purpose AI models. Article 53(1)(c) requires such providers to adopt a policy to comply with Union copyright law, in particular by identifying and complying with reservations of rights expressed pursuant to Article 4(3) of Directive (EU) 2019/790.[12]

Article 4 (1) of Directive (EU) 2019/790 requires Member States to provide in their legislation for exceptions that allow *„reproductions and extractions of lawfully accessible works and other subject matter for purpose of text and data mining"*[13] and so enable:

- permanent or temporary reproduction, in whole or in part, by any means and in any form of a database (Article 5 (a) Directive 96/9/CE)[14];

- extraction and reuse of database or substantial part of a database (article 7(1) Directive 96/9/CE)[15];

- the direct or indirect, permanent or temporary reproduction, by any means and in any form, in whole or in part, of work protected by copyright, and, for holders of related rights, the fixation of performances (article 2 Directive 2001/29/CE)[16];

- the direct or indirect, permanent or temporary reproduction, by any means and in any form, in whole or in part, of a computer program (article 4(1)(a) Directive 2009/24/CE)[17];

- translation, adaptation or any other modification of the computer program (article 4 (1)(b) Directive 2009/24/CE)[18];

According to article 4 (3) of Directive (EU) 2019/790, referred to in article 53 of the AI Act „*The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their right holders in an appropriate manner, such as machine-readable means in the case of content made publicly available online."*[19]

(Artificial Intelligence Act), OJ L 2024/1689 (July 12, 2024), art. 53(1)(c), https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng.

[12] Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019, OJ L 130 (May 17, 2019): 92–125, https://eur-lex.europa.eu/eli/dir/2019/790/oj/eng.

[13] Directive (EU) 2019/790, art. 4(1).

[14] Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996, on the Legal Protection of Databases, OJ L 77 (March 27, 1996): 20–28, art. 5(a), https://eur-lex.europa.eu/eli/dir/1996/9/oj/eng.

[15] Directive 96/9/EC, art. 7(1).

[16] Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on Copyright and Related Rights in the Information Society, OJ L 167 (June 22, 2001): 10–19, art. 2, https://eur-lex.europa.eu/eli/dir/2001/29/oj/eng.

[17] Directive 2009/24/EC of the European Parliament and of the Council of April 23, 2009, on the Legal Protection of Computer Programs, OJ L 111 (May 5, 2009): 16–22, art. 4(1)(a), https://eur-lex.europa.eu/eli/dir/2009/24/oj/eng.

[18] Directive 2009/24/EC, art. 4(1)(b).

[19] Directive (EU) 2019/790, art. 4(3).

From the legal provisions set forth above, we can conclude that the European Union has chosen to include all (mentioned earlier in the paper) works within the Text and Data Mining Exception established by article 4 (1) of Directive 2019/790, meaning that authors or rightsholders who wish to exclude their work from the exception must expressly opt-out.

In accordance with the AI Act, the European AI Office facilitated the preparation of the General-Purpose AI Code of Practice (hereinafter the GPAI Code), a voluntary compliance tool drafted by independent experts and endorsed by the European Commission and the AI Board. The Code has three chapters, one of which addresses copyright. Signatories commit to comply with rights reservations expressed through the Robot Exclusion Protocol (robots.txt) and other appropriate machine-readable protocols.[20]

This leads to a conflict between the provisions of the AI Act and the measures directly and voluntarily adopted by GPAIM through Code of practice. We therefore wonder whether the method of expressing the opt-out choice must necessarily be a „machine-readable reservation of right" (as required by the Code of practice) or whether it is sufficient for it to be expressed in an „appropriate manner" (as required by Directive (EU) 2019/790)?

In order to answer this question, we will first briefly explain the robots.txt protocol. Stepanka Havlikova's paper demonstrate that robots.txt can be used to create so-called blacklists or whitelists. Blacklists exclude certain user agents (web crawlers), while whitelists allow only those explicitly included. However, excluding all web crawlers is not an option because this would also block the Google search engine, which would result in the site being excluded from Google search results. Also, it should be noted that when creating their lists – whether blacklist or whitelists – access cannot be granted or restricted based on the purpose of the crawling. Therefore, each website that you wish to exclude or include must be specifically listed, however, this requires an awareness of the web crawlers.[21] This task can be excessive in some cases, especially since web crawler operators have their own policies imposing the introduction of the robots.txt file at a specific level of the site's directory so that it is visible to the crawler.[22]

Returning to the issue mentioned earlier – the manner of expressing the opt-out choise regarding the Text and Data Mining Exception – even though we do not yet have an interpretation from the Court of Justice regarding article 4 Directive 2019/790, national courts in Germany and the Neatherlands have ruled on cases relevant to this issue. In those cases, the courts looked at the same thing

[20] European Commission, "The General-Purpose AI Code of Practice," published July 10, 2025, https://digital-strategy.ec.europa.eu/en/policies/contents-code-gpai.
[21] Štěpánka Havlíková, "Technical Challenges of Rightsholders' Opt-out From Gen AI Training after Robert Kneschke v. LAION," *Journal of Intellectual Property, Information Technology and E-Commerce Law* 16, no. 1 (2025): 88–106, at 98, https://www.jipitec.eu/jipitec/article/view/422.
[22] Google, "How Google Interprets the robots.txt Specification," last updated December 11, 2025, https://developers.google.com/crawling/docs/robots-txt/robots-txt-spec.

and perceive entirely different realities. On the one hand, District Court in case *Robert Kneschke v. LAION* ruled that „*the concept of machine readability (...) must certainly be interpreted in the sense of <<machine comprehensibility>> (....) Nevertheless, the question of whether and under what specific conditions a reservation of rights declared in <<natural language>> can also be considered <<machine-readable>> will always have to be answered in relation to the technological developments existing at the relevant time of use of the work.*"[23] On the other hand, Amsterdam District Court held, among other things, that in the light of recital (18) of Directive 2019/790, the opt-out statement must be in a machine-readable format, since the protected data was made available to the public online.[24]

What is certain it is that both the Directive and the Code of practice require clear wording, both regarding the opt-out options and the content covered by it.

Regarding the machine-readable format, priority should be given to the binding provisions of the Directive rather than to the voluntary Code of Practice or the Directive's recitals. Directives bind Member States as to the result to be achieved; national courts must interpret domestic law consistently with them, and individuals may invoke sufficiently clear, precise, and unconditional provisions against the state. A directive does not, however, of itself impose obligations on private parties. Nor does a recital have binding legal force or permit an interpretation contrary to the operative provisions.[25]

From the above, it follows that the European union has adopted a policy of *ab initio* including work in the training datasets of artificial intelligence.

European Parliament Resolution of 10 March 2026 on copyright and generative artificial intelligence – opportunities and challenges, acknowledges the ambiguity of Directive 2019/790 and, in this regard, recommends the adoption of clarifying rules. It considers that, given the current state of development of artificial intelligence models, the regulations in force are insufficient to ensure effective copyright protection. And reminds that *„any exceptions to current rights under the copyright acquis, including on AI, must be in line with the three-step*

[23] *Robert Kneschke v. LAION e.V.*, Case No. 310 O 227/23 (Hamburg Regional Court, September 27, 2024), https://www.wipo.int/wipolex/en/judgments/details/2381.

[24] *DPG Media et al. v. HowardsHome*, C/13/737170 / HA ZA 23-690, ECLI:NL:RBAMS:2024:6563 (District Court of Amsterdam, October 30, 2024), https://uitspraken.rechtspraak.nl/details?id=ECLI%3ANL%3ARBAMS%3A2024%3A6563.

[25] *Van Duyn v. Home Office*, Case 41/74, ECLI:EU:C:1974:133 (Court of Justice, December 4, 1974), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61974CJ0041; *Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas*, Case C-136/04, ECLI:EU: C:2005:716, para. 32 (Court of Justice, November 24, 2005), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0136.

test under Article 5(5) of the InfoSoc Directive and under the Berne Convention"[26] From this, we can easily conclude that the Text and Data Mining Exception was never intended to be exempt from the tree-strep test[27]. Emphasizes that copyright holders must retain full control over the use of content for purposes other than training AI model, as such any other use of this data should require their express consent. The European Parliament's resolutions reflect a continuing desire to improve regulations, which reinforces the Union's vision of strong regulation in this area.

3. The United States Vision

Compared with the European Union, the United States has generally relied on existing law and policy rather than adopting a comprehensive federal copyright regime specific to AI training. Federal policy emphasizes innovation, while states continue to introduce measures addressing particular AI risks, including transparency, privacy, health care, employment, and consumer protection.[28]

The Copyright Act of 1976 is codified in Title 17 of the United States Code. Section 107 gives statutory recognition to the judicial doctrine of fair use. Its illustrative purposes include criticism, comment, news reporting, teaching, scholarship, and research, but the doctrine is not confined to education; it remains a flexible, case-by-case limitation on copyright.

Section 107 establishes as a general rule that the use of protected work, in any form, for purpose of „*criticism, comment, news reporting, teaching, (...) scholarship, or research, is not an infringement of copyright"*[29] The report by the U.S. Congress's Judiciary Committee, prepared at the time the Copyright Act was enacted, states that the permission granted to teachers to make multiple copies of a work for distribution in the classroom shall not be used to create or to replace or to substitute for anthologies, compilations or collective works. In addition to these specific exceptions, it establishes a standard to be applied to any type of use[30] in order to determine whether it is legitimate or not – *„fair use"* – which is assessed based on four factors that we will examine below. These factors must be

[26] European Parliament, "Copyright and Generative Artificial Intelligence—Opportunities and Challenges," resolution of March 10, 2026, P10_TA(2026)0066, https://www.europarl.europa.eu/doceo/document/TA-10-2026-0066_EN.html.
[27] Directive 2001/29/EC, art. 5(5).
[28] White House, *Winning the AI Race: America's AI Action Plan* (July 2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf; Troutman Privacy Team, "Proposed State AI Law Update: February 16, 2026," *Privacy + Cyber + AI*, February 16, 2026, https://www.troutmanprivacy.com/2026/02/proposed-state-ai-law-update-february-16-2026/.
[29] 17 U.S.C. § 107, https://www.law.cornell.edu/uscode/text/17/107.
[30] U.S. House Committee on the Judiciary, *Copyright Law Revision*, H.R. Rep. No. 94-1476, 94th Cong., 2nd sess. (September 3, 1976), 72, https://www.copyright.gov/history/law/clrev_94-1476.pdf.

treated and evaluated as a whole, since it is impossible to conduct a competition in isolation between them, consequently *„the results* [all are to be] *weighed together, in light of the purposes of copyright."*[31], on a case-by-case basis.

The first one – „*the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose"*[32] – to apply the fair use test, courts must determine whether the new work *„supersedes the objects"*[33] of the original work or offers a different approach; whether it consist of a *„new expression, meaning or message"*[34]*;* an analysis aimed to determining to what extent the use of work was „transformative", although this is not a requirement for a ruling of fair use. Anyway, way is this transformative effect of usage important? It has been noted that the more transformative the result of using the work is, the more it „*enriching public knowledge"*[35] and the less likely it will *„serve as a substitute for the original or its plausible derivatives"*[36]. Thus, the transformative nature diminishes the importance of the commercial nature of the use, as the result of its use can no longer compete directly with the original work from a commercial perspective.[37] Regarding the purpose of the use, the fact that this is done for commercial purpose does not *de plano* mean that it cannot be fair, since this would void nearly *„ all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities"*[38]

The second one – *„the nature of the copyrighted work"*[39] – has hardly ever been regarded as a determining factor in upholding fair use[40], since, regardless of the specific form of expression of the work, the law does not establish different levels of protection. In the same vein, through case law, the courts have ruled that it doesn't matter whether the work is factual or fictional.[41]

The third one – *„the amount and substantiality of the portion used in relation to the copyrighted work as a whole"*[42] – it is a test of quality and value of the works used.[43] In the case of *Authors Guild v. Google*, it was held that the shorter and les significant the passages taken from a work are in terms of their

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[31] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994), https://supreme.justia.com/cases/federal/us/510/569/.
[32] 17 U.S.C. § 107.
[33] L. Ray Patterson, "Folsom v. Marsh and Its Legacy," *Journal of Intellectual Property Law* 5, no. 2 (1998): 431, 440, https://digitalcommons.law.uga.edu/jipl/vol5/iss2/4/.
[34] *Campbell*, 510 U.S. at 579.
[35] *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214–15 (2d Cir. 2015), https://law.justia.com/cases/federal/appellate-courts/ca2/13-4829/13-4829-2015-10-16.html.
[36] *Authors Guild*, 804 F.3d at 214–15.
[37] *Campbell*, 510 U.S. at 579.
[38] *Campbell*, 510 U.S. at 584.
[39] 17 U.S.C. § 107.
[40] *Authors Guild*, 804 F.3d at 219–20.
[41] *Authors Guild*, 804 F.3d at 219–20.
[42] 17 U.S.C. § 107.
[43] Patterson, "Folsom v. Marsh," 440.

importance within the context of the entire work, the more likely it is that fair use will be found; since the longer and more significant the excerpt, the more likely it is that the second work might serve as a substitute for the original work and diminish its value, thereby also violating the first and the last factor of fair use.[44]

The fourth one – „*the effect of the use upon the potential market for or value of the copyrighted work"*[45] – since the purpose of copyright protection is to encourage creativity and innovation, which inherently has economic implications because the remuneration of authors serve as an stimulant.[46] Consequently, courts are required to take into account not only the actual damages caused by the use but also the potential damage, namely „*adverse impact on the potential market for the original."*[47] Thus, if the intended use is aimed at generating a commercial profit, the potential negative impact may be presumed; in contrast, if the use is noncommercial, it must be proven.[48]

Thus, by analyzing the use from the perspective of these four factors, one might conduct a fair use test that is generally applicable and relevant to the use of works for the purpose of training artificial intelligence models. As we mentioned earlier, this test was design from the outset to be easily adapted and applied to any given situation due to the „*rapid technological change"*[49]

With regard to the application of fair use to works used in AI development, several decisions are especially relevant. In Authors Guild v. Google, Google created digital copies of millions of books to provide full-text search, bibliographic information, and limited snippets while preventing users from accessing substantial expressive content. The Second Circuit held those uses fair. In Kadrey v. Meta Platforms, the district court rejected the theory that an AI model is necessarily a derivative work of the books used to train it and held that an output must itself be substantially similar to a protected work to support a derivative-work claim. In Bartz v. Anthropic, the district court held that using the plaintiffs' books to train language models was fair use, while treating the acquisition and retention of pirated library copies as a distinct infringement issue.[50]

The United States appears determined to maintain this long-stranding position dating back to 1976, despite the large number of cases that call intro question the fair use of training artificial intelligence models – „*it's one that will and*

[44] *Authors Guild*, 804 F.3d at 221–22.
[45] U.S. House Committee on the Judiciary, *Copyright Law Revision*, 66.
[46] *Authors Guild*, 804 F.3d at 223–25.
[47] *Campbell*, 510 U.S. at 590.
[48] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), https://supreme.justia.com/cases/federal/us/464/417/.
[49] U.S. House Committee on the Judiciary, *Copyright Law Revision*, 66.
[50] *Kadrey v. Meta Platforms, Inc.*, No. 23-cv-03417-VC, Order Granting Motion to Dismiss, at 3 (N.D. Cal. November 20, 2023), https://www.govinfo.gov/app/details/USCOURTS-cand-3_23-cv-03417/USCOURTS-cand-3_23-cv-03417-36/context; *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007, 1024–26 (N.D. Cal. 2025), order filed June 23, 2025, https://law.justia.com/cases/federal/district-courts/california/candce/3%3A2024cv05417/43 4709/437/.

should continue to be decided on a case-by-case basis"[51]

Moreover, the Copyright Alliance criticizes opt-out proposals, arguing that they can create implementation barriers, cannot reliably operate retroactively for works already used in training, and may fail when copies enter datasets through downstream sources. Unlike the EU's statutory opt-out architecture for the text-and-data-mining exception, U.S. law provides no comparable AI-training opt-out; instead, potentially infringing uses are assessed under fair use on a case-by-case basis.[52]

4. The China Vision

In the global race for technological dominance, the United States leads the way in terms of private investment in the fields, China stands out for the volume of research and implementation of artificial intelligence in industrial process, while the European Union leads the way in regulation.

As for China's stance on the use of copyrighted works in training artificial intelligence models, like the United State, China has not adopted specific regulations, However, it should be noted that it has updates its existing rules to make them more permissive. For instance, in its original form, the Copyright Law of the People's Republic of China of 1990, article 22 sets forth specific exceptions to the rule requiring the author's prior consent and remuneration, as established in article 23. Through the third amendment to the Copyright Law, a *„saving clause"* was introduced in paragraph 13 of article 24 (after renumbering), which established a new general exception – *„other circumstances as provided by laws and administrative regulations"*[53] - leaving the door open for further specific regulations, *„reserving space for China to create exceptions for text and data mining"*[54]. In implementing the Copyright Law, the Chinese legislature adopted the Regulations of the Implementation of the Copyright Law of the People's Republic of China which provide in article 21 that *„The exploitation of a published work which may be exploited without permission from the copyright owner in accordance with the relevant provisions of the Copyright Law shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner."*[55]

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[51] Copyright Alliance, "Response to the Request for Information on the Development of an Artificial Intelligence (AI) Action Plan," March 14, 2025, 3, https://copyrightalliance.org/wp-content/uploads/2025/03/Copyright-Alliance-AI-Action-Plan-Comments.pdf.

[52] Copyright Alliance, "Response to the Request for Information," 10.

[53] People's Republic of China, *Copyright Law of the People's Republic of China*, amended November 11, 2020, https://www.wipo.int/wipolex/en/legislation/details/21065.

[54] Jiayu Guo, Wei Lin, and Xuan Liu, "Research on the Copyright Fair Use of Text Data Mining in Generative Artificial Intelligence Training," in *Proceedings of the 1st International Conference on Politics, Law, and Social Science (ICPLSS 2025)* (SCITEPRESS, 2026), 232–240, at 238, https://doi.org/10.5220/0014360000004859.

[55] People's Republic of China, *Regulations for the Implementation of the Copyright Law of the*

Since 2023, China has applied the Interim Measures for the Management of Generative Artificial Intelligence Services. Article 4(3) requires providers and users to respect intellectual property rights, and Article 7 requires providers processing pre-training, training, and optimization data to avoid infringing intellectual property rights. The Interim Measures do not apply to entities that develop or use generative AI without providing services to the public within China. That scope limitation concerns the Interim Measures themselves; it does not exempt those entities from China's Copyright Law or other generally applicable law.[56]

The lack of specific regulations to protect intellectual property during the development process of training artificial intelligence stems from the desire to encourage technological advancement. In this regard, China promotes self-regulation and self-governance. This accretion is also supported by doctrinal finding of native authors.

Just as we did in our analysis of the EU and U.S. perspectives, we will proceed to present several key juridical rulings. In the case *Shanghai Xinchuanghua Cultural Development Co., Ltd. v. Guangzhou Niaguang Co., Ltd.*, the Guangzhou Internet Court held that creation of an image generated by the Tab website, which copies, in whole or in part, the original expression of the character „Ultraman" (protected by copyright), constitutes an infringement of the right of reproduction which was made without the authorization required by the law from the copyright holder (based on article 10 paragraph 1, term 5 of Copyright Law). In instances where the reproduction was partial and included some new features, the court found that the right of adaptation had been infringed (based on article 10 paragraph 1 term 14 of the Copyright Law). In addition, the court rejected the plaintiff's request to order the defendant to delete the training data that, as found, infringed the right of reproduction and the right of adaptation, but the court rejected this request on the consideration that, although the defendant is an AI service provider, it does not provide the service directly but through a third-party provider, and thus its liability is excluded.[57]

It is important to note that in this case, the court did not examine the copyright infringement from the perspective of training of the artificial intelligence model, but rather from the perspective of general copyright law, which requires that any use may be made only with the author's consent and with appropriate compensation, apart from exceptional cases provided by the law.

People's Republic of China, State Council Decree No. 359, amended January 30, 2013, https://www.wipo.int/wipolex/en/legislation/details/13428.

[56] Cyberspace Administration of China et al., *Interim Measures for the Management of Generative Artificial Intelligence Services*, promulgated July 10, 2023, effective August 15, 2023, https://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm.

[57] *Shanghai Xinchuanghua Culture Development Co., Ltd. v. Guangzhou Nianguang Network Technology Co., Ltd.*, (2024) Yue 0192 Min Chu No. 113 (Guangzhou Internet Court, February 8, 2024), 21–24, unofficial English translation, https://ia800409.us.archive.org/3/items/scla-v-ai-com pany-guangzhou-internet-court-02082024-with-english-translation/SCLA%20v%20AI%20Comp any%20Guangzhou%20Internet%20Court%2002082024%20with%20English%20Translation.pdf

Further guidance may emerge from the Beijing Internet Court in cases concerning allegations that the social-media platform Xiaohongshu (RedNote) used copyrighted works without authorization to train an AI model. China remains a civil-law jurisdiction and, in the absence of a specific AI-training exception, courts apply general copyright-law analysis: whether a work is protected, whether an act falls within an exception, and whether authorization and remuneration are required.[58]

We expect that following the Beijing court's ruling, the approach of all courts will change. However, this depends on how these initial cases are resolved in determining copyright infringement involving the training of artificial intelligence models.

Finally, in response to the growing use of models that mimic actors' appearance, voice, or other identifying features, China released the Administrative Measures for Digital Virtual Human Information Services (Draft for Comments) on April 3, 2026. The draft would require separate, informed consent when sensitive personal information is used for modelling, image generation, or scene construction, and would prohibit identifiable digital representations of a natural person without that person's consent. These rules principally protect personality and personal-information rights, while also intersecting with performers' and copyright interests.[59]

5. Conclusions

This study had highlighted three different perspective on the same issue, emphasizing the shortcoming of the each protection system adopted and their capacity for improvement.

The European Union has adopted an „opt-out" regime under which most works eligible for protection may be used to train artificial intelligence models; such works may be excluded only by means of an express declaration in the prescribed form from the rightsholders. The advantages of such an approach are that rights holders have the option to exclude their works regardless of whether their use would have been fair or not. The disadvantages are that excluding works via robots.txt can create an excessive burden for rightsholders, as they are required to analyze the exclusion policies of models' providers and constantly update their settings.

The United States has not enacted a copyright exception specific to the

[58] Edward Chatterton et al., "Can AI Training Result in Copyright Infringement? The State of Play in the UK, EU and China," DLA Piper, April 15, 2026, https://www.dlapiper.com/en/insights/publications/2026/04/ai-and-copyright-major-issues-and-direction-of-travel-in-the-uk-eu-and-china-in-q2-2026/can-ai-training-result-in-copyright-infringement.

[59] Cyberspace Administration of China, *Administrative Measures for Digital Virtual Human Information Services (Draft for Comments)*, April 3, 2026, https://www.cac.gov.cn/2026-04/03/c_1776952992709096.htm.

use of works in AI training. Instead, courts apply the four statutory fair-use factors to the facts of each case. Fair use is therefore neither an opt-in licensing system nor a categorical authorization for AI training: it is a case-specific limitation and affirmative defense whose application depends on the purpose and character of the use, the nature of the work, the amount used, and market effects.

China's legislations in this area is still taking shape. In anu case, given the goal of technological advancement and winning the neck-to-neck race with United States, the regulations have and will continue to aim to establish rules that do not hinder or slow down this progress. Meanwhile, China applies general legal principles when assessing whether the use of works in training artificial intelligence models infringes copyright.

In closing, rather than offering another overview, we recall Omar N. Bradley's warning: "If we continue to develop our technology without wisdom or prudence, our servant may prove to be our executioner."

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A Historical-Comparative Approach to Risk-Based Liability. Reinterpreting Roman *Actiones Adiecticiae* Within the Framework of the EU AI Act

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Abstract

This paper proposes an upstream reflection, conceptualize tomorrow's technological landscape by looking into the past. Through a historical-comparative view, it explores the „accountability gap" currently widening around the deployment of Artificial Intelligence systems. To be exact, we propose revisiting Roman praetorian mechanisms but not as historical relics, as viable blueprints for contemporary legal challenges. While most scholars tend to focus on the slave-AI analogy based strictly on degrees of autonomy, this study identifies critical structural flaws in that approach, therefore instead introduces a novel perspective: recalibrating the actiones adiecticiae qualitatis remedies according to the risk hierarchy newly codified by European Union through Artificial Intelligence Act (AI Act). The source and limits of AI deployer's liability should not relay on the algorithm's cognitive complexity, rather, liability should be tethered to the system's statutory risk category. We think we can adapt the concept of „peculium" to „digital peculium" to serve as limited liability cap for low-risk system, while high-risk ones to trigger an unlimited liability regime, closely mirroring the actio institoria. Finally, by revitalizing these archaic mechanisms of the fertile ground of AI Act, we could achieve the fusion necessary to build a modern model of „adjectival liability", but one capable of protecting without choking technological progress.

Keywords: *AI Act, AI liability, actiones adiecticiae, digital peculium, risk-based approach, roman law, comparative law.*

1. Introduction

The more robots require a legislation of their own, the more a new team of experts in robotic crimes, pacts and contracts, administrative procedures, copyright and privacy issues, laws of war, torts, and so on, will supersede the efforts of the single scholar. The process of specialization that has occurred within such fields as IT law, or legal informatics, throughout the 2000s, will likely resurface in the field of legal robotics in a few years. Retrospectively, this work is placed at a critical juncture of the contemporary legal systems, that is, so to speak, between a *"not yet"* and an *"any longer".* Not yet, because a number of challenges brought on by robotic technology and its manifold applications are still open to alternative solutions in the legal domain; any longer, because traditional legal outlooks increasingly fall short in coping with the novelty of such challenges. Let

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us grasp why we are facing such an in-between state of art in the laws of robots[2].

This state of *„in-between"*, this intermediary stage encapsulates the current legislative landscape. Going towards a deeply integrated digital economy transformed Artificial Intelligence from just a tool intro an agent possessing an unprecedented degree of decisional autonomy. Although the technical debate is far from reaching definitive conclusions, with the rapid evolution of artificial intelligence systems posing a genuine challenge to their theoretical conceptualization, the following lines will strictly focus on outlining the legal perspective.

As the algorithmic systems are increasingly delegated to manage critical infrastructure, medical diagnostics, or complex financial transactions, the classical architecture of private law faces a profound structural impasse. In other words, scholars crystallized the phenomenon as „accountability gap", by drawing attention to traditional civil liability frameworks which are grounded in concept of faut, foreseeability, and direct causation. These key concepts have worked for a long time, but are becoming highly inefficient when a damage-causing decision is generated by an algorithmic *"black box",* when human intervention is minimal, opaque, or untraceable.

At the European level, efforts to regulate this new technological landscape have culminated in the adoption of the Artificial Intelligence Act (AI Act). And although the European Union, striving to trigger the momentum of a *'Brussels Effect'*[3], appears to have partially achieved this aspiration, we must remain rigorous. To avoid steering this study into superficiality, we must acknowledge that the approaches of the US[4] and China[5] reveal profound divergences in how

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[2] Ugo Pagallo, *The Laws of Robots: Crimes, Contracts, and Torts* (Dordrecht: Springer, 2013), 4, https://doi.org/10.1007/978-94-007-6564-1.

[3] Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), OJ L 2024/1689 (July 12, 2024), https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng. The "Brussels Effect" describes the tendency of global firms to apply EU regulatory standards across their worldwide operations. See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press, 2020), https://doi.org/10.1093/oso/9780190088583.001.0001.

[4] An early statement of the laissez-faire ideal appears in John Perry Barlow's "A Declaration of the Independence of Cyberspace," delivered in Davos on February 8, 1996. Barlow wrote: "the global social space we are building is naturally independent of the tyrannies you seek to impose upon us. You have no moral right to rule us, nor do you possess any methods of enforcement that we have true reason to fear. Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours... Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions... Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here. Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the common good, our governance will emerge." John Perry Barlow, "A Declaration of the Independence of Cyberspace," Electronic Frontier Foundation, February 8, 1996, https://www.eff.org/cyberspace-independence.

[5] Kai-Fu Lee, *Superputerile inteligenței artificiale: China, Silicon Valley și noua ordine mondială*,

artificial intelligence should be regulated. While this topic alone could fuel an extensive comparative analysis, the specific objectives of this paper require us to confine our scope strictly to the European model. After all, the EU provides a systematized, horizontal framework upon which broader legal theories can be built, conversely, China and (more recently) the US have largely opted for vertical, piecemeal interventions rather than a cohesive legal system dedicated to AI.

Although EU legislative instrument serves both as a global benchmark by enshrining a novel methodology based exclusively on risk hierarchy (unacceptable, high, limited, and minimal risk), it remains, at its core, a product safety and market compliance regulation. The AI Act does not provide a substantive mechanism for resolving civil liability when damages occur. Furthermore, the stagnation and dilution of complementary initiatives, most notably the AI Liability Directive (AILD) have left a significant reparatory void[6].

Consequently, it falls upon legal doctrine and judicial practice to identify compensatory solutions capable of protecting victims without choking technological innovation through disproportionate sanctions. In this context, the present paper rejects the creation of modern legal fictions, such as the highly controversial "electronic person"[7], and proposes an upstream reflection. The central hypothesis of this study argues that the modern, risk-based approach codified by the AI Act can be optimally operationalized by resuscitating and recalibrating ancient liability mechanisms: the praetorian remedies of Roman private law.

We argue that by replacing the Roman criterion of algorithmic "autonomy" or authorization (praepositio) with the modern statutory "risk category," the system of *actiones adiecticiae qualitatis* can provide a highly effective architecture for imputing AI-generated damages. Under this framework, low-risk systems could benefit from liability limitations via a "digital peculium," thereby encouraging entrepreneurship, while high-risk systems would trigger the direct and unlimited liability of the deployer, closely mirroring the *actio institoria* regime. To test this hypothesis, the paper employs a historical-comparative methodology.

On a purely theoretical level, comparative law represents that domain of dogmatic, positive law dedicated to the complex analysis of legal branches and institutions across national, supranational, and global legal families, aiming to highlight their comparable similarities and differences[8]. Methodologically, this

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trans. George Chiriță (Bucharest: Corint, 2021), 26, https://www.libris.ro/preview/superputerile-inteligentei-artificiale-kai-fu-lee/27203274.

[6] Dragoș Alexandru Maior, "Defective by Design? Assessing the Effectiveness of the EU's AI Liability Regime," in *Echitate și/sau eficiența în drept: Conferința internațională a doctoranzilor în drept—Timișoara 2025* (Bucharest: Universul Juridic, 2025), 105, https://www.ujmag.ro/drept/echitate-si-sau-eficienta-in-drept-conferinta-internationala-a-doctoranzilor-in-drept-timisoara-2025.

[7] European Parliament, "Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics," 2015/2103(INL), para. 59(f), https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.pdf.

[8] Valerius M. Ciucă, *Lecții de drept privat comparat: O introducere în hermeneutica organică a*

discipline operates on two primary levels: macro-comparison and micro-comparison. While macro-comparison entails the analysis of large-scale structures — primarily to classify entire legal orders into overarching systems, micro-comparison focuses on the targeted analysis of specific legal rules or institutions belonging to different legal orders[9]. In this regard, the present research strictly adheres to the parameters of *micro-comparison*. It proposes a targeted analysis of how Roman praetorian remedies might function when juxtaposed with the categories established by the AI Act.

The choice of this method is not just an academic stylistic flourish, but a pragmatic necessity. *Primo,* ancient Rome was the stage for a remarkably comparable economic phenomenon: the massive integration of slaves, *instrumentum vocale* capable of executing complex business decisions into commercial administration[10]. Secondi, the Roman praetor resolved their era's "accountability gap" not by granting legal personality to these entities, but by tethering the economic consequences of their acts to the master's estate through an adaptable, adjectival liability.

The structure of this paper will closely follow this historical parallel. Section II explores how Roman praetors fragmented and calibrated liability through the actiones adiecticiae qualitatis. Section III analyzes the AI Act's context and the insufficiency of the current reparatory framework. Finally, Section IV demonstrates *in concreto* how the risk hierarchy of European law can be seamlessly grafted onto the liability categories developed by Roman jurists, ultimately offering a supple and equitable solution for the technology law of tomorrow.

2. The Historical Paradigm: Roman Indirect Liability

Looking back at early Roman society, it is known that not every human being was able to participate in legal relations as a bearer of rights and obligations. To engage in such matters, an individual required, above all, a formal recognition as a 'person.' This concept meant they possessed legal capacity, essentially the abstract and general aptitude necessary to hold rights and duties.

However, in contrast to well rooted modern assumptions, this status did not automatically follow the event of birth. Much like the broader legal framework itself, it operated as a superstructure, one that was firmly anchored to the economic realities of production. It remains a notorious historical fact that ancient

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dreptului privat comparat, vol. 1, 2nd ed. (Iași: Editura Fundației Axis, 2005), 61, https://opac.hasdeu.md/cgi-bin/koha/opac-detail.pl?biblionumber=198364.

[9] Leontin-Jean Constantinesco, *Tratat de drept comparat: Introducere în dreptul comparat*, vol. 1, trans. Dora Scarlat, ed. Valeriu Stoica (Bucharest: ALL, 1997), 228, https://opac.hasdeu.md/bib/198329.

[10] Marcus Terentius Varro, *De Re Rustica* 1.17.1, https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Varro/de_Re_Rustica/1%2A.html. See also W. W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908; digital ed., 2010), https://doi.org/10.1017/CBO9780511707360.

Rome completely stripped the slave of this legal capacity. Slaves could never qualify as subjects of law, instead, the system strictly relegated them to the status of a simple 'talking tool' (*instrumentum vocale*)[11].

While the economic importance of the slave in ancient Rome is undeniable, it is crucial to recognize that this legal position did not remain static, rather, it evolved with the transformations of Roman society itself. During the archaic period, the slave population was relatively small and strictly proportional to domestic needs. At this time, slaves lived a largely patriarchal existence, working alongside their masters and being integrated into the household almost as extended family members. This dynamic shifted drastically following the vast Roman conquests (most notably after the Punic Wars). The influx of captives led to an exponential increase in the slave population, and the ever-expanding needs of a burgeoning empire demanded continuous, large-scale production fuelled entirely by their labour. In essence, slavery became the bedrock of the entire Roman economy (a paradigm shift that remarkably mirrors the contemporary integration of Artificial Intelligence as the foundational engine of our digital economy). Yet, despite this massive shift in economic utility, the legal status of the slave remained rigidly confined. Legally speaking, the slave was nothing more than a 'talking tool' (*instrumentum vocale*, explicitly distinguished from the *instrumentum non-vocale*, the beast of burden). Lacking any legally recognized patrimony, the slave could never hold property, act as a creditor, or become a debtor. In the strict framework of the *ius civile*, the slave functioned purely as a conduit for legal acquisition (*instrumentum adquirendi*), he could improve his master's financial position, but under no circumstances could he legally worsen it.

The gradual recognition of a limited, but functional legal capacity for the slave was seen at the twilight of Roman Republic which marked a profound transformation. This process was strictly circumscribed and remained firmly tethered to the masters economic advantage, a real shift in legal optics catalyzed by the rapid expansion of slave-based commodity production. Once recognizing that their slaves were often highly skilled and gifted with a sharp sense of commercial initiative, owners found it increasingly indispensable to leverage them as active participants in complex trade operations, therefore opened new perspectives.

Under what specific circumstances did the praetor grant slaves the capacity to execute legal acts on behalf of their masters? Two distinct mechanisms emerge. On the one hand, a master held the prerogative to explicitly appoint a slave to oversee a terrestrial or maritime enterprise, or even to execute a strictly defined business transaction. Should conflicts arise from agreements negotiated by the appointed slave, third-party contractors were not left without recourse, they possessed the right to directly sue the master whose economic interests were

[11] Vladimir Hanga, *Manual de drept privat roman* (Cluj-Napoca: Cordial, 1993), 99, https://www.bcucluj.ro/sites/all/modules/custom/bcu_catalogs/data/cas/pdf/h/a/Hanga-Hanganu.pdf.

being served. Consequently, relying on the very authorization (*praepositio*) granted for managing the enterprise, these third parties could enforce the slave's contracts against the master in court. On the other hand, the master could opt for a different approach: allocating a specific fund of assets, legally termed the peculium to facilitate commercial activities. Although ownership of these assets never officially left the master, they functioned in practice as a highly distinct patrimonial mass. The slave wielded full administrative control over this fund, yet any commercial revenues generated ultimately flowed back into the master's estate[12].

Roman law recognized the prerogative of the pater familias to acquire creditor status through individuals under his legal authority, explicitly including slaves. The rigid structure of the early Roman economy imposed a strict, unidirectional rule: the head of the household could validly improve his financial standing through his dependents, but could not legally worsen it. Participation in complex trade, however, required the pater familias to assume the role of debtor through transactions executed by his subordinates. The majority of commercial dealings were synallagmatic and commutative, relying on the reciprocal interdependence of contractual performances. In answer to these economic realities, the praetor developed a major legal mechanism, the actiones *adiecticiae qualitatis(actione quae in peculium filiforumfamilias servorum que agitur)*[13]. These adjectival remedies granted third-party merchants who contracted with a subordinate the procedural right to bring direct legal action against the *pater familias*.

The foundational architecture of these praetorian remedies finds its most authoritative expression in the fourth book of Justinian's Institutes. Here, the functional link between economic benefit and legal responsibility is meticulously codified, providing the historical blueprint for our modern liability models: *„Based on the same equitable principle, the praetor grants two actions for the whole debt (in solidum): the actio exercitoria and the actio institoria. The actio exercitoria may be brought when a master has placed his slave in command of a ship, and a third party has entered into a contract with that slave concerning maritime business. The action is so named because the person who derives the daily profit from the vessel is called the exercitor. The actio institoria applies when a master has appointed his slave to manage a shop or any other enterprise, and someone has contracted with the slave in relation to that specific commerce. It is so called because the individual placed in charge of such a business is termed an institor.* ***2a.*** *The praetor extends these two actions even to cases where the person placed in command of the ship, shop, or other business is a free person or the slave of another, for the exact same underlying principle of equity applies to these situations.* ***3.*** *Furthermore, the praetor introduced another action known*

[12] Hanga, *Manual de drept privat roman*, 101.

[13] Justinian, *Iustiniani Institutiones: Instituțiile lui Iustinian*, Latin text and Romanian trans. Vladimir Hanga (Bucharest: Lumina Lex, 2002), 291, https://www.printrecarti.ro/384013-vladimir-hanga-iustiniani-institutiones-institutiile-lui-iustinian.html.

as the actio tributoria, functioning as follows: If a slave, acting with his master's knowledge and consent, engages in trade using his granted peculium, and third parties contract with him, the praetor orders that the mercantile capital and its profits be distributed proportionally between the master — for anything owed to him — and the rest of the creditors. The praetor entrusts the master himself with making this distribution; however, should any creditor complain of receiving less than their rightful share, the praetor grants them the actio tributoria. ***4.*** *Additionally, there is the action de peculio et de in rem verso. Its consequence is that, even if the slave contracted without his master's consent, the master remains liable to the exact extent that his own estate was enriched; if there was no such enrichment, he is liable only up to the limits of the peculium. Unquestionably, a person who has contracted with the master's consent, or who is entitled to bring the actio institoria or exercitoria, may alternatively bring the actio de peculio et de in rem verso. Yet, it would be sheer folly for someone to abandon an action that could satisfy their entire contractual claim, only to assume the heavy burden of proving the master's enrichment or that the slave's peculium is sufficient to cover the debt in full.* ***5a.*** *Likewise, a person entitled to the actio tributoria may alternatively rely on the action de peculio et de in rem verso. In this scenario, it is sometimes more advantageous to use the former, and sometimes the latter. The distinct advantage of the actio tributoria is that the master enjoys no privileged position; there is no prior deduction for debts owed to him, and he ranks equally alongside other creditors. Conversely, under the actio de peculio, debts owed to the master are deducted first, and he is condemned only to the extent of the remainder. On the other hand, the actio de peculio offers the advantage of encompassing the slave's entire peculium. The actio tributoria touches only the fraction of the peculium actively utilized in commerce — perhaps merely a third or a fourth of the whole — while the vast majority of the fund might be safely invested in land, other slaves, or interest-bearing loans. Therefore, the plaintiff may choose whichever action is more expedient; though, naturally, if it can be proven that the master's estate was enriched, the actio de in rem verso remains the superior path."*[14]

To be more specific, we can divide the praetorian response into two distinct architectural categories. *Primo,* encompasses the (so called *action in solidum*) *(1) actio exercitoria*, the *(2) actio institoria*, and *(3) actio quod iussu*m remedies explicitly designed to impose unlimited liability and *secundi*, the *(4) actio de peculio*, *the (5) actio de in rem verso*, and the *(6) actio tributoria*, legal mechanisms strategically engineered to ensure limited liability.

Actio exercitoria held a shipowner comprehensively accountable for the commercial obligations assumed by their appointed maritime captain (magister navis). Mirroring this exact principle on land, the *actio institoria* fastened full,

[14] Justinian, *Iustiniani Institutiones*, 4.7.2–5a, 292–94, https://www.printrecarti.ro/384013-vladimir-hanga-iustiniani-institutiones-institutiile-lui-iustinian.html.

unbounded liability onto a business owner for the daily dealings of their designated commercial manager (institor). *Actio quod iussu* was activated whenever a transaction was executed under the direct, explicit command (iussum) of the master.

The *(4) actio de peculio*, *the (5) actio de in rem verso*, and the *(6) actio tributoria*, legal mechanisms strategically engineered to ensure limited liability, thereby shielding the master's broader estate from catastrophic loss. Under this regime, the *actio de peculio* capped the principal's financial exposure strictly at the total value of the independent fund (peculium) entrusted to the subordinate. Operating alongside it as an equitable safety net, the *actio de in rem verso* permitted third-party recovery only to the exact extent that the master's own patrimony had been actively enriched by the subordinate's transaction. Rounding out this protective trio, the *actio tributoria* addressed specific situations where the subordinate traded with the peculium under the master's direct awareness; in the event of commercial insolvency, it mandated a proportional distribution of the remaining mercantile assets among all creditors, stripping the master of any priority rights.

While the *actiones adiecticiae qualitatis* resolved the allocation of commercial and contractual risk, the increasingly autonomous nature of modern artificial intelligence necessitates a critical inquiry into extra-contractual harm[15]. What occurs when a system operates entirely outside its anticipated parameters, causing independent damage?

To address such unpredictable torts committed by a subordinate (*sine iussu*), Roman jurisprudence offered a distinct and highly pragmatic mechanism: the *actiones noxales*. If a slave committed a delict, such as theft or property damage for example, without the master's knowledge or directive, equity dictated that the *pater familias* should not face absolute financial ruin. Instead, he was presented with a strict alternative: he could either pay the assessed damages out of pocket, or he could invoke *noxae deditio* (noxal surrender), effectively transferring ownership of the offending "tool" to the victim and immediately extinguishing his own liability.

This ancient taxonomy demonstrates that the Roman legal genius did not rely on a singular, monolithic rule, but rather on a modular system of actions calibrated to the specific nature of the commercial authorization, a logic that remains strikingly relevant for the contemporary classification of AI risks. Now

[15] For a recent U.S. complaint alleging wrongful death in connection with an AI companion, see *Garcia v. Character Technologies, Inc.*, No. 6:24-cv-01903 (M.D. Fla.), complaint filed October 22, 2024, https://www.courtlistener.com/docket/69300919/garcia-v-character-technologies-inc/. For the German Federal Court of Justice's "Autocomplete" decision, which addressed a search-engine operator's responsibility after notice of an unlawful personality-rights infringement, see Bundesgerichtshof, judgment of May 14, 2013, VI ZR 269/12, BGHZ 197, 213, https://www.bundesgerichtshof.de/SharedDocs/Entscheidungen/DE/Zivilsenate/VI_ZS/2012/VI_ZR_269-12.pdf?__blob=publicationFile&v=1.

that we explained the logic behind this approach, we could reflect upon contemporary debates surrounding artificial intelligence.

3. The Modern Legislative Context: The EU AI Act and the Accountability Gap

Does the risk really exist? Legal scholars confirms that this accountability gap is not just a theoretical hypothesis[16], and even that we will do not engage in this conversation, it is important to express this multi-layered reality. To be more exact, contemporary legal systems are actually confronted with a „triple-helix" of technological vulnerabilities: (*1) autonomy risk*, *(2) association risk* and (*3) network risks*, each of which dismantles our traditional reliance on human-centric, fault-based dogmatics[17].

First one ((*1) autonomy risk)* represents a scenario that materializes whenever a human operator deliberately delegates decision-making power to an algorithm. Take for example a highly automated vehicle or a agent authorized to independently execute commercial contracts based on ML, a system able to create binding legal obligations or causes physical harm without the human directing the specific (immediate) action. In this instance, traditional fault-based regimes do not help the victims cause, the deployer can easily evade lability by demonstrating compliance with *ex-ante* safety standards at the time of deployment. Second, *the (2) association risk*, characterized by a profound human-machine symbiosis (for example a medical specialist operating in tandem with a robotic surgical arm or a financial officer approving mortgages through a predictive analytics engine that harbours latent), when a *malpraxis* or discriminatory harm occurs, unravelling the decision-making process to allocate exact percentages of human versus algorithmic fault is practically impossible. It is known that civil liability cannot surgically extract and punish the human element alone, it must be structurally directed at the hybrid entity. Finally, ((*3) network risks)* the most striking manifestation is algorithmic collusion, where sophisticated pricing software autonomously learns to form *„digital cartels"* and sustain anti-competitive practices without any underlying code instructing them to do so. Traditional law is utterly powerless here because it relies fundamentally on punishing human intent the *mens rea* or the conscious meeting of minds. In an autonomous digital network, there is no human moral judgment to sanction, nor is there a traceable human tortfeasor to sue.

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[16] Silvia De Conca, "Bridging the Liability Gaps: Why AI Challenges the Existing Rules on Liability and How to Design Human-Empowering Solutions," in *Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice*, ed. Bart Custers and Eduard Fosch-Villaronga (The Hague: T.M.C. Asser Press/Springer, 2022), 239–58, https://doi.org/10.1007/978-94-6265-523-2_13.

[17] Klaus Heine and Alberto Quintavalla, "Bridging the Accountability Gap of Artificial Intelligence—What Can Be Learned from Roman Law?," *Legal Studies* 44, no. 1 (2024): 65–80, https://doi.org/10.1017/lst.2022.51.

To conclude this introduction, we could say that starting from an *autonomy risk*, where a human being it's there but lost the control, going to *association risk,* where the human-machine symbiosis makes impossible to determine which one's fault was involved, and finally to *network risk* where the human is absent, the risk exists, the real question it's now: how we respond to it?

On September 28, 2022, the European Commission (the Commission) published the proposed *Artificial Intelligence Liability Directive*[18] (AILD), a legislative attempt to create a harmonised regulatory regime for non-contractual civil liability concerning AI systems. The Commission's investigations showed that new technologies introduce new risks, such as openness to data inputs that affect safety or cybersecurity risks, while the existing EU liability framework consists of the Product Liability Directive 85/374/EEC (the 'PLD') provides for compensation only for physical or material damage. The specific characteristics of AI (e.g. opacity/lack of transparency, autonomous behaviour, continuous adaptation, limited predictability) make it particularly difficult to meet the burden of proof for a successful claim. Under current liability rules, in order to claim compensation for damages, victims usually have to prove the existence of damage, a fault of the liable person, and a causality[19] between that fault and the damage or prove the damage, the defect and the causal link between the two. However, AI systems have characteristics that make it excessively difficult or even impossible for victims to identify and prove the fault of a potentially liable person or a defect and the causal link between that fault/defect and the damage suffered, and therefore to obtain compensation[20].

The New Technologies Formation of the Expert Group has concluded[21]: *that the liability regimes in force in the Member States ensure at least basic protection of victims whose damage is caused by the operation of such new technologies. However, the specific characteristics of these technologies and their applications may make it more difficult to offer these victims a claim for compensation in all cases where this seems justified.*

To summarize, three main challenges existent with liability for artificial intelligence systems are: uncertainty, fragmentation, and lack of compensation[22].

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[18] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive)*, COM(2022) 496 final, September 28, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496.

[19] Mircea Duțu, *Elemente de dreptul inteligenței artificiale: Curs universitar* (Bucharest: Universul Juridic, 2025), 187, https://www.ujmag.ro/drept/elemente-de-dreptul-inteligentei-artificiale.

[20] European Commission, *Impact Assessment Report Accompanying the Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence*, SWD(2022) 319 final, September 28, 2022, 154, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SC0319.

[21] Expert Group on Liability and New Technologies, *Liability for Artificial Intelligence and Other Emerging Digital Technologies* (Luxembourg: Publications Office of the European Union, 2019), https://doi.org/10.2838/573689.

[22] Expert Group on Liability and New Technologies, *Liability for Artificial Intelligence*, 8.

These issues are a result of the general premise of current civil liability rules that places the burden of proof on the victim for their case to succeed. Pursuant to legislation presently in place, the victim is required to identify the person possibly liable, identify the action or omission that could constitute fault, and demonstrate the causal connection between that arguable fault and the damages claimed. There are no provisions for AI that would reduce the burden of proof for cases of fault-based liability as there are no AI specific statutory regimes of tort law designed to impose strict liability on purposes of artificial intelligence: thus, yet again the victim is still required to prove all the elements.

In February 2025, the European Commission announced its intention to withdraw the proposed Artificial Intelligence Liability Directive; the proposal was formally withdrawn on October 6, 2025. This withdrawal has significant legal and institutional implications. Legally, the withdrawal of this targeted regulatory mechanism has created legislative void in terms of protecting victims harmed by AI systems. This reinforces a reliance on national tort regimes or laws that are national-positioned rather than supranational-positioned, which is also often ineffectively implemented due to national fragmentation, inconsistency, and, ultimately, inadequacy in addressing the challenges posed by contemporary technological advancement. This is especially important to note as victims face considerable procedural obstacles, particularly, where there are no (and there are no EU harmonized) European wide mechanisms for dealing with issues associated with access to justice, thereby influencing what we can consider formally equal protection of the law across the legal space of Europe. However, the void is only partial to some extent, as there remains some limited level of protection provided under the Product Liability Directive[23] (PLD).

The revised Product Liability Directive[24] offers (to a degree) a *safety net* for physical or material harms, but it remains structurally fixed to the traditional concept of a "defect", a static notion that fundamentally struggles to encompass the emergent, autonomous, and non-deterministic behavior of modern machine learning models. Furthermore, the European digital strategy (AI Act), operates almost exclusively as an *ex-ante* market compliance and product safety mechanism. To be more specific, the AI Act categorizes systems into rigid tiers based on their systemic threat, ranging from minimal to unacceptable risk, and imposes heavy administrative obligations on both providers and deployers. To fully grasp the contemporary regulatory architecture, we must examine the genealogical

[23] European Commission, *Commission Work Programme 2025: Annex IV—List of Intended Withdrawals*, COM(2025) 45 final, February 11, 2025, 27, https://commission.europa.eu/document/download/7617998c-86e6-4a74-b33c-249e8a7938cd_en?filename=COM_2025_45_1_annexes_EN.pdf. The proposal was formally withdrawn on October 6, 2025; see European Commission, "Withdrawal of Commission Proposals," OJ C, C/2025/5423 (October 6, 2025), https://eur-lex.europa.eu/eli/C/2025/5423/oj/eng. See also Maior, "Defective by Design?," 109.

[24] Directive (EU) 2024/2853 of the European Parliament and of the Council of October 23, 2024, on Liability for Defective Products, OJ L 2024/2853 (November 18, 2024), https://eur-lex. europa.eu/eli/dir/2024/2853/oj/eng.

roots of the risk-based hierarchy. This paradigm does not emerge *ex nihilo*, rather, it is directly extrapolated from the European Union's New Legislative Framework for product safety, heavily infused with the precautionary principle[25]. For years, scholars were attempting to calibrate liability according to the specific degree of an algorithm's "autonomy"[26]. Yet, autonomy within computer science is a notoriously fluid and chimerical coordinate. What qualifies as highly autonomous decision-making today is rapidly normalized as standard automation tomorrow. Therefore, anchoring legal accountability to a sliding scale of technical autonomy inevitably creates an insurmountable burden of proof. It forces the judiciary into endless, unresolvable debates over neural network weightings, machine learning opacity, and the philosophical boundaries of artificial agency.

The risk-based hierarchy decisively cuts through this *Gordian knot*. It formally substitutes the subjective, technical uncertainty of how the system decides with the objective, socio-economic reality of where the system is deployed. By legally disregarding the internal, opaque mechanics of the digital black box, the European legislator shifts the focal point entirely to the external impact on fundamental rights and public safety. A sophisticated medical diagnostic tool and a basic retail chatbot might share the exact same underlying generative architecture and demonstrate identical levels of technical autonomy. Nevertheless, the law violently separates them, subjecting only the former to draconian compliance regimes based strictly on the gravity of potential societal harm. Risk, therefore, replaces autonomy as the sole catalyst for legal obligation. But as we discuss early, this conceptual pivot is not a modern invention, it is the exact functional equivalent of Roman adjectival liability. The classical praetor never inquired into the the personal autonomy, or the specific decision-making process of the slave. Such inquiries were legally irrelevant, but the absolute trigger for the master's liability was the *praepositio*, the objective risk profile of the commercial task to which the subordinate was assigned. Appointing a slave as a ship captain (*magister navis*) or a shop manager (*institor*) automatically generated a high-risk liability matrix, completely independent of the slave's personal agency. By adopting a tiered risk system, modern European law is effectively resurrecting this brilliantly pragmatic strategy, prioritizing the economic context of the deployment over the unfathomable technical autonomy of the instrument.

To conclude, we can agree that current regime conspicuously fails to establish a private right of action or a dedicated civil liability regime for the aggrieved end-user. Consequently, if a high-risk AI system autonomously generates pure economic loss or discriminatory harm, the regulatory fines levied by authorities might be immense, but the actual victim is left navigating the very same

[25] Dragoș Alexandru Maior, "The Normative Significance of the Precautionary Principle in Artificial Intelligence Problem," *Curentul Juridic* 100, no. 1 (2025): 55–67, at 55, https://doi.org/10.62838/cjjc-2024-0040.

[26] Heine and Quintavalla, "Bridging the Accountability Gap," 65–80, https://doi.org/ 10.1017/lst.2022.51.

outdated, fault-based national tort regimes that the Commission itself initially deemed utterly inadequate. This fractured regulatory architecture leaves contemporary legal systems at a profound conceptual deadlock. European lawmakers have successfully mapped and categorized the technological risk, yet they have ultimately failed to attach a functional, pan-European liability consequence to the materialization of that risk.

As recent legal scholarship highlights in the context of "agentic AI", the classical burden of proving specific fault or a product defect is fundamentally paralyzed by the inherent opacity and evolutionary learning capabilities of these advanced systems[27]. Therefore, attempting to single out an individual human tortfeasor within such a distributed technological ecosystem quickly reveals its absolute limitations. The sheer withdrawal of the AILD effectively concedes the impossibility of *retrofitting* traditional fault-based tort law to "black-box" systems. When human culpability or specific developmental negligence cannot be reliably traced through opaque layers of deep learning algorithms and autonomous neural networks, insisting that victims satisfy the traditional burden of proof is tantamount to a systemic denial of justice.

4. Reinterpreting Roman Remedies through the AI Act's Risk Hierarchy

After more than a century, the civil liability has a decline in individual to objective liability, leading to systematic compensation to all kind of damages. Doctrine proposes a few solutions regarding new technologies[28]. First, a controversial proposal aims granting legal rights to AI systems, similar[29] to conferring legal personality upon corporations, associations, and similar entities, this would allow the system to be held 'personally' liable."

To bridge this accountability gap, in our opinion, legal scholarship must pivot away from the burden of proving algorithmic "fault" or "defect." Instead, the focus must shift entirely toward objective, structural models of risk imputation. It is precisely within this modern legislative vacuum that the pragmatic mind of Roman jurisprudence reveals its striking contemporary relevance. By abandoning the modern view with tracing specific culpability, and focusing instead on the strict economic realities of commercial authorization and risk-taking, the classical framework provides a historically tested blueprint. Just as the Roman praetor bypassed the absolute legal incapacity of the slave through the *actiones*

[27] Mircea Duțu, "Inteligența artificială agentică: Schimbare de scară tehnologică și de model juridic?," JURIDICE.ro, April 20, 2026, https://www.juridice.ro/essentials/11509/inteligenta-artificiala-agentica-schimbare-de-scara-tehnologica-si-de-model-juridic.
[28] Duțu, *Elemente de dreptul inteligenței artificiale*, 203, https://www.ujmag.ro/drept/elemente-de-dreptul-inteligentei-artificiale.
[29] Gunther Teubner, "Digital Personhood? The Status of Autonomous Software Agents in Private Law," *Ancilla Iuris* (2018): 107–49, https://doi.org/10.2139/ssrn.3177096.

adiecticiae qualitatis and the *actiones noxales*, modern lawmakers can resolve the current fragmentation by grafting these ancient adjectival remedies directly onto the existing scaffolding of the AI Act.

We argue that by aligning the Roman modular liability system with the European risk tiers, we could eliminate the need to prove *algorithmic fault*, we simply hold the digital dominus objectively accountable for the economic and societal risk.

Building directly upon this structural premise, the practical alignment between the AI Act and classical jurisprudence begins with the most critical category:

(1) high-risk systems. When a corporate entity deploys an AI system categorized as high-risk under Annex III of the AI Act (such as an algorithm determining creditworthiness, a biometric identification grid, or automated medical diagnostic software) it engages in a modern form of *praepositio*. The enterprise deliberately positions the algorithm in a socio-economic role where failure carries devastating consequences for third parties, doing so explicitly to maximize corporate efficiency and profit. To address this, lawmakers must functionally resurrect the *actio institoria* and the *actio exercitoria*. By statutorily attaching these mechanisms to the high-risk tier, the digital dominus is subjected to strict, unlimited liability *(in solidum*) for any contractual or operational failures of the system. In this tier, the traditional defenses of unpredictable algorithmic behavior or *"lack of human negligence*" are rendered entirely inadmissible, just the act of depploying a high-stakes, profit-generating digital institor automatically assumes the totality of the financial risk.

(2) minimal or limited risk categories. We admit that applying draconian, unlimited liability to all technological deployments could paralyze the digital economy, a reality the Roman praetor understood intimately. For AI systems falling into the minimal or limited risk categories (such as standard customer service chatbots, inventory optimization scripts, or routine administrative automation) the *actio de peculio* offers a masterful blueprint for fostering innovation while protecting the core enterprise. In these instances, the modern deployer does not issue a high-stakes commercial mandate, but rather allocates a limited operational budget or software environment to the algorithm. Should the system err and cause pure economic loss, liability would not pierce the corporate veil to threaten the company's entire asset base. In our opinion, liability would be strictly ring-fenced and capped at the value of a digital peculium, conceptually modernized as a mandatory, tiered to a insurance bond (or the capitalized value of the software license itself). We argue that guarantees third-party recovery up to a clearly defined limit while ensuring that developers of low-risk systems are not driven into insolvency by minor algorithmic hallucinations.

(3) extra-contractual harm. But beyond authorized contractual parame-

ters, however, lies the most profound challenge of the digital age: the pure algorithmic tort[30]. When a highly autonomous system operates entirely outside its anticipated programming, committing the equivalent of a digital delict without the deployer's directive or awareness (sine iussu), the legal system faces the absolute *"black-box" dilemma*.

To address this extra-contractual harm, (we can imagine autonomous navigation system causing physical injury or a generative model autonomously producing defamatory associations), the Roman mechanism of the *actiones noxales* proves its efficiency. The issue under consideration concerns situations in which a delict (tort) is committed by a person *alieni iuris*, such as a slave. The same issue arises in the event of damages caused by a domestic animal. In all these instances, the wrongdoer lacked a patrimony (personal estate) and therefore possessed no means to compensate the victim. To uphold the principle of equity, the Romans established that the victim could bring an action against the *paterfamilias*, demanding the payment of damages.

Upon the filing of such an action, the defendant, the head of the family, had the following options at his disposal: (1) to litigate the matter with the plaintiff; (2) to pay the damages and avoid the trial; (3) to surrender the person under his power who committed the delict, transferring them into the power of the victim. The *noxal action* always had to be brought against the current master, and not against the master who held authority over the wrongdoer at the time the offense was committed[31]: *"All noxal actions follow the status of the wrongdoer. Indeed, if a son or a slave of yours has caused damage while under your potestas, the action is brought against you; if he has passed under the potestas of another, the action begins to be brought against that person; and if he has become sui iuris, the action will lie directly against him, and the noxal pursuit is extinguished[32]."*

Later on, the *Lex Aquilia* distinguishes between a slave who commits a delict with the master's knowledge and one who commits the act without the master's knowledge. If the slave acted upon the master's order or with his knowledge, the master cannot be relieved of liability by a simple surrender of his slave; rather, he is held liable as if for his own act. If the master was unaware of the slave's act, he may proceed with noxal surrender. In the classical era, a distinction was made between acts committed by the slave upon the master's order (*iussum*) and mere tolerance (*non prohibitio*). If the slave committed the delict upon the master's order, the latter is liable for the entire damage in solidum. In cases of tolerance

[30] *Garcia v. Character Technologies, Inc.*, No. 6:24-cv-01903 (M.D. Fla.), https://www.courtlistener.com/docket/69300919/garcia-v-character-technologies-inc/.

[31] Romulus Gidro and Aurelia Gidro, *Drept privat roman: Elemente comparative cu dreptul civil și dreptul procesual civil român contemporan* (Bucharest: Universul Juridic, 2014), 314, https://www.ujmag.ro/drept/drept-roman/drept-privat-roman.

[32] Gaius, *Institutes* 4.76, trans. Edward Poste, 4th ed., rev. E. A. Whittuck (Oxford: Clarendon Press, 1904), https://droitromain.univ-grenoble-alpes.fr/Anglica/gai4_Poste.htm.

by the master, the victim could either sue the master for liability *in solidum* or demand the *noxal surrender* of the guilty slave[33].

Transposed to contemporary AI problem, a modernized concept of noxal surrender could serve as an *escape hatch* for unprompted algorithmic failures. But a literal transposition of noxal surrender (such as transferring intellectual property rights or software architecture directly to the victim) proves highly impractical in the digital age. A layperson possesses neither the technical capacity to operate a complex neural network nor any practical use for defective source code.

To ensure both equity and technological safety, the Roman mechanism must be reconceptualized not as a private transfer of property, but as a transfer of regulatory control: an Algorithmic Quarantine within a state-supervised Sandbox. Under this modernized framework, in the event of an extra-contractual, highly unpredictable algorithmic failure (an AI acting *sine iussu*), the deployer exercises this modern *noxal* surrender by legally and technically forfeiting the specific, flawed iteration of the model. Practically, this requires isolating and sealing the model's exact state at the time of the incident, including neural weights, configuration parameters, and system logs. The corporate dominus cedes control of this specific instance to a supervisory authority, such as an AI Office, permanently forfeiting the right to commercially exploit that version. Within the isolated environment of a governmental sandbox, the "black box" is technically dissected to understand the failure mechanisms, effectively expropriating the algorithmic "wrongdoer" and converting it into a diagnostic tool for industry-wide safety standards.

To complete the functional equivalent of the Roman liability shield, this public forfeiture must be intrinsically linked to the victim's right to equitable recovery. Because the state assumes control of the defective system in the public interest, the financial obligation toward the victim is shifted to a centralized AI Guarantee Fund, conceptually similar to uninsured motorist funds. This pool could be financed through mandatory risk premiums levied on high-tier AI deployments or through a fixed fee paid by the deployer. Ultimately, this legal architecture achieves the profound systemic balance sought by classical jurisprudence: it shields the digital enterprise from infinite tortious liability, secures certain and immediate compensation for the victim, and repurposes the algorithmic defect to fortify the overall safety of the digital ecosystem.

5. Conclusions

Finally, we could say that the contemporary crisis in artificial intelligence systems liability is a crisis of legal taxonomy and methodological inertia.

[33] Ulpian, *Digest* 9.4.2.1, in *The Digest or Pandects of Justinian*, trans. Samuel P. Scott (Cincinnati: Central Trust Company, 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/D9_Scott.htm; cited in Gidro and Gidro, *Drept privat roman*, 315.

As this research has demonstrated above, the formal withdrawal of Artificial Intelligence Liability Directive (AILD) in early 2025 should not be interpreted just as a transient institutional or political setback, rather, it constitutes a profound admission of doctrinal defeat. By abandoning the pursuit of harmonized civil liability regime, and settle for archaic, fault-based national tort laws, the current legislative framework demands the impossible. It overstretches the legal framework to to pierce the impenetrable opacity of algorithmic "black boxes" in order to prove a specific developmental defect or targeted human negligence. Imposed upon the victim, this burden of proof, culminates in a systemic denial of justice.

While AI Act succeeds as an *ex-ante regulatory mechanism,* (meticulously) categorizing systems by their threat to fundamental rights, it remains a hollow shell regarding *ex-post* non-contractual civil compensation. We have successfully mapped the technological risk, yet we have failed to attribute its concrete financial consequences.

To overcome this situation, and definitively bridge this accountability gap, we argue that modern legal scholarship must decisively abandon the *dead-end* of measuring and categorizing algorithmic "autonomy". We think it's clear by now that artificial intelligence systems evolve from linear programming into deep, highly complex neural networks, so technical autonomy becomes a notoriously fluid, legally unquantifiable metric. Anchoring civil liability to such constantly shifting technological targets renders traditional fault-based approaches and even the much-debated precautionary principle inherently obsolete.

In our opinion, the solution to this modern deadlock most certainly does not lie in inventing unprecedented and perilous legal fictions, such as the heavily criticized concept of "electronic personhood". A distinct legal personality upon algorithms obfuscates the underlying economic realities, dangerously shielding the true beneficiaries and developers from direct accountability under the guise of technological independence. Instead of fabricating new technological rights of IA systems, the definitive answer resides in a structural return to the pragmatic genius of classical Roman law. History demonstrates that adjectival liability mechanisms provide the most balanced and efficient framework to simultaneously guarantee robust victim compensation and safeguard the fragile ecosystem of technological innovation.

The Roman praetor, confronted with the legal incapacity of the slave and the pressing economic necessity of commercial expansion, never attempted to interrogate the subordinate's internal cognitive process or personal autonomy (even though they could have done that, since we must not forget that we are discussing human beings, capable of reason and emotion, and not ultra-high-performance computer systems). Instead, he engineered a sophisticated, modular system of *objective liability* anchored entirely in the socio-economic reality of the deployment. By directly grafting these ancient adjectival remedies onto the modern regulatory scaffolding of the AI Act, we could forge a robust, historically tested liability matrix perfectly calibrated for our digital age.

Until (or if) we have an efficient auditing and expertise system capable of evaluating metrics such as the degree of autonomy, we believe that we must definitively cease the interrogation of the unfathomable mechanics of the machine, and simply hold the digital dominus objectively, proportionally, and inescapably accountable for the societal risk they wilfully chose to deploy.

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Smart Contract Recognition in International Trade: Comparing the CISG and CUECIC Frameworks

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Abstract

This study examines the recognition and enforcement of smart contracts and blockchain based transactions under the United Nations Covnention on Contracts for the International Sale of Goods (CISG) and the United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC). The objective is to assess whether the CISG, despite its widespread adoption and centrality in international trade, provides sufficient doctrinal clarity for automated and decentralised commercial obligations, and whether the CUECIC offers a more coherent framework for validating electronic communications and automated performance. The research employs a comparative doctrinal analysis, assessing the interpretative approaches, scope provisions and functional equivalence standards in both instruments. The findings indicate that while the CISG can accommodate certain aspects of digital contracting through flexible interpretation, CUECIC provides a more technologically aligned regime. However, its limited global adoption significantly constrains its practical impact. The study argues that this divergence creates uncertainty for cross border transactions involving decentralised contract automation. The implications are particularly relevant for developing economies, where fragmented uptake of international instruments may hinder participation in digitally mediated trade.

Keywords: *smart contracts, functional equivalence, CISG, CUECIC, electronic commerce, international trade law.*

1. Introduction

The rise of blockchain technology and blockchain based contracting has unsettled long standing assumptions in private law by relocating core functions of verification, performance and enforcement from institutional actors to decentralised, code driven systems. Smart contracts embedded on the blockchain automate performance of agreements by validating transactions through the use of cryptographic hashing and distributed consensus mechanisms.[2] These contracts are technical tools that are programmable and use self-executing

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[2] Kevin Werbach and Nicolas Cornell, "Contracts Ex Machina," *Duke Law Journal* 67, no. 2 (2017): 313–19, https://scholarship.law.duke.edu/dlj/vol67/iss2/2/; Riccardo de Caria, "The Legal Meaning of Smart Contracts," *European Review of Private Law* 26, no. 6 (2018): 735, https://doi.org/10.54648/ERPL2018052.

computer codes that contain the contractual obligations of either party.[3] Their immutability and automation promise efficiency and reduced reliance on intermediaries, yet they simultaneously generate new legal uncertainties, particularly regarding validity, enforceability and remedial flexibility.

A review of the scholarship shows that definitions of blockchain and smart contracts vary widely. Some authors conceptualise smart contracts and blockchain as a tool,[4] others as self-help,[5] and others as a piece of software.[6] These perspectives suggest smart contracts may be capable of fitting in existing legal categories, yet they also reveal the limits of domestic frameworks when confronted with decentralised cross border transactions.

A core difficulty in regulating autonomous contracts and smart contracts is the nature of these agreements themselves. The autonomous nature of these agreements collapses the distinction between formation and performance which is exacerbated by their immutability that renders errors instantaneous and irreversible. As Mik observed in 2013, early electronic commerce frameworks assumed that there shall always be some level of human oversight of all digital communications.[7] This assumption however fails to hold up in autonomous environments such as the blockchain as execution of the contract is automatic and irreversible.

In her writing, Vaitheeswaran highlights the evidentiary challenges posed by immutable ledgers,[8] while Verbanova emphasises the semantic gap between adaptable legal language and inflexible computer code.[9] These two strands of literature taken together, show the doctrinal vacuum that challenges international trade law assumptions, namely the traditional concepts of intention, offer and acceptance, mistake, and remedies, while simultaneously complicating jurisdictional issues, accountability and due process.

It is within this gap that the present paper situates its inquiry. Rather than

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[3] Pierluigi Cuccuru, "Beyond Bitcoin: An Early Overview on Smart Contracts," *International Journal of Law and Information Technology* 25, no. 3 (2017): 185–86, https://doi.org/10.1093/ijlit/eax003; Charlotte Ene, "Smart Contracts—The New Form of Legal Agreements," *Proceedings of the International Conference on Business Excellence* 14, no. 1 (2020): 1208, https://doi.org/10.2478/picbe-2020-0113.

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[8] Sneha Vaitheeswaran, "The Future of Blockchain Arbitration in the New 'Smart' World," *GNLU SRDC ADR Magazine* 4, no. 1 (2023): 35–37, https://gnlusrdcadrmagazine.com/wp-content/ uploads/2023/12/Volume-IV-Issue-I-Article-4.pdf.

[9] Gergana Varbanova, "Legal Nature of Smart Contracts: Contract or Program Code?," *Journal of Digital Technologies and Law* 1, no. 4 (2023): 1033, https://doi.org/10.21202/jdtl.2023.44.

examining the full technological or socio-economic landscape of blockchain, the paper shall focus specifically on the comparative private-law question of how international commercial law frameworks respond to the validity and enforcement of smart contracts. In particular, it examines whether the UNCITRAL Convention on the Use of Electronic Communications in International Contracts (CUECIC) and the Convention on Contracts for the International Sale of Goods (CISG) can serve as doctrinal bridges between traditional contract law and emerging automated contracting practices.

As will be discussed below, CUECIC offers a more technologically aligned and functionally coherent framework for recognising electronic and automated communications, but its limited global adoption restricts its harmonising potential. Conversely, the CISG enjoys widespread international acceptance but lacks the doctrinal specificity required to govern decentralised, self-executing transactions.

2. Background: CISG and CUECIC

2.1. CISG Overview

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was created with the objective of establishing minimum standards of contracting for contracts for international sale of goods between parties whose places of business are located in different states.[10] The Convention's scope is defined by the international character of the transactions that it regulated rather than the movement of the good across borders. In terms of application, the CISG is automatically applicable either to states who are both contracting parties,[11] or when the private international law rules applicable to the transaction lead to the application of the law of one of the contracting states.[12] The CISG is not prescriptive in nature and uphold the principle of party autonomy as it allows parties the freedom to exclude its provisions or vary the application of the provisions to their particular transaction.[13] These core principles illustrate the focus of the CISG, being to govern contract formation, rights and obligations of buyers and sellers and offering remedies foe breach. However, excluded from its provisions are issues relating to contract validity and the effect of the contract on the goods to which it apples.[14] It further does not apply to consumer sales, auctions, stocks and shares ships and other vessels or electricity.[15]

[10] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 UNTS 3 (CISG), art. 1(1), https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/19-09951_e_ebook.pdf.
[11] CISG, art. 1(1)(a).
[12] CISG, art. 1(1)(b).
[13] CISG, art. 6.
[14] CISG, art. 4.
[15] CISG, art. 2.

The CISG is underpinned by several key principles that guide interpretation and application. The central principle is party autonomy, which allows parties to derogate from or exclude the Convention.[16] The CISG also emphasises international uniformity and the observance of good faith in international trade transactions, both of which need to inform the interpretative approaches that courts and tribunals may choose to use.[17] Although good faith is framed as an interpretation principles, it does play an significant role in shaping how the Convention is used and applied in international sales contracts and the wider legal principles that would apply. Another foundational principle underpinning the convention is the flexibility in from requirements. In encouraging party autonomy, the Convention employs a wide approach to form requirements where the contracts that are subject to its provisions need not be concluded exclusively in writing but may be proved by any means, unless a state has made a reservation to the contrary.[18] This openness in contract formation is complemented by the COSG's emphasis on the principle of reasonableness in interpretation and conduct.[19] With regards to intent, the CISG employs a dual approach. Firstly, it looks at the subjective intent of the parties considering what was known and what the party could reasonably have been aware of, and secondly what the reasonable person in the same circumstances would be expected to know or do.[20] Taken together, these principles create a flexible and commercially oriented framework for international transactions for goods while allowing contracting parties significant freedom in the structuring of their respective contractual relations.

2.2. CUECIC Overview

The United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC) was adopted to facilitate the use of electronic communications in international contracts by ensuring that electronic messages, signatures and records are not denied legal force or effect solely on the basis that they are in electronic form.[21] The central purpose of this convention is to promote legal certainty and functional equivalence in cross border electronic commerce by establishing uniform rules for recognising and validating electronic communications.[22] The Convention applies to the use of electronic communications in connection with the formation or performance of

[16] CISG, art. 6.
[17] CISG, art. 7(1).
[18] CISG, art. 11.
[19] See, for example, CISG, arts. 8, 33, 34, and 48.
[20] CISG, art. 8.
[21] United Nations Convention on the Use of Electronic Communications in International Contracts, November 23, 2005, 2898 UNTS 3 (CUECIC), preamble, https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/06-57452_ebook.pdf.
[22] CUECIC, preamble and art. 3.

international contracts, except where parties have expressly excluded its application.[23] CUECIC, however, does not apply to contracts concluded for personal, family, or household purposes or to certain transactions in regulated markets and negotiable instruments or documents of title, reflecting the Convention's focus on commercial contracts.[24]

CUECIC is built on several key principles that assist in its interpretation and operation. The foundational principle is that of functional equivalence. The convention outlines that electronic communications satisfy the legal requirements for validity of a contracts, specifically, signature, writing and originality.[25] Rather than redefining these concepts, CUECIC emphasises technology neutrality by clearly establishing the conditions under which electronic forms of contract are treated as equivalent to their paper-based counterparts This ensures that the Convention does not mandate or favour one specific technological solution over others and embraces the growing variety of electronic communications.[26] Furthermore, the Convention emphasises the concept of non-discrimination, which provides that a contract must not be denied legal validity or enforceability merely because it is in electronic form.[27] Finally, CUECIC promotes international uniformity and encourages interpretations that are supportive of the overall objective of facilitating electronic commerce and reducing legal uncertainty in cross border transactions.[28] Taken together, these principles create a coherent framework that supports the recognition and enforceability of electronic communications in international trade contracting.

3. Comparative Analysis

The interaction between the CISG, CUECIC and the functional equivalence scholarship reveals a structural mismatch between the legal instruments that are most conceptually suited to digital contracting and those that are most widely adopted in global commerce. CUECIC provides the clearest doctrinal foundation for recognising electronic communications, automated processes and digital signatures, offering explicit criteria for when electronic acts satisfy the requirements of writing, signature and originality.[29] Its technology neutral drafting aligns closely with the functional equivalence approach advanced in the literature, which argues that smart contracts should be recognised when they perform the same legal function as their paper-based or human mediated

[23] CUECIC, art. 3.
[24] CUECIC, art. 2.
[25] CUECIC, arts. 6–9.
[26] CUECIC, preamble.
[27] CUECIC, art. 8.
[28] CUECIC, art. 5.
[29] Mik, "Certainty at Last?," 176; Anna Duke, "What Does the CISG Have to Say About Smart Contracts? A Legal Analysis," *Chicago Journal of International Law* 20, no. 1 (2019): 160–61, https://chicagounbound.uchicago.edu/cjil/vol20/iss1/4/.

counterparts.[30] In this sense, the CUECIC is the instrument that most naturally accommodates blockchain based contracting, inclusive of smart contracts, because it was drafted to validate electronic communications without prescribing a specific technology.

However, CUECIC's strength is undermined by its limited global adoption: as at August 1, 2026, it had 21 States parties and 18 signatories.[31] This significantly restricts its harmonising potential. Duke supports this perspective and notes that even though CUECIC offers the most coherent framework for validating automated contracting processes, its narrow uptake means that many cross-border transactions fall outside its scope.[32] This creates a legal dead zone where rules do not presently exist to allow for the validation and enforcement of smart contracts and blockchain based transactions, however, parties are still making use of these technologies even outside of the legal system with high risk to all parties.

By contrast, the CISG enjoys a broad international adoption, but its doctrinal foundations are built for human mediated transactions rather than autonomous, self-executing systems that underpin smart contracts and blockchain based contracting. While some scholars argue that smart contracts can satisfy the CISG's existing rules on formation and performance, the convention provides no explicit guidance on automated executions or blockchain specific risks.[33] Benson highlights that smart contracts often fail to meet traditional validity requirements for offer and acceptance and that courts may be forced to rely on equitable doctrines such as estoppel or unjust enrichment when automated transactions malfunction.[34] The CISG's silence on decentralised, jurisdictional uncertainty and evidentiary challenges further exposes its limitations in blockchain based commerce.[35]

Functional equivalence scholarship attempts to bridge this gap by arguing that smart contracts should be recognised when they perform the same legal function as traditional contracts.[36] Despite this, there remains a presumption that a level of human oversight will always be present in contract formation and that there is a way to ensure interpretative flexibility, even in a purely autonomous

[30] Raskin, "Law and Legality of Smart Contracts," 337; Jack Gilcrest and Arthur Carvalho, "Smart Contracts: Legal Considerations," in *2018 IEEE International Conference on Big Data (Big Data)* (Seattle: IEEE, 2018), 3280, https://doi.org/10.1109/BigData.2018.8622584.

[31] United Nations, "United Nations Convention on the Use of Electronic Communications in International Contracts: Status as at August 1, 2026," United Nations Treaty Collection, https:// treaties.un.org/pages/ViewDetails.aspx?chapter=10&mtdsg_no=X-18&src=TREATY.

[32] Duke, "What Does the CISG Have to Say?," 160–61.

[33] Duke, "What Does the CISG Have to Say?," 166–70.

[34] Gregory Benson Jr., "Implications of Adopting Blockchain Technology on International Sales Transactions," *Northern Illinois University Law Review* 39, no. 3 (2019): 509–10, https://huskiecommons.lib.niu.edu/niulr/vol39/iss3/2/.

[35] Benson, "Implications of Adopting Blockchain Technology," 499.

[36] Cuccuru, "Beyond Bitcoin," 185–89; Ene, "Smart Contracts," 1207; de Caria, "Legal Meaning of Smart Contracts," 736.

space. As Verbanova and Vaitheeswaren show, the semantic gap between legal language and computer code and the evidentiary challenges posed by immutable ledgers, complicate any attempts to follow a straightforward application of functional equivalence.[37] The effect of this is that at present, the legal concept of functional equivalence works well where it relates to electronic communications (such as emails, fax, or instant messaging) but not for autonomous execution (such as smart contracts, blockchain or use of artificial intelligence).

The comparative analysis therefore reveals that neither the CISG nor the CUECIC in their current form can fully accommodate the complexities of blockchain based contracting. Nonetheless, together they illuminate a possible pathway forward as CUECIC's technologically neutral stance and CISG's global legitimacy provide complementary building blocks for a more coherent international approach. Whether through interpretative evolution, targeted amendments or the development of a new model law, future reform efforts will need to reconcile the need for doctrinal specificity in addressing automation and the need for broad international cooperation.

Taken together, the analysis demonstrates that CUECIC is doctrinally superior but institutionally weak, while the CISG is institutionally dominant but doctrinally insufficient for blockchain based commerce. Functional equivalence provides a conceptual bridge between the two, but it cannot fully resolve the doctrinal, evidentiary and remedial challenges posed by decentralised, immutable and automated contract through smart contracts and blockchain. The result is a regulatory gap in which neither instrument on its own can provide the certainty required for digital first international trade.

4. Conclusion

This paper has examined the challenges that blockchain based smart contract pose for traditional private law frameworks and has evaluated whether the CISG and CUECIC can serve as effective bridges between automated contracting practices and established doctrines of validity and enforcement. The analysis shows that while smart contracts offer greater efficiency, their decentralised architecture, immutability and automation disrupt foundational assumptions related to party autonomy, writing, conflict of laws and remedies.

These features expose a doctrinal and regulatory gap that domestic legal systems alone cannot adequately resolve, particularly in cross border commercial transactions.

Ultimately, the validity and enforcement of smart contracts in international commerce cannot be secured by technological innovation. It requires a deliberate recalibration of private law principles in international

[37] Varbanova, "Legal Nature of Smart Contracts," 1033; Vaitheeswaran, "Future of Blockchain Arbitration," 35–37.

commercial law to ensure that the efficiency gains of automation do not come at the expense of accountability, fairness and legal certainty. The CISG and CUECIC offer partial solutions, but they also underscore the urgency of developing a more integrated and future focused approach to the development of governance frameworks that are adaptable enough to govern decentralised autonomous contracting systems.

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COMPETITION, TAXATION, TRADE AND TRANSNATIONAL DISPUTE RESOLUTION

The Need for Sanctioning Anti-Competitive Practices in the European Union

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Abstract

The topic that we propose for analysis is of particular importance from the perspective of the necessity, as the sanctions that we find in the primary legislation and in the other sources of EU law, namely the decision-making practice of the European Union, the jurisprudence of the European Union courts and the general principles of European Union law. At the level of each Member State of the European Union, it is recognised that it is necessary to sanction anti-competitive practices, with the caveat that these States have adopted different legislative solutions regarding the nature of the sanctions to be applied to the companies involved. The research method is primarily concerned with documentation, but also with the analysis of relevant aspects. From the perspective of the study's results and implications, we highlight the advantages of fair competition, which benefit producers of goods and service providers through pressure to innovate and technological development, and consumers through competitive prices.

Keywords*: anti-competitive practices, sanctions, European Union, legislation.*

1. Introductory Considerations on Anti-Competitive Practices and on the Necessity for Them to Be Sanctioned

The concept of competition has its origins in the noun *"competitio"* and the verb *"concurrere"* (both of Latin origin), referring to the act of initiating a struggle, an endeavour, or a rivalry for supremacy. Thus, the concept of competition places in the foreground the idea of rivalry within a competitive context, highlighting the effort undertaken to achieve a desired objective by each of the competitors[2].

Doctrine has emphasised that the meanings that have been and continue to be attributed to it, the perception of how the competitive process operates, and its effects on economic development remain varied. Competition, analysed from multiple viewpoints, is perceived, from the perspective of the attributes that characterise it, as a consequence of economic freedom: a rivalry between actual and potential competitors. This process generates innovation, a mechanism for selecting competitive undertakings, a promoter of efficiency and economic welfare, and a factor that prevents the unlimited monopolisation of the market and the

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[2] Ioan Lazăr and Laura Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței* (Bucharest: C.H. Beck, 2025), 50, https://law.ubbcluj.ro/stiri/aparitii-editoriale-recente/tratat-de-dreptul-uniunii-europene-in-domeniul-concurentei/.

creation of barriers to entry and exit[3].

In the course of our study, we propose to analyse both the advantages of fair competition and the disadvantages of a market vitiated by anti-competitive practices. The developments in doctrine are symbiotically linked to the evolution of case-law and to prior doctrinal contributions to which we intend to refer. The research method will focus on the study of the specialised literature and of case law. The solution we propose is connected to criminalisation at the level of the European Union of certain acts, as regulated by the Treaty on the Functioning of the European Union[4] considered as constituting anti-competitive practices. Furthermore, we propose the attribution of subject-matter jurisdiction, for acts of a high degree of seriousness, such as seriousness to be assessed in terms of the nature of the act and the value of the damage, to the European Public Prosecutor's Office[5].

The analysis of the challenges posed by aspects of the sanctioning and control of the relevant markets has led, at the level of the European Union, to balanced conclusions linked to the control of sanctions applied to anti-competitive practices. Thus, it has been considered that the discussions related to anti-competitive practices centre on two main topics: first, whether the recent developments are forcing the expansion of existing enforcement practices (for example, the public interest lest in mergers), and second, whether they may constitute exploration of a new approach in competition enforcement (for example, algorithmic cartels, privacy in unilateral conduct and merger cases). The scope of competition law leaves room for analysis of issues beyond the traditional focus on effects on prices, quality, diversity, and innovation, which have often been used to measure consumer welfare. In this regard, the doctrine is divided into those who consider that antitrust law should focus more on promoting welfare through competition and less on attaining other goals, and those who claim that, rather than being mutually exclusive, competition law and non-economic goals can serve to complement each other[6].

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[3] Laura Lazăr, *Abuzul de poziție dominantă: Evoluții și perspective în dreptul european și național al concurenței* (Bucharest: C.H. Beck, 2013), 5–26, https://www.baroul-bucuresti.ro/util/book/4330/, quoted in Ioan Lazăr and Laura Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței*, 51, https://law.ubbcluj.ro/stiri/aparitii-editoriale-recente/tratat-de-dreptul-uniunii-europene-in-domeniul-concurentei/. The author states that the approach to the conceptualization of competition reflects the cleavage existing in the specialized literature.

[4] Consolidated Version of the Treaty on the Functioning of the European Union, 2012 OJ C 326/47, https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj/eng.

[5] Council Regulation (EU) 2017/1939 of October 12, 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), 2017 OJ L 283/1, art. 1, https://eur-lex.europa.eu/eli/reg/2017/1939/oj/eng.

[6] Ioannis Kokkoris, "Introduction to the Research Handbook on the Law and Economics of Competition Enforcement," in *Research Handbook on the Law and Economics of Competition Enforcement*, ed. Ioannis Kokkoris and Claudia Lemus (Cheltenham, UK: Edward Elgar Publishing, 2022), 1, https://www.e-elgar.com/shop/usd/research-handbook-on-the-law-and-economics-of-competition-enforcement-9781789903782.html.

Proceeding further along this line of analysis, we retain an important doctrinal classification of the forms of competition, from which we will selectively mention two of the classifications that refer to the methods of carrying out competition, namely those which refer to the methods of carrying out competition, which may be lawful (or conducted by lawful means) or unlawful or prohibited (conducted by unlawful means), as well as to the criterion of the level of rivalry existing between competing undertakings on a given market and the conditions existing on that market. This criterion classifies competition into pure, perfect, and imperfect[7].

With reference to the work of the aforementioned author, we note that he shows that, in the domestic and French specialised literature, an important place in the analysis of the forms of competition is occupied by the classification of competition into fair and unfair, with reference to the honesty of the means by which the competitive process is carried out. The use of the adjective "fair" is criticised and considered inappropriate, as it is synonymous with honest, faithful, devoted, loyal, genuine, steadfast, sincere, and constant. In contrast, these cannot be characteristic of the relationships established between competitors, given the nature of such relationships.

Considering that fair competition is often erroneously identified with lawful competition, and unfair competition with unlawful competition. At the same time, the criterion of delimitation would, in fact, be the legality of the methods employed. The author concludes that, from this perspective, a distinction should be made between lawful and unlawful competition. Another conclusion of the author relates to the fact that the identification of lawful competition with fair competition, respectively of unlawful competition with unfair competition, could be achieved only under the conditions in which the existing legislative framework at a given moment would be a faithful reflection of what society considers regarding the honesty of the modalities of carrying out competition.

The arguments advanced are related to the fact that, on the one hand, there may exist competitive methods that are perfectly lawful but which are considered unfair or lacking in honesty, and, on the other hand, the legal classification of certain economic activities as unlawful may be subject to controversy, there being the possibility that what the legislator considers to be unlawful competition may not be regarded as unfair competition by society[8].

Lazăr states, with reference to the expression "perfect competition," that the adjective "perfect" refers to the highest degree of competition imaginable, retaining conditions necessary to be fulfilled on a given market, namely the atomicity of the economic ensemble (characterized by a large number of producers and suppliers with an insignificant size and economic power in relation to the

[7] Ioan Lazăr, *Dreptul Uniunii Europene în domeniul concurenței* (Bucharest: Universul Juridic, 2016), 62–64, https://www.hamangiu.ro/upload/cuprins_extras/dreptul-uniunii-europene-in-domeniul-concurentei-lazar-extras.pdf.
[8] Lazăr, *Dreptul Uniunii Europene*, 64–71.

size and power of the respective branch of activity), the homogeneity of the product (being a product of several undertakings which is identical in all respects, has the same destination and is intended to satisfy the same needs and desires), the free entry into and exit from any branch of activity (it is a matter of a fluidity which implies the absence of barriers of any nature, such as legal, institutional, technical, financial and others), the perfect transparency of the market (which presupposes complete information of undertakings regarding the type of goods and their quality which form the object of sale-purchase transactions, regarding the level, structure and dynamics of supply and demand, regarding price developments and others), as well as the perfect mobility of the factors of production (a condition consisting in the freedom of each economic operator to use the factors of production where it anticipates that it will obtain the highest benefits, with the allocation of resources based strictly on economic criteria, with destinations ensuring the highest possible level of profit for undertakings).

About perfect competition, it has also been emphasised in doctrine that ensuring it appears to be a utopian objective; therefore, the purpose of the rules governing the competitive process is that of ensuring a workable competition, capable of ensuring the achievement of the objectives contained in primary Community law[9]. In the context of the doctrinal approach to which we refer, the author states that attaining this objective necessarily involves regulations characterised by flexibility, which allows for certain restrictions on competition, insofar as such restrictions are necessary within *conduct that brings net benefits to consumers*.

2. Concrete Aspects Related to the Necessity for Anti-Competitive Practices to Be Sanctioned Within the European Union

It is necessary to emphasise that, in economic-commercial matters (as in any other branch of law involving social relations regulated by legal norms), there exists the right to operate in a competitive environment that functions properly, in which the idea of rivalry to become the best in the activity of supplying substitutable goods and services under the most advantageous economic conditions is essential.

We wish to highlight the advantages of fair competition, which arise both for producers of goods and providers of services, from the perspective of the pressure that entails innovation, technological development, competitive prices, as well as for consumers, who can choose the goods and services they pay for

[9] Laura Lazăr, "Reformarea dreptului comunitar al concurenței—încercare de a asigura convergența între instrumentele de politică concurențială ale Comisiei Europene (I)," *Revista Română de Drept al Afacerilor*, no. 5 (2009): 20–31, https://www.baroul-bucuresti.ro/util/serial/ 5762/. The author pertinently analyzed, at the time of drafting the article, the situation of the reform process at Community level in the field, showing that the main objective of this process was the removal of regulations which could have had the effect of possibly hindering pro-competitive business conduct, which did not have as their effect a significant restriction of competition.

based on a selective analysis, according to the quality/price criterion, under conditions of a varied supply. The supply available to the consumer is particularly important for the existence of a competitive environment that functions properly. The idea of competitive pressure, which is found only in this branch of law and carries positive connotations (in other branches, the notion of pressure has different connotations), reveals a legal and jurisdictional mechanism beneficial to consumers.

Anti-competitive forms practised by companies, according to the relevant doctrine, are classified into four categories: anti-competitive agreements between undertakings, abuse of a dominant position (monopoly), economic concentration operations between undertakings, and State aid[10].

Doctrine[11] highlighted that the Member States of the European Union have manifested different legislative options about the legal nature of the liability to be incurred in situations of anti-competitive practices, some States opting for administrative liability, while others for a mixed liability, administrative/ criminal, with the following examples:

- in Ireland and Estonia, only criminal sanctions are provided, consisting of criminal fines applicable both to undertakings and to natural persons, as well as imprisonment, applicable to the latter;

- in the United Kingdom, non-criminal fines are intended for undertakings. Still, disqualification of company directors is also provided, as are criminal fines and imprisonment for natural persons, especially in cases concerning price-fixing, limitation of production or supply, market-sharing, or bid-rigging. The amendment of legislation in the United Kingdom has decisively influenced amendments to other legislation, in the sense of the criminalisation of competition law;

- in Germany, criminal sanctions are reserved exclusively for anti-competitive agreements concerning bid-rigging. Infringements equivalent in domestic law to Articles 101 and 102 of the Treaty on the Functioning of the European Union are sanctioned by fines, however of an administrative nature, applied to natural persons and only subsidiarily to undertakings;

- in France, Cyprus and Slovakia, the main sanctions provided for undertakings are non-criminal fines, there also exists, at least at a theoretical level, imprisonment for natural persons;

- in Denmark and Malta there exist only fines applicable to undertakings, but these have a criminal nature. In Malta, directors may be held jointly liable with undertakings for such fines;

- in Greece, non-criminal fines are provided for natural persons and, subsidiarily, for undertakings, while imprisonment is specifically provided for bid-rigging;

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[10] Ioan Lazăr, *Dreptul Uniunii Europene*, 156.

[11] Lazăr, *Dreptul Uniunii Europene*, 230–32; Ioan Lazăr and Laura Lazăr, *Tratat de Dreptul Uniunii Europene*, 309–11.

- in Austria, non-criminal fines are provided only for undertakings, but, as in the case of Germany, imprisonment is provided for bid-rigging.

In any event, civil liability for injured undertakings is not excluded by any legislation of the Member States.

We consider it necessary to make a preliminary reference to the European locus of the matter; thus, we mention, alongside other provisions of law, Article 101 (ex-Article 81 EC) of the Treaty on the Functioning of the European Union, which provides that:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

We show that the European legislator has chosen to prohibit any agreements between undertakings, any decisions of associations of undertakings, and any concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, after which it refers “in particular” to

certain cases, an aspect which leads to the idea that it is an illustrative enumeration, as noted in doctrine[12].

However, the formula "in particular" allows us to understand the paramount importance of these examples of anti-competitive manifestations, while, of course, leaving room for the identification of any such manifestations, in accordance with the general rule of the regulation, it being for case-law and doctrine to make the necessary additions, which the regulation allows, to provide broader protection against anti-competitive agreements.

We shall refer, about Article 102 of the Treaty on the Functioning of the European Union, to the manner in which the official website of the European Union has chosen to refer to this form of anti-competitive practice of abuse of a dominant position, indicating that it is manifested by the fact that an undertaking holds a significant market share, which means that it enjoys a dominant position and must avoid:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In the case of this form of anti-competitive practice, we do not find a sanction of nullity *ipso jure*, as is the case with anti-competitive agreements, since it is not a matter of an agreement but of an undertaking's abuse of a dominant position on a relevant market.

Doctrine holds that the expression "economic concentration operation between undertakings," within the meaning of European competition law, covers a broad range of transactions between undertakings (mergers, acquisitions, takeovers of control, certain types of joint ventures, etc.) which result in the combination of the assets of two or more companies with a view to improving the market position of the undertakings participating in the operation or, as the case may be, for the creation of an entity that is economically stronger than the merged undertakings.

With regard to economic concentration operations, it should be noted that there are international regulations set out in Article 3 of Council Regulation (EC) No. 139/2004[13] which establish a definition of concentration, providing that a

[12] Ioan Lazăr, *Dreptul Uniunii Europene*, 156.

[13] Council Regulation (EC) No. 139/2004 of January 20, 2004, on the control of concentrations between undertakings, 2004 OJ L 24/1, art. 3, https://eur-lex.europa.eu/eli/reg/2004/139/oj/eng. For a relevant analysis, see Ioan Lazăr, "Noi modificări aduse procedurilor de evaluare a operațiunilor de concentrare economică prin Pachetul legislativ de modernizare 2023," *Revista*

concentration shall be deemed to arise where a lasting change of control results from: the merger of two or more previously independent undertakings or parts of undertakings, or the acquisition, by one or more persons already controlling at least one undertaking or by one or more undertakings, whether by the purchase of securities or assets, by contract or by any other means, of direct or indirect control over one or more undertakings or parts thereof.

Control shall derive from rights, contracts or any other means which, either separately or in combination and having regard to the relevant legal or factual considerations, confer the possibility of exercising decisive influence over an undertaking, in particular through ownership or the right to use all or part of the assets of an undertaking, or rights or contracts which confer decisive influence over the composition, voting or decisions of the organs of an undertaking. Control is acquired by persons or undertakings which are holders of the rights or beneficiaries under the contracts in question or, although not holders of such rights or beneficiaries under such contracts, have the power to exercise the rights deriving therefrom.

It is also stated in the analysed normative text that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitute a concentration within the meaning of Article 3(1)(b) of Council Regulation (EC) No. 139/2004.

The reasons for which undertakings resort to concentration operations are multiple: increasing profits, ensuring the viability and profitability of the undertaking, improving economic performance, increasing the efficiency of raw material use, satisfying the aspirations of company directors to acquire greater economic power, etc. Economic concentration operations between undertakings may give rise to a series of positive economic effects, such as increased capacity for development and innovation, access to new markets, reorganisation of human resources, increased economic efficiency, economies of scale, reduced production costs, diversification of production, etc.

The purpose of the rules of European competition law concerning economic concentration operations is to prevent and sanction operations and business strategies that may affect the maintenance of an adequate level of competition on the market and give rise to effects contrary to the interests of consumers. The role of the control exercised by the European Commission and national competition authorities consists of ensuring the optimal functioning of the internal market[14].

Română de Drept al Afacerilor, no. 1 (2024): 97–108, https://rrda.ro/noi-modificari-aduse-procedurilor-de-evaluare-a-operatiunilor-de-concentrare-economica-prin-pachetul-legislativ-de-modernizare-2023/. The author also analyzes the secondary Union legislation in the field under consideration, reflecting the evolving nature of EU practices in the field of competition.

[14] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford: Oxford University Press, 2014), 23, https://doi.org/10.1093/law/9780199644131.001.0001, quoted in Ioan Lazăr, *Dreptul Uniunii Europene*, 305.

About State aid, from the perspective which is the subject of our study, we note that, according to Article 107 of the Treaty on the Functioning of the European Union (ex-Article 87 EC), save as otherwise provided in the Treaties, any aid granted by a State or through State resources, in any form whatsoever, which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall be incompatible with the internal market, insofar as it affects trade between Member States.

Doctrine shows that State aid is considered by European legislation as constituting an anti-competitive practice which must be prohibited by legislative means and sanctioned[15].

Furthermore, doctrine emphasises, in the context of the analysis of a specific case of the Court of Justice of the European Union[16], the case-law of the Court of Justice of the European Union, by which the role of national courts is consolidated as essential institutional actors in guaranteeing compliance with Article 108(3) of the Treaty on the Functioning of the European Union, emphasizing their obligation to verify *ex officio* the legality of support measures, to order

[15] Livia Daniela Mocan and Aurelian Gheorghe Mocan, "Criterii de evaluare utilizate de Comisia Europeană în contextul calificării drept «ajutoare de stat» a plăților efectuate către o societate controlată de stat," *Revista Română de Drept al Afacerilor*, no. 4 (2024): 141–52, https://rrda.ro/ criterii-de-evaluare-utilizate-de-comisia-europeana-in-contextul-calificarii-drept-ajutoare-de-stat-a-platilor-efectuate-catre-o-societate-controlata-de-stat/. The authors explain why State aid is considered an anti-competitive practice requiring legislative intervention and sanctioning pursuant to Article 107 of the Treaty on the Functioning of the European Union. The work details the exceptions and the conditions under which such aid may be considered compatible with the internal market, as well as the role of national and European authorities in their assessment. Within a case analysis, the authors examine Commission Decision (EU) 2015/1877 concerning the electricity purchase agreements concluded by S.C. Hidroelectrica S.A. with S.C. Termoelectrica S.A. and S.C. Electrocentrale Deva S.A. The authors highlight, on the basis of this case study, how the influence of the State over public undertakings may lead to transfers of resources and selective advantages, considering these as State aid incompatible with the internal market. In this context, the legal criteria established by the Court of Justice of the European Union for determining the imputability to the State and the selectivity of aid are discussed, emphasizing the importance of the private economic operator test in the assessment of State interventions.

[16] Iulian Băiculescu and Ioan Lazăr, "Rolul instanțelor naționale în controlul ajutoarelor de stat: reflecții pe marginea Cauzei C-349/17—Eesti Pagar," *Revista Română de Drept al Afacerilor*, no. 2 (2025): 115–28, https://rrda.ro/rolul-instantelor-nationale-in-controlul-ajutoarelor-de-stat-reflectii-pe-marginea-cauzei-c-349-17-eesti-pagar/. In this context, see also Council Regulation (EC) No. 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 OJ L 1/1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R0001. The regulation contains detailed rules on combating anti-competitive practices; we consider important a reference to recital 1 of the Regulation, which justifies the regulation in the sense of establishing a system that guarantees that competition is not distorted in the common market. The Regulation is permissive as regards the possibility for Member States to adopt and apply on their territory national legislation that is stricter than that of Union law, which prohibits or sanctions unilateral conduct adopted by undertakings. The Regulation expressly provides, with reference to the national courts of the Member States, that they have an essential role in the application of Community (now Union) competition rules, emphasizing their complementary role to that of the authorities of the European Union.

the recovery of unlawful aid and to exclude the invocation of the principle of legitimate expectations in the absence of prior notification.

Specialised literature further emphasises that the correct classification of a state aid measure is particularly important in the context of compliance with Romania's obligations as a Member State of the European Union, as the consequences of disregarding State aid rules may lead to the suspension of a financing scheme[17].

3. Aspects Related to the Romanian Law

Article 148 of the Constitution of Romania provides, in paragraph (2), that, as a result of accession, the provisions of the founding treaties of the European Union, as well as the other binding Community regulations, have priority over contrary provisions in domestic laws, in compliance with the provisions of the act of accession. The provision enshrines the priority of European Union law in relation to domestic law, even in the context of certain lacunae of the Treaty, which should perhaps have expressly (*expressis verbis*) enshrined the effect of direct and priority applicability of European Union law in relation to the domestic law of the Member States.

In this context of constitutional obligatoriness, the adoption of legislation or the adaptation of the existing one through amendments to align it with that of the European Union in the field of competition was inevitable[18].

We mention, first of all, the adoption of Law No. 11/1991[19] on combating unfair competition, which aims to ensure fair competition, in compliance with honest practices and the general principle of good faith, for the protection of the legitimate public and/or private interest, by applying the rules of administrative, criminal or civil law, as the case may be, regulates the notion of unfair competition, establishes competences for the Romanian Competition Council (to which the status of an autonomous administrative authority in the field of competition is attributed, and which ensures the protection of undertakings against unfair competition practices within the limits of the competences conferred by law). The law specifies the types of legal liability that may arise from non-compliance with Article 1, referring to the possibility of engaging civil, administrative, or criminal liability, noting that these forms of legal liability may be engaged only under legal conditions.

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[17] Ciprian Pilan, *Ajutorul de stat—afaceri cu bani publici: Aspecte practice privind aplicarea legislației în domeniul ajutorului de stat* (Bucharest: Universul Juridic, 2010), 19, https://www.ujmag.ro/economie/finante/ajutorul-de-stat-afaceri-cu-bani-publici-aspecte-practice-privind-aplicarea-legislatiei-in-domeniul-ajutorului-de-stat/rasfoire/.

[18] Aurelian Gheorghe Mocan, "The Effects of Anti-Competitive Agreements on Both Enterprises and Consumers," *Annales Universitatis Apulensis, Series Jurisprudentia* 25 (2022): 243–53, https://jurisprudentia.uab.ro/upload/9_20_annales_nr25.pdf.

[19] Law No. 11/1991 of January 29, 1991, on combating unfair competition, Monitorul Oficial al României, no. 24 (January 30, 1991), https://legislatie.just.ro/Public/DetaliiDocument/1440.

This law contains numerous provisions that protect fair competition, including the identification of the acts that must be sanctioned and the specification of the sanctions, with the criteria for individualisation to be considered, in particular, given that these are provisions of a special law.

We shall refer to acts criminalised by this Law on combating unfair competition, as follows:

a) the use of a trade name, emblem or packaging of a nature to produce confusion with those legitimately used by another trader. The legislator's option to criminalise such an act is explained in relation to the necessity of protecting trademark rights and in circumstances where confusion may arise with the trade names, emblems, or packaging used by another trader, without any identity.

b) the use for commercial purposes of the results of experiments or of other confidential information related thereto, transmitted to the competent authorities for the purpose of obtaining marketing authorisations for pharmaceutical products or chemical products intended for agriculture, which contain new chemical compounds. The justification for sanctioning such an act, in the context of commercial practices lacking fairness, is the need to protect industrial property rights and the commercial interests of the injured undertakings, as well as to ensure a proper competitive environment.

c) the disclosure, acquisition or use of a trade secret by third parties, because of an act of commercial or industrial espionage, if thereby the interests or activity of a legal person are affected.

In this case, the legislator clearly explains that it intends to protect the interests or activity of a legal person, however, evidently, also in favour of an economic environment in which competition is fair[20].

[20] Alba Iulia Court of Appeal, Case No. 1655/85/2020, Second Civil Division, Decision No. 60/2023 (February 16, 2023), ECLI:RO:CAALB:2023:039.000060 (unpublished). According to this national case law, unfair competition falls, from the perspective of the legal liability it entails, within tort liability. The invocation of a practice consisting in the diversion of clientele requires evidence in the sense that honest practices in the field of commercial competition must be proven. The assessment of information held by a former employee with reference to the diversion of clientele implies, according to the law, evidentiary requirements to the effect that such diversion of clientele involves the use of information which the former employee possessed and which may significantly harm the interests of an undertaking. Information relating to offers, marketed products, prices applied, and the list of clients do not have the character of trade secrets, within the meaning of the law. The Court of Appeal Alba Iulia found that no evidence was produced of any hidden or obscure arrangements between the defendant in the case and the public authorities that requested offers through SEAP. It was further held that, although trade secret protection was invoked, namely the information allegedly held by the defendant in her capacity as a sales agent, no evidence was produced that the confidential or secret character of the information regarding offers, the products marketed by the claimant, or the prices applied had been brought to the attention of the defendant. It was also retained that the claimant did not prove that the defendant was aware, at the time of committing the act, that the aforementioned aspects represented trade secrets or confidential information. The court held that all the information invoked in the case, being public under the conditions of publication in SEAP, can no longer be considered business secrets. It was concluded that, in the case, no evidence was provided of the existence of an unlawful act under Article

d) the disclosure or use of trade secrets by persons authorised by the legitimate holders of such secrets to represent them before public authorities or public institutions, if thereby the interests or activity of a legal person are affected. The justification for sanctioning such a practice is the need to protect natural or legal persons against the disclosure or use of trade secrets by persons authorised by the legitimate holders of such secrets.

e) the use, by a person among those provided for in Article 175 paragraph (1) of the Criminal Code, of trade secrets of which they became aware in the exercise of their official duties, if thereby the interests or activity of a legal person are affected. Such a practice is equivalent to any other practice of compromising trade secrets, from the perspective of its harmful effects on the competitive environment; thus, the legislator's option to criminalise it was a natural one.

f) the production in any manner, import, export, storage, offering for sale or sale of goods or services bearing false indications regarding patents for inventions, plant variety rights, trademarks, geographical indications, industrial designs or models, topographies of semiconductor products, other types of intellectual property, such as the external appearance of the undertaking, the design of shop windows or the clothing design of staff, advertising means and the like, the origin and characteristics of goods, as well as the name of the producer or trader, for the purpose of misleading other traders and beneficiaries. The legislator specifically refers to the most serious forms of infringement of intellectual property and industrial property rights, which are criminalised in this regard.

Law 21/1996, referred to as *the Competition Law* – republished – aims at the protection, maintenance and stimulation of competition and of a normal competitive environment, with a view to promoting the interests of consumers, and states that, within the meaning it envisages, the principles laid down by Directive (EU) 2019/1 of the European Parliament and of the Council, transposed by this law, apply in situations where the Romanian Competition Council applies only the provisions of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union, applies in parallel national legislation and the provisions of Articles 101 and/or 102 of the TFEU, as well as when it applies national legislation exclusively.

The law confirms the status of the Competition Council as the national competition authority, with the powers provided by this law, and confirms that it has the guarantees of independence, resources and enforcement competences, so that competition is not distorted on the internal market, with a view to ensuring mutual assistance for guaranteeing the proper functioning of the internal market, also establishing that the Competition Council cooperates with the European

1357(1) of the Civil Code, nor of the unlawful act provided for in Article 2(2)(b) of Law No. 11/1991.

Commission and with the other national competition authorities within the European Competition Network.

The law clearly establishes its scope of application, stating that it applies to acts and deeds which restrict, prevent or distort competition, committed by undertakings or associations of undertakings – natural or legal persons – of Romanian or foreign citizenship or nationality, hereinafter referred to as undertakings, as well as by the authorities and institutions of the central or local public administration, insofar as they, through the decisions issued or the regulations adopted, intervene in market operations, directly or indirectly influencing competition, except where such measures are taken in the application of other laws or for the protection of a major public interest.

The law regulates the obligations of undertakings, defines anti-competitive practices (in accordance with the Treaty on the Functioning of the European Union), establishes clear prohibitions incumbent upon the authorities and institutions of the central or local public administration and the entities to which they delegate their powers, which restrict, prevent or distort competition, as well as aspects related to the organization of the Competition Council[21], as well as the description of certain acts liable to be sanctioned administratively, and other essential aspects in the field of competition.

With a view to providing as complete a picture as possible of the legislative framework, we shall mention the provisions of Emergency Government Ordinance No. 170/2020 on actions for damages in cases of infringement of competition law provisions, as well as for the amendment and supplementation of Competition Law No. 21/1996[22]. It is stated that the purpose of the regulation is to ensure the existence of effective mechanisms and actions for the enforcement of competition rules at a private level, to ensure the right of access to a court for the recovery of damage by undertakings that have been affected by the anti-competitive conduct of other market participants, with a view to deterring anti-competitive behaviour.

This emergency ordinance, as defined in its scope of application, regulates the right of any person who has suffered damage caused by an infringement of competition law by an undertaking or an association of undertakings to request

[21] Romanian Competition Council, "Consiliul Concurenței," accessed August 2, 2026, official website. The Romanian Competition Council is the sole national authority responsible for the enforcement of competition rules, its main mission being the protection of consumers from practices that may distort the functioning of the free market. Its activity has two components: a preventive one, consisting of the monitoring and supervision of markets, and a corrective one, consisting of the sanctioning of deviations from normal competitive conduct.

[22] Emergency Government Ordinance No. 170/2020 on actions for damages in cases of infringement of competition law provisions and amending Competition Law No. 21/1996, Monitorul Oficial al României, no. 952 (October 16, 2020), official text, approved by Law No. 320/2024, Monitorul Oficial al României, no. 1308 (December 23, 2024), approval law. The ordinance transposes Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014, 2014 OJ L 349/1, EUR-Lex.

from the competent courts full compensation for the damage suffered. It applies to infringements of Articles 101 or 102 of the Treaty on the Functioning of the European Union, to infringements of Articles 101 or 102 of the TFEU applied in parallel with national competition legislation, as well as to cases of the exclusive application of national competition legislation.

4. Conclusions and *De Lege Ferenda* Proposals

We conclude that, given the importance of a properly functioning competitive environment on each relevant market, the necessity of sanctioning anti-competitive practices is indisputable. National States have the freedom to establish substantive regulations and procedures for the application of such sanctions, except in cases where competence lies with the European Commission.

Union legislation highlights the advantages of fair competition but clearly establishes the criteria for prohibiting anti-competitive practices, which must be correctly transposed into domestic legislation. It is not disputed, within the scope of the debate on this matter, that an environment of fair economic competition brings advantages both to undertakings and to consumers.

However, we consider that there is room for progress and improvements in the European and domestic legislative framework, a circumstance which leads us to propose two legislative amendments:

a) The attribution of investigative competences, about certain acts which infringe competition rules at Union level, based on the criterion of the seriousness of the act and the extent of the damage, to the European Public Prosecutor's Office, taking into account that this prosecution body investigates offences affecting the financial interests of the European Union, a category of acts to which anti-competitive practices may be assimilated.

b) The unification of competition legislation into a single normative act, which would provide greater clarity, coherence and predictability to the regulations in this field, with the elimination of the confusion that multiple regulations may generate through successive legislative amendments, republications, and the definition of the same terms.

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Algorithmic Hub-and-Spoke Arrangements and the Attribution of Anticompetitive Liability: A Comparative Analysis of EU and US Law

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Abstract

The growing use of artificial intelligence in the activity of undertakings, particularly pricing algorithms, has generated a new form of anticompetitive coordination in which a third-party software provider collects and combines confidential data to generate pricing recommendations and eliminate independent decision-making. This configuration, known as an algorithmic hub-and-spoke arrangement, raises a fundamental question: whether existing competition law frameworks are adequate to attribute liability to the algorithm provider as a co-author of an anticompetitive agreement. This paper examines the question through a comparative analysis of EU and US competition law. The methodology is primarily doctrinal, drawing on treaty provisions, case law of the Court of Justice of the European Union, such as AC-Treuhand (C-194/14 P) and Eturas (C-74/14), and US federal court decisions, namely United States v. RealPage, Inc. (No. 1:24-cv-00710, M.D.N.C.). Legal analogy is used to extend established jurisprudential principles to novel technological configurations. The comparative analysis reveals that while US enforcers have acted directly against the algorithmic hub, EU law has yet to produce a ruling expressly addressing the liability of algorithm providers as co-authors of a concerted practice. The paper proposes a standard of "constructive knowledge" as a doctrinal basis for extending Article 101 TFEU to algorithmic hubs.

Keywords: *hub-and-spokes, artificial intelligence, third-party software provider, pricing algorithm, anticompetitive agreements, concerted practices.*

1. Introduction

The digitalization of the economy and growing use of artificial intelligence in the activity of undertakings, particularly pricing algorithms, has generated a new form of anticompetitive agreements in which a third-party software provider collects and combines confidential data to generate pricing recommendations and eliminate independent decision-making. This configuration has begun to appear in competitor's practice, prompting the EU and US courts to analyse if the property management software company is a part of the anticompetitive agreement and can be held accountable. For example, the US Department of Justice filed an antitrust complaint against RealPage, Inc. alleging for the first time that an algorithmic intermediary had operated as the hub of a price-fixing conspiracy under Section 1 of the Sherman Act. Shortly thereafter, the European

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Commission confirmed that multiple inquiries into algorithmic pricing mechanisms are currently underway. These developments signal that the question of whether existing competition law frameworks are adequate to attribute liability to algorithm providers as co-authors of anticompetitive coordination is no longer a theoretical one.

This paper examines the question through a comparative analysis of EU and US competition law. The methodology is primarily doctrinal, drawing on treaty provisions, case law of the Court of Justice of the European Union, such as *AC-Treuhand* (C-194/14 P) and *Eturas* (C-74/14), and US federal court decisions, namely *United States v. RealPage, Inc.* (No. 1:24-cv-00710, M.D.N.C.). Legal analogy is used to extend established jurisprudential principles to novel technological configurations.

For this analysis, the paper is structured in four sections. Section I clarifies the key concepts, establishes the conceptual framework of hub-and-spoke arrangements and identifies the specific characteristics that distinguish their algorithmic variant from the classical model. Section II examines the EU law framework, analysing the capacity of Article 101 TFEU to attribute liability to the algorithmic hub through the jurisprudential principles developed in *AC-Treuhand, Höfner, T-Mobile Netherlands* and *Eturas* rulings. Section III analyses the US law framework and the evolution of hub-and-spoke doctrine from Interstate Circuit to *RealPage* case law. Section IV conducts a comparative analysis, identifying two convergences, two divergences and a common gap in both legal systems.

The paper concludes by proposing a standard of "constructive knowledge" as a doctrinal basis for extending the reach of both Article 101 TFEU and Section 1 of the Sherman Act to hubs that use artificial intelligence in order to facilitate anticompetitive agreements, without requiring legislative reform in either system.

2. The Hub-and-Spokes Structure: Concept, Typologies and Algorithmic Specificities

This section examines the concept of hub-and-spoke arrangements, the functional typology of algorithms relevant to competition law, and the specific characteristics that distinguish algorithmic hub-and-spoke configurations from their classical counterparts. In order to properly frame the analysis, it is necessary to clarify the key concepts such as anticompetitive agreements or concerted practices, hub-and-spoke arrangements, pricing algorithm.

In this sense, anticompetitive agreements are a form of collaboration between undertakings for the purpose of reducing or eliminating the competitive pressures that would otherwise incentivize economic operators to innovate and to improve their offers from the perspective of the requested price, as well as the

quality of the goods and services offered. As a result, anti-competitive agreements can harm the interests of consumers, who end up paying more for goods and services of lower quality than would exist in a competitive market.[2]

For the second term, the ECJ, in the *ICI v. Commission of the European Communities* (known as the "Dyestuffs" case),[3] explained that a concerted practice is "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".[4] "Hence, a concerted practice is, firstly, a reciprocal cooperation, and secondly, it is such cooperation, which *knowingly* substitutes competition".[5] In other words, for the undertakings to be held accountable to concerted practice, it must fulfil three elements: namely a concertation, subsequent behaviour in the market and the causal link between the concertation and the subsequent behaviour in the market.[6] But, according to the ECJ, a concerted practice, although it does not have all the elements of a contract, "may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants".[7]

The concerted practices can take the form of an agreement among numerous parties „(the spokes) as to the price at which they will sell a particular product could be achieved, directly, or indirectly, through the intermediary of a supplier (a hub)".[8] This is the classic form of a hub-and-spoke agreement, where a central undertaking, namely the hub, controls and makes use of a numerous undertaking, the spokes.

Although the term "hub-and-spoke" does not appear in the US Court's opinion, Interstate Circuit[9] is the case law which founding precedent of this doctrine, given that the Court established the key principle that a hub's simultaneous proposal to competing spokes, known to all parties, may give rise to an implied

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[2] Ioan Lazăr and Laura Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței* (C.H. Beck, 2025), 207, https://www.beckshop.ro/tratat-de-dreptul-uniunii-europene-in-domeniul-concurentei.

[3] *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, Case 48/69, ECLI:EU:C:1972:70 (ECJ, July 14, 1972), https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?language=en&num=48%2F69.

[4] *Imperial Chemical Industries*, Case 48/69, para. 64.

[5] Gintarė Surblytė-Namavičienė, *Competition and Regulation in the Data Economy: Does Artificial Intelligence Demand a New Balance?* (Edward Elgar Publishing, 2020), 159–60, https://doi.org/10.4337/9781788116657.

[6] *Hüls AG v. Commission of the European Communities*, Case C-199/92 P, ECLI:EU:C:1999:358 (ECJ, July 8, 1999), para. 161, https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?language=en&num=C-199%2F92.

[7] *Hüls*, Case C-199/92 P, para. 65.

[8] Alison Jones, Brenda Sufrin, and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases & Materials*, 8th ed. (Oxford University Press, 2023), 198–99, https://doi.org/10.1093/he/9780192855015.001.0001.

[9] *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221–22 (1939), https://supreme.justia.com/cases/federal/us/306/208/.

horizontal agreement among the spokes without direct contact between them. After this case law, the term hub-and-spoke conspiracy entered the American legal vocabulary and it is used in *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

Prior to examining the categories of collusion, we must define the concept of algorithm which is „a sequence of operations that transform an input into an output".[10]

Algorithms are developed in a specified way to respond for different purposes. We can classify them according to the following functional typology[11]: *(i) search*: it presents many types of search engines like general (e.g., Google search) special, meta, semantic, Question and answer services. And can be used to search for products or services (e.g., Amazon or Booking.com); *(ii) recommendation*: for its recommendations for certain information or products uses data about the user (including behavioural data), the product and/or other parameters (e.g., Spotify or Netflix); *(iii) allocation*: used for automated transactions, for advertising (e.g., Google Adsense) or for distribution and allocation of supply and demand (e.g., Uber); *(iv) Surveillance or observation*: it can observe the patterns of behaviour for the purpose of identify deviations such as fraud detection in transactions, employee monitoring or general monitoring software. „It could also relate to market monitoring to track the behaviour and strategic decisions of competitors, such as prices"[12]; *(v) pricing*: an algorithm which can set or recommend prices based on data, customers characteristics or market conditions; *(vi) aggregation*: these are the news aggregators which collect and reorder the information from different sources; *(vii) communication*: automated communication with consumers and/or businesses, such as the interactions between consumers and chatbots; *(viii) filters*: spam filter (mostly in the background) for information and data; *(ix) information production:* the production of information; *(x) prediction*: predicting future behaviour or scenarios; *(xi) scoring*: such as reputation systems, news scoring, credit scoring, or social scoring, which can score or order of information, products, businesses and/or consumers.[13]

The algorithms outlined above may be easily incorporated into undertakings' commercial strategies and market conduct. In particular, pricing and surveillance algorithms are highly relevant to competition law, since they allow firms to monitor competitors' behaviour and adapt prices in real time. As a result, such systems may facilitate anticompetitive coordination in the absence of explicit human direction.

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[10] OECD, *Algorithmic Competition*, OECD Roundtables on Competition Policy Papers, no. 296 (OECD Publishing, 2023), 7–13, https://doi.org/10.1787/cb3b2075-en.

[11] Michael Latzer and Noemi Festic, "A Guideline for Understanding and Measuring Algorithmic Governance in Everyday Life," *Internet Policy Review* 8, no. 2 (2019): 8, https://doi.org/10.14763/2019.2.1415.

[12] OECD, *Algorithmic Competition*, 8.

[13] OECD, *Algorithmic Competition*, 7–8.

The academic literature has identified in the practice of the undertakings „four nonexclusive categories of collusion – Messenger, Hub and Spoke, Predictable Agent, and Digital Eye"[14] In the first one, called Messenger, the humans agree to collude into a cartel.[15] In the scenario of using the artificial intelligence, the computers are used to execute the will of humans in their agreement to collude and restrict competition. In other words, after the humans agree to the cartel, they use computers to assist in implementing, monitoring, and policing the cartel. This is a simple scenario, where the use of machines for the purpose of facilitating the cartel can be sanctioned.[16]

The second category, namely hub-and-spoke, which is the most relevant for this article, „concerns the use of a single algorithm to determine the market price charged by numerous users".[17] In the classic scenario, a multitude of similar vertical agreements concluded between numerous competing undertakings in the same industry may constitute the structural basis of a hub-and-spoke arrangement, in which the intermediary (the hub) facilitates horizontal coordination among the spokes, with the effect of raising prices above competitive levels.[18] But in the scenario of using the artificial intelligence, the hub is replaced by a computer algorithm which facilitates the collusion among numerous competitors.[19]

For the third category, the predictable agent, involves undertakings that unilaterally design an advance algorithm to produce predictable outcomes in response to changing market conditions. In this case, multiple competitors adopt similar algorithms which may lead to a tacit collusion. Importantly, the agreements in this scenario are not the result of express collusion. The last category, digital eye, the competitors unilaterally create and use artificial intelligence to determine the optimal competitive strategy through continuous market experimentation. The algorithms, which have the functions of self-learning and experiment, determine without any human instruction the means to optimize profit.[20]

From the considerations above, the transition from the classic agreements to the algorithmic hub-and-spoke arrangements generate a set of distinguished characteristics. The first one, in the traditional agreements, the hub is an undertaking that consciously facilitates horizontal coordination among competi-

[14] Ariel Ezrachi and Maurice E. Stucke, "Artificial Intelligence & Collusion: When Computers Inhibit Competition," *University of Illinois Law Review* 2017, no. 5 (2017): 1782, https://illinoislawreview.org/print/vol-2017-no-5/artificial-intelligence-collusion/.

[15] Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016), 39, https://doi.org/10.4159/9780674973336.

[16] Ezrachi and Stucke, "Artificial Intelligence & Collusion," 1782.

[17] Ezrachi and Stucke, "Artificial Intelligence & Collusion," 1782.

[18] Jones, Sufrin, and Dunne, *Jones & Sufrin's EU Competition Law*, 198–99.

[19] Ezrachi and Stucke, *Virtual Competition*, 47.

[20] Ezrachi and Stucke, "Artificial Intelligence & Collusion," 1783.

tors, called the spokes, through direct communications. In the algorithmic scenario, the hub is a third-party software provider or a digital platform whose pricing algorithm acts as the coordinating mechanism which collects competitively sensitive data from each spoke and generates pricing recommendations on that basis. The second one is the automation and speed of decision-making processes, which allow real-time adjustments to market conditions. Third, the artificial intelligence reduces or even eliminates the direct human interaction, which can make the identification of an agreement or concerted practice more difficult. Finally, the spokes undertakings may not be fully aware of the extent to which their independent decision-making has been replaced by the algorithm's output.

The foregoing analysis demonstrates that algorithmic hub-and-spoke arrangements retain the structural characteristics of traditional collusion while substituting direct human coordination with automated and data-driven mechanisms. This development raises the question of whether the current legal frameworks of the European Union and the United States are capable of attributing liability to both the algorithmic hub and the undertakings that knowingly employ it. The following sections address this issue.

3. The EU Law Framework: Article 101 TFEU and the Attribution of Liability in Algorithmic Hub-and-Spoke Arrangements

According to Article 101 paragraph 1 TFEU[21]: „The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (…)".

Analysing the regulation, the subjects are the undertakings and the prohibitive actions are the agreements between them. These agreements can have the object or the effect of „prevention, restriction, or distortion of competition, and affect trade between the EU member states".[22]

The legal provisions have developed through the ruling of the Court of Justice of the European Union such as *AC-Treuhand* (C-194/14 P)[23], *Höfner* (C-41/90), *T-Mobile Netherlands* (C-8/08) and *Eturas* (C-74/14).

The first case law is *AC-Treuhand*[24] and it is important for this article

[21] Treaty on the Functioning of the European Union, art. 101(1), 2012 O.J. (C 326) 47, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E101.

[22] Ariel Ezrachi, *Competition and Antitrust Law: A Very Short Introduction* (Oxford University Press, 2021), 50 et seq., https://doi.org/10.1093/actrade/9780198860303.001.0001.

[23] *AC-Treuhand AG v. European Commission*, Case C-194/14 P, ECLI:EU:C:2015:717 (CJEU, October 22, 2015), https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?language=en&num=C-194%2F14+P.

[24] *AC-Treuhand*, Case C-194/14 P, paras. 31–36.

because the Court held „that an undertaking may be liable for taking part in a cartel even when it is not active on the market on which the restriction of competition materialised, but nonetheless, in its action it contributed to the implementation of the cartel".[25] Another important aspect is „that passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of *rendering* the undertaking liable".[26]

The relevance of *Höfner*[27] lies in the Court's functional definition of the undertaking as „any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed."[28] By analogy, we can consider that a third-party software provider can by qualified as an algorithmic hub undertaking. It follows that the software provider, having been qualified as an undertaking, may be held liable under *AC-Treuhand* even if it is not active on the market of the spokes.

Another important decision for this analysis is *T-Mobile Netherlands*[29] (C-8/08), where the Court held that an exchange of confidential information can be an infringement of EU regulation if the purpose is the coordination of the undertakings conduct.[30] In the present context, if the software provider which we categorized as an undertaking that has the quality of a hub collect, correlate and disseminate the information in order to establish an agreement between the spokes, it can be guilty of anti-competitive practices. Further, if the undertakings participating in the practice remain active on that market, it will be applied the presumption according to which they remain influenced by the exchange of confidential information, therefore under coordinate conduct.[31]

The last case law is *Eturas* (C-74/14)[32] where it is held that a software

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[25] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases*, 7th ed. (Hart Publishing, 2021), 173, https://search.worldcat.org/title/1259527714.

[26] Surblytė-Namavičienė, *Competition and Regulation in the Data Economy*, 166.

[27] *Höfner and Elser v. Macrotron GmbH*, Case C-41/90, ECLI:EU:C:1991:161 (CJEU, April 23, 1991), para. 21, https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?language=en&num=C-41%2F90.

[28] *Höfner and Elser*, Case C-41/90, para. 21; Claudia Seitz, "Healthcare Systems and Competition Law: Challenges and Boundaries for the Application of Competition Law in the EU Healthcare Sector," in *The Roles of Innovation in Competition Law Analysis*, ed. Paul Nihoul and Pieter Van Cleynenbreugel (Edward Elgar Publishing, 2018), 146, https://doi.org/10.4337/9781788972444.00015.

[29] *T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, ECLI:EU:C:2009:343 (CJEU, June 4, 2009), para. 35, https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?language=en&num=C-8%2F08.

[30] Ezrachi, *EU Competition Law*, 111.

[31] *T-Mobile Netherlands*, Case C-8/08, paras. 51–53; Jones, Sufrin, and Dunne, *Jones & Sufrin's EU Competition Law*, 201–2.

[32] *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, Case C-74/14, ECLI:EU:C:2016:42 (CJEU, January 21, 2016), https://infocuria.curia.europa.eu/tabs/redirect/juris/liste.jsf?language=en&num=C-74%2F14.

can make arrangement between undertakings[33] and „confirms the capacity of Article 101 to prohibit hub and spoke cartels administered by an online intermediation services provider".[34] Another important point of this ruling is that the context was the travel agents which use the same online system to engage in a concerted practice. In this case, the administrator of the platform sent multiple messages to the travel agents through electronic mailbox relating to the capping of the level of online discounts that they could grant. Even so some of them alleged that they did not open and read the e-mails, „in the absence of any opposition on the part of the agents, they could be presumed to have participated in the concerted practice".[35]

Although the Court of Justice has not yet issued a ruling expressly addressing the liability of algorithm providers as co-authors of a concerted practice, the principles established in *AC-Treuhand, Höfner, T-Mobile Netherlands and Eturas* provide a sufficient jurisprudential basis for extending Article 101 TFEU to algorithmic hub-and-spoke arrangements through legal analogy, without requiring legislative reform. The evolution of the rulings and the growing focus on the algorithmic pricing risks is reflected in the European Commission's recent activity. In July 2025, the Deputy Director-General for Antitrust confirmed that the Commission is currently conducting multiple inquiries into the use of algorithmic pricing mechanisms, signaling a growing institutional recognition of the need to apply Article 101 TFEU to these configurations.[36]

4. The US Law Framework: Section 1 of the Sherman Act and the RealPage Case

According to 15 U.S. Code § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished (…)".

Starting from the analysis of the legal framework, *Section 1 of the Sherman Antitrust Act* prohibits contracts, combinations or conspiracies which are made for the purpose of restraining of trade or commerce. In order to establish that the person violated this rule, it is required to prove the agreement using one of two standards. Therefore, the regulation prohibits explicit collusion since that

[33] Ezrachi, *EU Competition Law*, 688.
[34] Jones, Sufrin, and Dunne, *Jones & Sufrin's EU Competition Law*, 1216.
[35] Jones, Sufrin, and Dunne, *Jones & Sufrin's EU Competition Law*, 203.
[36] Tobias Klose, Bruce McCulloch, and Uta Itzen, "EU Steps Up on Algorithmic Pricing Cartels, Joining the US and Other Jurisdictions," *Freshfields Risk & Compliance Blog*, July 16, 2025, https://www.freshfields.com/en/our-thinking/blogs/risk-and-compliance/eu-steps-up-on-algorithmic-pricing-cartels-joining-the-us-and-other-jurisdiction-102kt76.

is "considered to be a threat to the competitive process and economic efficiency".[37] The first one is the *rule of reason* which demand "a detailed analysis of the market reality and the possible harmful and competitive effects of the activity or agreement in question".[38] The second one is the *'per-se'* rule which is applied when it is clear the infringement of the law. "In such cases, the practice will be deemed to infringe the law and there will be no need for any inquiry into the market context in which the restraint operates, consideration of its effect, or the existence of an objective competitive justification."[39]

For the subject of this article, the algorithmic price fixing, the per se approach is used by the American courts because the price fixing agreements through hub-and-spoke is a conduct that is "very likely to be anticompetitive and very unlikely to be justifiable".[40] In this context, it is sufficient to establish the existence of the conduct itself, without demonstrating its anticompetitive effects. At the same time, it "cannot justify the infringement by providing an objective competitive justification".[41]

The same as in the EU, the American cases law provided an evolution for the legal framework. For example, in the *Interstate Circuit* (306 U.S. 208, 221) the owner of a movie theater approached different distributor separately to join a conspiracy, told each other about the existing of the other distributors and that is essentially the cooperation of all of them for the conspiracy to work. From the action of all parties, it results that the owner of the movie theater became the hub and the distributors became the spokes of an anticompetitive agreement. They were liable even "without simultaneous action or agreement on the part of the conspirators".[42] Another American decision in which the court held the existing of an anticompetitive agreement is *Toys „R" Us* (221 F.3d 928, 7th Cir. 2000). Where the hub "used a series of vertical agreements with each of ten leading toy manufacturers to orchestrate a horizontal agreement among the manufacturers to boycott certain discounting retailers".[43] In this case law, it was established the condition of mutual knowledge of the anticompetitive conduct of the others competitors: "only condition on which each toy manufacturer would agree to TRU's demands was if it could be sure its competitors were doing the same thing. That

[37] Stefan Thomas, "Ex Ante and Ex Post Control of Buyer Power," in *Abusive Practices in Competition Law*, ed. Fabiana Di Porto and Rupprecht Podszun (Edward Elgar Publishing, 2018), 306, https://doi.org/10.2139/ssrn.2605577.
[38] Ezrachi, *Competition and Antitrust Law*, 48–49.
[39] Ezrachi, *Competition and Antitrust Law*, 48–49.
[40] Andrew I. Gavil, William E. Kovacic, Jonathan B. Baker, and Joshua D. Wright, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, 4th ed. (West Academic Publishing, 2022), 100, https://www.westacademic.com/Antitrust-Law-in-Perspective-Cases-Concepts-and-Problems-in-Competition-Policy_20.
[41] Ezrachi, *Competition and Antitrust Law*, 49.
[42] Ezrachi, *EU Competition Law*, 199.
[43] Gavil et al., *Antitrust Law in Perspective*, 335.

is a horizontal agreement".[44]

The most important ruling is United States v. RealPage, Inc.[45], where a property management software company known for its AI-powered pricing software[46] facilitates price coordination among other entities.[47] In this case law the spokes agreed to share their nonpublic sensitive data to be used by the algorithmic pricing model of the hub (RealPage). The agreement allowed the spokes to coordinate and artificially inflate rental rates.[48] The arrangement was facilitated by the software company which used artificial intelligence.

According to the complaint, "RealPage replaces competition with coordination. It substitutes unity for rivalry. It subverts competition and the competitive process. It does so openly and directly – and American renters are left paying the price".[49] The complaint established that RealPage facilitated the coordination of the entities' conduct to an anticompetitive one. Therefore, RealPage takes the form of a hub. The mechanism through which the hub distorts competition consists in selling commercial revenue-management software to landlords; develops, markets, and sells this software to enable landlords to sidestep vigorous competition to win renters' business; landlords, who would otherwise be competing with each other, submit on a daily basis their competitively sensitive information to RealPage. This nonpublic, material, and granular rental data includes, among other information, a landlord's rental prices from executed leases, lease terms, and future occupancy; RealPage collects a broad swath of such data from competing landlords, combines it, and feeds it to an algorithm.[50] It follows that the conduct of the RealPage is coordinated and has the purpose to facilitate the anticompetitive agreement. As established in paragraph 12, the RealPage is an algorithmic intermediary that collects, combines, and exploits landlords' competitively sensitive information. In the present context the artificial intelligence is involved and it is directly used by the hub to settle the agreement between the spokes. The condition of the mutual knowledge of the participation of the other competitor at the anticompetitive agreement it is established in paragraphs 19 and 20 where: "Landlords understand that AIRM and YieldStar use their data to rec-

[44] *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000), https://law.justia.com/cases/federal/appellate-courts/ca7/98-4017/98-4017.html.
[45] *United States v. RealPage, Inc.*, No. 1:24-cv-00710, Complaint (M.D.N.C. filed August 23, 2024), https://www.justice.gov/atr/case-document/complaint-303.
[46] Clifford Chance, "DOJ and Eight State Attorneys General File Civil Antitrust Lawsuit Against RealPage Inc. Alleging Its Algorithmic Pricing Software Amounts to Price-Fixing and Monopolization," August 26, 2024, https://www.cliffordchance.com/briefings/2024/08/doj-and-ei ght-sta te-attorneys-general-file-civil-antitrust-lawsu.html.
[47] OECD, *Algorithmic Competition*, 13.
[48] Sauntharya Manikandan, "The Implementation of Algorithmic Pricing and Its Impact on Businesses, Consumers, and Policymakers," *Berkeley Technology Law Journal*, May 18, 2025, https://btlj.org/2025/05/implementation-of-algorithmic-pricing/.
[49] *United States v. RealPage*, Complaint, para. 3.
[50] *United States v. RealPage*, Complaint, para. 5.

ommend prices not just for their own units, but also for competitors" and "Landlords agree to provide this information for use by their competitors because they understand they will be able to leverage the sensitive information of their rivals in turn".

For this case law, The Justice Department's Antitrust Division filed a proposed settlement in 2025. The terms of the settlement are: "Cease having its software use competitors' nonpublic, competitively sensitive information to determine rental prices in runtime operation; Cease using active lease data for purposes of training the models underlying the software, limiting model training to historic or backward-looking nonpublic data that has been aged for at least 12 months; Not used models that determine geographic effects narrower than at a state level, which is broader than the markets alleged in the complaint; Remove or redesign features that limited price decreases or aligned pricing between competing users of the software; Cease conducting market surveys to collect competitively sensitive information; Refrain from discussing market analyses or trends based on nonpublic data, or pricing strategies, in RealPage meetings relating to revenue management software; Accept a court-appointed monitor to ensure compliance with the terms of the consent judgment; and Cooperate in the United States' lawsuit against property management companies that have used its software."[51]

In this context, the Assistant Attorney General Abigail Slater of the Justice Department's Antitrust Division declared that: "Competing companies must make independent pricing decisions, and with the rise of algorithmic and artificial intelligence tools, we will remain at the forefront of vigorous antitrust enforcement",[52] This is important, because the statement acknowledges the existence of algorithmic and artificial intelligence tools and that the competitors have begun to made use of them for the purpose of anticompetitive conduct. In the new scenarios, the antitrust enforcement must be developed to respond at the use of artificial intelligence.

The last important American ruling for this subject is the *Gibson v. Cendyn*[53] case law. In which the court established the importance of the proof of the anticompetitive agreement between the parties. It was alleged that multiple competitors "participated in a "hub-and-spoke" antitrust conspiracy where they agreed with each other to use the same pricing software and abide by the software's pricing recommendations".[54] The Court held that even the competitors

[51] U.S. Department of Justice, "Justice Department Requires RealPage to End the Sharing of Competitively Sensitive Information and Alignment of Pricing Among Competitors," November 24, 2025, https://www.justice.gov/opa/pr/justice-department-requires-realpage-end-sharing-compe titively-sensitive-information-and.

[52] U.S. Department of Justice, "Justice Department Requires RealPage to End the Sharing of Competitively Sensitive Information and Alignment of Pricing Among Competitors."

[53] *Gibson v. Cendyn Group, LLC*, 148 F.4th 1069 (9th Cir. 2025), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/08/15/24-3576.pdf.

[54] Andre Geverola, C. Scott Lent, Leah J. Harrell, and Zoe Staum, "Ninth Circuit Clarifies Antitrust

knew that each was subscribing at the same pricing software which use algorithms, they independently subscribed and it was not proved the existing of an agreement between the competitors to subscribe to the same algorithms in the purpose to facilitate the horizontal agreement. Furthermore, it was not proved neither "that the algorithm pooled, shared, or used the information provided by competing hotels when generating price recommendations for each"[55] competitors.

5. Comparative Analysis: Convergences, Divergences and Remaining Gaps

The comparative analysis of the EU and US legal frameworks reveals two important convergences and two divergences in the treatment of algorithmic hub-and-spoke arrangements, alongside a common gap that neither system has yet resolved.

The first convergence is the exchanging of confidential information through a third party, the hub. In Europe (e.g., *AC Treuhand*) and the United States (e.g., *Toys 'R' Us*), the facilitator's role is reserved for the separate economic agents that do not participate or have influence in the market where the anticompetitive practice takes place.[56] Both legal systems have addressed this issue through case law. For the EU the *T-Mobile* and *Eturas* are the defining ruling and for the American system is the *RealPage*.

The second convergence is about the imputability of the spokes for the anticompetitive agreement even if they have not a direct contact, but they knew about the existing of each other. In EU system, the presumption of knowledge[57] is analysed in *Eturas* case law. In US the relevant decision is *Toys „R" Us*, where it was established the condition of mutual knowledge of the anticompetitive conduct of the other competitors.

The first divergence is the status of the hub. The US established the liability of the hub in RealPage as a part of the anticompetitive agreement. But in EU law system it did not exist a case law where a third-party provider is held directly liable. The *AC-Treuhand* ruling laid the foundation of the application of

Implications of Algorithmic Pricing," Arnold & Porter, August 25, 2025, https://www.arnoldporter.com/en/perspectives/advisories/2025/08/antitrust-implications-of-algorithmic-pricing.

[55] Wilson Sonsini Goodrich & Rosati, "Ninth Circuit Clarifies (Somewhat) the Antitrust Risk of Pricing Algorithms," August 18, 2025, https://www.wsgr.com/en/insights/ninth-circuit-clarifies-somewhat-the-antitrust-risk-of-pricing-algorithms.html.

[56] Andrés Calderón, "Cartels' Little Helpers: A Comparative Study of the Case Law Regarding the Facilitators of Collusion in Europe, United States and South America," in *Challenges to Assumptions in Competition Law*, ed. David Bosco and Michal S. Gal (Edward Elgar Publishing, 2021), 176, https://doi.org/10.4337/9781839109072.00014.

[57] Sophie Lawrance, "Eturas – Any Conclusions on Platform Collusion?," *Antitrust Connect Blog*, January 19, 2017, https://legalblogs.wolterskluwer.com/antitrust-connect/eturas-any-conclusions-on-platform-collusion/.

Article 101 TFEU to an undertaking which it is not active on the market on which the restriction of competition materialised, but it contributed to the implementation of the cartel.

Unfortunately, in *Eturas* case law, the Court's analysis focused exclusively on the conditions under which the spokes could be presumed to have participated in the concerted practice. The question of the hub's liability and specifically whether a third-party algorithm provider that collects and aggregates competitors' confidential data may be qualified as a co-author of a concerted practice was not analysed by the Court. But the Lithuanian competition authority sanctioned Eturas as the operator of the common platform in the national proceedings.

The second divergence takes the form of the standard of proof. In the US law system, the existence of the agreement must be proved, even in case where is applicable the *'per-se'* rule. For example, in the *Gibson v. Cendyn* it is held that the simple use of the same pricing software is not enough to establish an anticompetitive agreement if the exchange of the confidential information did not occur. The Plaintiffs failed to prove the agreement between the parties to use the same algorithmic pricing software with the aim of facilitating anticompetitive agreements.

On the other side, in EU the Court held in *T-Mobile Netherlands* that if the undertakings participating in the practice remain active on that market the presumption that they remain under coordinate conduct is activated.

A common gap still remains in both legal systems. This is the scenario in which the hub is a self-learning algorithm trained on aggregated data, without any individual undertaking being explicitly aware that its data is being combined with that of its competitors to generate recommendations especially on price adjustment. In such cases, neither Article 101 TFEU nor Section 1 of the Sherman Act provides a clear answer to the question of the liability of both the hub and spokes.

This challenge has been explicitly recognized by the OECD, which noted that existing legal frameworks may be insufficient to address autonomous algorithmic coordination, and called for further consideration of whether the concepts of agreement and concerted practice require adaptation to the use of the pricing algorithm.[58] Academic literature has similarly identified this scenario as the most legally challenging, where is demonstrated that Q-learning algorithms, a type of self-learning algorithms, can reach supracompetitive prices through autonomous experimentation, without any form of communication between the competing firms.[59]

[58] OECD, *Algorithmic Pricing and Competition in G7 Jurisdictions: Emerging Trends and Responses* (OECD Publishing, 2025), https://doi.org/10.1787/f36dacf8-en.

[59] Emilio Calvano, Giacomo Calzolari, Vincenzo Denicolò, and Sergio Pastorello, "Artificial Intelligence, Algorithmic Pricing, and Collusion," *American Economic Review* 110, no. 10 (2020): 3267–97, https://doi.org/10.1257/aer.20190623.

6. Conclusions

After the analysis of the EU and US legal frameworks and the cases law in their legal system, the conclusion is that neither of their regulations directly provide the scenario of using the artificial intelligence in the anticompetitive agreements, but the development of the case law goes in that direction.

From the comparison of those two systems, it follows that the US is more open to holding liable a third-party software provider that use algorithms for pricing coordination. But in EU system it is easier to prove the existence of the agreement. But neither the EU nor the US legal system expressly addresses the impact of the self-learn or Q-learning algorithms on the anticompetitive agreements on coordination of pricing. Is the same situation for hub's status which is the provider of these algorithms.

In order to address the identified gap in the EU and US legal systems regarding the liability of the algorithmic hub, this paper proposes a standard of "constructive knowledge" as a doctrinal basis for extending the application of Article 101 TFEU and Section 1 of the Sherman Act to third-party algorithm providers. Under this standard, a software provider that knows, or it ought reasonably to have known, that the exchange of competitors' confidential data in its pricing algorithm reduces competitive uncertainty and aligns the market behaviour of its users, should be held liable for the anticompetitive coordination. The proposal is applicable even if the hub does not operate on the affected market. In EU law, this standard finds its jurisprudential foundation in *AC-Treuhand* case law, where the Court of Justice established that liability under Article 101 TFEU of the undertaking even is not active on the market on which the restriction of competition materialised, but it contributed to the implementation of the anticompetitive agreement. This condition is fulfilled if a software provider deliberately designs an algorithm to aggregate confidential information of the competitors for pricing purposes. In US law, the standard is consistent with the principles established in *Interstate Circuit* case law, where the Supreme Court held that acceptance by competitors of an invitation to participate in an agreement whose necessary consequence is the restraint of commerce is sufficient to establish an unlawful conspiracy. This scenario applies to a hub that knowingly creates the structural conditions for such acceptance.

The application of this standard does not require the modification of the regulation, especially taking into consideration of the difficulty of this legal procedure. Article 101 TFEU is technologically neutral having a general application, and the jurisprudential evolution from *Dyestuffs* to *Eturas* cases law demonstrates the Court of Justice's capacity to extend its application to different evolved forms of coordination without modifying the Treaty text. Similarly, Section 1 of the Sherman Act has been applied through judicial interpretation to increasingly sophisticated forms of collusion. The challenge is therefore not normative but

interpretive. This is the application of established legal principles to a new technological reality, extending their reach to the algorithmic hub through the doctrinal tools already at their disposal.

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The Limits of the VAT Neutrality Principle: The Distribution of Tax Risk Between the State and the Taxpayer in the Case-Law of the CJEU

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Abstract

The study aims to investigate the balance between a taxable person's fundamental right to fiscal neutrality in VAT matters and the Member States' obligation to protect budgetary revenues, specifically determining how fiscal risk is allocated between the public treasury and the taxpayer. Employing a comparative and analytical legal method, the research contrasts the judicial logic of the Court of Justice of the European Union (CJEU) regarding VAT deductions with national administrative formalism by dissecting landmark cases such as Fatorie, Farkas, and Greentech. The results demonstrate that the "Reemtsma remedy" — an exceptional mechanism grounded in the principles of neutrality and effectiveness that allows a taxpayer to recover erroneously paid VAT directly from the State when recovering the amounts from the supplier has become impossible or excessively difficult — does not constitute a State guarantee against the insolvency of private partners, but functions strictly as an instrument to correct the State's unjust enrichment when traditional recovery paths are blocked. The study highlights the role played by national judiciaries as protectors of fiscal justice, ensuring a necessary equilibrium between strict procedural formalism and the underlying economic substance of taxation, thereby preventing administrative overreach and securing the actual financial intent of legislation.

Keywords: *VAT neutrality, fiscal risk, principle of effectiveness, reverse charge, unjust enrichment.*

1. The "Non-Guarantor State"

In the architecture of the common value-added tax system, the deduction regime is intended to entirely relieve the entrepreneur of the burden of the VAT due or paid in the course of all their economic activities, thus guaranteeing perfect fiscal neutrality, provided that the respective operations are, in principle, subject to taxation[2].

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[2] Viorel Terzea, *TVA – jurisprudența Curții de Justiție a Uniunii Europene. Partea I* [VAT—Case Law of the Court of Justice of the European Union, Part I] (Bucharest: Universul Juridic, 2023), 20, citing *Halifax plc and Others*, Case C-255/02, ECLI:EU:C:2006:121, judgment of February 21,

Through this mechanism, the taxable person acts as a veritable tax collector on behalf of the state[3], but this administrative task is not accompanied by a public guarantee against the commercial risks inherent in running a business. The tension between the state's prerogative to ensure revenue collection and the vulnerability of taxpayers is justified by the very nature of the fiscal relationship. As the European Court of Human Rights has ruled (in landmark cases such as *Ferrazzini v. Italy*), tax matters belong to the "hard core of public authority prerogatives," and the public character of the relationship between the state and the taxpayer remains predominant, even if tax disputes inevitably produce significant pecuniary effects on individuals[4].

The state is not a guarantor of business success and refuses to act as an insurer against the insolvency of private sector partners[5]. The distribution of risk depends on the actual flow of money, so that, if the state has not benefited from the tax revenues, the risk of taxation errors is transferred entirely to the taxpayer. This imbalance is perfectly illustrated by the dispute of Romanian origin resolved in the *Fatorie* case (C-424/12). The case exposed the practice of Romanian tax authorities, which, although initially recognizing the taxpayer's right of deduction through an irrevocable decision, subsequently reversed this decision. Specifically, the buyer had erroneously paid VAT to its supplier (although the transaction should have been subject to the reverse charge mechanism). Because the supplier became insolvent and never transferred the tax to the state budget, the tax authorities denied the buyer the right to deduct and obliged them to pay the VAT again, to which default interest and penalties were added[6]. Since the state treasury had not collected the amounts, the risk of bankruptcy remained strictly with the taxpayer, the state refusing to bear the financial consequence.

In practice, there is often a tendency of the Romanian tax administration to seek the fiscal burdening of individuals, even by invoking formal irregularities[7] and in counterweight to this position of authority of the non-guarantor state, European doctrine and jurisprudence have reacted by recognizing the taxpayer's right to lawful tax optimization[8].

2006, para. 78.

[3] Ben J. M. Terra and Julie Kajus, *A Guide to the European VAT Directives*, vol. 1, *Introduction to European VAT 2023* (Amsterdam: IBFD, 2023), 198; Mariken van Hilten, "Balancing between Legal Character and Combating Fraud," in *EU Value Added Tax and Beyond: Essays in Honour of Ben Terra*, ed. Marta Papis-Almansa (Amsterdam: IBFD, 2023), 85, 94, https://doi.org/10.59403/1gx5n73004.

[4] *Ferrazzini v. Italy*, App. no. 44759/98, judgment of July 12, 2001, para. 29, HUDOC (accessed April 19, 2026).

[5] Bogdan Florea, "Fiscal Neutrality and Exceptional Remedies in VAT Matters: Direct Recovery of Not Due VAT from the Tax Authority in the Context of CJEU Case Law," *Annales Universitatis Apulensis, Series Jurisprudentia* 28 (2025): 75.

[6] *Fatorie SRL*, Case C-424/12, ECLI:EU:C:2014:50, judgment of February 6, 2014, paras. 11–16.

[7] Septimiu Ioan Puț, "Jocul procedurilor în materia inspecției fiscale privind TVA" [The Game of Procedures in VAT Tax Inspections], *Tax Magazine*, no. 4 (2017): 207.

[8] Cosmin Flavius Costaș, "Scurte considerații privind dreptul de a nu plăti cele mai mari impozite

Legal systems make a clear distinction between tax evasion (an illicit activity to circumvent the law) and tax avoidance (minimizing the tax burden through the legal exploitation of regulations)[9]. The Sixth Directive does not impose to a taxpayer to pay the highest possible taxes just to satisfy the tax authorities[10] and it is a consolidated principle in European tax law that a taxpayer is entitled to organize their business as they wish within the limits of the law[11].

However, national tax legislation enshrines general anti-abuse rules that allow tax authorities to disregard a transaction that does not have an economic purpose (i.e. has an exclusively tax purpose) or to reframe the form of a transaction/activity to reflect its real economic content[12].

In that particular situation of transactions with foreign elements, the law sanctions transactions or series of transactions qualified as "artificial" and as an effect, the taxpayer is denied the application of double taxation avoidance conventions. Artificial transaction are defined as operations that have no economic content and cannot be normally used in ordinary economic practices, having as their essential purpose the avoidance of taxation[13]. Member States are also obliged to sanction aggressive tax planning that goes beyond the bounds of good faith[14].

According to anti-abuse rules, actions that are not honest and are not undertaken for valid commercial reasons that reflect economic reality will not be taken into account when determining tax obligations, which will be recalculated strictly on the basis of economic substance[15].

2. VAT Principles as Risk Allocation Instruments

The distribution of fiscal risk is governed by fundamental principles that are enshrined in all European legal systems and crystallized in the jurisprudence of the Court of Justice of the European Union (CJEU) and these principles operate to ensure that tax disputes are resolved based on objective realities rather than

posibile. Studiu de caz în materia taxei pe valoarea adăugată" [Brief Comments on the Right Not to Pay the Highest Possible Taxes: A VAT Case Study], *Tax Magazine*, no. 5 (2016): 293.

[9] Miguel Poiares Maduro, Opinion in *Halifax plc and Others*, Case C-255/02, ECLI:EU:C:2005:200, delivered April 7, 2005, n. 75; Daria Spătariu, "Societăți offshore – limita dintre legalitate și eludarea prevederilor fiscale" [Offshore Companies—The Line between Legality and Tax Avoidance], *Tax Magazine*, no. 3 (2025): 197.

[10] Terzea, *TVA – jurisprudența Curții de Justiție a Uniunii Europene*, 19, citing *Halifax plc and Others*, Case C-255/02, ECLI:EU:C:2006:121, para. 73.

[11] Costaș, "Scurte considerații," 293.

[12] Radu Bufan, "Aplicarea abuzivă a regulilor antiabuz" [Abusive Application of Anti-Abuse Rules], *Tax Magazine*, no. 2 (2016): 73.

[13] Bufan, "Aplicarea abuzivă a regulilor antiabuz," 74.

[14] Spătariu, "Societăți offshore," 197.

[15] Mihaela Tofan, "Analiza propunerii Comisiei UE pentru adoptarea normelor împotriva evitării obligațiilor fiscale de către societăți" [Analysis of the European Commission Proposal for Rules against Corporate Tax Avoidance], *Tax Magazine*, no. 2 (2017): 71–72.

administrative formalism, allocating the risk based on the substantive nature of the transactions[16].

Fiscal neutrality dictates that before any limitation of the right of deduction can be applied — such as in cases of alleged tax fraud or abuse of law — the tax authorities and the courts must first establish whether the substantive conditions for exercising this right are met[17], so the analysis must focus on the concrete content of the acquisition and how this acquisition is reflected in the economic activity of the taxable person[18].

The CJEU jurisprudence (such as in the *Gabalfrisa* and *Mahagében* cases) confirms that the right of deduction is an integral part of the VAT mechanism and cannot be systematically refused by national practices[19]. The right of deduction can only be denied if objective circumstances prove a lack of diligence attributable to the taxable person — specifically, if it is proven that the taxpayer knew or should have known that the transaction was involved in a tax fraud[20]. However, the burden of proving this involvement rests entirely with the tax authorities, who cannot base their refusal on undefined, non-legal concepts such as "phantom companies" or "conduit fraud" without a strict legal basis and the administrative act issued by tax authorities can benefit from the presumption of legality only when its issuance was based on solid and concrete evidence[21]. Therefore, the taxpayer faced with such accusations can rely on the innocent party theory (a name that can be attributed to the arguments that can be invoked based on the case law of the Court of Justice of the European Union)[22].

The **principle of legal certainty** acts as a shield against the state's attempt to retroactively transfer its own administrative risks onto the taxpayer. As highlighted in national and European doctrine, no fault can be attributed to a taxpayer for relying on the manner in which the local tax administration previously understood and assessed a specific tax issue during a reference period[23]. Further-

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[16] Daniela-Ioana Stăncioi, Alexandra Irina Ghergheșanu, and Viorel Terzea, "Sinteză de jurisprudență fiscală națională comentată" [Synthesis of Commented National Tax Case Law], *Tax Magazine*, no. 5 (2024): 397–98.

[17] Stăncioi, Ghergheșanu, and Terzea, "Sinteză de jurisprudență fiscală națională comentată," 395.

[18] Stăncioi, Ghergheșanu, and Terzea, "Sinteză de jurisprudență fiscală națională comentată," 398.

[19] Ciprian Păun, "Condițiile în care statele membre pot să refuze dreptul de deducere. Examen de jurisprudență europeană" [Conditions under Which Member States May Refuse the Right of Deduction: A Review of European Case Law], *Tax Magazine*, no. 4 (2016): 230.

[20] *Global Ink Trade Kft.*, Case C-537/22, ECLI:EU:C:2024:6, judgment of January 11, 2024, paras. 35–37.

[21] Tudor Vidrean-Căpușan, "Teoria părții inocente, taxa pe valoarea adăugată și controalele antifraudă" [The Innocent-Party Theory, VAT, and Anti-Fraud Controls], *Tax Magazine*, no. 8 (2016): 525.

[22] Vidrean-Căpușan, "Teoria părții inocente," 525.

[23] Guy Loustalet and Antoine Merchadier, *Cours de droit fiscal 2022*, 2nd ed. (Paris: Éditions IEJ de la Sorbonne, 2022), 17–18; Cosmin Flavius Costaș, "Epopeea impozitului pe mijloacele de transport. Despre fisc, Curtea de Conturi și securitatea juridică în materie fiscală" [The Epic of the

more, legal certainty precludes administrative practices that impose on the taxable person the burden of conducting complex and profound verifications regarding their contractual partners, as such verifications are the inherent duty of the tax administration[24].

This abusive procedural asymmetry has been consistently sanctioned by the Court of Justice of the European Union, which, through the Teleos (C-409/04) and Mecsek-Gabona (C-273/11) jurisprudence, established the rule according to which, if a taxpayer meets the conditions for a tax exemption, presenting documents that were not known to be false at the time of the operation (reasonable diligence), a subsequent material reassessment by the authorities – which attests to the fraud of the contractual partner – cannot lead to the retroactive withdrawal of the exemption and a contrary approach on the part of the administration would constitute an unlawful transfer of the control function and a flagrant violation of the principle of legal certainty[25].

The evaluation of the right of deduction and the allocation of the fiscal risk must always be analyzed through the lens of the **principle of proportionality[26].** As referenced in CJEU jurisprudence (such as the *Farkas* case, C-564/15) measures or sanctions applied by the state must not go beyond what is necessary to ensure the correct collection of the tax and imposing disproportionate formal burdens or refusing deductions when substantive conditions are met effectively breaches the balance of risk, unjustly enriching the state at the expense of the diligent taxpayer[27].

When the civil recovery of the erroneously paid tax between business partners (the beneficiary must normally request a refund of the tax paid in error from the supplier) becomes impossible or excessively difficult (usually due to supplier's bankruptcy), **the principle of effectiveness** (the "*Reemtsma* remedy") is activated to restore the patrimonial balance. This exceptional remedy offers the good-faith buyer a direct action against the tax authority, preventing the unjustified enrichment of the state[28].

3. The Case-Law of the European Court of Justice: The Allocation of Fiscal Risk

Tax on Means of Transport: The Tax Administration, the Court of Accounts, and Legal Certainty in Tax Matters], *Tax Magazine*, no. 2 (2014): 15–16.

[24] *Mahagében kft and Péter Dávid*, Joined Cases C-80/11 and C-142/11, ECLI:EU:C:2012:373, judgment of June 21, 2012, paras. 60–62.

[25] *Teleos plc and Others*, Case C-409/04, ECLI:EU:C:2007:548, judgment of September 27, 2007, paras. 50, 58; *Mecsek-Gabona Kft.*, Case C-273/11, ECLI:EU:C:2012:547, judgment of September 6, 2012, paras. 47–48.

[26] Stăncioi, Ghergheșanu, and Terzea, "Sinteză de jurisprudență fiscală națională comentată," 398.

[27] *Farkas*, Case C-564/15, ECLI:EU:C:2017:302, judgment of April 26, 2017, paras. 59–60, 65–66.

[28] *Reemtsma Cigarettenfabriken GmbH*, Case C-35/05, ECLI:EU:C:2007:167, judgment of March 15, 2007, para. 41.

The analysis of recent CJEU jurisprudence, extensively debated in specialized European literature, shows that the resolution of tax disputes depends on identifying the money trail, the applicable VAT regime, and the patrimonial entity that ultimately benefited from the undue tax.

In situations involving procedural errors combined with supplier insolvency, the fiscal risk remains strictly with the private party if the state did not receive the money. In the *Fatorie* case (C-424/12), the buyer erroneously paid VAT to the supplier despite the transaction being legally subject to the mandatory reverse charge mechanism.

Under normal reverse charge conditions, the input and output VAT are equal and offset each other so that taxable persons do not actually pay the VAT amount to the tax authorities for that specific transaction, meaning that the state inherently does not suffer any loss in tax revenues [29].

However, because the buyer in *Fatorie* erroneously paid the VAT to the supplier who subsequently went bankrupt, the tax was never collected by the state and the CJEU ruled that the VAT Directive and the principle of fiscal neutrality do not preclude depriving the beneficiary of the right to deduct the unjustifiably paid VAT. So, basically, the CJUE, stated that in the absence of the funds reaching the state, the financial risk belongs entirely to the beneficiary who failed to apply the correct legal mechanism[30].

The distribution of risk changes significantly when dealing with fraud committed by the supplier, provided the buyer acted diligently and his "good faith" acts as a fundamental prerequisite for the deduction of input VAT[31]. The CJEU ruled that the tax administration cannot deny the right to deduct input VAT even if the invoice was issued by a non-existent trader or a supplier involved in fraud, provided the taxable person did not know and could not have known that the transaction in question was involved in a tax fraud, and so, in this scenario, the money trail indicates that the buyer paid the consideration in good faith, and the State cannot shift the risk of its own inability to collect taxes from fraudulent entities onto a bona fide taxpayer[32].

But, when a classification error results in the actual payment of VAT to the state budget, the balance shifts to prevent the state's unjust enrichment. In such cases, when VAT is erroneously invoiced but actually paid to the Treasury, the tax authorities are prevented from suffering any loss of tax revenue so, deny-

[29] Bartosz Gryziak, "The Legality of the Punitive Deferral of the Exercise of the Right of Deduction," *International VAT Monitor* 31, no. 5 (2020): 251, https://doi.org/10.59403/7f7jdh.
[30] Florea, "Fiscal Neutrality and Exceptional Remedies," 75.
[31] Krzysztof Lasiński-Sulecki, "Looking for Taxable Persons' Good Faith—Stehcemp Case," *International VAT Monitor* 27, no. 2 (2016): 113–14, https://doi.org/10.59403/2w1ch0y.
[32] Lasiński-Sulecki, "Looking for Taxable Persons' Good Faith," 114–15.

ing the deduction or imposing severe penalties contradicts the principles of neutrality, effectiveness, and proportionality[33].

This idea is evident in the *Greentech* (C-640/23) and *Farkas* (C-564/15) cases. When the state treasury suffers no loss of tax revenues, the CJEU applied the principles of VAT neutrality and effectiveness, ruling that if recovery from the invoice issuer becomes impossible or excessively difficult, the buyer must be able to direct their refund claim directly against the tax administration[34]. CJEU increasingly relies on the neutrality principle to sanction Member States (like Romania) that violate EU law by denying VAT refunds based solely on formal conditions when the decisive substantive conditions—namely that the person concerned is a taxable person who carried out the taxable transactions—are met[35]. The alignment of the VAT liability with the actual money trail is also paramount in bad-debt situations, where the objective of the VAT Directive is to ensure that the tax authorities do not collect an amount of VAT exceeding the tax applied to the consideration actually received by the supplier[36]. So, according to this mechanism, if the customer fails to pay, the State must allow the supplier to reduce the taxable amount, placing the risk of the unpaid tax back on the State rather than the unpaid supplier, and conditions imposed by Member States must not go beyond what is necessary to attain this objective[37].

However, the exceptional remedy of direct restitution has a strict limitation aimed at protecting the state budget: the prohibition of double refunds. In the *H GmbH* case (C-83/23), the CJEU established that the beneficiary of a service cannot request a direct refund of the VAT from the tax administration if the state has already refunded that VAT to the supplier undergoing judicial liquidation because providing a direct refund to the buyer in such a scenario would generate a risk of tax revenue loss through a double reimbursement[38].

4. The Romanian Context

The interaction between taxpayers and the Romanian tax administration is frequently marked by excessive formalism and a systemic push for taxation

[33] Aldo Bisioli and Marco Zanetti, "VAT Wrongly Charged by the Supplier and Right of the Customer to Deduct, from an Italian and EU Perspective: Where Are We?," *International VAT Monitor* 33, no. 3 (2022): 138, https://doi.org/10.59403/28rq9hn.

[34] *Greentech SA*, Case C-640/23, ECLI:EU:C:2025:175, judgment of March 13, 2025, paras. 37–38; *Farkas*, Case C-564/15, ECLI:EU:C:2017:302, para. 57.

[35] Karoline Spies, "CJEU VAT Case Law in 2020: Evergreens, Revivals and New Trends," *Intertax* 49, nos. 8–9 (2021): 611, https://kluwerlawonline.com/journalarticle/Intertax/49.8/TAXI2021063

[36] Martin Dlagnekov, "Bulgaria Finally Introduced a VAT Bad-Debt Relief Mechanism—Was It Worth the Wait?," *International VAT Monitor* 34, no. 2 (2023): 55, https://doi.org/10.59403/3pm43yz.

[37] *Di Maura*, Case C-246/16, ECLI:EU:C:2017:887, judgment of November 23, 2017, paras. 23–27.

[38] *H GmbH*, Case C-83/23, ECLI:EU:C:2024:699, judgment of September 5, 2024, para. 37.

that often ignores economic reality so, for this reason national doctrine has colorfully described the tax inspection as a "Pandora's box" containing non-virtues such as vanity and arrogance, driven by an almost uncontrollable desire of the authorities to impose taxes "in any way and in any place"[39].

Often, the tax authorities' reasoning effectively empties the legal exemptions or deductions of their intended content, denying the taxpayer their substantive rights based on rigid interpretations that contravene the law's purpose[40]. Moreover, the administration sometimes attempts to retroactively penalize taxpayers, even though no fault can be attributed to the taxpayer for relying on how the tax administration itself understood, accepted, and assessed a tax issue during a previous reference period[41].

In the light of European case law, retroactively penalising a taxpayer for a tax practice previously validated by the tax administration itself constitutes a breach of the principles of legal certainty and the protection of legitimate expectations. As the CJEU ruled in the Salomie and Oltean case (C-183/14), corroborated with the "precise assurances" thesis in the Fatorie case (C-424/12), the imposition of retroactive penalties or accessories is disproportionate when no fault can be attributed to the taxable person. In other words, the good faith taxpayer cannot be forced to bear the punitive financial consequences of hesitations, errors of interpretation or changes in perspective that occurred in the practice of the control bodies from one reference period to another[42].

According to Romanian jurisprudence, Tax Procedure Code is supplemented by the Law on Administrative Litigation (Law no. 554/2004) so there is no legal basis to exclude the possibility of taxpayers directly addressing the court with a request for the restitution of illegally established amounts and the courts have the full authority to order the direct restitution of sums that were collected unlawfully, thus bypassing the administration's procedural inertia and ensuring the effective recovery of the undue tax [43].

National courts' role is protecting the good-faith taxpayer from being unfairly burdened with the fiscal risk generated by their business partners, and, Romanian courts, directly apply CJEU jurisprudence such as the *Teleos* case (C-

[39] Puț, "Jocul procedurilor," 218.
[40] Viorel Terzea, "Refuzul dreptului de deducere a TVA-ului în lipsa facturii originale" [Refusal of the Right to Deduct VAT in the Absence of the Original Invoice], *Tax Magazine*, no. 8 (2015): 443; *Salomie and Oltean*, Case C-183/14, ECLI:EU:C:2015:454, judgment of July 9, 2015, paras. 59–60.
[41] Costaș, "Epopeea impozitului pe mijloacele de transport," 20.
[42] *Salomie and Oltean*, Case C-183/14, ECLI:EU:C:2015:454, paras. 50–52; *Fatorie SRL*, Case C-424/12, ECLI:EU:C:2014:50, paras. 44–45.
[43] Bianca Chiurtu, "Practica neunitară a instanțelor judecătorești privind solicitarea contribuabililor de restituire a sumelor achitate în baza unui titlu de creanță nelegal și a dobânzii fiscale aferente" [Inconsistent Judicial Practice concerning Taxpayers' Claims for Refund of Amounts Paid under an Unlawful Tax Decision and Related Tax Interest], *Tax Magazine*, no. 2 (2024): 99–100.

409/04), and by their decisions stated that tax authorities cannot compel a supplier who acted in good faith to pay the VAT if the taxpayer presented justifying evidence and took all reasonable measures within their power to ensure they were not participating in a tax fraud[44]. So, the courts must annul tax assessment decisions and joint liability decisions when the tax organs fail to unequivocally prove the taxpayer's bad faith or culpable conduct[45].

Romanian legal framework provides an extraordinary legal remedy to ensure the absolute supremacy of European tax law (Art. 21 of Law no. 554/2004), so that taxpayers can request the revision of final national court judgments if those judgments were pronounced in violation of the principle of the priority of European Union law[46]. This mechanism acts as an ultimate procedural safeguard, ensuring that the fiscal risk is allocated correctly in accordance with the mandatory principles established by the CJEU, overriding any conflicting national administrative practices or prior erroneous judicial decisions[47].

5. Conclusions

The analysis of the European and national jurisprudential evolution reveals a different approach from rigid administrative formalism to a model of shared responsibility. The CJEU case law effectively establishes that the allocation of fiscal risk between the state and the taxpayer is not absolute, but rather governed by three rules that balance the state's right to collect taxes with the protection of the bona fide economic operator:

(i) The Allocation of Risk Based on Actual Budget Collection. The state does not act as a guarantor against private commercial failures, as demonstrated in the *Fatorie* analysis. When the state has not effectively collected the tax due to a procedural error (such as the failure of the beneficiary to apply the mandatory reverse charge mechanism) compounded by the supplier's insolvency, the fiscal risk remains strictly within the private patrimony. The VAT system does not oblige the state to bear the financial consequences of taxes lost in the commercial circuit when the public treasury did not benefit from them.

(ii) The Imperative of Effective Remediation and Proportionality. When the state has effectively collected a tax that was not legally owed, retaining

[44] Alina-Adriana Arseni, "Operațiuni intracomunitare pretins frauduloase. Nelegalitatea impunerii determinată de nedovedirea conduitei culpabile a contribuabilului. Proceduri concurente. Consecințe" [Alleged Fraudulent Intra-Community Transactions: Unlawful Taxation Resulting from Failure to Prove the Taxpayer's Culpable Conduct; Concurrent Proceedings; Consequences], *Tax Magazine*, no. 4 (2024): 298–99.

[45] Arseni, "Operațiuni intracomunitare pretins frauduloase," 298–99.

[46] Daniela-Ioana Stăncioi, "Revizuirea hotărârilor judecătorești în temeiul art. 21 din Legea nr. 554/2004 a contenciosului administrativ pentru încălcarea principiului priorității dreptului Uniunii Europene" [Review of Court Decisions under Article 21 of Law No. 554/2004 on Administrative Litigation for Breach of the Primacy of EU Law], *Tax Magazine*, no. 2 (2024): 85–86.

[47] Stăncioi, "Revizuirea hotărârilor judecătorești," 85–86.

it would breach the principle of proportionality – which strictly dictates that measures taken by public authorities must not exceed what is necessary to achieve the objective of correct tax collection – and the principle of neutrality – because the taxable person would bear the cost of a tax that should be borne by the consumer. Keeping the unduly paid VAT would be an unjust enrichment for the state. Also, national practices that condition the right to a tax exemption or deduction solely on compliance with formal obligations — without considering the substantive requirements and without even verifying if those substantive conditions were met — go beyond what is necessary to ensure the correct levying of the tax. Therefore, effective direct remedies must be guaranteed to the taxpayer to restore the economic balance, provided that substantive conditions are met.

(iii) Taxpayer Diligence and Legal Certainty. This rule protects the diligent taxpayer against the state's attempts to retroactively transfer its own administrative risks. The principle of legal certainty demands that legal rules be clear, precise, and predictable, allowing taxpayers to unequivocally know their fiscal obligations before concluding a transaction. Consequently, a taxpayer cannot be penalized or denied substantive rights for relying in good faith on an established administrative practice, nor can the state retroactively reconsider its position based on the same factual elements after previously accepting them. The good faith of the taxpayer is legally presumed, meaning that the burden of proving bad faith or intentional evasion rests entirely and exclusively with the tax authorities.

This shared responsibility framework ensures that while the state retains its sovereign prerogative to combat fraud and evasion, it cannot do so by transferring the financial burden onto a diligent taxpayer who operated transparently and within the boundaries of the law. The taxpayer is not protected because the state would act as a guarantor of private commercial transactions — a role it expressly rejects – but, this protection springs intrinsically from the foundational pillars of the VAT mechanism itself: the principle of fiscal neutrality, which guarantees the substantive right not to bear the tax burden, and the principle of effectiveness, which ensures this right remains practically enforceable when traditional commercial recovery fails. It is the conection between fiscal neutrality and the principle of effectiveness that shields the bona fide operator, ensuring that VAT remains strictly a tax on final consumption rather than a penalty on legitimate businesses.

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The Global Steel Overcapacity and Possible Options to Salvage the South African Steel Industry

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Abstract

This paper explores the possible options for South Africa to salvage its 'limping' steel industry from the potential demise. In 2025, South Africa's major steel manufacturer indicated its intention to close some of its processing plants, citing the inability to compete with low-priced imports from countries with excess steel production. The increase in global steel production causes market distortion and poses instability in the global market. Amid the current unstable geopolitical landscape, the World Trade Organization (WTO) rules are struggling to effectively address the issue of global steel overcapacity. In response to adverse effects of the global steel overcapacity, other jurisdictions like the United States (US) and the European Union (EU) have explored alternative protective measures. To salvage South Africa's steel industry, the paper proposes that South Africa should reconsider the imposition of countervailing measures on steel products to supplement the existing anti-dumping and safeguard measures, customs duties, and import control measures. The paper uses a desktop study evaluating the relevant literature, legislation, policy review and case law. Furthermore, the paper calls for South Africa to adopt a balanced policy framework that considers both the interests of major steel industry and the downstream users in addressing global steel overcapacity.

Keywords: *WTO, South Africa, ITAC, global steel overcapacity, trade remedies, tariffs.*

1. Introduction

The South African steel industry is one of the salient strategic sectors of the economy employing eight million people and contributing to an estimated of 15 precent to the South African Gross Domestic Product (GDP).[2] Despite the action taken by South Africa to protect its domestic steel industry through trade remedies – anti-dumping and safeguards measures. In 2025, South Africa's major steel manufacturer (ArcelorMittal) indicated its intention to close some of its processing plants, citing the inability to compete with low–priced imports from countries with excess steel production which may result into over 3500 job

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[2] Sizwe Khoza, Chengedzai Mafini, and Welby V. Loury Okoumba, "Lean Practices and Supply-Chain Competitiveness in the Steel Industry in Gauteng, South Africa," *South African Journal of Economic and Management Sciences* 25, no. 1 (2022): 1–14, https://doi.org/10.4102/sajems.v25i1.4617.

losses.[3] Trade remedies are some of the instruments available within the WTO[4] to counteract the potential injurious effects associated with global steel overcapacity. According to WTO rules, in case of dumped imports or subsidised exports cause or threaten to cause material injury or serious injury to the domestic industry in the importing country, WTO members may impose an additional duty to the imports in question in a form of anti-dumping,[5] countervailing[6] and safeguard duties.[7]

According to OECD report, the global steel overcapacity is expected to increase by 6.7 percent between 2025 – 2027, and projected global demand to rise by 0.7 percent annually from 2030 onwards.[8] The global steel overcapacity is exacerbated by some government's intervention actions to promotion and support of their steel industry. Some of these government's intervention actions like undue subsidisation to their domestic steel industry to increase production and profit result into market-distorting practice.[9] Generally, the government subsidisation to steel industry is either through direct subsidisation (e.g. financial contribution) or indirect subsidisation (e.g. tax incentives) which distorts global competition and causes uneven playing grounds within international trade.[10] For instance, China's subsidisation rate to the domestic steel industry is predicted to be ten times that of Economic Co-operation and Development (OECD) countries.[11] The subsided steel industry has the capacity to substantially maximise their productivity and exports surplus to foreign market at a lower price (usually less than the cost of production). Thus, the influx of steel imports or low-priced steel would lead to job loses, low investment returns, weak supply chain and hinder the innovation in the importing countries.[12]

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[3] Reuters, "ArcelorMittal South Africa Says on Course to Close Long Steel Plants in September," *Engineering News*, July 31, 2025, https://www.engineeringnews.co.za/article/arcelormittal-south-africa-says-on-course-to-close-long-steel-plants-in-september-2025-07-31-1.

[4] Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154 (entered into force January 1, 1995), https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

[5] General Agreement on Tariffs and Trade 1994, art. VI; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, https://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

[6] Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, https://www.wto.org/english/docs_e/ legal_e/24-scm.pdf.

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[8] OECD, *OECD Steel Outlook 2025* (Paris: OECD Publishing, 2025), 10, 16, https://doi.org/10.1787/28b61a5e-en.

[9] OECD, *OECD Steel Outlook 2025*.

[10] OECD, *OECD Steel Outlook 2025*, 10.

[11] OECD, *OECD Steel Outlook 2025*, 10.

[12] OECD, *OECD Steel Outlook 2025*, 10.

Amid the current unstable geopolitical landscape, the WTO rules are struggling to effectively address the issue of global steel overcapacity. As such, some WTO members like US and the EU has recognised the shortcomings of the WTO rules and resorts to other alternative protective measures. The alternative measures undertaken by other WTO members, bags a question whether the trade remedies provide a necessary protection to counteract non-market practices – global steel overcapacity. To answer this question, this paper gives an overview of the global steel overcapacity; South Africa's protective instruments and the effects of steel overcapacity to domestic industry; explore the South Africa's interim measures to salvage steel industry and whether the alternative measures undertaken by US and the EU to protect their respective steel industry could server as template to South Africa. In conclusion, this paper explores possible options for South Africa to protect its steel industry.

2. Global Steel Overcapacity

Legally speaking, the term "overcapacity" it is not theoretically defined as it depends on the context and the industry in question. The term overcapacity may be either due to a non-market practice or natural consequence of an economy or market-structure.[13] At regional or national landscape, the steel overcapacity may be mathematically defined as the difference between the capacity which includes steel production (raw material) and subtracting the demand (which include steel exports plus steel imports and minus indirect steel exports plus indirect steel imports).[14] Usually, non-market practice take place when a certain government deploys intentional intervention policy to support their domestic industry to maximise its production output and increasing exports capacity of the certain product.[15] The deployment these non-markets exports leads to trade distortion, and causes an injury to the domestic industry of the like product in the importing country through loss of profit, job losses, decline in productivity, return on investment – invest in new and existing technologies, capacity utilisation, increase input cost and ultimately create a weaker industrial supply chain.[16] Additionally, non-market practices such as 'circumvention of trade measures, transnational subsidies, cross-border investments by state-owned enterprises, and indirect steel trade', also deepening the effects of global steel overcapacity.[17]

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[13] OECD, *OECD Steel Outlook 2025*, 10.

[14] Benjamin Blase Caryl, "International Trade Options to Tackle Global Steel Overcapacity," *Global Trade and Customs Journal* 21, no. 2 (2026): 86–87, https://doi.org/10.54648/GTCJ20260 10.

[15] OECD, *Measuring Distortions in International Markets: Below-Market Energy Inputs*, OECD Trade Policy Papers, no. 268 (Paris: OECD Publishing, 2023), https://doi.org/10.1787/b26140ff-en.

[16] Global Forum on Steel Excess Capacity, *Impacts of Global Excess Capacity on the Health of GFSEC Steel Industries* (n.d.), accessed August 3, 2026, https://www.steel forum.org/content/dam/steel-forum/en/publications/gfsec-impacts-of-global-excess-capacity_0325.pdf.

[17] OECD, *OECD Steel Outlook 2025*, 10.

In 2016, the G20 members established the Global Forum on Steel Excess Capacity (GFSEC) as a progressive effort to address the issue of overcapacity and enhance fair global market in the steel sector.[18] The GFSEC brings together the largest steel producing economies, policy makers, stakeholders to share information and fostering cooperation in issues related to steel manufacturing. Recently, a ministerial meeting of the GFSEC was held in South Africa, Gqeberha, on 10 October 2025, to discuss the crisis of global overcapacity in steel sector.[19] GFSEC representatives and other invited non- member countries, recognised the worsening global steel overcapacity crisis which requires an urgent actions and cooperation to counteract trade distortion in the steel sector.[20] The GFSEC members agreed amongst others, to share experiences and trade actions taken to address steel overcapacity, circumvention of trade measures, including data sharing related to "melt and pour" requirement for steel manufacturing.[21]

According GFSEC, global steel overcapacity increased by 5.6 percent during the first six months of 2025, driven primarily by developments in the China, Iran, and Egypt.[22] Global steelmaking is forecast to increase between 2025 and 2027 by 47.3 million metric tonnes, China leading with 30.4 million metric tonnes, India records 21.7 million metric tonnes and Middle Eastern countries amounts to 14.8 million metric tonnes. The GFSEC report further indicated that excess capacity in the Chinese steel industry appears to be associated with price depression in importing markets, which may adversely affect domestic manufacturers.[23] The emergence of excess steelmaking capacity spilling over into downstream segments of the steel value chain, including sectors such as automotive manufacturing, and thereby artificially enhancing the price competitiveness of those downstream industries, constitutes an additional source of concern.[24] The emergence of steel overcapacity spills over to the downstream users including sectors such as automotive industry, and thereby negatively impact on the price competitiveness. The above dataset on the rapid emergence of global steel overcapacity requires an immediate interventional at multilateral level.

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[18] Global Forum on Steel Excess Capacity, *Global Forum on Steel Excess Capacity 2017* (approved November 30, 2017), https://www.steelforum.org/content/dam/steel-forum/en/publications/global-forum-on-steel-excess-capacity-report_301117.pdf.

[19] Global Forum on Steel Excess Capacity, "GFSEC Ministerial Media Release 2025," October 10, 2025, https://www.steelforum.org/.

[20] Global Forum on Steel Excess Capacity, "GFSEC Ministerial Media Release 2025."

[21] Global Forum on Steel Excess Capacity, *2025 Ministerial Statement*, October 10, 2025, 2, https://www.steelforum.org/.

[22] Global Forum on Steel Excess Capacity, *Steel Excess Capacity Monitoring Bulletin*, October 2, 2025, https://www.steelforum.org/content/dam/steel-forum/en/publications/20251002%20-%20GFSEC%20Steel%20Excess%20Capacity%20Monitoring%20Bulletin.pdf.

[23] OECD, *OECD Steel Outlook 2025*, 17.

[24] OECD, *OECD Steel Outlook 2025*, 110–11.

As above highlighted, at national level WTO members resorted to the trade remedies as a temporarily measures to offset the injurious effects of the steel overcapacity and provide protection to their respective domestic steel industry. As of 2025, a total of forty-five anti-dumping and seven countervailing measures have been initiated by WTO members directed at steel-related products.[25] Notwithstanding the increase in trade remedies, exports originating from countries with steel excess capacity continued to rise in the first half of 2025, particularly in flat steel products, which increased by six per cent (1.7 million metric tonnes), and twelve percent (1.3 million metric tonnes) increase for long steel products.[26] This is an indication that the prolific use of trade remedies does not prevent global steel overcapacity and eliminate its negative impacts.

Until there is a global agreement in addressing the adverse impacts of the steel overcapacity, countries will continue to resort to trade remedies to protect their respective domestic markets.[27] Thus, the WTO as the multilateral forum on matters related to free trade and the elimination of trade barriers should foster the negotiations on a separate agreement on steel overcapacity (including other industrial overcapacity). The proposed WTO agreement on steel overcapacity should include, inter alia; a clear definition of global steel overcapacity, semi-annual reports - steel production, capacity, demand and subsidies), monitoring and collecting data - related to capacity reduction and remedies and dispute settlement mechanisms.[28]

3. South Africa's Protective Instruments

In South Africa, the investigations into trade remedies, tariffs and import and export control are conducted by an independent body, the International Administrative Commission (ITAC).[29] In respect to anti-dumping, countervailing and safeguard measures, ITAC conduct those investigations as guided by the relevant domestic legislation and regulations, the Customs and Excise Act 91 of 1964 (CEA), International Trade Administration Act 71 of 2002 (ITA Act), its Anti-Dumping Regulations (ADR) of 2003,[30] countervailing regulations (CVR) of 2005,[31] and the Amended Safeguard Regulations (SGR)[32], and if applicable,

[25] Author's calculations based on World Trade Organization, "Trade Remedies Data Portal," accessed August 3, 2026, https://trade-remedies.wto.org/en.
[26] OECD, *OECD Steel Outlook 2025*, 110.
[27] Caryl, "International Trade Options," 89.
[28] Caryl, "International Trade Options," 89.
[29] International Trade Administration Act 71 of 2002 (South Africa), sec. 7, https://www.gov.za/documents/international-trade-administration-act.
[30] Anti-Dumping Regulations, General Notice 3197, *Government Gazette* No. 25684 (November 14, 2003), https://www.gov.za/sites/default/files/gcis_document/201409/25684.pdf.
[31] Countervailing Regulations, Government Notice R. 356, *Government Gazette* No. 27475 (April 15, 2005), https://www.gov.za/sites/default/files/gcis_document/201409/274750.pdf.
[32] Amended Safeguard Regulations, Government Notice R. 662, *Government Gazette* No. 27762

the Board on Tariffs and Trade Act 107 of 1986 (BTTA).[33] South Africa as a member to WTO Agreement has to ensure that its domestic instruments complies with the WTO Agreement.[34]

The investigation into anti-dumping, countervailing and safeguard are conducted in two stages: preliminary and final investigation. In both preliminary and final investigations, an application into alleged dumping, subsidised import or unforeseen surge of imports can only be initiated upon a written application by the Southern African Customs Union (SACU) industry[35] and initiation notice published in the Governmental Gazette.[36] The Interested parties have the right to make representations within thirty days from the date initiation notice and may request an extension upon shown a good cause.[37] Upon completion of the final investigation, ITAC will submit its recommendation to the Minister of Trade, Industry and Competition (Minister), who has the final decision.[38] If the Minister accepts the recommendation of ITAC, the Minister may then "request" the Minister of Finance to give effect to this "request" through an amendment of Schedule 2 to the CEA.[39]

Over the past 10 years, ITAC initiated seven anti-dumping[40] and eighteen safeguard investigations[41] on steel-related products. Recently, in flat-rolled steel products investigation despite the ITAC found an affirmative dumping on the subject products, it decided not to impose provisional anti-dumping duties cited that the provisional safeguard duties were already imposed on the same subject

(July 8, 2005), https://www.gov.za/sites/default/files/gcis_document/201409/277620.pdf.

[33] Board on Tariffs and Trade Act 107 of 1986 (South Africa).

[34] Clive Vinti, "The Extension of 'Safeguard Measures' in South Africa Within and Outside the Framework of the Agreement Establishing the African Continental Free Trade Area," *Potchefstroom Electronic Law Journal* 28 (2025): 3, https://doi.org/10.17159/1727-3781/2025/v28i0a17953; *Progress Office Machines CC v. South African Revenue Services and Others* (532/06) [2007] ZASCA 118, paras. 5–6, https://www.saflii.org/za/cases/ZASCA/2007/118.html.

[35] ITAC conducts investigations on behalf of the Southern African Customs Union member states: Botswana, Eswatini, Lesotho, Namibia, and South Africa.

[36] Anti-Dumping Regulations, reg. 28.1; Countervailing Regulations, reg. 28.1; Amended Safeguard Regulations, reg. 14.1.

[37] Anti-Dumping Regulations, reg. 29.3; Countervailing Regulations, reg. 19.3; Amended Safeguard Regulations, reg. 15.2.

[38] Board on Tariffs and Trade Act 107 of 1986 (South Africa), sec. 4(2)(a).

[39] Board on Tariffs and Trade Act 107 of 1986 (South Africa), sec. 4(2)(b), read with Customs and Excise Act 91 of 1964, sec. 56, https://www.gov.za/documents/customs-and-excise-act-31-jul-1964-0000; Clive Vinti, "The Right of 'Interested Parties' to Be Heard during an Anti-Dumping Investigation Conducted by the National Treasury on Behalf of the Minister of Finance," *South African Law Journal* 137, no. 4 (2020): 713–32, https://doi.org/10.10520/ejc-jlc_salj-v137-n4-a7.

[40] International Trade Administration Commission of South Africa (ITAC), Reports nos. 758, 745, 743, 737, 720, and 710, "Investigation Reports," accessed August 3, 2026, https://itac.org.za/trade-remedies/investigation-reports/. The original note duplicated Report No. 758 and therefore identified only six unique reports.

[41] ITAC, Reports nos. 763, 750, 740, 730, 715, 668, 661, 656, 639, 636, 620, 605, 596, 589, 555, 551, 537, and 533, "Investigation Reports," accessed August 3, 2026, https://itac.org.za/trade-remedies/investigation-reports/.

product.[42] With respect to countervailing, ITAC initiated thirteen countervailing measures and the last investigation was initiated in 2008.[43] To date, South African has only imposed four countervailing measures since 2001 and 2002.[44] This means that over the past 23 years, the South African industries has been vulnerable to subsidised imports without any protection whatsoever.

As it will be seen in the discussions below, the recent non-usage of the countervailing measures is the missing link within the South Africa's protective instruments. Another challenge is that even though South Africa has protective measures in place, ITAC to complete anti-dumping, safeguard, and tariffs investigations outside the prescribed time limits. For instance, ITAC complete anti-dumping investigation on average of 546 days beyond 12-months' time limits as set out in Article 5.10 of the Anti-Dumping Agreement.[45] The delay in complete investigations within the prescribed time limits is a long-standing hurdle that the ITAC needs to overcome.[46] These administrative hurdles need to be addressed urgently as this would hamper the effectiveness of South African's protective instruments.

4. South Africa's Interim Measures to Salvage Steel Industry

On June 2024, the Minister has exercised its powers vested in ITA Act and issued a directive order to the ITAC to conduct a review on mater with concerning safeguard and amendment of a customs duty.[47] The scope of the related to tariff structure for steel products classifiable under Chapters 72 (primary steel and stainless steel), 73 (articles of steel, i.e., pipes and wire), 82 (tools and cutlery), and 83 (miscellaneous steel articles, i.e., padlocks) of the CEA.[48] The steel review covers 609 tariff codes and the is first largest review since the establishment of ITAC. The review on steel process considered both

[42] ITAC, *Report No. 758: Investigation into the Alleged Dumping of Flat-Rolled Products of Iron or Non-Alloy Steel Imported from China—Preliminary Determination* (September 30, 2025), para. 9, https://itac.org.za/trade-remedies/investigation-reports/.

[43] World Trade Organization, "Countervailing Initiations by Reporting Member, 1 January 1995–30 June 2025," accessed August 3, 2026, https://www.wto.org/english/tratop_e/scm_e/CV_ InitiationsByRepMem.pdf.

[44] World Trade Organization, "Countervailing Measures by Reporting Member, 1 January 1995–30 June 2025," accessed August 3, 2026, https://www.wto.org/english/tratop_e/scm_e/CV_Measures ByRepMem.pdf.

[45] Author's calculations based on ITAC investigations conducted between 2020 and 2025.

[46] Gustav Brink, "Anti-Dumping in Southern Africa," in *International Economic Law: (Southern) African Perspectives and Priorities*, ed. Kholofelo Kugler and Franziska Sucker (Cape Town: Juta, 2021), 352; Gustav Francois Brink, *A Theoretical Framework for South African Anti-dumping Law* (LLD thesis, University of Pretoria, 2004), 886–89.

[47] International Trade Administration Act 71 of 2002 (South Africa), sec. 16(1)(d)(i).

[48] International Trade Administration Commission of South Africa, "Review of the Tariff Structure for Steel Products Classifiable under Chapters 72, 73, 82 and 83 of the Customs and Excise Act," General Notice 3061, *Government Gazette* No. 52347 (March 19, 2025), https://www.gov.za/sites/default/files/gcis_document/202503/52347gen3061.pdf.

external and internal factors. On internal factors, the ITAC cited that the internal factors like influx of dumped imports, instability in energy supply, freight logistics exacerbate the South African steel industry crisis.[49] With respect to external factors, the ITAC stated the global trade distortion caused by the emerging overcapacity in steel production poses a serious threat to the sustainability of the South African steel industry and which in turn would adversely impact the country's socio-economic objectives.[50]

The interested parties were given four weeks to make comments on issues, *inter alia*, whether the situation of global overcapacity necessitate justifiable grounds to invoke Article 19 and 21 of General Agreement on Tariffs and Trade (GATT) on emergency situation and national security; whether South African should reconsider its WTO customs duties bound rates pursuant to Article II.1(b) of the GATT;[51] possible re-consideration of the Price Preferential System (PPS)[52] to reduce raw material price on scrap, iron ore, coking coal to support domestic industry; and possible rebate on intermediate products classified under Chapters, 72, 73, 82, and 83 of the Customs and Excise Act.[53] The ITAC received more than 150 comments from the industry and other stakeholders.[54]

On 25 August 2025, the ITAC made the preliminary findings on steel review:

a) To increase the customs duty-bound rates on a number of identified products under Chapter 72, 73, 82 and 83 of CEA.

b) To create rebate provisions for certain grades of steel products produced outside the country

c) Subject certain classified products to import control as provided for by section 6 of the ITA Act.

d) Grant a free duty to the identified products commonly used by domestic steel industry, in particular stainless steel.

e) To consider the invocation of Article 19 and 21 of GATT amid the current state of instability in the geo-political landscape.

f) To establish an Ad hoc Advisory Committee composed of experts and part-time Commissioners to advice the ITAC on steel-related matters.[55]

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[49] International Trade Administration Commission of South Africa, General Notice 3061.
[50] International Trade Administration Commission of South Africa, General Notice 3061.
[51] World Trade Organization, *World Tariff Profiles: South Africa*, accessed August 3, 2026, https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/za_e.pdf.
[52] Department of Trade, Industry and Competition, "ITAC Completes Investigation into the Supply of Scrap to the Metals Industry," October 2020, https://www.thedtic.gov.za/itac-completes-investigation-into-the-supply-of-scrap-to-the-metals-industry/.
[53] International Trade Administration Commission of South Africa, General Notice 3061.
[54] International Trade Administration Commission of South Africa, General Notice 3061.
[55] International Trade Administration Commission of South Africa, "Review of the Tariff Structure and Investigation into the Possible Introduction of an Import Surveillance System for Steel Products Classifiable under Chapters 72, 73, 82, and 83 of the Customs and Excise Act," Notice 3438,

The interested parties had two weeks to make a written representation from the date of the preliminary findings. In the main, the ITAC preliminary findings to increase custom duty rates to certain products and grant a free duty rate, imports control and rebate provisions are WTO-compliant. In the past five years, the ITAC has granted rebates and tariff increase to several steel products.[56] That said, the proposal to invoke Articles 19 and 21 of GATT on national security to remedy global steel overcapacity crisis could be vulnerable to WTO scrutiny. As it will seem below, the US imposition of unilateral tariffs on steel and aluminium product through legislative measures – Section 232 citing economic national security was dismissed by several WTO panels on the basis that those measures lacks justifiable grounds under Article 21 of GATT.[57] Yet, the ITAC preliminary findings reflect the possibility to invoke either "emergency measure" or "national security" as exceptional measures under the GATT. Nevertheless, it is presumed that the ITAC findings on the possible invocation of Articles 19 and 21 of GATT would not progress to the final review. Moreover, the proposal to establish an ad hoc Advisory Committee is commendable.[58] The Advisory Committee of the stakeholders in steel industry could provide insightful inputs on the ground material conditions of the South African steel market. The Advisory Committee may among other things, ensure that the competitive views and the interests of the major the steel industry and downstream users are equally accommodated in policymaking.

On 03 July 2020, the ITAC conducted a review on PPS system on how to reduce the costs of scrap metal, iron ore and coking coal to the domestic industry.[59] The review was initiated following a petition from the domestic industry indicating the unaffordable price on scrap metal, iron ore, and coking coal which resulted in the loss of profit and facing a possible jobs retrenchment.[60] Note that the implementation of the PPS system in the protection of the downstream users had unintended adverse effects to the major steel.[61] This signals a lack by ITAC's review to reach a balanced coordination between the competing interests of the major steel industry and the downstream users. In this light, it is believed that the establishment of an ad hoc Advisory Committee could make recommendations to ITAC that cater both the interests of the major steel

Government Gazette No. 53207 (August 20, 2025), https://itac.org.za/wp-content/uploads/ITAC-Notice-3438-of-2025-Steel-review.pdf.

[56] International Trade Administration Commission of South Africa, "Tariff Investigation Reports," accessed August 3, 2026, https://itac.org.za/tariff-investigations/investigation-reports/.

[57] See section 5 below for the discussion of the United States' Section 232 measures.

[58] International Trade Administration Commission of South Africa, "Tariff Investigation Reports."

[59] Department of Trade, Industry and Competition, "ITAC Completes Investigation into the Supply of Scrap."

[60] Department of Trade, Industry and Competition, "ITAC Completes Investigation into the Supply of Scrap."

[61] Department of Trade, Industry and Competition, *South African Steel and Metal Fabrication Master Plan 1.0* (2020), 23, https://www.thedtic.gov.za/wp-content/uploads/SteelMasterplan.pdf.

manufacturers and the downstream users.

5. US and EU Steel Protection Alternative Measures

At present, WTO rules contain any no provision on how to address the issues of global steel overcapacity. As above discusses, WTO member resorts to anti-dumping, countervailing and safeguard measures to counteract negative impact of the steel overcapacity. Although, the importing countries may deploy anti-dumping, countervailing and safeguard measures to salvage their domestic industries from injurious effects, these instruments appear to provide inadequate protection.[62] In 2025, the European Commission (EC) proposal to restrict tariff-free steel imports at 18.3 million tonnes annually (which is about 47 percent reduction compared to 2024 quotas),[63] and increasing out-of-quota duties to 50 percent (which is 25 percent to the existing safeguard level), promoting transparency in the market through a "melt and pour" requirement to prevent circumvention.[64] These proposal on threshold tariff quota regarding steel products is a strategic protective measures to EU amid the emergence of the global steel overcapacity. The proposal will replace the existing the safeguards which were in-force since June 2026 as to ensure on-going protection of the domestic industry.[65] The proposal was largely the comments from the interested stakeholder consultation i.e domestic steel, community union, workers, consumers and their representative associations on the adverse effect of overcapacity in steel sector. Unlike the US measures under Section 232 on national security, the EU proposal on steel tariff quota threshold is WTO compliant.[66] The proposed EU measures may significantly adjust the home market demand and maintain market-based steel price and at the same time providing a temporary safeguard to the domestic industry.[67] That said, anti-dumping, countervailing, and safeguard measure remain the indispensable tools to remedy the injurious effects associated with steel overcapacity.[68]

In response to overcapacity in steel sector, the US invoked Section 232

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[62] Sara Franzone, "A New EU Measure Addressing the Trade Effects of Global Steel Overcapacity," *Global Trade and Customs Journal* 21, no. 2 (2026): 125, https://doi.org/10.54648/GTCJ2026014.

[63] European Parliament, "New Measures to Protect EU Steel Market from Global Overcapacity," January 27, 2026, https://www.europarl.europa.eu/news/en/press-room/20260126IPR32626/new-measures-to-protect-eu-steel-market-from-global-overcapacity.

[64] Council of the European Union, "Steel Overcapacity: Council Adopts Mandate on New Rules to Protect EU Steel Industry from Global Overcapacity," December 12, 2025, https://www.consilium.europa.eu/en/press/press-releases/2025/12/12/steel-overcapacity-council-adopts-mandate-on-new-rules-to-protect-eu-steel-industry-from-global-overcapacity/.

[65] European Parliament, "New Measures to Protect EU Steel Market."

[66] General Agreement on Tariffs and Trade 1994, art. XXVIII, https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXVIII.

[67] Franzone, "New EU Measure," 124.

[68] Franzone, "New EU Measure," 125–26.

of the Trade Expansion Act (1962),[69] as amended to increase tariffs on imports of steel, aluminium, and derivative products from 25 percent to 50 percent claims national economic security.[70] The US addition tariffs on certain steel and aluminium imports come after the US Secretary of Commerce undertaken investigation on the effects of steel and aluminium imports on national security pursuant to Section 232.[71] The US Secretary of Commerce reports found that the excessive on imported steel and aluminium into the US markets have resulted in, among other things, decline in domestic production of the like products, market share, capacity utilisation, employment and the consequent impact to the domestic industry prices.[72] Based on these findings, the US invoked Section 232 on national security. The above listed factors by the US Secretary of Commerce are similar to the listed injury factors in Article 2 of the Agreement on Safeguard states that for the purpose of assessing whether that the unforeseen surge imports have caused or are threatening to cause serious injury to the domestic industry producing the like product.[73] Withstanding this, the US Secretary Commerce reports recommended invoking Section 232 on national security instead of the Agreement on safeguard.

In 2025, the President Trump administration extended the tariffs on steel imports from all countries through Section 232 and International Emergency Economic Powers Act 95–223 (1977) (IEEPA).[74] According to IEEPA requires that before the enforcement an emergence, the President must consult with the Congress "in every possible instance".[75] In practice, once the President declares an emergence must sent a report to Congress for approval that includes inter alia, the circumstance warranting the invocation of IEEPA, the reasons why the President believes the circumstance constitute an extraordinary foreign threats and scope and nature of the intended IEEPA.[76] On contrary, the Trump administration proceeded with the enforcement of the IEEPA on steel-intensive

[69] Trade Expansion Act of 1962, sec. 232, 19 U.S.C. § 1862.
[70] Keigh E. Hammond and Kyla H. Kitamura, *Expanded Section 232 Tariffs on Steel and Aluminum*, CRS Insight IN12519 (Washington, DC: Congressional Research Service, September 26, 2025), https://www.congress.gov/crs-product/IN12519.
[71] U.S. Department of Commerce, Bureau of Industry and Security, *The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended* (January 11, 2018), https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf.
[72] U.S. Department of Commerce, *Effect of Imports of Steel*, 41–53.
[73] Agreement on Safeguards, art. 4.2(a), https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.
[74] White House, "President Donald J. Trump Increases Section 232 Tariffs on Steel and Aluminum," fact sheet, June 3, 2025, https://www.whitehouse.gov/fact-sheets/2025/06/fact-sheet-president-donald-j-trump-increases-section-232-tariffs-on-steel-and-aluminum/.
[75] International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, sec. 204(a), 91 Stat. 1625, 1627 (1977), codified at 50 U.S.C. § 1703(a), https://uscode.house.gov/view.xhtml?req=(title:50%20section:1703%20edition:prelim).
[76] International Emergency Economic Powers Act, sec. 204(b), codified at 50 U.S.C. § 1703(b)(1)–(5), https://uscode.house.gov/view.xhtml?req=(title:50%20section:1703%20edition:prelim).

imports without sufficient consultation with the Congress.[77] In *Learning Resources, Inc. v. Trump (consolidated with Trump v. V.O.S. Selections, Inc. (No. 25-250)*, the US Supreme Court invalidate the tariffs under IEEPA on steel and aluminium imports from Mexico, Canada, and China.[78] However, in this case, the court scrutiny on the IEEPA did not provide much clarity on the question related potential limitations of the Executive powers and legitimate sanctions.[79]

The panel in *US — Steel and Aluminium Products (Canada)* found the US invocation of Section 232 on national security to be inconsistence with Article XXI(b)(iii) of the GATT 1994 which dictates that measures related to national security may be invoked "in time of war or other emergency in international relations."[80] Also in the *United States – certain measures on steel and aluminium product,* the panel has dismissed the US measures to subject steel and aluminium imports under Section 232 on national security.[81] The panel agreed with the China's claims that the circumstances under which the US invoked Section 232 on steel and aluminium are in violation with Article XXI(b)(iii) of the GATT 1994 and Article 2.1, 2.2, 4.1, 4.2, 5.1, 7, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards.[82] Although Article XXI of the GATT regards the issues of essential national security fundamental importance to every member state, however, it is not a "self–judging" which give permission to an arbitrary action.[83] The panel in *Russia - Measures Concerning Traffic in Transit* pointed out that Article XXI(b) (iii) of the GATT 1994 may be invoked as an exception promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade.[84] Thus, the US measures on steel and aluminium to invoke

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[77] Ben Budner, "The Questionable Legality of IEEPA Tariffs: Does the Major Questions Doctrine Apply?," *Texas Law Review* 104, no. 1 (2025): 218, https://texaslawreview.org/the-questionable-legality-of-ieepa-tariffs-does-the-major-questions-doctrine-apply/.

[78] *Learning Resources, Inc. v. Trump*, 607 U.S. 229 (2026), consolidated with *Trump v. V.O.S. Selections, Inc.*, No. 25-250, argued November 5, 2025, decided February 20, 2026, https://www.supremecourt.gov/opinions/slipopinions.aspx.

[79] Ryan Mitchell, "IEEPA's Changing Context, Multipolar Sanctions, and the Evolving Limits of Economic Security," 78 *Rutgers University Law Review* (forthcoming 2026), 23, https://doi.org/10.2139/ssrn.6424698.

[80] *United States—Certain Measures on Steel and Aluminium Products (Canada)*, WT/DS550/R (circulated July 11, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds550_e.htm. The report records a mutually agreed solution and contains no substantive finding under GATT article XXI. For the substantive findings discussed in the text, see *United States—Certain Measures on Steel and Aluminium Products (China)*, WT/DS544/R (circulated December 9, 2022), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm.

[81] *United States—Certain Measures on Steel and Aluminium Products (China)*, WT/DS544/R (circulated December 9, 2022), para. 2.1, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm.

[82] *United States—Certain Measures on Steel and Aluminium Products (China)*, paras. 2.1–2.2.

[83] *Russia—Measures Concerning Traffic in Transit*, WT/DS512/R (circulated April 5, 2019; adopted April 26, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.

[84] *Russia—Measures Concerning Traffic in Transit*, para. 7.79.

Section 232 on national security is the serious violation of the WTO rules and the expansion of a national security to include so called 'national economic security' would erode the fabric of the multilateral free trading system.[85]

Furthermore, the US measures exempted others steel and aluminium imports from Canada and Mexico was exempted which is in contravention of Articles XX and XXI of GATT 1994.[86] In defence, the US submitted that the principle of Most-Favoured-Nation (MFN) is outdated and no longer relevant in this era of "deepening divergence" wherein some are members are unwilling to play by the WTO rules and engaging in unfair trade practice like overcapacity of certain products.[87] According to the US, the current WTO rules should be flexible in manner that allows preferential treatment to other trading members without extending those treatment to other trading members.[88] The US submission in respects to the reform of the MFN principle is supported by the EU. The EU pointed out that in light of changing times of the "mismatch between the current WTO rulebook and today's trade environment"[89] embedded in market-distorting practices and a rapid rise in digital trade calls for the reform of MFN principle.[90] The EU proposed that the existing WTO rules should be re-adjusted to allow for a "differentiated decision-making", so that the "like-minded" members could lower the level of tariffs on a reciprocal basis without being blocked by non-participating members.[91] In the same breath, US argues that the consensus rule-based as the pillar of the WTO decision-making process is one of the barriers for the WTO to effectively address the issue of steel overcapacity as the "perpetrators" and the "victims" of this trade distortion needs to reach a consensus, which unlikely to happen.[92] According to US, the WTO is not suitable and no longer viable forum to address the issues like global steel overcapacity unless members are willing to have robust engagement on how to deal with such market-distorting practices.[93]

Although both US and EU submission on the reform of the MFN principle is more persuasive, however, the disbarment of the MFN could weaken one of pillar on which the WTO stands on – non-discrimination. As stipulated in the preamble of the Marrakesh Agreement establishing the WTO, the

[85] Zhao Yangdi, "Study on WTO Compliance of Additional Tariffs on Imported Steel and Aluminium under Section 232 of the U.S. Trade Expansion Act 1962," *Journal of WTO and China* 9, no. 3 (2019): 43.
[86] *United States—Certain Measures on Steel and Aluminium Products (China)*, para. 2.9.
[87] United States, "On WTO Reform," WT/GC/W/984 (December 15, 2025), para. 3.1, https://www.wto.org/english/tratop_e/reform_e/reform_e.htm.
[88] United States, "On WTO Reform," paras. 3.1–3.2.
[89] European Union, "EU Submission on WTO Reform," WT/GC/W/986 (January 21, 2026), https://www.wto.org/english/tratop_e/reform_e/reform_e.htm.
[90] European Union, "EU Submission on WTO Reform," 4.
[91] European Union, "EU Submission on WTO Reform," 7.
[92] United States, "On WTO Reform," para. 4.7.
[93] United States, "On WTO Reform," WT/GC/W/984.

"…elimination of discriminatory treatment in international trade relations" is the core founding principle of the multilateral trading system.[94] The author argues that whenever multilateral trading system face with an unforeseen challenges like global steel overcapacity or a rise in digital trade, members should not hasty to uprooted core founding principle of the WTO like MFN principle. It is proposed that, considering instability in geopolitical landscape, which clouded with the market-distortion practices such as global steel overcapacity, members should instead put forward some of the progressive mechanisms on how to tighten the loose "nuts" and "bolts" within the WTO rulebook in a pursuit to reinforce compliance.

6. Proposal for South Africa

As argues by some members, in particular EU and the US that the current WTO rules appear to be grumbling to deal with the issue of overcapacity in steel sector, this calls for an alternative extraordinary measure. Despite that the US unilateral measures steel and aluminium products under the disguised of national security as an exception under Article 21 of GATT reciprocal tariffs on steel imports from certain countries it has been dismissed by various WTO panels, the US maintained those unilateral measures. Thus, the defiance US posture towards the WTO Dispute Settlement Mechanism tantamount to undermine the legitimacy of the WTO rule based. As such, it is not recommended for South Africa to follow the US "footsteps" in addressing the issues of global steel overcapacity. On the other hand, the threshold on steel related on imports deployed by EU to 50 percent it's a purely a protective strategy rather than a trade remedies. Although, the EU threshold strategy argued to conform with the WTO rules it's a purely a protective strategy rather than a trade remedy. The excessive protection of the certain sector with the international trade could result into trade distortion.

Therefore, this paper argues that any measures which is discriminatory in nature or providing a overprotection in the quest to offset adverse effects of the steel overcapacity may exacerbate the situation. In this light, both the EU and the US alternative protective instruments to address the global steel overcapacity crisis are not entirely suitable option for other members like South Africa faced with the same conundrum. Thus, this paper suggests that South Africa should deploy trade remedies effectively. As above discussed, South Africa has since initiated a countervailing investigation in 2008. In addition, the ITAC take longer time to concludes investigations on anti-dumping and safeguard measures. This is unnecessary further injury to the domestic industry, which could have been avoided. To speedily concludes its trade remedies investigations, it suggested that the ITAC should redirect the function of its investigatory sub–divisions. Based

[94] Marrakesh Agreement Establishing the World Trade Organization, preamble.

on the ITAC organisational structure, the investigation into trade remedies is sub–division; Trade Remedies I and Trade Remedies II.[95] In practice, the investigation into anti-dumping, countervailing and safeguard measures are not conducted separately as per organisational structure. This paper proposes Trade Remedies I should conduct anti-dumping and countervailing investigation and Trade Remedies II focus only on the safeguard investigations. The sub-division of the investigation into Trade Remedies I and Trade Remedies II could expedient the investigations within the prescribed WTO time-limits and timeous offer protection to the domestic industry.

7. Conclusion

The WTO requires an urgent reform to be considered as a suitable forum to some of the unforeseen issued like overcapacity in steel production. As it was extensively deliberated in this paper, that the WTO rules are struggling to deal with the issues of global steel overcapacity. Despite the prolific use of the measures, the widespread of overcapacity persist within the multilateral trading system. That said, trade remedies remain effective instruments with the WTO rules to domestic industry against market-distorting practices. In response to global steel overcapacity, US opted to invoke a unilateral tariff increase to selected steel and aluminium exports under the disguise of national economic, which was declared by several panel not to be incompatible with the relevant WTO rules. On the other hand, EU import quota threshold could be a possible option for South Africa. Besides, the ITAC preliminary findings on steel review propose to among others, import control and tariffs increase to certain steel products. It is argued that even though the EU approach conforms to the WTO rules, it merely results in excessive protection of the domestic industry but does not address the global overcapacity in steel production. Although, this paper does not prescribe a panacea to the issue of global overcapacity, it proposes that the South Africa needs to exhaust all forms of trade remedies, particularly countervailing measures. The use of countervailing measures in tandem with other measures within the WTO framework would add a layer of relief to the domestic steel industry.

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The Applicable Law to the Substantive Validity of Arbitration Agreements, a Comparative Approach Under the UNCITRAL Model Law and the New York Convention

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Abstract

My objectives are to analyze the applicable law to substantive validity of arbitration agreements under the Model Law and the New York Convention. Determining such law is relevant during all stages of the arbitral process, when jurisdiction of the tribunal is contested, determining whether there is a valid arbitration agreement, when anti-suit injunctions are sought, or at set-aside and enforcement stages. The importance of determining the applicable law is crucial. In the so-called Dallah or Kabab-Ji sagas courts in England and France, applying (or interpreting divergently) separate laws to the arbitration agreements, reached contradictory outcomes: UK courts deemed the tribunal had no jurisdiction over a non-signatory, whereas under the French law at the seat, it had, therefore the French court upheld the award, which dismissed the annulment action, but the England court refused enforcement. Neither the UNCITRAL Model Law nor the New York Convention provide for choice-of-law rules for the substantive validity of arbitration agreements. I will analyze certain jurisdictions to see how courts apply the above conventions. The scope is to determine the law implicitly chosen by the parties in the absence of an express choice, and what is the objective connector in the absence of choice.

Keywords: *applicable law to arbitration agreements; New York Convention; international commercial arbitration; UNCITRAL model law.*

1. Introduction

International commercial arbitration is a form of alternative dispute resolution frequently used in international business disputes, by which disputes can be finally solved in a neutral forum according to the parties' agreement, by independent, non-governmental decision makers.[2]

As rightly emphasised in doctrine, "international arbitration is ordinarily consensual – the parties must agree to arbitrate their differences".[3]

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[2] Gary B. Born, *International Commercial Arbitration*, 2nd ed. (Alphen aan den Rijn: Kluwer Law International, 2014), 70, https://search.worldcat.org/de/title/international-commercial-arbitration/oclc/903592530.

[3] Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th ed. (Alphen aan den Rijn: Kluwer Law International, 2016), 1, https://books.google.com/books?id=of-SnQAACAAJ. See also William W. Park, "Non-Signatories and International Contracts: An Arbitrator's Dilemma," in *Multiple Party Actions in International Arbitration*, ed.

Such a choice of the parties is generally included in an arbitration agreement, which is considered "a sui generis type of contract, not involving a typical commercial bargain but instead involving a commitment by the parties to a particular procedure for resolving their future commercial disputes".[4]

A valid arbitration agreement "is a system changer: it extinguishes the jurisdiction of the state courts that would normally be competent and brings a different dispute-resolution system into life."[5]

Given its specific features, the arbitration agreement is governed by a specialized legal regime, necessary to ensure its validity and enforceability, which is the ultimate purpose of the parties' agreement to arbitrate.[6]

Such legal regime includes not only national legislation, but also international instruments aimed at ensuring finality and enforceability of parties' choice, mainly in the framework developed by or under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958),[7] (the "New York Convention"), or the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (the "Model Law")[8].

The New York Convention defines the arbitration agreement in Article II, as: "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

The UNCITRAL Model Law defines the arbitration agreement in article 7(1) as follows: "'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement".[9]

Belinda Macmahon (Oxford: Oxford University Press, 2009), 3, https://doi.org/10.1093/oso/9780199551729.001.0001, quoted in Andrea Sesin-Tabarelli, "Extension of the Arbitration Agreement to Non-Signatories: Landscape of Legal Theories and Jurisdictional Approaches," *ICC Dispute Resolution Bulletin* 2017, no. 4: 17, https://2go.iccwbo.org/icc-dispute-resolution-bulletin-2017-issue-4.html.

[4] Born, *International Commercial Arbitration*, 236.

[5] Marco Stacher, "Jurisdiction and Admissibility under Swiss Arbitration Law—The Relevance of the Distinction and a New Hope," *ASA Bulletin* 38, no. 1 (2020): 57, https://doi.org/10.54648/ASAB2020005.

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[7] United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, June 10, 1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.

[8] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006*, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

[9] UNCITRAL, *Model Law on International Commercial Arbitration*, art. 7(1), https://uncitral.un.

When tasked with determining whether the parties in parties have consented to arbitration, courts might find that consent exists not only because it was expressly recorded in a document, but also on the basis of implied consent, for example because parties have participated in the negotiation of the contract containing the arbitration clause, or based on parties' conduct in performing the contract, or because parties had knowledge of an arbitration agreement.

In this respect, there is general agreement on the fact that active participation by a non-signatory in the negotiation, execution, performance and/or termination of the contract containing an arbitral agreement can be taken as evidence of implied consent to arbitrate".[10]

The extent of consent between the parties in dispute is also assessed by the courts.

Jurisdiction "boils down to whether the parties entered into a valid arbitration agreement and whether the dispute is within its scope".[11]

Therefore, arbitration is generally based on consent, which is based on an agreement between the parties in dispute.

Such agreement is considered separable from the main agreement, mainly for preserving its validity.[12] As such, doctrine has expressed the view that the 'separability' doctrine could be used to explain that "[t]he very consent to arbitration, then, allows [..] to infer a willingness to arbitrate any challenges made to the main agreement - sensibly imputing to the parties a preference for what has neatly been termed "the practical advantages of one stop adjudication".[13]

One of the practical consequences of the separability presumption is that the law applicable to the arbitration agreement might be different than the law applicable to the main agreement. They need not necessarily differ, but they might: "[i]ndeed, in many cases, the same law governs both the arbitration agree-

org/sites/default/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

[10] Eduardo Silva Romero and Luis Miguel Velarde Saffer, "The Extension of the Arbitral Agreement to Non-Signatories in Europe: A Uniform Approach?" *American University Business Law Review* 5, no. 3 (2018): 372, https://digitalcommons.wcl.american.edu/aublr/vol5/iss3/9/.

[11] Stacher, "Jurisdiction and Admissibility," 57.

[12] As Born explains, "The separability presumption has important practical consequences. It means that challenges to the parties' underlying contract will generally not be regarded as affecting or vitiating the parties' 'separate' or 'autonomous' arbitration agreement." Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th ed. (Alphen aan den Rijn: Kluwer Law International, 2016), 126, https://books.google.com/books?id=of-SnQAACAAJ.

[13] Alan Scott Rau, "Asymmetrical Arbitration Clauses—The United States," in *Jurisdictional Choices in Times of Trouble*, ed. Georges Affaki and Horacio Grigera Naón (Paris: International Chamber of Commerce; Alphen aan den Rijn: Kluwer Law International, 2015), 7, https://2go.iccwbo.org/jurisdictional-choices-in-times-of-trouble-institute-dossier-xii-insitute-series-config.html; Dietmar Czernich, "The Law Applicable to the Arbitration Agreement," in *Austrian Yearbook on International Arbitration 2015*, ed. Christian Klausegger et al. (Vienna: Manz, 2015), 73, https://www.schiedsrichter.at/wp-content/uploads/2016/11/Austrian_Yearbook_on_International_Arbitration_2015.pdf.

ment and the underlying contract notwithstanding the separability of the arbitration agreement. […] The essential point, however, is that, where the arbitration clause is a separate agreement, a separate conflict of laws analysis must be performed with regard to that separate agreement".[14]

The principle of separability and the principle of competence-competence are confirmed for example both by the 2021 ICC Rules[15] and the applicable French procedural rules.

Under article 9(6) of the 2021 ICC Rules: "Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void."

Also, French law recognizes the principle of separability of an arbitration agreement, providing that the nullity of the contract containing the arbitration agreement does not have any effect on the validity of the arbitration agreement and vice versa.

As such, Article 1447 of the French Code of Civil Procedure provides that: "An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void. If an arbitration clause is void, it shall be deemed not written."[16]

Also, Article 1448 of the French Code of Civil Procedure provides for the negative effect of competence-competence: "[w]hen a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable."

The arbitration agreement's formation, interpretation, termination, scope and effects are subject to the law applicable to it. This is generally referred to as the law applicable to the substantive validity of the arbitration agreement, and it is largely considered to include aspects such as its interpretation, and issues of consent, error, fraud, and scope of the arbitration agreement.

Other aspects of an arbitration agreement may be governed by different laws, such as:

- formal validity (mostly governed by the law of the seat),
- the subjective capacity of the parties (normally governed by the law of their nationality in case of a natural person and its seat in case of a corporation),

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[14] Born, *International Commercial Arbitration*, 464.

[15] International Chamber of Commerce, *ICC Arbitration Rules 2021*, art. 9(6), https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

[16] France, *Code of Civil Procedure*, art. 1447, https://www.wipo.int/wipolex/en/legislation/details/23226.

- the authority of representatives to enter into an arbitration agreement (governed by the law applicable to the power of attorney),

- matters of subrogation and transfer, such as non-signatories (however, these are most of the times considered to be governed also by the applicable law to the substantive validity of the arbitration agreement. For example in the *Kabab-Ji* case which concerned non-signatories, it was "undisputed that the law governing the validity of the arbitration agreement governs the question of whether KFG became a party to the arbitration agreement",[17]

- the question of objective arbitrability (governed normally by lex fori), or consumer protection aspects.

Determining the law applicable to the substantive validity of an international arbitration agreement might be relevant during all stages of the arbitral process, for example when jurisdiction of the tribunal is contested, to determine whether there is a valid arbitration agreement, or when anti-suit injunctions are sought, and of course at set-aside and enforcement stages.[18]

According to the doctrine, certain options exist as to which might be the law applicable to the substantive validity of the arbitration agreement: (a) the law of the forum where judicial enforcement of the agreement is sought; (b) the law expressly or impliedly chosen by the parties to govern the arbitration agreement itself; (c) the law of the arbitral seat; (d) a "validation" principle; and (e) international law.[19]

2. Practical Implications of Determining the Applicable Law: *Dallah and Kabab-Ji Sagas*

The importance of correctly determining the applicable law (and uniformly) cannot be stressed enough. The so-called Dallah or Kabab-Ji sagas[20] are illustrative in this respect.

In these cases, courts in England and France had divergent views as to

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[17] *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*, [2020] EWCA Civ 6, https://www.bailii.org/ew/cases/EWCA/Civ/2020/6.html. See also Crina Baltag and Mihaela Maravela, "Applicable Law to Arbitration Agreement and No Oral Modification Clause: Case Note on the Decision of the England and Wales Court of Appeal, 20 January 2020," *Contemporary Asia Arbitration Journal* 13, no. 2 (2020): 479–500, https://ssrn.com/abstract=3776575.

[18] Julian D. M. Lew, "Sulamérica and Arsanovia: English Law Governing Arbitration Agreements," in *Jurisdictional Choices in Times of Trouble*, ed. Georges Affaki and Horacio Grigera Naón (Paris: International Chamber of Commerce; Alphen aan den Rijn: Kluwer Law International, 2015), 136, https://2go.iccwbo.org/jurisdictional-choices-in-times-of-trouble-institu te-dossier-xii-insitute-series-config.html.

[19] Gary B. Born, *International Arbitration: Law and Practice*, 2nd ed. (Alphen aan den Rijn: Kluwer Law International, 2016), 47–72, https://books.google.com/books?id=kgZejwEACAAJ.

[20] Mihaela Maravela, Keilin Anderson, and Nick Papadimos, "2020 in Review: Proper Law of Arbitration Agreement," *Kluwer Arbitration Blog*, January 1, 2021, https://legalblogs.wolters kluwer.com/arbitration-blog/2020-in-review-proper-law-of-arbitration-agreement/.

the applicable law to the arbitration agreement. Applying (or interpreting divergently) separate laws to the arbitration agreements, UK courts deemed the tribunal had no jurisdiction over a non-signatory, whereas under the French law at the seat, it had. The result was that the French court – the seat court – upheld the award, which dismissed the annulment action, but the England court refused enforcement.

The courts reached different conclusions because they applied different laws to the arbitration agreement, according to their choice-of-law systems.

In the Kabab-Ji case the issue was whether the arbitral tribunal was correct into holding it has jurisdiction over a non-signatory. The underlying contract (a franchise agreement) was subject to English law, and the arbitration clause referred the dispute to ICC arbitration with the seat in Paris.

According to French law jurisprudence, not only is the arbitration agreement separable from the main agreement, but it is also deemed to be independent from any domestic law. Its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law, provided that no mandatory provision of French law or international public policy (*ordre public*) is affected. Therefore, under the French doctrine, there is no need to ascertain the (national) law applicable to the arbitration agreement. Rather, one should focus solely on the will of the parties.

Indeed, in 1972 the Court of cassation held that an arbitration agreement could be governed by another law than the law governing the underlying contract.[21] And, in 1993, it admitted that an arbitration agreement was independent from any domestic law.[22]

The Paris Court of Appeal applied the French principles and determined that the proper law to the arbitration agreement is the law at the seat, on the ground that the parties' in the governing law of the main contract (in this case English law) could not override their ulterior choice in favor of Paris as the seat of arbitration, and French law was (i) the law applicable at the seat of arbitration, and thus (ii) to the arbitration agreement.

The court stated that: "[p]ursuant to a substantive rule of international arbitration law, the arbitration clause is legally independent from the underlying contract in which it is included either directly or by reference, and its existence and validity are interpreted, subject to the mandatory rules of French law and international public policy, according to the common will of the parties, without the need to refer to any national law." [para. 25] the Court also prudently confirmed that its approach could only apply in cases where the parties did not choose in the contract the arbitration agreement's governing law: "…no express provision was agreed between the parties which would designate English law as

[21] *Hecht v. Buisman's*, Cour de cassation, July 4, 1972, https://www.legifrance.gouv.fr/juri/id/JURITEXT000006987522/.

[22] *Société Dalico v. Khoms et El Mergeb*, Cour de cassation, 1st Civil Chamber, December 20, 1993, no. 91-16.828, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007030314/.

governing the arbitration clause…". [para. 29]

As a result, it then held that under the applicable French law, the tribunal had jurisdiction over the non-signatory.

On the other hand, the English courts followed the *Sulamerica* standard[23] applying the English conflict of laws rules, which require to consider (i) whether the parties expressly chose a law governing the arbitration agreement; (ii) if they did not, whether the parties made an implied choice of such law; and (iii) in the absence of either choice, which system of law has the "closest and most real connection" with the arbitration agreement.

The UK court found that English law applies to the arbitration agreement. It held that the express choice of law in the main contract may amount to an express choice of law of the arbitration agreement, if the construction of the contract so mandates (essentially "This Agreement" clauses, which means that the law agreed for the main contract covers all clauses, including the arbitration clause).

A similar situation had happened before in the *Dallah* saga, where despite its previous involvement in negotiations with Dallah, Pakistan was not a signatory to the main agreement that reached arbitration. The arbitral tribunal seated in Paris uphold jurisdiction over the non-signatory. Subsequently French courts allowed exequator, but the enforcement courts in England reached the opposite outcome (despite applying the same French law as the courts at the seat) and denied enforcement.

In the Dallah v. Pakistan case, unlike the United Kingdom Supreme Court, the Paris Court of Appeals (Cour d'appel) gave full effect to the underlying arbitration agreement (in the UK: [2010] UKSC 46; in France: docket No 09/28533). In this case, an arbitral tribunal sitting in Paris rendered an award against the respondent, the government of Pakistan. The claimant brought enforcement proceedings in England to enforce the award, which Pakistan sought to resist. The English courts applied French law and ruled that contrary to the Tribunal's decision Pakistan was not bound by the arbitration clause because the actual signatory of the agreement was a trust created by the Ministry of Religious Affairs. Accordingly, the English courts refused to enforce the award. At the same time, Pakistan had applied to the French courts to have the Paris-seated award set aside.

The Paris Court of Appeals, which was confronted with the same question, namely whether Pakistan was bound by the arbitration clause as a matter of French law, reached the opposite conclusion to that of the English courts. The

[23] *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*, [2012] EWCA Civ 638, https://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html. See also Georges Affaki and Horacio Grigera Naón, "Introductory Remarks," in *Jurisdictional Choices in Times of Trouble*, ed. Georges Affaki and Horacio Grigera Naón (Paris: International Chamber of Commerce; Alphen aan den Rijn: Kluwer Law International, 2015), 7, https://2go.iccwbo.org/jurisdictional-choices-in-times-of-trouble-institute-dossier-xii-insitute-series-config.html.

French court ruled that Pakistan was bound by the arbitration clause by virtue of its actions both before and after the contract was concluded.

Therefore, on one hand, according to French law jurisprudence, the arbitration agreement is deemed to be independent from any domestic law. Its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law.[24]

3. Provisions of the New York Convention and the UNCITRAL Model Law

According to article V1(a) of the New York Convention: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; […]."

Furthermore, the UNCITRAL Model Law provides in article 34(2)(a)(i) that: "Article 34. Application for setting aside as exclusive recourse against arbitral award (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. (2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; […]".

In addition, article 36(1)(a)(i) of the Model Law stipulates as follows: "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; […]"

Neither the above provisions contain an express choice-of-law rule for the law applicable to the substantive validity of the arbitration agreements.

They only contain provisions dealing with the setting aside and enforcement, namely article 34(2)(a)(i) of the Model Law for the setting aside of arbitral awards, respectively article 36(1)(a)(i) of the Model Law or article V1(a) of the New York Convention for the recognition and enforcement of arbitral awards.

[24] *Société Dalico v. Khoms et El Mergeb*, no. 91-16.828.

Both the provisions of the New York Convention and of the Model Law cited above, basically stipulate that an award might be set aside or enforcement refused if the arbitration agreement was not valid under the law to which the parties subjected it, or in the absence of any indication thereon, under the law of the seat.

The above provisions are largely considered to apply to questions of substantive validity of the arbitration agreement as well.

The conclusions that seem to be clear from the above provisions are that:

- the parties' agreement is the starting point to determine the applicable law, reflecting the key principle of party autonomy in arbitral proceedings,

- second, parties' choice can be express or implied; this conclusion results from the wording used by the New York Convention and the Model Law: "failing any indication thereon", which should be construed to allow not only express, but also express choice, and lastly,

- in the absence of parties' agreement, the fallback is on the law at the seat.

4. Application of the Above Provisions in Selected Jurisdictions

Looking at few Model Law jurisdictions, there is rarely a reference to the Model Law by courts when determining the law applicable to the substantive validity of arbitration agreements. However, courts often rely on the New York Convention's provisions indicated above for recognition and enforcement of arbitral awards.

In my research I have identified at least four main categories in certain analysed Model Law or New York Convention jurisdictions – either statutory or case law-based conclusions, specifically in cases where parties selected the law governing their main contract and selected the seat of the arbitration in a different jurisdiction:

- Countries applying the law of the main contract, mainly as implied choice (e.g. Austria – with fallback on the law of the seat applying New York Convention, Singapore[25]).

- Countries applying the law of the seat, either as provided by statutory provisions or by case law interpretation, but mainly as the fallback (Scotland,[26] Belgium, Bulgaria, Cyprus, Greece, Germany).

- In between the two systems: Hungary, where its statutory provisions[27] stipulate that if no law is chosen, the law governing the main contract applies.

[25] *BNA v. BNB*, [2019] SGCA 84, https://www.elitigation.sg/gdviewer/s/2019_SGCA_84.

[26] Scotland, *Arbitration (Scotland) Act 2010*, https://www.legislation.gov.uk/asp/2010/1/cros sheading/arbitration-agreements (accessed August 3, 2026).

[27] Richard Schmidt, "Hungary: Enforcing Arbitration Agreements by Applying Foreign Law," *Kluwer Arbitration Blog*, February 7, 2022, https://legalblogs.wolterskluwer.com/arbitration-blog/hungary-enforcing-arbitration-agreements-by-applying-foreign-law/.

However, the law of the seat of arbitration may be used if it has a closer connection to the agreement.

- So-called validation principle, where courts apply any of the prescribed laws that validate the arbitration agreement (e.g. Spain,[28] Peru[29]), the laws mainly considered being the law governing the substance of the dispute, the law of the main contract, the law of the seat. Similar provisions in non-Model Law countries, including chiefly Switzerland,[30] and also Portugal and Romania.

This might be seen as an inconsistent interpretation of the Model Law and the New York Convention. However, it might be just a reporting issue, as jurisdictions applying the law of the seat to the substantive validity of the arbitration agreement, might already have found there was no express or implied choice of the parties.

5. Proposed Interpretation of the New York Convention and the Model Law

My proposal on the interpretation of articles 34(2)(a)(i), respectively 36(1)(a)(i) of the Model Law, respectively of article V(1)(a) of the New York Convention, which, as mentioned, are generally considered to apply to the substantive validity of the arbitration agreements as well, is that the likely intention of the legislator was to consider parties' choice for the law of the main contract as an implied choice for the law applicable to the arbitration agreement.

The starting point of my analysis is that there are arguably two main systems that might govern the substantive validity of an arbitration agreement: the law of the main contract and the law of the seat.

Further, it should not be debatable that the New York Convention and the Model Law allow for implicit choice, given the use of the wording "failing any indication thereon".

In addition, in the absence of choice (express or implied), the fallback, as an objective connector, is on the law of the seat.

Therefore, under both the New York Convention and the Model Law, the implicit choice was most likely intended for the law of the main contract, as the fallback is on the law of the seat in both mentioned instruments, as an objective connector that comes into play in the absence of parties' choice (express or implied), which in turn, is of subjective nature.

This makes sense because it gives prevalence to the intention and choice

[28] Spain, *Act 60/2003 of 23 December on Arbitration*, https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_on_arbitration_%28Ley_60_2003__de_arbitraje%29.PDF.

[29] Peru, *Legislative Decree No. 1071 Governing Arbitration* (2008), https://cdn.www.gob.pe/ uploads/document/file/377449/DL-1071-ley-que-norma-el-arbitraje.pdf.

[30] Switzerland, *Federal Act on Private International Law of 18 December 1987*, chap. 12, as amended January 1, 2021, https://www.swissarbitration.org/wp-content/uploads/2021/05/20210129-Chapter-12-PILA_Translation_English.pdf.

of the parties in a process of contractual interpretation, whereas determining that the objective factor/closest connection leading to the law of the seat, is an objective process applied irrespective of the parties' intentions.[31]

The interpretation seems to be consistent with the approach in most jurisdictions, apart from those that only provide a two-stage test: express choice of the parties and fallback on the law of the seat. But apart from those situations, most of the analysed jurisdictions apply a three-stage test: express choice, implied choice for the law of the main contract, with fallback on the law of the seat.

This might mean that in practice less situations might trigger the applicable law as being the law of the seat, because in most cases there might not be sufficient elements pointing to another solution than that the parties implicitly opted for the same law to apply to all their clauses in the main contract, including to the arbitration agreement.

The issue remains on what the principles in assessing whether there is an implied choice or not are, as the more expansive the interpretation, the less cases falling on the law of the seat would be.

It is worth mentioning in this context the evolution we have seen in UK courts on the issue of whether an implied choice of the parties should be solved in favor of the seat or of the main contract:

- *implied choice for the law of the main contract*. As such, an initial approach was that where parties have made an express choice of law of the main contract the arbitration agreement will normally be governed by it: e.g. Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd [2001] EWHC 481 (Comm) (4 October 2001) (at [32]),[32] with no separate inquiry at the second and the third stage, as a choice was implied by reference to the body of law with which the arbitration agreement has its closest and most real connection; Svenska Petroleum Exploration AB V Lithuania [2005] EWHC 2437 (Comm) (at [76])[33]);

- *implied choice for the law of the seat.* A second approach that I identified in the practice of UK courts was that there is an implied choice for the law of the seat (*XL Insurance Limited v Owens Corning [2001]*, C v D, [2007] EWCA Civ 1282 (at [22-26]),[34] Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm) (at [20-24],[35] although in *C v D* and in *Abuja* an implied choice was derived from the analysis of the closest and most real connection,

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[31] Mihaela Maravela, "Enka v Chubb Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement," *Kluwer Arbitration Blog*, October 11, 2020, https:// legalblogs.wolterskluwer.com/arbitration-blog/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement/.

[32] *Sonatrach Petroleum Corporation (BVI) v. Ferrell International Ltd.*, [2001] EWHC 481 (Comm), https://www.bailii.org/ew/cases/EWHC/Comm/2001/481.html.

[33] *Svenska Petroleum Exploration AB v. Lithuania*, [2005] EWHC 2437 (Comm), https://www.bailii.org/ew/cases/EWHC/Comm/2005/2437.html.

[34] *C v. D*, [2007] EWCA Civ 1282, https://www.bailii.org/ew/cases/EWCA/Civ/2007/1282.html.

[35] *Abuja International Hotels Ltd. v. Meridien SAS*, [2012] EWHC 87 (Comm), https://www.bailii.org/ew/cases/EWHC/Comm/2012/87.html.

with no separate inquiry at the second and third stage;

- *implied choice for the law of the main contract.* As such, *Sulamérica*[36] was the first to separately undertake the three stage analysis and decided that since there is no express or implied choice, at the third stage the arbitration agreement has the closest and most real connection to the seat; at the second stage, the court established that as a principle, there is an implied choice of law governing the arbitration agreement for the law governing the main contract, absent other factors (such as choosing another country as the seat and for reason of avoiding unenforceability of the arbitration agreement, as the court found in *Sulamérica,* citing also *XL* for the later reason), the seat alone not being sufficient to rebut the presumption (at [26]); *Arsanovia* followed suit (at [21][37]);

- *implied choice for the law of the seat*, at the second stage (Enka [2020] EWCA Civ 574[38]); as I explored and argued in previous writings, "[t]he reliance of the Court of appeal in Enka on XL and C v D to conclude that the general rule should be that the law of the arbitration agreement is the curial law as a matter of implied choice might be far-fetched, as those cases concerned an arbitration agreement with a specific reference to the provisions of the Arbitration Act. The court in XL had analysed whether such reference meant that English law would govern "not merely the arbitral procedure in the narrowest sense, but also the jurisdiction of the arbitral tribunal and the formal validity of the arbitration agreement", and concluded that the latter is true. This case specific difference was also considered by the lower court in C v D (as cited in Enka at [75]).

What is also arguable is that the court relied on the separability doctrine to justify its conclusions; by doing so it departed from Sulamérica where it was specifically held that "[t]he concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes"; by doing so the court extended unwarrantedly the applicability of the separability doctrine to determine the law applicable to the arbitration agreement, instead of using it just as a starting point to undertake the analysis of the proper law of the arbitration agreement separate from the same analysis with the main contract.

Moreover, the court placed too much weight to the commercial sense of businessman that would not be expected to choose two different systems of law to apply to their arbitration package (at [99]). However, as the arbitration package involves complicated legal discussions onto the legal implications of the different applicable systems of laws, and it is unlikely that all such intricacies are explained

[36] *Sulamérica*, [2012] EWCA Civ 638.
[37] *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm), https://www.bailii.org/ew/cases/EWHC/Comm/2012/3702.html. See Lew, "Sulamérica and Arsanovia," 136.
[38] *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*, [2020] EWCA Civ 574, https://www.bailii.org/ew/cases/EWCA/Civ/2020/574.html.

for these midnight clauses, the traditional and opposing view, that businessman should not be taken to have intended that different systems of law should apply to their relationship might be more realistic."[39]

- *implied choice for the law of the main contract* (Enka [2020] UKSC 38[40]). As I advanced in earlier writings, "[t]he arguments referring to the New York Convention, that the majority found compelling reason for treating an arbitration agreement as governed by the law of the seat of arbitration in the absence of choice, will probably be considered a welcome development by those advocating that English courts ought to realign with the New York Convention (according to which absent an agreement of the parties, the applicable law of the arbitration agreement is the law of the seat, Article V1(a) of the New York Convention; the same in Article 34 2a(i) of the UNCITRAL Model Law).

The argument of the majority, that a reason for applying the law of the seat as a default rule in the absence of a(n express or implied) choice is giving effect to commercial purpose, is an important argument as well, as ultimately parties chose a neutral seat of arbitration that is expected to be supportive of arbitration. When parties chose London as the seat of arbitration, like in Enka, they might consider inter alia that English courts are known for adopting a pro-arbitration approach and are most likely to grant anti-suit injunctions in support of arbitration by precluding the enjoined party to continue court proceedings in breach of the arbitration agreement. The ultimate purpose is for the parties' commercial agreement to arbitrate to be upheld and parallel litigation prevented."[41]

- *no implied choice and fallback on the law of the seat according to the English Arbitration Act 2025*.[42]

Areas of interpretation also remain in the absence of parties' agreement for the law of the main contract and/or for the seat.

There are arguments both in favour or against either approach, but I argue that the decisive factor should be creating uniformity and certainty. Parties choosing arbitration should be able to rely on a simple system without the need to litigate over the law applicable to their arbitration agreement.

It might be for this reason that the UK legislator settled the matter in favor of the seat, despite its Supreme Court favoring the law of the main contract in *Enka* as described above, and subsequently in Unicredit.[43] Moreover, given the extended scope of the express agreement in Kabab-Ji, the English Arbitration Act 2025 clarifies that such clause does not represent express consent: "[..] agreement

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[39] Mihaela Maravela, "Hold on to Your Seats, Again! Another Step to Validation in Enka v Chubb Russia?" *Kluwer Arbitration Blog*, May 5, 2020, https://legalblogs.wolterskluwer.com/arbitration-blog/hold-on-to-your-seats-again-another-step-to-validation-in-enka-v-chubb-russia/.

[40] *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*, [2020] UKSC 38, https://www.bailii.org/uk/cases/UKSC/2020/38.html.

[41] Maravela, "Enka v Chubb Revisited."

[42] United Kingdom, *Arbitration Act 2025*, c. 4, https://www.legislation.gov.uk/ukpga/2025/4.

[43] *UniCredit Bank GmbH v. RusChemAlliance LLC*, [2024] UKSC 30, https://supremecourt.uk/uploads/uksc_2024_0015_judgment_117c893794.pdf.

between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that that law also applies to the arbitration agreement." Therefore, if there is no express agreement recorded by the parties for the law governing the arbitration agreement, it means the fallback is the law of the seat.

6. Current Trends in International Commercial Arbitration

The current trend is that more institutions recommend parties to expressly agree on the applicable law to the arbitration agreement.

Notable examples in this respect could be found in the SIAC UNCITRAL Rules Model Clause, revised as of 9 December 2024,[44] which provide that:

"*Where parties intend for SIAC to administer an arbitration governed by the UNCITRAL Arbitration Rules, we recommend that they include the following arbitration agreement in their contracts:*

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules for the time being in force.

The arbitration shall be administered by the Singapore International Arbitration Centre ("SIAC") in accordance with its Practice Note on UNCITRAL cases.

The appointing authority shall be the President or Vice-President of the SIAC Court of Arbitration.

The seat of the arbitration shall be [Singapore].

The number of arbitrators shall be _____.

The language to be used in the arbitral proceedings shall be _____.

The law governing this arbitration agreement shall be _____.

With an explanation being included in the sense that "[..] We recommend that parties agree on the law governing the arbitration agreement. This law potentially governs matters including the formation, existence, enforceability, legality, scope, and validity of the arbitration agreement, and the arbitrability of disputes arising from it."

Another recent example can be found in the Arbitration under the HKIAC Administered Arbitration Rules,[45] according to which:

"*Parties to a contract who wish to have any future disputes referred to arbitration under the HKIAC Administered Arbitration Rules may insert in the contract an arbitration clause in the following form:*

Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

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[44] Singapore International Arbitration Centre, "SIAC UNCITRAL Rules Model Clause," revised December 9, 2024, https://siac.org.sg/uncitral-rules-model-clause.

[45] Hong Kong International Arbitration Centre, "Model Clauses," https://hkiac.org/arbitration/ model-clauses/.

The law of this arbitration clause shall be ... (Hong Kong law). […]"[46]

In case parties do not agree,[47] legislators have started expressly providing for the fallback if parties do not (expressly) agree: the law of the seat, as legislated in the English Arbitration Act 2025 mentioned above, or the law of the main contract, as proposed as an amendment[48] to the Singapore Arbitration Act.

Furthermore, arbitration rules provide for the fallback if parties do not agree.

For example, the LCIA Arbitration Rules 2020 provide that: "[..] the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."[49]

7. Conclusions

Determining the law governing the substantive validity of an international arbitration agreement is essential at every stage of the arbitral process. It may influence the tribunal's jurisdiction, the effectiveness of the parties' consent to arbitrate, the availability of judicial measures in support of arbitration, and ultimately the setting aside, recognition, or enforcement of the award. Nevertheless, the comparative analysis undertaken in this study confirms that identifying the applicable law remains a complex and insufficiently harmonised exercise.

Although the New York Convention and the UNCITRAL Model Law establish party autonomy as the starting point and refer, in the absence of any indication by the parties, to the law of the seat, they do not expressly determine how an implied choice should be identified. National courts and legislators have therefore developed different approaches. Some jurisdictions regard the law governing the main contract as the parties' implied choice for the arbitration agreement, while others give priority to the law of the seat or apply a validation principle designed to preserve the effectiveness of the agreement. These differences demonstrate that the existence of international instruments does not,

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[46] HKIAC explains that the provision identifying the law of the arbitration clause should be included particularly when the law governing the substantive contract differs from the law of the seat. Hong Kong International Arbitration Centre, "Model Clauses," https://hkiac.org/arbitration/model-clauses/.

[47] Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th ed. (Alphen aan den Rijn: Kluwer Law International, 2016), para. 97, https://books.google.com/books?id=of-SnQAACAAJ.

[48] Singapore International Dispute Resolution Academy, *Review of the Singapore International Arbitration Act (2024)* (2025), https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/2025-03/Review%20of%20the%20Singapore%20International%20Arbitration%20Act%20(2024)_final.pdf.

[49] London Court of International Arbitration, *LCIA Arbitration Rules 2020*, art. 16.4, effective October 1, 2020, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

by itself, ensure uniform interpretation.

The *Dallah* and *Kabab-Ji* cases illustrate the practical consequences of this lack of uniformity. The same arbitration agreement and substantially the same factual circumstances may be assessed differently by courts applying distinct conflict-of-laws methodologies. As a result, an award may be upheld at the seat of arbitration but refused recognition or enforcement in another jurisdiction. Such outcomes undermine predictability, generate substantial costs, and may lead to lengthy parallel proceedings concerning jurisdiction instead of the substantive dispute that the parties intended to resolve through arbitration.

Against this background, this study proposes a clear three-stage approach. First, effect should be given to any express choice of law specifically governing the arbitration agreement. Second, in the absence of such an express choice, the law governing the main contract should generally be regarded as the parties' implied choice, unless the contractual language or the surrounding circumstances indicate otherwise. However, where the application of that law would invalidate the arbitration agreement, the law of the seat should apply in order to preserve the effectiveness of the parties' agreement to arbitrate. Third, where no express or implied choice can be established, the law of the seat should operate as the objective connecting factor, consistently with the structure of the New York Convention and the Model Law. This interpretation would reconcile party autonomy with legal certainty and the principle of effectiveness of arbitration agreements.

From a practical perspective, the safest solution remains for the parties to specify expressly the law governing the arbitration agreement. The growing inclusion of such provisions in institutional model clauses confirms an increasing awareness of the importance of this issue. Similarly, recent legislative developments show that states are seeking to replace uncertain judicial tests with clearer statutory rules. Until a more uniform international approach emerges, parties and their advisers should treat the governing law of the arbitration agreement as an essential component of the dispute-resolution clause, particularly where the law governing the main contract differs from the law of the seat.

Ultimately, greater clarity in drafting and greater consistency in interpretation would reduce jurisdictional disputes and strengthen the predictability and effectiveness of international commercial arbitration. A simple and foreseeable framework would allow parties, arbitral tribunals, and courts to focus on resolving the substantive dispute, while ensuring that the parties' original agreement to arbitrate is respected across jurisdictions.

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The Enforcement of Sports Arbitration Awards: A Comparative Approach

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Abstract

This paper examines the enforcement of sports-related disputes arbitration awards by contrasting two distinct models: the traditional state-centred mechanism based on the 1958 New York Convention and the sport-specific model of "self-enforcement", operating within the closed regulatory systems of international sport. The study focuses on awards rendered by the Court of Arbitration for Sport (CAS), especially in football disputes within the FIFA framework and anti-doping disputes governed by the WADA system. Using doctrinal, comparative and case-law analysis, the paper aims to determine whether CAS awards are, in practice, enforced more effectively through internal regulatory mechanisms than through judicial recognition and exequatur procedures. The results indicate that many CAS awards become effective without any state recognition at all, because compliance is secured by governing bodies through disciplinary, eligibility and participation-related sanctions. The paper also addresses how that this self-enforcement model has recently come into tension with key aspects of EU law, notably competition law and effective judicial protection. Its implications are twofold: it highlights both the efficiency of sports-specific enforcement and the need to assess its compatibility with EU law and, where necessary, propose corrective institutional solutions.

Keywords: *arbitral awards, self-enforcement, exequatur, EU law.*

1. Introduction

International sport has evolved into a highly regulated transnational normative order in which disputes are increasingly resolved through specialized arbitral mechanisms rather than through ordinary state courts[2]. Within that framework, the Court of Arbitration for Sport (CAS), established in Lausanne in 1984, has become the central adjudicatory body of world sport, exercising jurisdiction in a broad range of disputes, including contractual, disciplinary, transfer-related, eligibility, and anti-doping matters[3]. In both football and anti-doping, CAS now occupies a functionally superior position within a largely autonomous dispute-resolution structure, one that operates across borders and often independently of

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[2] Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (The Hague: T.M.C. Asser Press, 2019), 1–8, https://doi.org/10.1007/978-94-6265-285-9.

[3] Court of Arbitration for Sport, "History of the CAS," accessed August 3, 2026, https://www.tas-cas.org/en/general-information/history-of-the-cas.html.

the ordinary judicial systems of individual states[4]. This broader context is essential for understanding the specific problem addressed in this paper: not the validity of sports arbitration as such, but the enforcement of sports arbitral awards.

The central research question is whether sports arbitration awards are enforced primarily through the traditional state-centred model of recognition and enforcement under the 1958 New York Convention, or through the internal enforcement mechanisms of sports governing bodies[5]. From a formal legal perspective, CAS awards are arbitral awards and may be recognized and enforced through domestic courts under the classical exequatur model[6]. In practice, however, many sports awards appear to become effective without prior recourse to state courts, because compliance is secured through internal sporting rules, disciplinary procedures, and eligibility-based sanctions. This is particularly visible in the two fields examined in this paper. In football, enforcement is frequently linked to the FIFA regulatory ecosystem, including disciplinary sanctions for non-compliance with final decisions, registration bans, and exclusionary pressures connected to participation in the organized football pyramid[7]. In anti-doping, enforcement is even more clearly internal: suspensions, periods of ineligibility, and disqualification of results are generally implemented directly by anti-doping organizations, federations, and competition organizers through the athlete status system itself[8].

The scope of the paper is deliberately limited to these two areas. From the sports-law perspective, the analysis focuses on football under the FIFA framework and anti-doping under the WADA system, with particular reference to Romanian anti-doping legislation, especially Law no. 310/2021. This limitation is methodologically justified because football and anti-doping offer two distinct but complementary variants of sports self-enforcement. Football illustrates a model in which financial and regulatory compliance is often produced through disciplinary and economic pressure within a closed professional environment. Anti-doping, by contrast, illustrates a model in which enforcement is primarily status-based, since the central consequences of a decision concern eligibility to compete rather than the recovery of assets. The Romanian example is included not as an isolated national case, but as an illustration of how international anti-

[4] Lindholm, *Court of Arbitration for Sport*, 9–20.
[5] United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, June 10, 1958, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.
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[8] World Anti-Doping Agency, *World Anti-Doping Code 2021* (Montreal: WADA, 2021), arts. 10 and 13, https://www.wada-ama.org/sites/default/files/resources/files/2021_code.pdf.

doping obligations are received and operationalized within domestic law.

The novelty of the paper lies in its comparative focus on the enforcement logic of CAS awards. Much of the existing literature on sports arbitration has concentrated on the validity of arbitration agreements in sport, the independence of CAS, or the compatibility of mandatory arbitration with procedural fairness[9]. By contrast, this paper asks how CAS awards actually produce effects in practice. Its working hypothesis, already reflected in the abstract, is that although CAS awards can in principle be recognized through the New York Convention, they are often enforced more effectively through internal sports-governance mechanisms, which are faster, clearer, and less expensive than judicial recognition proceedings. This is especially true where the debtor remains within the organized professional sporting environment. The situation becomes more complex where assets lie outside that environment or where the debtor exits professional sport altogether, which may reactivate the practical relevance of state enforcement. In such a case, the mandatory opt-in arbitration clause would be seen as caducous. In anti-doping, however, the classical New York Convention route is even less central, since sanctions of ineligibility and disqualification are in large measure self-sufficient and operate directly through sporting institutions.

Methodologically, the paper combines doctrinal legal analysis, the comparative method, case-law analysis, and a functional analysis of enforcement mechanisms. Doctrinal analysis is used to examine the New York Convention interpretation, FIFA regulations, the World Anti-Doping Code, and Romanian anti-doping legislation. The comparative method is employed to contrast the traditional state-centred enforcement model with the sports-specific model of self-enforcement, while also distinguishing between football and anti-doping as two different variants of that latter model. Case-law analysis will be used in later chapters in relation to CAS jurisprudence, disciplinary practice, and relevant EU case law. Finally, the paper adopts a functional perspective, asking not merely whether a legal path to enforcement exists, but which path is practically effective, how rapidly it operates, what kind of coercive force it generates, and whether it remains compatible with the broader requirements of domestic and EU law.

2. Historical and Conceptual Framework

2.1. The Court of Arbitration for Sport: Historical Development and Central Adjudicatory Role in World Sport

The Court of Arbitration for Sport (CAS) was established in 1984 in response to the increasing internationalization of sport and to the corresponding need for a specialized dispute-resolution mechanism capable of operating more

[9] Lindholm, *Court of Arbitration for Sport*, 33–55.

rapidly and more coherently than ordinary domestic courts[10]. From the outset, CAS was conceived as a forum adapted to the specific characteristics of sports disputes: transnationality, urgency, technical complexity, and the need for relatively uniform outcomes across jurisdictions[11]. Its early institutional design, however, also generated doubts concerning its independence, since the body was created under the auspices of the International Olympic Committee (IOC) and remained closely connected to it in structural and financial terms.

The decisive moment in CAS's institutional evolution came after the Gundel judgment[12] of the Swiss Federal Tribunal. In that case, the Tribunal accepted that CAS could operate as a genuine arbitral body, but it also signalled that the strength of its ties with the IOC could cast doubt on its independence in cases involving the Olympic movement. The reform that followed in 1994 fundamentally reshaped the institution. The creation of the International Council of Arbitration for Sport (ICAS) and the adoption of a new organizational structure were designed precisely to reinforce CAS's autonomy and legitimacy as an arbitral tribunal. From that point onward, CAS consolidated its position as the principal forum for the resolution of international sports disputes, both in ordinary arbitration and, especially, in appeals from decisions of international federations and other sports governing bodies[13].

Its contemporary role is best understood not merely in institutional terms, but in systemic ones. The academic literature has consistently shown that CAS now occupies a central place in the transnational legal order of sport. It's described as the key adjudicatory site in which *lex sportiva* is shaped, stabilized, and disseminated across sporting sectors and national borders[14]. Similarly, other authors argue that the CAS does not only resolve disputes, but also contributes decisively to the making of a transnational body of sports norms and principles[15]. This does not mean that the CAS is a public court in the constitutional sense. It means, rather, that for a great number of disputes arising within organized sport, CAS is the final and most authoritative adjudicatory instance.

That position is especially significant for the subject of this paper. The more CAS occupies a central and quasi-final role in global sports adjudication,

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[10] Richard H. McLaren, "Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror," *Marquette Sports Law Review* 20, no. 2 (2010): 306–10, https://scholarship.law.marquette.edu/sportslaw/vol20/iss2/2/.

[11] Ian S. Blackshaw, "The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport,'" *Entertainment and Sports Law Journal* 2, no. 2 (2003): 62–66, https://doi.org/10.16997/eslj.139.

[12] *G. v. Fédération Équestre Internationale (FEI)*, no. 4P.217/1992, BGE 119 II 271 (Swiss Federal Tribunal, March 15, 1993), https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F119-II-271%3Ade&lang=de&type=show_document.

[13] Matthieu Reeb, "The Role and Functions of the Court of Arbitration for Sport (CAS)," *International Sports Law Journal*, no. 2 (2002): 23–27.

[14] Lindholm, *Court of Arbitration for Sport*, 33–55.

[15] Lorenzo Casini, "The Making of a Lex Sportiva by the Court of Arbitration for Sport," *German Law Journal* 12, no. 5 (2011): 1317–40, https://doi.org/10.1017/S2071832200017326.

the more important becomes the question of how its awards are made effective. In other words, CAS's historical development and centrality help explain why the issue of enforcement cannot be treated as a secondary procedural matter. It is a structural issue for the functioning of international sport regulatory framework itself. CAS's prominence has therefore to be understood not only through its jurisdictional reach, but also through the practical circulation and effectiveness of its awards within the sporting system.

2.2. Brief History and Function of the 1958 New York Convention

If CAS represents the institutional center of transnational sports adjudication, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards represents the classical legal framework through which arbitral awards acquire transnational enforceability in general international arbitration. Adopted on 10 June 1958, the Convention was intended to overcome the deficiencies of the earlier Geneva instruments and to establish a more effective, uniform, and pro-enforcement regime for the recognition of arbitration agreements and foreign arbitral awards. Its importance in modern arbitration law is fundamental: it made international arbitration practically viable by facilitating the cross-border recognition and enforcement of awards through a common treaty structure[16].

The Convention performs two core functions. First, it requires contracting states to recognize written arbitration agreements and, in principle, to refer parties to arbitration when seized of a dispute covered by such an agreement.15 Second, it obliges contracting states to recognize and enforce foreign and non-domestic arbitral awards, subject only to the limited grounds for refusal listed in Article V. The architecture of the Convention is therefore clearly pro-enforcement. It does not eliminate judicial control, but it confines that control within a narrow framework, thereby reducing the possibility that national courts will revisit the merits of the arbitral dispute.

This is why the New York Convention has long been understood as the paradigmatic model of arbitral effectiveness in international private law. Albert Jan van den Berg emphasizes that the Convention's enduring strength lies precisely in its combination of state-backed enforceability and limited judicial review. The award remains an arbitral decision, but its practical coercive force depends on the court of the enforcing state, which transforms it into a title capable of execution within the domestic legal order. In that sense, the Convention is not an autonomous enforcement mechanism. It is a treaty-based framework that relies on national courts and domestic enforcement authorities to give arbitral awards real coercive effect.

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[16] Albert Jan van den Berg, "The New York Convention of 1958: An Overview," in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard and Domenico Di Pietro (London: Cameron May, 2008), 1–9.

2.3. The Concept of Arbitral Award Enforcement - a Comparative Perspective

From a comparative perspective, the concept of arbitral award enforcement reveals an important distinction between adjudication and coercive implementation. In traditional international arbitration, the parties choose arbitration primarily as an alternative to state jurisdiction for the determination of their dispute. They seek a private, neutral, and (often transnational) adjudicatory forum instead of litigating before a national court. Yet the arbitral process usually replaces only the judicial determination of the dispute, not the coercive machinery required to enforce the outcome. Once a party refuses voluntary compliance, the successful party will normally have to return to the state and request recognition and enforcement before domestic courts, which alone possess the public authority to order attachment, seizure, or other compulsory enforcement measures against the debtor's assets. In fact, one of the attributes given to a recognised arbitral award (i.e. an award that has undertaken the exequatur procedure) is the possibility of being enforced just like a regular stat court decision[17]. Traditional arbitration is therefore alternative to state adjudication, but usually not to state enforcement.

This state-centred model of enforcement is reflected directly in the New York Convention. The Convention presupposes that arbitral awards do not circulate by themselves as self-executing commands. Rather, they become coercively effective because domestic courts recognize them and domestic enforcement bodies execute them. Even the celebrated autonomy of arbitration remains, at the enforcement stage, structurally dependent on the public legal order. The arbitral tribunal may decide the dispute, but it is normally the state that provides the final coercive force.

Sport, however, has developed a partially different model. The literature on CAS, *lex sportiva*, and global sports governance shows that the sporting system possesses internal regulatory techniques capable of producing compliance without immediate reliance on state enforcement[18]. Access to competitions, sporting status, eligibility, licensing, registration, and participation in organized sport are all controlled by governing bodies that can attach serious consequences to non-compliance with final decisions[19]. In that sense, the sporting system can often transform adjudicatory outcomes into practical effects through regulatory belonging rather than through the coercive power of the state. This does not mean

[17] Romania, *Code of Civil Procedure*, Law no. 134/2010, republished, arts. 1124–1133, https://legislatie.just.ro/Public/DetaliiDocument/140271.

[18] Ken Foster, "Global Sports Law Revisited," *Entertainment and Sports Law Journal* 17, no. 1 (2019): 1–14, https://doi.org/10.16997/eslj.228.

[19] Marcus Mazzucco and Hilary Findlay, "The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System," *International Journal of Sport and Society* 1, no. 2 (2010): 135–40, https://doi.org/10.18848/2152-7857/CGP/v01i02/54015.

that state enforcement disappears. CAS awards remain arbitral awards, and recourse to the New York Convention may still be necessary, especially in disputes involving assets outside the sporting system or debtors no longer susceptible to internal sporting pressure. But it does mean that the classical model of arbitral enforcement does not fully explain the functioning of sports arbitration awards. In sport, the central comparative question is whether effectiveness is produced externally, through state institutions, or internally, through the self-enforcing mechanisms of sports governance.

3. The Traditional Model: Enforcement Under the New York Convention

The traditional model of arbitral award enforcement is built on a clear institutional separation between adjudication and coercive implementation (enforcement). In international commercial arbitration, the parties choose arbitration mainly as an alternative to state courts for the resolution of the merits of the dispute, due to one or more advantages. Speedy trials or over-specialization of the arbitrator are among the most often ones. Once the award is rendered, however, its practical coercive force usually still depends on state institutions. The New York Convention is the central instrument of this model: it does not make arbitral awards self-executing, but instead obliges contracting states to recognize and enforce foreign and non-domestic awards through their own courts, subject to a limited set of refusal grounds. This is why the Convention is rightly described as the cornerstone of the international arbitration system.

In procedural terms, the model is relatively straightforward. The award creditor applies to a competent national court, produces the award and the arbitration agreement, and seeks recognition and enforcement in the forum state. Article IV of the Convention sets out the documentary requirements, while Articles III and V establish the governing logic: recognition and enforcement are the rule, refusal is the exception. Judicial review is not intended to reopen the merits of the dispute. Instead, it is confined to specific defects such as incapacity, invalidity of the arbitration agreement, lack of proper notice or basic due process, excess of jurisdiction, irregularity in the composition of the tribunal, annulment or suspension at the seat, non-arbitrability, or violation of public policy. The architecture is therefore markedly pro-enforcement, but it remains state-mediated at every decisive step.

This state-mediated structure is also what gives the model its principal strength. Once recognition is granted, the award creditor can rely on the ordinary coercive apparatus of the enforcing state: attachment, seizure, execution against bank accounts or other assets, and the procedural guarantees attached to public enforcement law. In this respect, the New York Convention model offers something that no purely private adjudicatory mechanism can provide on its own: ac-

cess to sovereign coercive power. At the same time, that same structure also explains the model's limitations in sport. Recognition proceedings require time, legal costs, translation and documentary formalities, and they are territorially fragmented, since enforcement may have to be pursued separately wherever the debtor's assets are located. For ordinary commercial disputes this may be acceptable, or even unavoidable. For sport, however, it is often poorly suited to the speed, seasonality, and transnational mobility of the field.

The mismatch becomes particularly visible when one compares the tempo of judicial enforcement with the tempo of organized sport. Sporting disputes often concern matters that lose much of their practical significance if they are not resolved, and made effective, within days or weeks rather than months or years. Eligibility disputes, transfer disputes, disciplinary disputes, and competition-related sanctions are all embedded in tight calendars and in regulatory structures that require immediate effect. A court-based exequatur mechanism, even when formally efficient, remains dependent on procedural timetables and on domestic judicial administration. For that reason, the New York Convention model is normatively central to international arbitration, but functionally less adapted to many sports disputes than to ordinary commercial claims. This does not mean it is irrelevant in sport; rather, it means that its role is often residual or fallback in practice, especially where the sporting system itself can exert more immediate pressure on the debtor or respondent and is less prone to procedural abuse.

The interim conclusion is therefore clear. The traditional model of enforcement under the New York Convention is highly effective for what it is designed to do: provide transnational enforceability through coordinated state action, under a pro-enforcement treaty framework and with limited judicial review. But its strengths are also its limits. Because the model relies on courts, territorial procedures, and state coercion, it is slower, more expensive, and institutionally less responsive than internal regulatory enforcement mechanisms. It may also be prone to political influence or simple procedural abuse. That structural characteristic helps explain why sport, and especially the CAS-centered system, has increasingly relied on alternative forms of effectiveness that do not wait for exequatur before producing practical consequences.

4. The Sports-Specific Model in Football: FIFA and the Self-Enforcement of Cas Awards

4.1. FIFA's Regulatory Ecosystem and the Place of CAS Awards

Football provides the clearest example of how a transnational sporting regime can generate a form of enforcement that is functionally distinct from the traditional New York Convention model. FIFA regulates a highly integrated and vertically organized system composed of member associations, leagues, clubs, players, and various adjudicatory and disciplinary bodies. Within that system, the

Football Tribunal decides a large number of international football disputes, while CAS acts as the principal appellate body for many FIFA-related decisions. The result is a relatively closed normative environment in which legal obligations are embedded in participation itself: access to competitions, player registration, transfer activity, and recognition within the international football pyramid all depend on continued compliance with FIFA rules and final decisions.

This institutional setting matters because it changes the practical meaning of enforcement. In ordinary international arbitration, enforcement becomes necessary when the award creditor must rely on state coercion to reach the debtor's assets. In football, however, many debtors remain deeply dependent on the regulatory environment controlled by FIFA and the member associations. A club that wishes to register players, participate in competitions, receive transfer-related benefits, or preserve its standing within the organized game cannot easily ignore a final financial or regulatory decision[20]. This is why CAS awards in football often produce practical effects before, and sometimes without, any exequatur procedure before national courts. The award is still an arbitral award in legal form, but its effectiveness is often secured internally by FIFA's disciplinary and registration machinery[21].

4.2. Types of Football Disputes and the Mechanisms of Self-Enforcement

The football disputes most relevant to the present paper are those concerning contractual stability, employment-related claims, transfer disputes, training compensation, solidarity contributions, and certain disciplinary matters with financial consequences. These categories are central because they often culminate in orders to pay money or comply with a regulatory obligation, and they therefore allow a direct comparison between state enforcement and sports self-enforcement. Where a club, player, coach, or other football stakeholder does not voluntarily comply with a final FIFA or CAS decision, FIFA may shift the dispute from the adjudicatory level to the disciplinary level.

The key provision in this respect is Article 21 of the FIFA Disciplinary Code, which governs the failure to respect decisions. FIFA's own disciplinary reporting explains that Article 21 is the mechanism used where a party under FIFA's jurisdiction fails to respect a final and binding financial decision issued by a FIFA body or by CAS. The same reporting also shows how central this mechanism has become in practice. In the 2023/2024 reporting period, FIFA recorded over 1,000 new disciplinary cases overall, including numerous matters related to the enforcement of decisions issued by the Football Tribunal and CAS[22].

[20] Foster, "Global Sports Law Revisited," 1–14.
[21] Matteo Maciel, "Court of Arbitration for Sport: The Effectiveness of CAS Awards and FIFA," *Legal Issues Journal* 4 (2016): 21–38, https://sulisinternational.com/landing/page/6/.
[22] Fédération Internationale de Football Association, *Disciplinary and Ethics Report 2023/2024*

In the 2024/2025 period, FIFA again highlighted the enforcement of Football Tribunal and CAS decisions as a major component of the Disciplinary Committee's workload, with the broader increase in cases linked to the growing centralization of financial compliance in football[23].

The most visible sanction in this area is the registration ban. FIFA itself describes the registration ban list as a system that identifies clubs temporarily prohibited from registering new players because of financial disputes or regulatory breaches. Economically and competitively, this is a powerful enforcement tool. A registration ban does not seize assets in the ordinary civil-enforcement sense, but it places immediate pressure on a club by restricting its ability to recruit and restructure its squad. In modern professional football, that pressure can be more effective than judicial enforcement, especially during transfer windows or in situations where sporting underperformance quickly translates into economic loss. For precisely that reason, the threat of a registration ban often functions as a serious deterrent against non-compliance with final football decisions, including CAS awards.

The efficiency of this model is reinforced by FIFA's procedural architecture. Proceedings before the Football Tribunal are centralized, digitized, and linked to FIFA's Legal Portal, while disciplinary enforcement is integrated into the same wider regulatory ecosystem. Functionally, this creates a streamlined route from adjudication to compliance: the creditor does not need to leave the football system and seek exequatur abroad before pressure can be exerted on the debtor. Instead, the system internalizes enforcement by transforming non-compliance into a new disciplinary breach. In that sense, football illustrates a genuine self-enforcement model: the award is not self-executing in a formal public-law sense, but it becomes practically effective through the debtor's continued dependence on regulatory membership in the sport.

4.3. Why FIFA Enforcement Is Often Faster than New York Convention Recognition, and Its Limits

Compared with the New York Convention model, FIFA's enforcement logic is usually faster, cheaper, and better adapted to the temporal structure of football. A New York Convention route requires recourse to national courts, compliance with documentary formalities, possible translation costs, and potentially parallel actions in multiple jurisdictions depending on the location of assets. FIFA's internal model, by contrast, focuses directly on the debtor's sporting position. It is therefore more immediate and often more effective, especially where

(Zurich: FIFA, 2024), https://digitalhub.fifa.com/m/19ac0082bd24b21c/original/FIFA-Disciplinary-and-Ethics-Report-2023-2024.pdf.

[23] Fédération Internationale de Football Association, *Disciplinary and Ethics Report 2024/2025* (Zurich: FIFA, 2025), https://digitalhub.fifa.com/m/6241e0cfddb29da7/original/Disciplinary-and-Ethics-Report-2024-2025.pdf.

the debtor is an active club or other stakeholder whose economic model depends on participation in the regulated football market. The deterrent effect is substantial: a party may postpone compliance with an arbitral award, but it is much harder to continue normal football operations while subject to escalating disciplinary restrictions.

That said, football self-enforcement is not unlimited. It is strongest where the debtor remains inside the organized game and where compliance can be induced through sporting pressure. Its limits become visible when the debtor has left the football system, has few meaningful sporting dependencies left, or holds assets outside the reach of football regulation. A retired player, an insolvent club, or an entity whose relevant assets lie entirely outside the sport may still require classical state enforcement. For that reason, the New York Convention remains legally available and practically important as a fallback mechanism. The comparative point, however, remains unchanged: in football, the primary practical model of enforcing many CAS-related obligations is not exequatur, but disciplinary and regulatory self-enforcement within the FIFA system.

5. The Sports-Specific Model in Anti-Doping: Wada and Romanian Anti-Doping Law

5.1. The Anti-Doping Framework and the Romanian Legal Setting

If football shows how self-enforcement can be built around financial and registration-related pressure, anti-doping presents an even more self-sufficient model. The World Anti-Doping Code (WADC) is the central normative instrument of the global anti-doping regime and is expressly designed to ensure "harmonized, coordinated and effective" anti-doping programs at both international and national level[24]. Unlike the classical arbitration model, anti-doping enforcement does not focus primarily on the recovery of assets. Its core sanctions are status-based: disqualification of results, periods of ineligibility, provisional suspension, loss of prizes, and exclusion from participation. Those consequences are inherently suited to direct implementation by sport governing bodies, national anti-doping organizations, and event organizers.

The 2021 WADC makes this logic particularly clear. Article 10 regulates sanctions on individuals, including disqualification and ineligibility, while Article 10 governs status during ineligibility or provisional suspension and prohibits participation during those periods. Article 13 then structures the appeal system, including the central appellate role of CAS in international-level cases, and Article 15 provides for the implementation and binding effect of anti-doping deci-

[24] World Anti-Doping Agency, *World Anti-Doping Code 2021*, purpose, scope, and organization section, effective January 1, 2021, https://www.wada-ama.org/sites/default/files/resources/files/2021_code.pdf.

sions across signatories. In other words, the Code already contains the core architecture of self-enforcement: once a valid anti-doping decision exists, sporting institutions are expected to recognize it, apply it, and prevent the athlete or other person from competing contrary to it[25].

Romanian law now reflects that same architecture. Law no. 310/2021 regulates the prevention and combating of doping in sport and places the national system squarely within the wider WADA structure. The law expressly provides that, in examining the facts and legal issues of an anti-doping case, exclusive jurisdiction belongs to sports adjudicatory bodies, with CAS in Lausanne as the final instance. It also identifies the ANAD (National Anti-doping Agency) as the national anti-doping organization and aligns national results management with the Code and the international standards. This represents a significant modernization of the domestic framework. Law no. 310/2021 repealed the main operative parts of the earlier Law no. 227/2006 immediately upon entry into force, while the remaining procedural provisions were repealed shortly thereafter. The transition is important because it confirms that Romanian anti-doping law is no longer structured as a largely self-contained domestic regime, but as a national implementation layer of a harmonized transnational anti-doping order.

5.2. CAS Awards in Anti-Doping Disputes and the Self-Enforcement of Sanctions

In anti-doping disputes, CAS awards are distinctive because the main relief granted or confirmed by CAS is usually not a simple monetary order, but the determination of sporting status. CAS may confirm or modify a suspension, a period of ineligibility, the disqualification of results, or the consequences flowing from an anti-doping rule violation. These are sanctions that do not require bailiffs, attachment orders, or seizure of assets in order to become effective. They require recognition and operationalization by the relevant sporting institutions: federations, anti-doping bodies, competition organizers, and eligibility-control systems.

This is why the anti-doping field is, functionally, the clearest example of self-enforcement in the present paper. The WAD Code itself states that anti-doping decisions should be resolved through fair internal processes with a final appeal, and it gives a wide range of actors, including WADA, the relevant international federation, the national anti-doping organization, and in some cases the International Olympic Committee or International Paralympic Committee, rights of appeal to CAS. Once a final decision or CAS award is rendered, however, its implementation follows from the structure of the anti-doping regime itself. A

[25] Shaun Star and Sarah Kelly, "Examining Procedural Fairness in Anti-Doping Disputes: A Comparative Empirical Analysis," *International Sports Law Journal* 22 (2022): 217–240, https://doi.org/10.1007/s40318-022-00222-5.

suspended athlete is barred from participating; results may be automatically invalidated; a violation of the prohibition on participation during ineligibility triggers further consequences. The sanction is therefore embedded in the conditions of lawful sporting participation. The only effective recourse is a motion to set aside the arbitral award, as per Article 190 of the Swiss Private International Law Act, but this has nothing to do with the merits of the case and just with the minimum due process being respected.

The current Romanian law mirrors this structure in striking detail. Article 107 of Law no. 310/2021 provides that no athlete or other person subject to suspension or provisional suspension may participate in competition, training activity, or other specified sporting activity during the relevant period. The practical effect is immediate and self-sufficient: the sanction does not wait for state-court recognition. It is applied through exclusion from the sporting environment. Romanian law also states that decisions remain effective during the appeal procedure unless the Appeal Commission or CAS orders a stay. This is another strong indicator of self-enforcement. The anti-doping decision is presumed operative within the sports system, and the appeal does not automatically suspend its effects.

5.3. The Role of Domestic Law and the Reduced Practical Role of the New York Convention

Domestic law still matters in anti-doping, but not in the same way as under the classical exequatur model. Its role is mainly to receive, support, and operationalize the international anti-doping regime. Law no. 310/2021 regulates results management, the hearing structure, national appeal mechanisms, and the relationship between ANAD, international federations, WADA, and CAS. It also confirms the strong procedural position of WADA. Romanian law provides that, where a dispute arises between anti-doping organizations over results-management authority, WADA decides the matter, and that decision may be appealed to CAS within seven days. The law further provides that, if ANAD does not adopt a decision within a reasonable time set by WADA, WADA may appeal directly to CAS as if ANAD had decided that no violation occurred. Finally, WADA may appeal final decisions directly to CAS without exhausting all other remedies in the anti-doping organization's internal process where the statutory conditions are met.

These provisions are central for the comparative argument of the paper. They show that anti-doping enforcement is not primarily conceived as the judicial enforcement of an arbitral award against assets, but as a multi-level governance system in which international and national bodies coordinate the identification, sanctioning, recognition, and implementation of status-based consequences. In that system, CAS functions as the final appellate authority, but the implementation of its awards is typically carried out by the anti-doping network itself. The

New York Convention remains legally relevant in the abstract, because CAS awards are still arbitral awards. Yet in anti-doping disputes it is even less central in practice than in football. That is because the decisive consequences of the award are usually not asset-based. They concern whether a person may compete, train, hold status, keep results, or receive the benefits attached to sporting participation. Those are consequences that the sports system can enforce directly and continuously, without the intermediation of ordinary state enforcement bodies.

6. The Eu-Law Challenge: Competition Law, Effective Judicial Protection, and the Future of Sports-Specific Enforcement

The practical strength of sports-specific arbitration and self-enforcement is also the source of its main legal vulnerability. The more sport succeeds in resolving disputes internally, enforcing them quickly, and insulating them from ordinary courts, the more acute becomes the question whether that autonomy remains compatible with the requirements of EU law[26]. This is especially true where sports federations do not merely regulate a sporting activity in the abstract, but also govern market access, control participation in economically significant competitions, and impose sanctions capable of excluding clubs, athletes, or organizers from the market. In that setting, the issue is no longer limited to the internal logic of *lex sportiva*. It becomes a question of competition law, EU public policy, and effective judicial protection.

The Court of Justice made that point particularly clearly in International Skating Union v Commission. In this judgement, it has been confirmed that the ISU's prior-authorization rules and related sanctions infringed EU competition law because they were not subject to guarantees ensuring that they were transparent, objective, non-discriminatory, and proportionate[27]. The Court stressed that the organization of sporting competitions constitutes an economic activity and that sports associations exercising regulatory and sanctioning powers must remain subject to Article 101 TFEU when those powers can exclude competitors or prevent athletes from taking part in rival events. Crucially for sports arbitration, the Court also held that the Commission had been right to call into question the ISU's arbitration rules, because exclusive recourse to CAS in Lausanne could reinforce the anti-competitive effects of the federation's regulatory system by depriving affected parties of sufficiently effective judicial review within the EU

[26] Antoine Duval, "The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter," *Maastricht Journal of European and Comparative Law* 22, no. 2 (2015): 224–255, https://doi.org/10.1177/1023263X1502200205.

[27] *International Skating Union v. European Commission, Mark Jan Hendrik Tuitert, Niels Kerstholt, and European Elite Athletes Association*, Case C-124/21 P, judgment of December 21, 2023, ECLI:EU:C:2023:1012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CJ0124.

legal order[28]. The significance of ISU therefore goes beyond skating. It signals that where a federation combines regulatory power, disciplinary power, and economic interests, the arbitral insulation of that structure may itself become part of the EU-law problem.

In doctrinal terms, ISU destabilizes one of the traditional assumptions of sports arbitration: that mandatory CAS jurisdiction is acceptable because Swiss-seated review by the Swiss Federal Tribunal is enough. The Court did not condemn arbitration as such. On the contrary, it accepted that arbitration between private parties is possible in principle. What it challenged was the idea that compulsory, structurally embedded sports arbitration can operate in fields covered by EU law while remaining effectively shielded from EU judicial supervision.

That line of reasoning was pushed further in RFC Seraing v FIFA, decided by the Grand Chamber on 1 August 2025[29]. The case concerned FIFA's prohibition of third-party ownership and the reliance placed by Belgian courts on a CAS award rendered in Switzerland. The Court held, in essence, that while arbitration between individuals is not precluded in principle by EU law, national courts within the Union must be able to carry out an in-depth review of CAS awards for compliance with the fundamental rules of EU law that form part of EU public policy. The judgment is especially important because it addresses not only the abstract compatibility of CAS with EU law, but also the downstream effects of national rules granting CAS awards res judicata or enhanced evidentiary value without prior review by a court capable of ensuring the effectiveness, uniformity, and autonomy of EU law. The Court expressly linked this issue to Article 19(1) TEU, Article 47 of the Charter, and the preliminary-ruling system under Article 267 TFEU. In other words, Seraing transforms the problem from one of competition-law sensitivity into one of systemic judicial protection: where a CAS award decides issues touching EU public policy, Member State courts cannot simply defer to it as though it were immune from meaningful review.

The implications for sports-specific enforcement are substantial. Until recently, the attractiveness of CAS-based self-enforcement rested partly on its concentration in Lausanne and on the relative narrowness of review by the Swiss Federal Tribunal. That model favored speed, uniformity, and systemic coherence. But Seraing makes clear that, at least where EU-law issues are at stake, those advantages cannot come at the expense of effective judicial protection inside the EU. The problem is particularly acute in exactly the kinds of disputes examined in this paper: market-access disputes, disciplinary sanctions affecting economic

[28] Mees Brenninkmeijer and Paul E. Trinel, "The Relationship between EU Law and Sports Arbitration in ISU v Commission: The Good, the Bad, and the Ugly," *Arbitration International* 41, no. 4 (2025): 767–793, https://doi.org/10.1093/arbint/aiaf017.

[29] *Royal Football Club Seraing SA v. Fédération Internationale de Football Association (FIFA), Union des associations européennes de football (UEFA), and Union royale belge des sociétés de football association ASBL (URBSFA)*, Case C-600/23, judgment of August 1, 2025, ECLI:EU:C:2025:617, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62023CJ0600.

participation, and regulatory measures backed by strong internal enforcement pressure. In such cases, sports self-enforcement is no longer just a matter of institutional efficiency. It may also operate as a mechanism that amplifies the coercive impact of federation rules before those rules have been fully tested against EU competition law or other EU public-policy norms. That is why the recent literature describes Seraing as opening a new phase in the judicial scrutiny of sports arbitration[30].

The tension is therefore twofold. First, there is a competition-law tension: federations such as FIFA, UEFA, or the ISU may simultaneously regulate access to competitions, sanction non-compliance, and protect their own economic position. EU law does not prohibit such governance structures outright, but it requires that the exercise of these powers be framed by objective, transparent, non-discriminatory, and proportionate criteria. Second, there is a judicial-protection tension: when disputes concerning those powers are compulsorily sent to CAS outside the EU, the resulting awards must still remain amenable to sufficiently robust review by courts within the Union whenever EU public policy is engaged. Together, these two tensions strike at the doctrinal foundation of the old self-enforcement model, which assumed that the combination of mandatory CAS arbitration, Swiss review, and internal sporting sanctions was legally stable.

UEFA's reaction is therefore highly revealing. In its 2024 Authorisation Rules governing International Club Competitions, UEFA maintained CAS arbitration but introduced an important novelty: for disputes under those rules, the appellant may choose Dublin, Ireland, rather than Lausanne, as the seat of arbitration. Article 16 provides that CAS remains the exclusive arbitral forum, but the party initiating the appeal or request for provisional measures may indicate whether it accepts Lausanne or chooses Dublin; UEFA is then bound by that choice. The same provision also states expressly that challenges to enforcement or recognition on grounds of public policy may include European Union public policy laws. This is not a marginal technical amendment. It is an institutional response to the very problem identified in ISU and sharpened in Seraing: if EU law requires review by a court within the Union capable, where necessary, of making a preliminary reference to the Court of Justice, then one way to preserve CAS while accommodating EU requirements is to retain CAS as the tribunal but move the seat, for selected disputes, into an EU Member State.

That development points toward the most plausible future solution. The challenge raised by ISU and Seraing does not require abandoning CAS or dismantling sports-specific enforcement. The efficiency of the sports model remains real and, in many sectors, functionally indispensable. What EU law appears to require is a hybrid correction of that model. CAS may remain at the top of the dispute-resolution pyramid, but where disputes concern EU competition law,

[30] Stefano Bastianon and Michele Colucci, "Sports Arbitration and Effective Judicial Protection under EU Law: The RFC Seraing Case," *Rivista di Diritto ed Economia dello Sport* 21 (2025), https://hdl.handle.net/10446/307565.

market access, or other elements of EU public policy, the system must ensure access to judicial review within the EU that is sufficiently intense to protect those norms. A differentiated approach is therefore preferable to a general rejection of sports arbitration: purely disciplinary or status-based disputes with no significant EU-law content may continue under the traditional Lausanne-centered model, whereas disputes with serious EU-law implications may justify an EU seat, or at least a clearer review mechanism before Member State courts. Such an approach would preserve the principal advantages of CAS-specialization, speed, consistency, and global legitimacy-while reducing the most serious incompatibilities with the European legal order.

The sections's conclusion is accordingly straightforward. The recent CJEU case law does not deny the practical effectiveness of sports-specific arbitration and self-enforcement; it exposes their legal limits. ISU shows that internal sports enforcement may reinforce anti-competitive structures when federations combine regulatory and economic power. Seraing shows that imposed CAS arbitration cannot be insulated from meaningful EU judicial review where EU public policy is concerned. The future of sports arbitration in Europe therefore lies neither in the abandonment of CAS nor in the preservation of its previous insulation, but in a recalibrated model that preserves sports-specific efficiency while reintroducing judicial safeguards sufficient to satisfy EU competition law and the principle of effective judicial protection.

7. Conclusions

Our paper highlights that international commercial arbitration cannot adequately explain sports arbitral award enforcement. In the traditional approach, still represented in the 1958 New York Convention, national courts and state enforcement machinery make arbitral awards coercive. This is the typical legal procedure for global arbitral enforcement, especially when the creditor seeks asset attachment, seizure, or public coercion. Different practices have emerged in football and anti-doping. CAS awards are generally effective through sport's internal regulatory institutions, not exequatur.

This distinction is clear in football and anti-doping. Self-enforcement in football occurs mostly in financial and regulatory conflicts, where non-compliance can result in disciplinary penalties or registration bans that pressure clubs and other participants. Due to status-based rather than asset-based awards in anti-doping, self-enforcement reasoning is stronger. Federations, anti-doping organisations, and competition organisers actively apply ineligibility, disqualification, and exclusion. Thus, the sports system often ensures compliance. This comparison suggests an obvious conclusion. The New York Convention is the standard legal fallback, but it is rarely used to enforce sports prizes. Self-enforcement is speedier, cheaper, and better for organised sports' temporal reality. Sports conflicts occur within seasons, transfer periods, qualification cycles, and competitive

calendars, which rarely allow for court-based recognition delays. Sport has created enforcement methods that use eligibility, participation, and regulatory dependency rather than bailiffs and court execution, unlike commercial arbitration.

The report also explains why the CAS-centered system has been successful for decades. Sports arbitration is concentrated in a single jurisdiction with a single seat and review by a single top court, the Swiss Federal Tribunal. This has made sports law more coherent, predictable, and uniform. It has also avoided fragmentation that would result from various national courts reviewing CAS rulings using different arbitral control standards. The Swiss seat's impartiality and lack of political interference have also helped legitimise CAS as a multinational arbitral organization. These benefits are significant. They explain why CAS has been the world's top sports adjudicator for decades. These strengths are under assault from EU law. Recent Court of Justice decisions, including International Skating Union and RFC Seraing, illustrate that sports-specific arbitration and self-enforcement cannot ignore core EU law aspects, such as antitrust, market access, or adequate judicial protection. The conclusion must not be drawn that EU law prohibiting arbitration. The issue is when obligatory sports arbitration, paired with strong internal enforcement measures, generates rulings with significant economic or regulatory repercussions while limiting EU court review. The same procedures that make CAS awards fast and effective may also increase the practical impact of laws or fines before they have been fully scrutinised under EU law.

For that reason, the CAS system should adapt rather than forsake sports arbitration. The best option is a differentiated arrangement that keeps CAS as the top sports arbitrator while adding EU-law safeguards. Recent UEFA experience suggests maintaining Lausanne as the general site of CAS arbitration while allowing an EU seat for disputes that highlight major EU public policy problems. This model would preserve most of CAS' systemic advantages, including specialisation, coherence, speed, and global authority, while allowing review by a Member State court that can protect EU law's effectiveness and autonomy.

While sports-specific self-enforcement may have outperformed New York Convention enforcement in several sports conflicts, especially football and anti-doping, that efficiency should be kept because it meets international sport's functional needs. However, it cannot be preserved as before and untouched. A recalibrated architecture that maintains the benefits of a centralised sports arbitral system while ensuring consistency with EU competition legislation and adequate judicial protection is CAS's future.

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COMPARATIVE PRIVATE LAW, LABOUR REGULATION AND LEGAL TRADITIONS

Comparison of Selected Principles of Private Law in the States of the Former Czechoslovakia

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Abstract

This article focuses on comparing selected fundamental principles of private law in the successor states of the former Czechoslovakia, specifically the Czech Republic and the Slovak Republic. The aim of this paper is to identify similarities and differences in the development and application of key principles in the context of legal developments after 1993. The research is based on a comparative analysis of legislation, case law, and relevant legal doctrine in both legal systems. At the same time, other scientific methods are also used, particularly synthesis and induction, as well as the methods of abstraction and analysis, which enable a deeper understanding of the phenomena under examination and the formulation of more general conclusions. Particular attention is paid to the recodification of private law in the Czech Republic and its impact on the interpretation of traditional principles, as well as to continuities and changes in Slovak private law. The findings suggest that, despite a common legal foundation, there is a gradual differentiation in the approach to the interpretation and application of individual principles, which has significant implications for legal practice and the further development of private law in both countries.

Keywords: *Civil Code, Czech Republic, legal principles, private law, Slovak Republic.*

1. Introduction

As Lazar states, private law is one of the fundamental pillars of the legal order, whose function is to regulate property and personal relationships between entities acting in principle in an equal position. Its internal structure is not determined exclusively by individual legal norms, but also by general principles that represent the value and interpretative starting points of legal regulation.[3] These principles play a key role not only in the creation of law, but also in its applica-

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[3] Ján Lazar et al., *Občianske právo hmotné 1: Všeobecná časť, rodinné právo, vecné práva, dedičské právo*, 2nd rev. ed. (Bratislava: Iuris Libri, 2018), 582, https://arl4.library.sk/arl-sus/en/ detail-sus_us_cat-0002210-Obcianske-pravo-hmotne-1/.

tion, as they allow to bridge gaps in legal regulation and ensure its internal coherence. In our opinion, the examination of the principles of private law in the legal orders of states that have a common historical basis seems particularly important in this context. However, what is particularly important is the fact that they have undergone different developments. A typical example is the Czech Republic and the Slovak Republic as successor states of the former Czech and Slovak Federal Republic. Until December 31, 1992, both legal systems formed a single whole.[4] The basis of their private law regulation was determined, in addition to the Constitution of the Czech Republic[5] and the Constitution of the Slovak Republic[6], mainly by the Civil Code of 1964[7] and related legal regulations. The dissolution of the Czech and Slovak Federal Republics on 31 December 1992 resulted in the emergence of two separate legal systems, which, although based on the same normative basis, gradually began to develop autonomously. According to Drgonec, immediately after the establishment of independent states, both legal systems were characterized by a significant degree of legal continuity, since the majority of federal legislation was absorbed into national law.[8] However, subsequent developments revealed different approaches to the modernization of private law. While in the Czech Republic there was a fundamental recodification of private law with the adoption of the new Civil Code, which entered into force in 2014[9] and which consciously adheres to traditional continental legal concepts, the legal order of the Slovak Republic is characterized by gradual amendment interventions while maintaining the basic systematic framework of the original regulation. This difference in approach is inevitably reflected in the way the basic principles of private law are understood and applied.

According to Ivančík and Dušek, a significant factor influencing the development of private law in both countries is also their membership in the European Union, which brought about the need for harmonization of legal regulations and strengthening the importance of certain principles, especially in the area of consumer protection or the principle of good faith.[10] Despite these integration

[4] Czech and Slovak Federative Republic, *Constitutional Act No. 542/1992 Coll. on the Dissolution of the Czech and Slovak Federative Republic* (1992), https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1992/542/19921208.

[5] Czech Republic, *Constitution of the Czech Republic*, Constitutional Act No. 1/1993 Coll., https://e-sbirka.gov.cz/sb/1993/1/2013-06-01?zalozka=text.

[6] Slovak Republic, *Constitution of the Slovak Republic*, Constitutional Act No. 460/1992 Coll., as amended, https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1992/460/20250101.

[7] Czechoslovak Socialist Republic, *Civil Code*, Act No. 40/1964 Coll., https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1964/40/vyhlasene_znenie.html.

[8] Ján Drgonec, *Ústava Slovenskej republiky: Teória a prax: Komentár*, 2nd ed. (Bratislava: C.H. Beck, 2019), https://www.beck.sk/ustava-slovenskej-republiky-komentar-2-vydanie.

[9] Czech Republic, *Civil Code*, Act No. 89/2012 Coll., https://e-sbirka.gov.cz/sb/2012/89?zalozka=text.

[10] Radoslav Ivančík and Jiří Dušek, "The Provision of Security in the EU: An Interdisciplinary Analysis of Security as a Public Good in the Era of Transnational Threats," *Entrepreneurship and Sustainability Issues* 13, no. 3 (2026): 236–249, https://doi.org/10.9770/g6427894395.

tendencies, however, a gradual differentiation in approaches to the interpretation and application of individual principles can be observed, which is conditioned not only by legislative changes, but also by the development of case law and legal doctrine.[11]

The aim of this article is a comparative analysis of selected basic principles of private law in the Czech Republic and the Slovak Republic with an emphasis on their development and current form after 1993. Attention is focused mainly on identifying similarities and differences in their normative anchoring and practical application, as well as on assessing their significance for the further development of private law in both legal systems.

From a methodological point of view, based on scientific literature, we primarily use the comparative method, which is supplemented by the methods of analysis, synthesis, induction and abstraction.[12] The subject of the study is mainly relevant legal regulations, case law and legal doctrine of both states. The above methodological approaches allow not only to identify differences and similarities between the examined legal systems, but also to formulate more general conclusions regarding the development of private law principles in the conditions of post-socialist legal systems.[13]

The structure of the article is subordinated to the stated goal. After an initial definition of the theoretical foundations of the principles of private law, a more detailed comparative analysis of them in the conditions of both legal systems follows. Subsequently, special attention is paid to the recodification of private law in the Czech Republic and the development tendencies in the Slovak Republic, while the final part of the article brings a synthetic evaluation of the findings.

2. The Concept and Meaning of the Basic Principles of Private Law

According to Puhach et al., the basic principles of private law represent the fundamental starting points on which the entire system of private law regulation is built. In legal theory, they are usually understood as general legal principles that express the basic values and ideological direction of the legal order in the field of private law. These are not norms in the traditional sense of the word, i.e. precisely formulated rules of conduct, but more abstract rules of a higher de-

[11] Francesco Maletto, "The International and EU Principle of Prevention: A Different Legal Force?" *Review of European Administrative Law* 18, no. 3 (2025): 7–30, https://doi.org/10.7590/187479825X17634815243636.

[12] David Collier, "The Comparative Method," in *Political Science: The State of the Discipline II*, ed. Ada W. Finifter (Washington, DC: American Political Science Association, 1993), 105–119, https://polisci.berkeley.edu/sites/default/files/people/u3827/APSA-TheComparativeMethod.pdf.

[13] Katerina Linos and Melissa Carlson, "Qualitative Methods for Law Review Writing," *University of Chicago Law Review* 84, no. 1 (2017): 213–238, https://chicagounbound.uchicago.edu/uclrev/vol84/iss1/10/.

gree of generality that permeate the entire legal system and determine its interpretation and application.[14]

The definition of the principles of private law is not uniform in legal theory, which, according to Števček et al., is mainly related to their nature as a category standing on the border between legal norms and value postulates.[15] Part of the legal doctrine emphasizes their normative character and considers them to be legally binding rules that have the ability to be directly applied. Other authors, such as Iniesta Delgato, on the other hand, point to their rather interpretative significance, when they understand them as methodological guidelines for the interpretation and application of specific legal norms. Regardless of these differences, it can be stated that the principles of private law represent an indispensable element of the legal system, which ensures its internal unity and value consistency.[16]

In our opinion, the above also leads to a distinction between the normative and interpretative functions of the principles of private law. Within the normative function, the principles act as binding rules that can be directly applied in cases where specific legal regulation is absent or when it is necessary to overcome its gaps. In this sense, the principles fulfill the role of a subsidiary source of law and allow the judge to decide even in situations that the legislator has not explicitly regulated. Their normative significance is more pronounced in modern legal systems, which explicitly enshrine the basic principles directly in legal texts.

On the other hand, the interpretative function of principles is that they guide the interpretation of legal norms and help to remove their ambiguities or ambiguity. Principles thus represent a kind of interpretative criteria through which it is ensured that the application of law is in accordance with its fundamental values. In this context, they play a particularly important role in the interpretation of vague legal concepts, such as good morals or the principle of fair trade, the content of which cannot be determined without support in the broader value framework of the legal order. The principles of private law also form the basis of its value system. They express the values that private law protects and promotes, such as, in particular, autonomy of will, legal certainty, protection of good faith or equality of subjects of private law relations. Through these principles, broader social and ethical requirements are also reflected in the legal regulation, thereby ensuring its legitimacy and acceptability. The principles thus do not only fulfill a technical function within the legal system but also represent an

[14] Anatolii Puhach, Oleksandr Shevchuk, Oleh Zrazhevskyy, Alexander Rusnak, and Viktor Trepak, "Legal Principles of the Use of Open Intelligence in Criminal Proceedings in Ukraine and the EU," *Cadernos de Dereito Actual*, no. 31 (2026): 457–474, https://cadernosdedereitoactual.es/ index.php/cadernos/article/view/1442.

[15] Marek Števček, Anton Dulak, Jana Bajánková, Marián Fečík, František Sedlačko, and Marek Tomašovič, *Občiansky zákonník I: § 1–450: Komentár*, 2nd ed. (Prague: C.H. Beck, 2019), https:// sclib.svkk.sk/sck01/Record/000629223/Details?print=1.

[16] Juan José Iniesta Delgado, "Legal Principles and Soft Law," *Isonomía*, no. 63 (2025): 131–158, https://doi.org/10.5347/isonomia.63/2025.844.

expression of its value anchoring.

The importance of the principles of private law is particularly evident in the process of applying law and in the decision-making activities of courts. Vaníčková and Bílek argue that when resolving specific disputes, judicial practice inevitably encounters situations in which it is necessary to overcome the shortcomings of the legal regulation or to choose an interpretation of the legal norm that will be in accordance with its purpose.[17] It is in such cases that the principles of private law provide a basic orientation for decision-making. They allow the judge not only to identify a fair solution to a specific case, but also to ensure that his decision is in accordance with the overall value orientation of the legal order.

The growing importance of the principles of private law is also closely related to the strengthening of the discretionary power of the courts, which have a wider scope for consideration when applying them. This trend is particularly evident in modern legal systems, where there is a gradual shift away from a strictly formalistic understanding of law towards its value-oriented interpretation. The principles of private law thus represent a dynamic element of the legal system, which allows its flexible adaptation to changing social conditions, while at the same time preserving its internal continuity.

3. Selected Principles of Private Law and Their Comparison

3.1. The Principle of Autonomy of Will

The principle of autonomy of will is one of the fundamental pillars of private law, which expresses the right of subjects to freely form their legal relationships at their own discretion. Its essence lies in the ability of individuals to decide on the establishment, content and termination of legal relationships, primarily through contracts. This principle is closely linked to the idea of individual freedom and responsibility, while at the same time forming the basis for the functioning of market relations.[18]

According to Matejková et al., the principle of autonomy of will has acquired a significantly strengthened position in the legal order of the Czech Republic, mainly as a result of the recodification of private law.[19] The new legal

[17] Radka Vaníčková and Stanislav Bílek, "Principles of Transfer of European versus Czech Human Rights and Responsibilities Arising Employment Legal Relations," *DANUBE* 16, no. 1 (2025): 61–87, https://doi.org/10.2478/danb-2025-0005.

[18] Supeno Supeno, Rosmidah Rosmidah, and Syed Mohd Uzair Iqbal, "Personal Data Protection in Review of Legal Theories and Principles," *Journal of Law and Legal Reform* 6, no. 3 (2025): 1349–1376, https://doi.org/10.15294/jllr.v6i3.10252.

[19] Jitka Matějková, Ondřej Pavelek, and Bohumil Vítek, "The Influence of the Ius-Naturale Conception of ABGB on the Regulation of Personality Protection and Compensation for Non-Proprietary Damage in the Czech Civil Code," *Hungarian Journal of Legal Studies* 62, no. 3 (2021): 185–197, https://doi.org/10.1556/2052.2021.00329.

regulation emphasizes contractual freedom as a basic starting point, while explicitly allowing subjects to deviate from the statutory regulation, unless the law expressly prohibits it. This approach reflects a return to traditional continental concepts of private law, in which autonomy of will plays a dominant role.

On the contrary, according to Fekete, the principle of autonomy of will is undoubtedly present in the legal order of the Slovak Republic, but its normative expression is less explicit and its application is determined to a greater extent by the mandatory provisions of legal regulations. Slovak legal regulation thus shows a higher degree of regulation of contractual relations, which is reflected mainly in the area of protection of the weaker party.[20]

The differences between the two legal orders are therefore reflected primarily in the degree of contractual freedom. While Czech law provides subjects with a wider scope for autonomous organization of legal relations, Slovak law places greater emphasis on protective mechanisms that limit this freedom to a certain extent. Nevertheless, it can be stated that in both legal orders the principle of autonomy of will remains one of the determining elements of private law regulation.

3.2. The Principle of Protection of Good Faith and Trust in Law

The principle of protection of good faith represents another key principle of private law, which expresses the requirement that legal relations be implemented in accordance with honesty and legitimate expectations of subjects. Good faith appears as a psychological state of a subject who acts in the belief that his actions are in accordance with the law[21].

Eliáš states that in the Czech legal order, the protection of good faith is strongly emphasized and finds its explicit expression in the basic provisions of private law. The recodification strengthened the importance of this principle by elevating it to one of the central interpretative criteria. Czech case law uses the principle of good faith quite intensively as a tool for correcting the formalistic interpretation of legal norms.[22]

The principle of good faith is also present in the Slovak legal order, but its application is traditionally tied to specific legal provisions rather than to its general application as a basic principle. Although judicial practice reflects this

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[20] Imrich Fekete, *Občiansky zákonník: Veľký komentár*, 2 vols. (Bratislava: Eurokódex, 2011), 1009, https://aak.slu.cz/artkey/aak-201103-0021_FEKETE-I-Obciansky-zakonnik-Velky-komentar-1-diel-sect-1-sect-459-2-diel-sect-460-sect-880.php.

[21] Irene Domenici, Christian Günther, and Ulrich Becker, "Constructing Effectiveness as a General Legal Principle of Public Healthcare Systems: Comparative Insights from France, Germany, and England," *Health Economics, Policy and Law* 21, no. 2 (2026): 137–155, https://doi.org/10.1017/S1744133126100371.

[22] Karel Eliáš, Bohumil Havel, Petr Bezouška, and Daniela Šustrová, *Občanské právo pro každého: Pohledem (nejen) tvůrců nového občanského zákoníku* (Prague: Wolters Kluwer Česká republika, 2013), 316, https://arl.psp.cz/arl-par/en/detail/?idx=par_us_cat%2A154999.

principle, its significance as an independent argumentative tool is less significant.

Differences in interpretation are mainly reflected in the intensity of the use of the principle of good faith. While in Czech law this principle fulfills a significant corrective function, Slovak law applies it more within the framework of situations precisely defined by law. This difference is also related to the overall approach to the role of principles in the legal system.

3.3. Principle of *Pacta Sunt Servanda*

The principle of pacta sunt servanda, expressing the binding nature of contracts, is one of the traditional and universal principles of private law. According to Funta, its essence lies in the fact that the contracting parties are bound by the content of the concluded contract and are obliged to fulfill their obligations properly and on time. This principle represents a necessary prerequisite for legal certainty and stability of legal relations.[23]

In both examined legal systems, the principle of pacta sunt servanda is firmly anchored and forms the basis of the law of obligations. However, its application is not absolute, as it is subject to certain limits, which include, in particular, good morals, public order and the protection of the weaker party.

In Czech law, this principle is interpreted in the context of a broader emphasis on the autonomy of will, which leads to a strong emphasis on the binding nature of contractual agreements. At the same time, however, there are mechanisms that allow the harshness of this principle to be mitigated, for example through the doctrine of change of circumstances.

In Slovak law, the principle of pacta sunt servanda is also fully respected. However, its application is more often balanced by mandatory provisions and the protection of the weaker party. The limits of the binding nature of contracts are thus applied more strictly in some cases. This may, in our opinion, lead to a greater degree of interference with contractual freedom.

The comparison shows that although it is a common principle, its specific application is influenced by the overall character of the legal order, in particular by the degree of emphasis on the autonomy of will and the protective functions of law.

3.4. The Principle of Equality of Subjects of Private Law Relations

According to Zin et al., the principle of equality of subjects of private law relations expresses the basic characteristic of private law, according to which subjects act in legal relations as formally equal. This equality means that none of the subjects has the authority to unilaterally determine the rights and obligations

[23] Rastislav Funta, "Economic Law and Economic Crisis: Where Do We Go from Here? Economic, Legal and Political Dimension," *DANUBE: Law and Economics Review* 2, no. 1 (2011): 65–71, https://ideas.repec.org/a/cmn/journl/y2011i1p65-71.html.

of the other subject.[24]

However, in current legal developments, there is a gradual shift from a purely formal understanding of equality to its material concept. This is manifested mainly in the effort to ensure a real balance between subjects. Such a procedure results in strengthening the protection of the weaker party, especially the consumer, tenant or employee.

In the Czech legal order, we observe a situation where this trend is manifested, while maintaining a strong emphasis on the autonomy of the will, also through special protective provisions. Czech legislation thus combines the traditional principle of equality with modern elements of substantive justice.

In the Slovak legal system, the emphasis on protecting the weaker party is traditionally more pronounced, which is also reflected in the wider scope of mandatory provisions. Equality of subjects is thus more often corrected in practice in order to ensure a fair outcome of the legal relationship.

Developments in both legal systems point to a common trend towards a material understanding of equality, although the degree of its implementation differs.

3.5. The Principle of Prohibition of Abuse of Rights

The principle of prohibition of abuse of rights according to Sudarto et al. (2026) represents an important corrective to the exercise of subjective rights. Its essence lies in the fact that the exercise of a right, which is formally in accordance with legal norms, must not be in conflict with its purpose or must not unreasonably interfere with the rights and legitimate interests of other subjects.[25]

In the Czech legal system, this principle is explicitly enshrined and plays a significant role in the interpretation and application of law. Judicial practice uses it as a tool to prevent the formalistic application of rights, which would lead to unfair results.

In the Slovak legal system, the principle of prohibition of abuse of rights is also recognized, but its explicit normative expression is less pronounced and its application is more tied to specific provisions, mainly through the category of good morals. Nevertheless, Slovak courts are gradually developing its content through case law.

The differences between the two legal systems are mainly reflected in the intensity of application of this principle. While in Czech law it is a relatively

[24] May Myo Zin, Ken Satoh, and Georg Borges, "From Court Decisions to Guiding Principles: Advancing Complex Legal Summarization with LLMs," in *Legal Knowledge and Information Systems: JURIX 2025*, Frontiers in Artificial Intelligence and Applications 416 (Amsterdam: IOS Press, 2025), 371–376, https://doi.org/10.3233/FAIA251612.

[25] Sudarto Sudarto and Siti Zaynul Rahmawati, "Post-Reform Defense Sector Legal Policy: The Principle of Civil Supremacy," *Jurnal Hukum* 42, no. 1 (2026): 75–96, https://doi.org/10.26532/jh.v42i1.49704.

frequent argumentative tool, in Slovak law its use is more cautious. This difference again reflects the broader context of the approach to the role of principles in the legal system.

The above comparison of selected principles of private law confirms that, despite the common historical basis, there is a gradual differentiation between the Czech and Slovak legal systems. This differentiation is manifested not only at the level of legislation, but also in the area of interpretation and application of law, which has significant consequences for legal practice in both countries.

4. Development and Continuity of Private Law in the Slovak Republic and the Czech Republic

4.1. Recodification of Private Law in the Czech Republic and Its Impacts

Recodification of private law in the Czech Republic represents one of the most significant legislative interventions in the legal order after 1989. Its result was the adoption of the new Civil Code, effective since 2014, which replaced the previous legal regulation based on the period of socialist law. The aim of the recodification was not only to eliminate the ideological and systematic shortcomings of the previous regulation, but above all to create a modern, internally coherent code of private law based on the traditional principles of the continental legal system.

One of the characteristic features of the recodification is a conscious return to the historical and doctrinal foundations of private law, which were partially suppressed in the previous period. The new legal regulation is inspired mainly by classical codifications and emphasizes the importance of fundamental principles such as autonomy of will, protection of good faith, and the principle of *pacta sunt servanda*. These principles are not only implicitly present in individual provisions, but are also explicitly expressed in the introductory parts of the code, thereby acquiring a significant normative and interpretative significance.

Strengthening the role of private law principles is one of the key aspects of the recodification. Principles are no longer perceived only as auxiliary interpretative tools, but as an integral part of legal regulation that can be directly applied. This approach leads to greater flexibility of the legal system, as it allows courts to respond to specific circumstances of the case even in situations that the legislator has not explicitly regulated. At the same time, however, it places increased demands on the argumentative activity of the courts and on the quality of the legal justification of their decisions.

Recodification also had a significant impact on the way in which law is interpreted and applied. There is a gradual shift from formalistic interpretation

towards a teleological and value-oriented approach in which private law principles play a central role. Judicial practice is thus led to take into account not only the literal wording of legal norms, but also their purpose and value background when making decisions. This trend contributes to greater fairness of individual decisions, but at the same time may raise questions regarding legal certainty and predictability of law.

4.2. Development and Continuity of Private Law in the Slovak Republic

Unlike the Czech Republic, the development of private law in the Slovak Republic is characterized by the absence of a comprehensive recodification. The legal regulation continues to be based on the Civil Code of 1964, which has been repeatedly amended, but its basic systematics and concept have been preserved. This approach reflects the evolutionary rather than revolutionary nature of legislative development.

Gradual amendments made it possible to respond to changing social and economic conditions, as well as to the requirements arising from membership in the European Union. The changes concerned mainly areas in which it was necessary to strengthen the protection of the weaker party or ensure compliance with European law. Despite these interventions, Slovak private law maintains a significant degree of continuity, which is also reflected in the stability of its basic principles.[26]

The preservation of traditional concepts of private law is also reflected in the way its basic principles are understood and applied. Although they play an important role, their application is more closely tied to specific legal provisions and less often acts as an independent normative basis for decision-making. This approach contributes to a higher degree of legal certainty, since the application of law is more closely tied to explicit legal rules.

The question of the relationship between the stability and flexibility of legal regulation represents one of the key aspects of Slovak private law. On the one hand, the stability of the legal framework supports the predictability of legal relations and reduces the risk of inconsistent decision-making practice. On the other hand, however, it can lead to a certain rigidity of legal regulation, which may not always sufficiently reflect the dynamics of social changes.

A comparison of the development of private law in both countries thus points to two different approaches to its modernization. While the Czech legal system has embarked on a path of comprehensive recodification and strengthening the role of principles, the Slovak legal system prefers a gradual adaptation of the existing regulation. Both approaches have their advantages and limits, with

[26] Jiří Dušek, "Transformation of Settlement Structures in Europe: Trends, Challenges, and Reform Approaches," *Land* 14, no. 1 (2025): article 167, https://doi.org/10.3390/land14010167.

their consequences being particularly pronounced in the area of interpretation and application of law.

5. Comparative Assessment and Development Trends

A comparative analysis of selected principles of private law in the Czech Republic and the Slovak Republic confirms that, despite the common historical basis and long-term development within a unified legal order, there is a high degree of similarity between the two systems. This is manifested primarily in the very existence and recognition of the basic principles of private law, such as autonomy of will, protection of good faith, the principle of *pacta sunt servanda*, equality of subjects, and the prohibition of abuse of law. The aforementioned principles form a fundamental value framework in both legal orders, from which both legal regulation and its application are based.

Similarities can also be identified at the level of their content definition. In both states, the principles are understood as general starting points that determine the interpretation and application of legal norms and at the same time serve as a corrective in cases where a strictly formalistic application of the law would lead to unjust consequences. There is also a clear trend in both legal systems towards strengthening the protection of the weaker party and towards a material understanding of equality, which is reflected mainly in the area of consumer law and other asymmetric legal relations.[27]

However, in addition to the above similarities, the comparison also reveals significant differences, which are manifested mainly in the extent and manner of application of individual principles. The key differentiating factor is primarily the recodification of private law in the Czech Republic, which led to the explicit enshrining of principles and the strengthening of their normative function. Thus, in the Czech legal system, principles appear not only as interpretative rules, but also as an independent basis for decision-making, which gives them a more significant practical significance.

On the contrary, in the Slovak legal system, the application of principles remains to a greater extent tied to specific legal provisions. Their function is rather complementary and interpretative, while their direct application as an autonomous normative basis is less frequent. This difference is also reflected in the decision-making activity of the courts, where a more cautious approach to the use of principles as an argumentative tool can be observed.

The above differences point to a broader trend of gradual differentiation between Czech and Slovak private law. This trend is a consequence not only of different legislative approaches, but also of the development of legal culture, case

[27] Cristina Elena Popa Tache and Cătălin Silviu Săraru, "Evaluating Today's Multi-Dependencies in Digital Transformation, Corporate Governance and Public International Law Triad," *Cogent Social Sciences* 10, no. 1 (2024): article 2370945, https://doi.org/10.1080/23311886.2024.2370945.

law and legal doctrine in both countries. While the Czech legal system is characterized by a more dynamic and value-oriented approach to the application of law, the Slovak legal system retains a more conservative and normatively bound character.

From the point of view of legal practice, these differences have significant implications. Strengthening the role of principles in Czech law allows for a more flexible response to the specific circumstances of individual cases and achieving materially fairer decisions. On the other hand, it is necessary to express concern that such a procedure may lead to a certain degree of uncertainty regarding the predictability of the decision-making activity of the courts. In the Slovak legal environment, on the contrary, greater adherence to the statutory text contributes to a higher degree of legal certainty, but at the cost of less flexibility in resolving atypical situations.

In the context of further development, we assume that the tendency of differentiation between the two legal systems will continue. In the Czech Republic, we expect further deepening of the importance of private law principles, especially in connection with the development of case law and doctrinal elaboration of the new legal regulation. In the Slovak Republic, development will probably continue to take place in a more evolutionary manner. However, given the ongoing recodification of private law, we cannot rule out a more systematic recodification of private law. This could lead to a more significant strengthening of the role of principles.

From the point of view of the principles examined, we can state that their importance will continue to grow in both legal systems. The reason for this is mainly the connection with the growing complexity of social relations and the need to ensure fair and efficient resolution of legal disputes. In our opinion, the principles of private law will remain a key tool for ensuring a balance between the stability and flexibility of the legal system in the future, while the method of their application will continue to represent one of the main distinguishing features between the Czech and Slovak legal environments.

6. Conclusion

This scientific article has focused on a comparative analysis of selected principles of private law in the legal systems of the Czech Republic and the Slovak Republic. Our stated goal was to identify similarities and differences in their development and application after the dissolution of the common state and the subsequent establishment of successor states in 1993. The starting point of the research was the assumption that, despite the common historical basis, there is a gradual differentiation in both legal systems, which is significantly manifested in the area of the basic principles of private law.

Our analysis confirmed that both legal systems continue to be based on the same value and conceptual basis, which was formed by the common legal

development during the existence of Czechoslovakia. Principles such as autonomy of the will, protection of good faith, the principle of *pacta sunt servanda*, equality of subjects of private law relations or the prohibition of abuse of law are not only present in both systems, but also generally recognized as fundamental starting points of private law regulation. This continuity represents a significant stabilizing element that contributes to maintaining the internal coherence of the legal systems of both states.

At the same time, however, the results of the comparison point to the gradual deepening of differences in the way the above principles are understood and applied. The key factor in this differentiation is, in particular, the recodification of private law in the Czech Republic, which led to the explicit enshrining of the principles and the strengthening of their normative function. Thus, the principles in the Czech legal system acquire a more significant importance as an independent basis for decision-making and play an active role in the interpretation and application of law. In contrast, the Slovak legal system retains a rather traditional approach, within which the principles are applied primarily as interpretative tools tied to specific legal provisions.

Based on the above findings, we can state that the objective of the article has been met. We have identified not only the main similarities between the legal systems under study, but also significant differences, which are manifested mainly in the degree of normative significance of the principles and in their practical application. These differences are not accidental but reflect broader conceptual approaches to the role of private law, as well as different legislative strategies chosen after 1993.

From the point of view of broader implications for the theory of private law, we express the opinion that the examination of principles represents an important tool for understanding the internal functioning of the legal system. Principles not only reflect the value bases of legal regulation, but also significantly influence its interpretation and application. Moreover, a comparative approach allows us to identify different models of their application, thereby contributing to the development of legal theory and to the search for an optimal balance between the stability and flexibility of the legal system.

In terms of legal practice, there is no doubt that the differences identified have specific and undeniable consequences for the decision-making activity of courts, but also for the legal certainty of participants in legal relations. Strengthening the role of principles in the Czech legal order allows for a more flexible response to individual circumstances of cases and to achieve materially fairer solutions, but at the cost of potentially lower predictability. On the contrary, the Slovak approach based on greater binding to the statutory text provides a higher degree of legal certainty. However, its Achilles heel may be flexibility in dealing with new or atypical situations. The above differences thus point to the need to find a balance between these two aspects, which represents one of the key challenges of contemporary private law.

From the perspective of further development, we expect that the importance of private law principles will continue to grow in both legal orders. This trend is conditioned not only by national developments, but also by the influence of European law and the case law of supranational judicial authorities. They increasingly work with principles as autonomous argumentative tools. In this context, it is worth observing whether the Slovak legal system will proceed to a more systematic recodification of private law as well as to a more explicit enshrining of principles, or will retain the current evolutionary model of development.

We cannot neglect possible stimuli for further research. A deeper examination of the case law of both states, focused on specific ways of applying individual principles, as well as an analysis of their mutual relations and potential conflicts, seems particularly promising. It would also be beneficial to expand the comparative framework to include other legal systems, which would allow the Czech and Slovak models to be better placed in a broader European context. Such research could contribute not only to the development of legal science, but also to the improvement of legislative and application practice in the field of private law.

In conclusion, we would like to state that the principles of private law represent a dynamic and at the same time stabilizing element of the legal system, the importance of which will continue to grow in the conditions of a modern constitutional state. Their comparative study allows not only to better understand the development of individual legal systems, but also to identify the direction of their future development.

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The Indefinite Legal Concept of Good Morals Under the Prism of Greek Theory and Jurisprudence

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Abstract

The subject of this study constitutes the indefinite legal concept of good morals, as it is shaped in the theory and jurisprudence of the Greek legal order. More specifically, good morals are understood as a general and indefinite legal clause, which is found in various legal branches, through which the law enforcer has the appropriate margin of assessment, so as to adapt this clause to the particularities of each specific case. While the traditional view identifies them with the perceptions of the average, prudent and honest social person, modern theoretical approaches treat them as unwritten but normatively binding rules with moral necessity and simultaneously with broader foundation in the values of the Rule of Law. The aim of the research is the systematic mapping and critical evaluation of the above versions, as well as the expansion of the normative content of good morals. The methodology followed is dogmatic and interpretative, with analysis of the relevant bibliography and jurisprudence. The findings highlight the shift from a descriptive to a normative understanding of the concept, which strengthens the systematicity of judicial judgment. The contribution of the study lies in the theoretical clarification of the concept and in strengthening legal certainty through a more coherent interpretative framework.

Keywords*: general clause, good morals, legal certainty, Greek civil law, fundamental rights, interpretative specification of indefinite legal concepts.*

1. Introduction

Good morals constitute an indefinite legal concept of Greek private law with significant normative function, as they delimit private autonomy and evaluate behavior in private relations. The difficulty of their conceptual determination is connected with the continuous change of social perceptions and raises the question of whether they are identified with the respective social ethics or whether they constitute more objective principles of the legal order. An issue is also the maintenance of legal certainty during their application.

The study proposes an interpretative approach that transcends the simple sociological view and highlights the normative character of good morals as an expression of fundamental rule-of-law values. The aim is the formation of an intermediate standard that combines theoretical consistency and practical application, limiting the risk of interpretative arbitrariness.

The analysis examines the legal nature of good morals as a general

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clause and their relationship with concepts such as public order and commercial morals, as well as the criteria for their specification, particularly through the standard of the average prudent person. At the same time, jurisprudential practice is utilized to highlight the way courts concretize the concept. The methodology is dogmatic, interpretative and comparative, with critical assessment of jurisprudence and highlighting of evaluative considerations. Finally, the need for objectification of good morals is supported, with reference to fundamental constitutional principles, systematic jurisprudential elaboration and enhanced reasoning, so that legal certainty and predictability are established.

2. On the Indefiniteness of Legal Concepts

The pluralism of legal rules is characteristic of every well-ordered State which, through their normative form, incorporates general clauses that contain the so-called indefinite legal concepts. The peculiar nature of these legal rules is found in the fact that they belong to the broader category of mandatory law rules (*ius cogens*)[2], that is, the totality of legal regulations that govern legal relationships in a binding manner and as a result, the appliers of law possess a wide margin of appreciation in the externalization of their judicial reasoning. The latter emerges from the consideration of various factors and circumstances of each case and may relate either to the factual elements of the case under examination, or to its particularities, or even to changing conditions[3].

In other words, therefore, it is reasonable to say that indefinite legal concepts provide the appropriate stimulus to the judge to outline, trace, but much more to listen to the needs as well as the specific emerging issues of each case[4]. More analytically, the nature of these legal rules requires for the determination of the existence or not of the prescribed conditions the utilization of certain flexible, abstract, general and indefinite legal concepts. Much more, the above concepts provide the appropriate flexibility, adaptability and elasticity to judges during the stage of interpretive approach to existing legislation. In other words, indefinite legal concepts constitute the appro-

[2] See Ioannis S. Spyridakis, *General Principles of Civil Law*, 3rd ed. (Athens: Sakkoulas Publications, 2022), 31–32, https://www.sakkoulas.gr/el/editions/i-spyridakis-genikes-arches-astikou-dikaiou-3i-ekd-2022/.

[3] See Apostolos S. Georgiadis and Michalis P. Stathopoulos, eds., *Civil Code: General Principles—Article-by-Article Commentary* (Athens: P. N. Sakkoulas, 2016), 123–26, https://www.bookworld.gr/gr/book/bkid/211027/astikos-kodikas-katarthro-ermineia.

[4] See Kostas Stamatis and Andreas Takis, *Introduction to the Science of Law*, 2nd ed. (Thessaloniki: Sakkoulas Publications, 2018), 224–29, https://www.bookworld.gr/gr/ book/bkid/ 233375/eisagogi-stin-epistimi-tou-dikaiou.

priate tool so that the judge can concretize these concepts within the framework of adjudication[5] of pending cases. This is moreover evident, if one resorts to the normative form of these legal rules, from which it is perceivable that indefinite legal principles are instrumentalized as interpretive methods of these rules, for the purpose of expanding their applicable field in a comprehensible, elastic and flexible manner. At this point the judge will be called to adjudicate a case under the prism of indefinite legal concepts, in order to recognize the ontological content of the applicable rule of law[6], adorned with the depiction of the methodology of judicial reasoning.

Consequently, in practice indefinite legal concepts function as a basis for the formation of judicial conviction which through the latter will be shaped, expanded, specialized and concretized, so as to be applied *in concreto* to the case under examination. Undeniably however, the process is not simplistic but multifaceted, since for the recognition of the opposition to the general clause of good morals[7] of a case which is also the subject of our research, it is of major importance that the interpreter of law has informally devised a special and intermediate rule, which will perform a dual function. Firstly, it will specialize the general clause and secondly, it will generalize the case, so as to create a standardized casuistry that falls under the general clause under judgment, as the existing guidelines and mainly judicial precedent are also taken into account.

Consequently, the interpretive approach of these by judges functions as a guarantor of the lawful operation of the third state power, protecting from unlawful interventions and interferences, realizing the demand for good justice and proving once again the law-creating nature of justice and its function as a derivative of jurisprudence.

3. The Legislative Foundation of the General Clause of Good Morals in the Greek Civil Code and German Civil Code

The legislative form of the article provision of 178 CC explicitly incorporates the indefinite legal concept of good morals, providing that every legal transaction that is contrary to good morals suffers from nullity. Undoubtedly, however, good morals require specification and ad hoc application on a case-by-case basis. Theory as well as jurisprudence, however, in an attempt to concretize the above general clause, have preferred the utilization of

[5] See Angelos P. Kornilakis, *General Principles of Civil Law: Practical Issues* (Athens: Sakkoulas Publications, 2025), 131 ff., https://www.sakkoulas.gr/el/editions/a-kornilakis-genikes-arches-tou-astikou-dikaiou-praktika-themata-2025/.

[6] See Ioannis S. Spyridakis, *Handbook of Civil Law: General Principles*, vol. 1 (Athens: Sakkoulas Publications, 2025), 87–89, https://www.sakkoulas.gr/en/editions/i-spyridakis-encheiridio-astikou-dikaiou-genikes-arches-tom-1-2025/.

[7] See G. Ladogiannis, *The Declaration of Will and the Problem of Its Validity: Elements of a Critical Approach* (Athens: Sakkoulas Publications, 2025), 112–15, https://www.sakkoulas.gr/ el/editions/g-ladogiannis-i-dilosi-voulisis-kai-to-provlima-tis-ischyos-tis-2025/.

a safe evaluative criterion of the average and prudent social person[8]. This means that good morals do not reflect isolated and scattered social perceptions, so that the evaluative measure is objectified. It becomes clear that good morals have an anthropocentric character, with a dual nature of externalization of moral rules and social imperatives. Having said the above, the judge has the primary role to specify the clause in question, to evaluate whether the factual circumstances of the case under examination fall under the cases of opposition to good morals, relying not on his personal positions and beliefs nor on prevailing ideologies but on the value system[9] that exists in the consciousness of the social whole.

It can be said that the applicable framework of article 178 CC over the years is increasingly expanding with the consequence that all types of contracts fall under it (bilateral, unilateral, with condition or term), even at the stage of negotiations in the pre-contractual stage, that is, if from the circumstances an issue of immorality arises. In the same framework, collective labor contracts, banking contracts, declarations of last will (wills) and the constitution of associations are also included. Also included are dispositive legal transactions by which an obligatory or real right is transferred, abolished or encumbered, which may contain the element of immorality.Consequently, it is a fact that the field of application of article 178 CC is not limited exclusively and only to the field of civil law but is also traced in other legal branches[10] such as commercial, administrative and criminal law, highlighting their multifaceted character.

Finally, it should be mentioned that the affirmation of the infiltration of the immoral element in a legal transaction constitutes an extremely complex process, as it is not based only on the concurrence of one aggravating factor but on the coincidence of several elements[11] from which the subversion of good morals is founded. Therefore, before the law enforcer proceeds to characterize a legal transaction as contrary to good morals, he will not be satisfied with the assessment of scattered factors, such as the motives, purpose and manner of its conclusion. Much more is required a comprehensive assessment of all the special circumstances that accompanied its formation, so that from their combination the element of immorality[12] is proven beyond any reasonable doubt. These factors, therefore, are in a relationship of

[8] See Georgios Balis, *General Principles* (Athens–Thessaloniki: P. Sakkoulas, 1961), § 64B.

[9] See Pavlos Chr. Filiou, *General Principles of Civil Law*, 4th ed. (Thessaloniki: Sakkoulas Publications, 2011), 343–47, https://www.sakkoulas.gr/el/editions/p-filios-genikes-arches-asti koudikaiou-4i-ekd-2011/.

[10] See Nikolaos Triantos, *Legal Transactions: Commentary, Case Law, and Models* (Athens: Nomiki Vivliothiki, 2011), 208 ff., https://www.nb.org/ekdoseis/nomikes-ekdoseis/dikaiopraxies.html.

[11] See Apostolos S. Georgiadis, *General Principles of Civil Law*, 5th ed. (Athens: P. N. Sakkoulas, 2019), 159–61, https://amelib.seab.gr/archive/item/41560?lang=en.

[12] See G. Kostaras, "Concept and Application of Article 178 of the Civil Code," *EEN* (1960): 840 ff.

interaction and mutual assistance, so as to form a compact whole that validates the immoral character of the contract being concluded.

In direct connection with the above, the German Civil Code and specifically through the legislative regulation of § 138 BGB defines that a legal transaction[13] that is contrary to good morals is void, while paragraph 2 of the same legislative provision specifically regulates usury, as a particular case of immoral legal transaction. The basic function of the provision is to exclude the provision of legal protection to legal transactions that come into direct opposition with the fundamental values of the legal order. The law does not adopt an abstract or "excessive morality", but incorporates only the basic and generally accepted social values, that is, those that are considered necessary for the smooth functioning of a legal system.

The central element of the above provision is the concept of "good morals". German jurisprudence defines these as the "sense of propriety of all those who think justly and honestly[14]". This formulation attempts to reflect an objective social morality, which does not depend on the personal judgment of the respective judging judge, but on a more general social perception of justice and propriety.

By analogy, therefore, with Greek civil law, the German civil code also prefers that the criterion will be specified based on the relevant transactional or professional circle[15]. By logical consequence, therefore, if the issue concerns a specialized field (e.g. commercial transactions) the perceptions of the involved parties will be taken into account. On the contrary, when it concerns an issue of general social interest, the issue of possible immorality in a behavior[16] or act will be examined under the microscope of general social perceptions. The concept of good morals in the German legal system and correspondingly with the Greek civil code is not static. On the contrary, it changes historically and socially. This means that acts that were once considered clearly immoral may today no longer be judged as contrary to good morals. This is why the dynamic nature of this concept makes its application difficult to implement.

Particularly at the theoretical level, Larenz has proposed the distinction of the content of good morals into two levels: First, at the socio-ethical level, which includes socially acceptable perceptions[17] and rules of behavior

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[13] See Katharina Gräfin von Schlieffen and Jenny Nolting, *Rechtsphilosophie: Grundlagen für das Jurastudium* (Stuttgart: UTB; Paderborn: Ferdinand Schöningh, 2018), 95 f., https://katalog.bibliothek.kit.edu/bib/1437038.

[14] See Theo Mayer-Maly, *Recht – Gerechtigkeit – Rechtswissenschaft: Gesammelte Schriften*, ed. Heinrich Honsell and Dorothea Mayer-Maly (Vienna: Verlag Österreich, 2019), 152, https://www.verlagoesterreich.at/recht-gerechtigkeit-rechtswissenschaft/99.105005-9783704679826.

[15] See Mayer-Maly, *Recht – Gerechtigkeit – Rechtswissenschaft*.

[16] See Stefan Perner, Martin Spitzer, and Georg Kodek, *Bürgerliches Recht (inkl. Glossar)*, 6th ed. (Vienna: Manz, 2019), https://research.wu.ac.at/en/publications/b%C3%BCrgerliches-recht-inkl-glossar-7/.

[17] See Thomas Müller and Norbert Wimmer, *Wirtschaftsrecht: International – Europäisch – National*, 3rd ed. (Vienna: Verlag Österreich, 2018), para. 216 ff., https://www.thalia.at/shop/home/

that are not necessarily legally secured, but are considered necessary for the smooth functioning of social coexistence and second at the legal-ethical level, which emerges from the very principles of the legal order. Here are mainly integrated the values of the Constitution and fundamental rights.

However, this does not imply that every conflict with constitutionally secured rights will lead to automatic nullity, because this would be equivalent to direct third- party effect, which is not accepted.

Consequently, in cases where clear social morality cannot be established, legal-ethical criteria and constitutional values acquire increased importance and can guide the judgment on immorality.

Even in the German legal order there is intense dialogue about whether the application of § 138 BGB presupposes the concurrence of a certain subjective element. In theory, various versions have been proposed such as culpable or reprehensible intent, consciousness that the act is immoral or knowledge that the factual circumstances constitute an immoral and socially reprehensible act. A large portion supports that the cumulative concurrence of the subjective element would mean that persons who completely ignore social moral imperatives could conclude valid contracts[18]. This is why it is mainly supported by jurisprudence that immorality is judged primarily objectively based primarily on the content and circumstances of the legal transaction. However, an explicit exception to the above rule is recognized in § 138 BGB paragraph 2 (usury), where the parallel coexistence of the element of exploitation is required, as a more specific manifestation of subjective culpable behavior.

From the above, it emerges that both the German (§ 138 BGB) and the Greek civil code (CC 178) through the specific provisions that regulate the general clause of good morals elevate this as a general clause of paramount importance through which the law provides judicial protection to the weak parties of an agreement, which contravenes fundamental social and constitutional values, protecting the latter from a manifest violation of their legal interests.

4. The General Clause of Good Morals in the Supreme Court of Cassation of the Areopagus and the Attribution of Semantic Content

It is jurisprudentially accepted that the decisions of the plenary session or sections of the Areopagus for the clarification of the indefinite legal concept of good morals utilize the criterion of an abstract "value code of ethics that is found in the average social person who thinks with prudence[19] and

artikeldetails/A1046081226.

[18] See Franz Bydlinski, “Über das Verständnis der ‘guten Sitten’ im österreichischen Recht,” in *Festschrift für Joachim Gernhuber zum 70. Geburtstag*, ed. Hermann Lange, Knut Wolfgang Nörr, and Harm Peter Westermann (Tübingen: Mohr Siebeck, 1993), 827, https://www.mohr siebeck.com/buch/festschrift-fuer-joachim-gernhuber-zum-70-geburtstag-9783161652509/.

[19] See G. Theodosis, “Good Morals and the Constitution,” *Kritiki Epitheorisi* (1999): 49 ff.

honesty." This jurisprudential position is not accidental, as it explicitly declares that the supreme cassation court of Greece has proceeded with an informal legal transplantation from the German legal order, which means that the jurisprudence of the Areopagus harmonizes with the corresponding jurisprudence of the Supreme German Federal Court.

To strengthen the above position of the author, it is worth making a comparative law observation[20]. More specifically, it is a fact that for over one hundred (100) years, namely from the year 1901 onwards, the then Reichsgericht, that is, the supreme court of Germany, which operated from the years 1879 to 1945, presented a uniform interpretative approach for the meaning of the legal concept of good morals by proceeding with the following wording "Den Maßstab für die guten Sitten hat der Richter aus dem herrschenden Volksbewusstsein zu entnehmen, dem Anstandsgefühl aller billig und gerecht Denkenden," which if we could decode it, we would translate as "Good morals as a criterion of particular character should be approached interpretatively by each interpreter of law with exceptional restraint and taking into account the prevailing popular sentiment about what ought to be done as well as the existing moral and correctly acceptable frameworks of social behaviors."

At this point, a brief preview of the older issued Areopagus decisions with their issuance dates between the years 1975 to 1991 will be attempted. These specific decisions of the Plenary Session of the Areopagus constitute jurisprudential material of major importance, as through them the necessary control of the correct specification of good morals by the courts of substance was attempted.

Specifically, with decisions numbered OlAP 398/1975[21], OlAP 821/1977[22], and OlAP 2/1991[23], the Areopagus in the reasoning of its decisions displays a common paraphrased methodology for specifying the legal concept of good morals. This becomes apparent, starting from the first of these in which the criterion for specifying good morals is the average perception of a socially prudent citizen, in the second of these a moral-formative element is added to the criterion with parallel mention of the average prudent person, while in the third and last no additional element is mentioned for the specification of the above criterion but only suffices in repeating the criteria used by the previous jurisprudence and specifically of the average conscientious citizen who thinks with prudence and honesty.

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[20] See P. Daskalopoulos, *Decisions of the General Assembly of a Société Anonyme Contrary to Good Morals* (Athens: Nomiki Vivliothiki, 2019), 12 and nn. 84–86, https://www.nb.org/apofaseis-genikis-syneleysis-anonomis-etairias-antithetes-sta-xrista-ithi.html.

[21] Supreme Court (Plenary), Decision No. 398/1975, *EEN* 1976: 22–23.

[22] Supreme Court (Plenary), Decision No. 821/1977, *NoB* 1978: 669–70.

[23] Supreme Court (Plenary), Decision No. 2/1991, *EllD* 1991: 746; *EEmpD* 1993: 256; *EEN* 1992: 195.

With a holistic approach to the jurisprudence produced in the following decade (AP 211/1980[24], AP 958/1988[25], AP 826/1989[26], OlAP 2/1991[27], OlAP 10/1991[28], AP 925/1991[29]), it is clear that the Areopagus stubbornly adheres to this position regarding the determination of good morals, while refusing to deviate jurisprudentially from the criterion "of the average healthy thinking social person," which it has established as a safety valve to demonstrate the opposition of a behavior as contrary to good morals. However, from the decade of 2000 onwards, judicial decisions rich in major considerations are observed, and this is because they are based on rule-of-law guarantees that govern the Greek legal order and which will be briefly developed below.

On the first axis, decision AP 900/2011[30] of the A1' Section of the Areopagus was called to examine under what circumstances the described behavior according to Article 919 of the Civil Code contravenes good morals. More analytically, it was judged that a behavior as typified in the provisions of the above article should not be examined exclusively and only with objective criteria and according to the established criterion of the average prudent and sensible social person, as such an assessment is inadmissible and unfounded. For the Cassation Court, every behavior should be examined multifactorially, namely judged by the legitimacy of the pursued purpose as well as the means used to achieve it in direct connection, however, with the general criterion of the average healthy thinking person. From the above, it emerges that the above-mentioned decision proceeded with an important step of "weaning" from the sterile established criterion of the average prudent person, proposing a radical view of including other endogenous factors related to the psyche of the wrongdoer and specifically the motives that drove him to commit the wrongful act, the purpose he pursued, and generally the means he decided to use to achieve this goal. Therefore, the court in the disputed case prioritized the need when a behavior falls under the normative form of Civil Code 919 not to be examined in isolation but multi- factorially, so as to judge whether the damage that occurred is in causal connection with the actions of the contracting party.

On the second axis, decision AP 43/2013[31] of the A2' Section of the

[24] Supreme Court, Decision No. 211/1980, First Civil Chamber, *NoB* 1980: 1483.
[25] Supreme Court, Decision No. 958/1988, Fourth Civil Chamber, *EllD* 1989: 1345.
[26] Supreme Court, Decision No. 826/1989, First Civil Chamber, dissenting opinion, *EllD* 1990: 1237.
[27] Supreme Court (Plenary), Decision No. 2/1991, *EllD* 1991: 746; *EEmpD* 1993: 256; *EEN* 1992: 195.
[28] Supreme Court (Plenary), Decision No. 10/1991, *ArchN* 1991: 652; *EllD* 1992: 69; *EEN* 1992: 205.
[29] Supreme Court, Decision No. 925/1991, First Civil Chamber, *Arm* 1992: 115.
[30] Supreme Court, Decision No. 900/2011, A1 Civil Chamber (TNP NOMOS).
[31] Supreme Court, Decision No. 43/2013, A2 Civil Chamber (TNP NOMOS).

Areopagus essentially repeats in the context of specifying good morals in connection with Article 919 of the Civil Code what was previously stated in the above decision, emphasizing once again that the affirmation of the opposition of a behavior to good morals does not constitute a simple procedure, which would be completed exclusively and only with the utilization as a criterion of the average prudent thinking person, as this would undoubtedly lead to erroneous judicial judgments. The judicial judgment must also rely on other circumstances such as purposefulness, the means and methods used, in order to extract a safe conclusion about whether the conduct of the contracting parties is in an affirmative or negative analogical relationship. On the third axis, decision AP 167/2015[32] of the A1' Section of the Areopagus dealt with the issue of further specification of the general clause of good morals when it is correlated with the numbered 1 general clause "on unfair competition." The court noted that its semantic content tends to shrink significantly when the issue of opposition to good morals of a behavior regulated by another statute arises, such as in this case that of unfair competition. This means that a competitive action will contravene good morals when the methods and practices used are manifestly contrary to the average common perception within this transactional circle, given the value perceptions that have been formed within this professional circle.

On the fourth and final axis, the most recent jurisprudence of the Areopagus will be presented, specifically decision AP 99/2019[33] of the C' Section, in the reasoning of which it was explicitly stated that during the examination of Article 919 of the Civil Code, a behavior can be judged as undermining good morals provided it fulfills on the one hand the criterion of disagreement of this behavior with social-transactional imperatives and on the other hand the criterion of moral-economic perceptions that exist in a healthy and prudent thinking person. The above jurisprudential view can be said to combine various manifestations of social life, so as to constitute a safe criterion for crystallizing the legal concept of good morals.

5. Summary Findings Regarding the Existing Case Law of the Supreme Court of Cassation

With an overall review of the case law of the Areopagus [Supreme Court] regarding the issue of delimiting the conceptual content of the legal notion of good morals [χρηστά ήθη], certain basic observations can be drawn, which are useful for a critical reassessment of its established jurisprudential stance. Specifically, the following are observed:

a) Within the framework of cassation review of the correctness of judicial decisions of courts of substance regarding the correct interpretation and specification of good morals, the Areopagus appears to adopt a rather one-

[32] Supreme Court, Decision No. 167/2015, A1 Civil Chamber (TNP NOMOS).
[33] Supreme Court, Decision No. 99/2019, Third Civil Chamber (TNP NOMOS).

dimensional and problematic mode of reasoning. This is demonstrated by the linguistic formulation of the major premises, through which vague and unclear phraseologies are systematically repeated such as "general perceptions," "moral sentiment," "common conscience," "average prudent citizen," "soundly thinking person." This choice by the Supreme Court does not appear to be consistent with the normative character of legal science, which is bound to formulate binding judgments and not inaccurate descriptions of social perceptions. This results in the major premise of judicial reasoning referring to a rhetorical construct or wordplay rather than a strictly founded legal evaluation. For a judicial decision to be persuasive and verifiable, it is required to be based on clear and substantial arguments, utilizing appropriate interpretive tools and taking into account the fundamental principles that govern law in a legal order that respects the Rule of Law. Conversely, vague and evaluatively indeterminate concepts allow neither adequate reasoning nor substantial review of the judicial decision.

Although such expressions may have a place in other fields of discourse, such as journalism or public dialogue, they do not meet the requirements of legal reasoning, which presupposes precision, clarity, and deontological foundation.

b) Supplementary to what has been mentioned, it is observed that the Areopagus repeats in a large number of judicial decisions a substantially uniform general reasoning regarding good morals, varying only the linguistic expression thereof. However, small linguistic or syntactic variations do not negate the fact that the content remains equally vague and legally inadmissible.

Much more so in cases such as that of good morals, judicial interpretation requires increased intensity and creativity. The judge is not sufficient to attribute a general semantic content to the concept, but must proceed further, formulating more specific rules that can be applied to concrete factual situations. In other words, a process of specification is required that will bridge the gap between abstract concept and concrete life event.

In the aforementioned case law of the Areopagus, however, this process is not complete. Instead of progressively limiting the vagueness of the concept through concretization, the same vagueness is reproduced with different formulations. Thus the interpretive effort does not lead to the creation of clearer rules, but remains at the same level of generality and vagueness. Consequently, the need for a more coherent and deontologically founded approach is highlighted, which will enhance the transparency, predictability, and control of judicial judgment within the framework of the Rule of Law.

6. An Alternative Approach to the Interpretation of Good Morals

At this point, the fundamental concern of the study reaches its peak, which relates to the interpretation of good morals. Having previously presented the prevailing view in theory and jurisprudence, at this point a critical

commentary thereof will be attempted and an alternative approach will be formulated. This new approach seeks to highlight the normative character of law and to ground legal judgments on arguments of substantive correctness, with a strong ethical-political dimension.

The dominant conception treats good morals as a reflection of prevailing social perceptions, that is, as a set of values[34] that supposedly the majority of society's members share. However, such an approach presents serious difficulties, because it transforms a normative issue - what should apply - into an empirical question - what actually applies. In this way, ethical-legal principles are equated with simple social beliefs, which are often shaped by habit, interest or social conformism and not by conscious moral judgment. Conformity to social morals does not necessarily entail moral authenticity, as it is often based on mechanistic or exogenous causes. Social norms have a relative and changing character and cannot establish universally binding moral standards. Moreover, the evaluations formulated within the framework of social life are not always products of rational processing, but often manifestations of emotional reactions without real moral depth. Conversely, a rational approach to ethics, such as that derived from Kantian philosophy, argues that the criterion of moral correctness does not arise from experience or social majority, but from right reason and moral law. Moral law has a deontological character and imposes universal principles, independent of prevailing social conditions. Moral action presupposes autonomy of will and conscious adherence to duty, not mere conformity to what the many dos.

The identification of good morals with the perceptions of the "average person" leads to a purely descriptive and not normative understanding of law. Social perceptions, even if they can be empirically established, do not possess binding force on their own nor adequate foundation for the formation of legal rules. Law, as a normative issue, must be grounded on principles that transcend the simple recording of reality.

The theoretical foundations of the prevailing view appear to be connected either with historical or with relativistic conceptions. The historical approach becomes trapped in accepting the existing situation as given and fails to transcend it critically. On the other hand, relativism denies the possibility of universal truth and correctness, leading to an inability to rationally[35] ground values.

These approaches end up reducing the criterion of good morals to the opinion of the majority, a fact that entails the danger of imposing a "tyranny of the majority." At the same time, any possibility of controlling the correctness of legal judgments is weakened, creating a space for arbitrary judicial

[34] See Kalliope K. Papakonstantinou, "The General Clause of Good Morals: A Legal-Historical Approach," *Yearbook of the Research Centre for the History of Greek Law* 40 (2007): 307 ff., https://www.searchculture.gr/aggregator/edm/KEIED/000134-232058.

[35] See Kostas Stamatis and Andreas Takis, *Introduction to the Science of Law*, 3rd ed. (Athens–Thessaloniki: Sakkoulas Publications, 2025), 158, https://www.sakkoulas.gr/en/editions/k-stamatis-a-takis-eisagogi-stin-epistimi-tou-dikaiou-3i-ekd-2025/.

assessment. Consequently, good morals should not be determined based on what prevails in society but based on the substantive moral correctness of their content. Their binding nature does not derive from social acceptance, but from their agreement with fundamental ethical-legal principles grounded in right reason. Summarizing the criticism toward the prevailing theory on good morals, certain basic observations can be formulated.

First, the dominant view suffers from logical circularity, as it essentially defines good morals as the morals of the "good person," without determining their content. In this way, what is sought is considered given, without being proven. A more correct approach would require clear identification of specific moral standards[36] and justification of their goodness based on arguments that can be rationally examined. Therefore, the notion of goodness cannot function as a prerequisite, but as a result of evaluating human behavior.

Second, the totality of social perceptions is particularly unstable, changing and often contradictory. For this reason, it cannot constitute a safe foundation for determining what is just or morally correct. In a modern pluralistic society, different groups adopt different value systems, which often clash with each other. Therefore, it is not clear why the perceptions of a majority should bind everyone, especially when these cannot be determined with precision. Moreover, the historical and cultural relativity of morals shows that they adapt to prevailing conditions and do not possess a stable normative core. At the same time, it is not rare for socially acceptable practices to conflict with fundamental principles of law and ethics. Examples from different cultural backgrounds show that social acceptance of behavior does not guarantee its moral correctness. If it is accepted that the "prevailing" is identified with the "real," then the normative element of law is completely weakened, leaving unanswered the question of why a social belief should be elevated to a moral principle.

Third, the invocation of the "average social person" does not provide an objective and universally applicable criterion. This is an abstract and vague construction, which may have some utility at a sociological level, but does not meet the requirements of a normative science like law. In contrast to philosophical concepts such as Aristotelian moderation, which incorporates evaluative content, the "average person" remains a static average without moral weight.

Fourth, adherence to changing and often conflicting social perceptions entails the danger of subjectivism on the part of the law enforcer. The judge, as a member of society, may project his own beliefs as supposedly "prevailing," using good morals as a tool for imposing personal evaluations. This can lead to arbitrary judgments and to exceeding the institutional limits of judicial function, resulting in restriction of citizens' freedom and autonomy.

Fifth, individual beliefs in a free and polyphonic society continuously

[36] See Kostas Stamatis, *Law and Justice in the Age of Limits* (Athens: Polis, 2000), 247.

differentiate and cannot acquire universal binding force. The imposition of a specific perception as a general rule would negate personal autonomy and lead to restriction[37] of freedom of thought. Every individual has the right to form and change their views, provided they do not infringe upon the freedom of others.

Finally, the approach to ethics through right reason differs from the level of simple beliefs. Right reason does not provide absolute and immutable answers, but functions as a means of critical processing and orientation of human thought. Through autonomy of will, the evolution of moral and legal perceptions becomes possible, aiming at the continuous improvement of human coexistence.

In a well-ordered state, the notion of good morals cannot be exhausted in simple social perceptions, but is integrated into a broader framework of moral and political obligations with legal significance. Beyond strictly legal obligations, law recognizes rules that do not have complete formal establishment, such as constitutional principles of a guiding character, transactional morals and rules of professional ethics. These express expectations of reasonable behavior regarding the exercise of freedom.

Law is characterized by a dual nature: it is simultaneously a positive system of rules and a bearer of moral values. Consequently, its interpretation cannot be merely technical or linguistic but must seek balance between the authority of law and substantive justice. Legal judgment emerges through argumentation that combines legal and ethical-political criteria, aiming at the most just possible solution.

Under this perspective, good morals do not constitute given content drawn from social reality, but result from normative judgment. The interpreter does not simply ascertain what prevails, but evaluates based on principles such as freedom, equality and solidarity, which constitute foundations of the legal order and a filter for integrating unwritten rules into law. Thus, good morals must be understood as rules of moral character that correspond to a rational and universally oriented idea of justice. They are not identified with the views of the "average person," but with standards of behavior that would be adopted by a reasonable and responsible person within the framework of a democratic society. This standard concerns the free and responsible citizen, who functions based on the fundamental principles of the legal order, respects the rights of others, pursues freedom for all and assumes responsibility for their actions. In this sense, good morals function as a normative measure for evaluating behavior and not as a simple reflection of social beliefs. In conclusion, therefore, the binding nature of good morals does not depend on whether they reflect the actual behavior of society, but on whether they correspond to this normative standard of justice and responsible freedom.

[37] Kostas Stamatis, *Critical Theory of Justice: Foundation of Principles* (Athens: Savvalas, 2011), 145 and n. 21.

7. Conclusions

Summarizing the findings of the present study, good morals as an indeterminate legal concept have consistently been the subject of intense theoretical and jurisprudential debate. The traditional approach that equates them with prevailing social perceptions and what ought to be carries the risk of interpretative arbitrariness and undermining legal certainty. For this reason, a more objective approach is necessary, harmonized with the fundamental principles of the legal order and constitutional guarantees, in order to limit the influence of subjective evaluations. Within this framework, the proper interpretation of good morals must proceed through two fundamental interpretative steps.

First, it is necessary to determine the source of the criteria for their semantic determination within a minimally legitimate State. These criteria cannot be derived merely from fluid social perceptions, but from the moral law as conceived by Kantian practical reason, within a rule-of-law framework grounded in primary principles of justice.

Second, the formulation of the major premise must rely on the best possible argumentation, particularly on arguments of substantive correctness and of legal- political and ethical-political nature. At the same time, it is necessary to shape more specific, abstractly narrower rules of law, which are connected to the concrete facts of life, allowing both factual specification and the possibility of their universal application to essentially similar cases.

The above intellectual processes operate dynamically and interactively until the final subsumptive judgment. From this perspective, it becomes clear that the interpretation of good morals requires a coherent combination of abstract normative redefinition and concrete factual application, guided by the fundamental principles that legitimize the legal order.

In conclusion, good morals as an indeterminate legal concept require systematic interpretative processing in order to ensure predictability and legal certainty. At this point, the convergence between German law (§ 138 BGB) and Greek law (Article 178 of the Civil Code) becomes evident, as both treat good morals as a general clause safeguarding the legal order and protecting weaker parties, grounded in fundamental social and constitutional values. Through the adoption of a more objective interpretative standard, consistent and substantive administration of justice becomes possible.

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Subsequent Impossibility and Hardship in Contract Law: A Comparative Study of Hungarian and Slovak Law

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Abstract

Each contract that is not performed immediately after its conclusion may face disturbances in performance arising from supervening events, difficulties, or changes in circumstances. Non-performance or non-conformity is considered a breach, which gives rise to claims for damages and other consequences. In the absence of contractual provisions, exemption from liability for breach may be granted exceptionally in cases of subsequent impossibility and hardship, if the conditions defined by law and strictly applied by courts are met. This study, focusing on two neighbouring states, Hungary and Slovakia, provides an overview of the key questions, challenges, and solutions found in different legal systems and instruments of international comparative law, and concludes by highlighting the advantages of properly drafted contractual provisions agreed by the parties.

Keywords: *subsequent impossibility, hardship, breach of contract, exemption from liability.*

1. Introduction

Through its general aims of facilitating international economic relations and contributing to the legal set-up of economic integration, comparative private law has reached a high level of common understanding in the sphere of contract law. Its focal points generally follow the life cycle of a contract and address the most debated issues. In examining these focal points and questions, comparative law has collected the various answers, analysed them and thus created a shared body of knowledge. It promotes a natural convergence of useful ideas and contributes to the development of contract law as a whole. Within the life cycle of contracts, particularly at the phase of performance, one question continues to attract the attention of comparatists: the issue of proportionality and equilibrium, often regarded as the "soul" of the contract. This question can be summarized as that of changes in circumstances, in a narrower sense, the subsequent changes of circumstances.

No single, uniform scheme can be established, as stability and general confidence in contract law and legal order must also be taken into account alongside the interests of private individuals. Legal systems, each following their own traditional paths, have developed different solutions and employ different termi-

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nology. In examining the existence, advantages and disadvantages of these solutions, the study draws on foundational works in comparative law.[2]

Following a bird's-eye overview of key concepts and principal approaches, a more detailed analysis of comparative contract law, together with the unified law instrument of CISG,[3] assist in exploring and evaluating the legal system of two neighbouring Central European countries. At the end of this intellectual journey, the study highlights the importance of party cooperation in shaping contractual relations, particularly in cases of subsequent impossibility and hardship.

2. A General Background: Concepts and Main Approaches

2.1. Basic Concepts for the Examination of Changes in Circumstances

By common understanding in comparative contract law, a contract is a legal institution in which the relationship between the parties is expressed. It provides the framework of their relationship and sets out the rights and duties arising from it. Through contracts, parties reflect the needs of everyday life and economic demands. There is no uniform definition of a contract across different legal systems. Contracts vary in many respects and must often be assessed on a case-by-case basis. Rather than attempting to provide a comprehensive definition, this study uses the term to refer to an agreement between two or more parties for erecting mutual rights and obligations.[4] As a source of obligation, a contract is typically characterized by an equilibrium, between competing interests, as well as by cooperation in performance. A contract is the "internal law" of the parties, which they are, in principle, free to shape. This freedom, however, is not absolute and is limited by rules of legal order serving the needs of social coexistence.

Performance is understood here in the contract law sense, meaning that only performance in conformity with the contract is considered performance. Under this strictly objective approach, any non-performance or non-conforming performance, regardless of the reason, constitutes a breach of contract. Whether or not the breach is fundamental, if it is detrimental to the other party, it substantially deprives them of what they were entitled to expect,[5] any deviation from what was

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[2] Konrad Zweigert and Hein Kötz, trans. Tony Weir, *Introduction to Comparative Law*, 3rd rev. ed. (Oxford: Clarendon Press, 1998); Gyula Eörsi, *Comparative Civil (Private) Law: Law Types, Law Groups, the Roads of Legal Development*, trans. Gábor Pulay, Imre Móra, and Edna Lénárt (Budapest: Akadémiai Kiadó, 1979).

[3] United Nations Convention on Contracts for the International Sale of Goods adopted April 11, 1980, 1489 UNTS 3 (CISG), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

[4] Hungary, Act V of 2013 on the Civil Code (Hungarian Civil Code), § 6:58, https://njt.hu/jogszabaly/2013-5-00-00.

[5] CISG, art. 25.

agreed is regarded as non-conforming and gives rise to liability. The injured party may, among other remedies, claim specific performance damages, repair or replacement, or a price reduction. Alternatively, the contract may be terminated through avoidance. The risk of non-performance is implicitly inherent in obligation, meaning that the party is deemed to accept liability for breach when entering into the contract.

Besides the principle of the sanctity of contract, there is always a possibility of improper performance. There may even be situations where performance would go beyond what was originally undertaken. Exemption from liability disrupts the predictability of changes planned commonly by the parties. It can only be exceptional and justified by extraordinary events or changes that fundamentally affect the contract, either in validity or its content. In principle, any circumstance may serve as a cause or source if it adversely affects performance. However, the required threshold is high, it must amount to impossibility or to come very close to it. Interpreted strictly, exemption becomes an ultima ratio solution. For this reason, both the concept if exemption and the methods of dealing with it require clarification. Legal literature identifies several aspects that help to shape this concept, such as the extent of exemption (full or partial), its temporal starting point, the relationship between the cause and time of contract conclusion, and the temporary or permanent nature of the impediment.

Among the changes of circumstances that may lead to exemption are those arising after conclusion of the contract, requiring the parties to reassess their situation, their interests, and the future of their relationship. Such subsequent events may hinder proper performance and render it impossible or significantly more difficult.

2.2. Main Directions of Consequences of Subsequent Changes in Circumstances

Let us proceed along the path of comparative law findings. By their nature and degree of severity, the changes in circumstances that impede performance generally lead either to termination or modification of the contract. In the first instance, the parties themselves are primarily empowered to decide on their contract. In the absence of their agreement, the intervention in the contractual relationship must respect the fundamental principles of the relevant legal order. Legislation and the courts are the two fora of the exceptional intervention. There is no precise and unified definition or method for assessing the effects and circumstances of such changes. Nevertheless, the world of contracts requires stability and trust.

The starting point is expressed in the principle of *pacta sunt servanda*, according to which each contracting party must bear the risk of changing circum-

stances. However, any contract that is not performed immediately after its conclusion is exposed to the possibility of subsequent changes in circumstances.[6] When performance becomes objectively impossible due to an event occurring after the conclusion of the contract, the legal response is subsequent impossibility, and its consequences depend on the obligor's relationship to the changed circumstances. Distinct from impossibility is the concept of hardship, which arises when, due to fundamentally changed circumstances, contractual performance becomes so onerous for the obligor that it can no longer reasonably be expected.[7] The legal response to such situation is the doctrine of *clausula rebus sic stantibus*, which operates within a set framework of conditions.

The first question for the lawmakers and courts is whether the obstacle or impediment[8] reaches the threshold required for intervention and, if so, whether it results in impossibility or hardship. The next question concerns the consequences, which aim at restoring the contractual equilibrium or at reallocating risks between the parties.

The first question for lawmakers and courts is whether the obstacle or impediment reaches the threshold required for intervention and, if so, whether it results in impossibility or hardship. The next question concerns the consequences, which aim either at restoring the contractual equilibrium or at reallocating risks between the parties. As all legal systems face these issues, this study seeks to identify common answers through a broader comparative survey, examining both the advantages and the concerns involved.

3. Conditions and Aspects of Subsequent Changes

3.1. A Comparative Survey

In case of uncertainty or doubt, the first point of reference should be the contract itself. It is generally expected that, before entering into a contract, parties assess potential risks and either provide for them or accept their possible occurrence through risk allocation. However, a simple cursory review can show that clauses on impossibility or hardship are not among the primary concerns of the parties when drafting a contract. In the absence of such provisions, the role of the courts is to assist in a more appropriate allocation of risks, to correct disproportionality, and to restore the contractual equilibrium.

The reasons why the innocent party is required to bear part of the risk or its consequences must be convincing and broadly acceptable, not only in relationship between the parties to the contract, but also in the wider social context. This is essential for maintaining confidence in contractual stability and for

[6] Hungarian Constitutional Court, Decision 32/1991 (VI. 6.) AB, pt. III.2.
[7] Ágnes Juhász, *A szerződésmódosítás kérdésköre a magyar polgári jogban* (Budapest: Wolters Kluwer Hungary, 2019), 188.
[8] Zweigert and Kötz, *Introduction to Comparative Law*, 500.

providing guidance in future cases.

Changes in circumstances at stake refer to a radical disturbance of what was originally agreed, resulting from non-performance or non-conformity, regardless of the reason.[9] As a breach of contract, this may give rise to claims for damages or other remedies on the part of the innocent party. However, contracts are not to be performed in all circumstances and at any cost or at the expense of any sacrifice. Legal responses to changes in circumstances have developed differently across legal systems, yet many common features can be identified.

The first common characteristic is the respect for the parties' contractual autonomy. Neither the legislator, nor the courts may, as a rule, supplement the contract or depart from its content.[10] The principle of the sanctity of contract, together with the nature of the legal order, limits public intervention in the sphere of private autonomy.

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In the history of Western legal systems, different approaches have developed to address unforeseen impediments. French law initiated the concepts "*imprévisible*" and "*irrésistible*" events beyond the slightest chance of negligence. Gern law traditionally focused on factual impossibility, for example in case of accidental destruction of a thing assumed to remain available.[11] In common law, the excuse is often regarded as implicitly contained in the contract itself. Over time, legal development has led to a distinction between different types of impediments and their consequences: cases where performance becomes impossible, where it becomes unacceptably difficult, and where the purpose of the contract is frustrated. Similar ideas have also appeared in Central-European legal thinking.[12]

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[9] Zweigert and Kötz, *Introduction to Comparative Law*, 488.

[10] Lajos Vékás and Péter Gárdos, eds., *Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez*, Jogtár ed., updated June 20, 2025 (Budapest: Wolters Kluwer Hungary, 2025), commentary on § 6:192, ISBN 978-963-594-518-4.

[11] Zweigert and Kötz, *Introduction to Comparative Law*, 500, 509.

[12] Károly Szladits, cited in Juhász, *A szerződésmódosítás kérdésköre*, 123.

Initially, courts sought answer in general principles such as good faith and fair dealing.[13] Many cases arose in the context of economic crises and wars at the turn of the 19th and 20th centuries. Where subsequent events led to a serious imbalance, courts sometimes regarded the creditor's insistence on strict performance as an "*usurious exploitation*" of the debtor.[14]

Today, common conditions for the application of possible exemption can be found across different legal systems, although additional requirements appear in national legislation and practice. These concepts serve to emphasize the theoretical and practical distance between the impediment and the obligor and aim to reduce one-sided adverse consequences.

The subsequent occurrence of an impediment implies that neither party was aware of the risk at the time of concluding the contract and that it arose before passing of risk. Questions of validity fall out of the scope of subsequent impossibility and relate instead to the two initial reason why a contract may be considered void. The concept of superior force, or force major has well-established prerequisites in codified law, typically requiring that the impediment is unforeseeable, unavoidable and beyond the control of the parties.

Events and changes in circumstances that impede, frustrate, or radically disturb the subject matter or the purpose of the contract, or render performance commercially impracticable as understood in different legal systems, must be assessed on the basis of objective criteria, albeit on a case-by-case basis. Such an objective benchmark is provided by the notions of foreseeability or unavoidability, concepts often borrowed from tort law. In cases of hardship, the continuity of performance or the existence of a long-term relationship appears to be a frequently used criterion. These factors are applied when assessing the obligor's situation and characteristics in relation of possible exemption.

Both impossibility and hardship may be partial, raising the question of how the affected part influences the remainder of the performance. Moreover, temporariness is not excluded, as long as the impediment persists.[15]

While in case of subsequent impossibility the contract comes to an end and the remaining issue concerns the allocation of damages, hardship continues to exist in situations of "out of proportion", with the aim of reducing the disproportionality to a level that can reasonably be expected.[16] The threshold of hardship is close to that of impossibility in terms of severity, since, as the established formula suggests, performance is no longer reasonably expected from the obligor. Nevertheless, this assessment remains challenging for the courts.

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[13] Segessemann & Cie. v. Dreyfus Frères & Cie., ATF 48 II 242 (Swiss Federal Tribunal, May 4, 1922); Thomas Kadner Graziano and János Bóka, *Összehasonlító szerződési jog* (Budapest: Complex, 2010), 412.

[14] Zweigert and Kötz, *Introduction to Comparative Law*, 536.

[15] Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law*, 2nd ed. (Oxford: Oxford University Press, 2022), 712, https://doi.org/10.1093/law/9780198871255.001.0001.

[16] Zweigert and Kötz, *Introduction to Comparative Law*, 517.

Another feature, derived from case law, is its rare and exceptional application. Courts and legislative bodies are generally reluctant to intervene in private legal relationships and have established strict conditions under which such intervention may be justified. When assessing all the circumstances of the case objectively, including the impact and conduct of a non-breaching party and the fulfilment of ancillary duties such as cooperation and the duty to inform of impediments, courts ensure the flexibility, necessary for proper use subsequent possibility and hardship. Decision-making in claims related to breach, impossibility and hardship also involves a close examination of the limits of the burdens placed on the obligor, while the obligee's conduct is also relevant. The sacrifices of the injured party fall outside the scope of this study; however, as a general remark, cooperative and adaptive behaviour, including timely information, may be expected from them.[17]

When deciding claims related to subsequent impediments, courts refrain from reshaping the contract in place of the parties. Courts have no right to alter the contractual content.[18] This follows from the principle of freedom of contract and is reinforced by the general requirement of legal certainty and stability. Even the courts' exceptional power to grant exemption is limited in substance. What remains is gap-filling, which is based on the occurrence of unforeseeable events or changes in circumstances. Judges are not tasked with discovering a "hypothetical intention of the parties". Rather, as has also been noted, the aim is "to find out what the relevant commercial interests would regard as the normal and appropriate allocation of risk in contracts of the type in question".[19]

A particular aspect relevant to intervention is the number of similar cases. The legislator may be required to assume a role similar to that of the courts, subject to the guarantees and requirements of public law and public order, where a large number of cases and contracts are involved. In even more exceptional situations, legislative measure may have retroactive effect.

Although there are differences between legal systems in dealing with subsequent impediments. "The differences are clearly not unbridgeable. This is shown by the unification of the law of international sales."[20] One of the driving forces behind the development of comparative law has been "to facilitate international economic relations, to contribute to the legal set-up of economic integrations". In the following sections, the most successful instruments of unification and harmonization of contract law will be examined with regard to their contribution to the treatment of subsequent disturbances of performance.

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[17] Zweigert and Kötz, *Introduction to Comparative Law*, 509; *Taylor v. Caldwell* (1863) 3 B. & S. 826, 122 Eng. Rep. 309, https://www.bailii.org/ew/cases/EWHC/QB/1863/J1.html.

[18] Zweigert and Kötz, *Introduction to Comparative Law*, 536; Vékás and Gárdos, *Nagykommentár*, commentary on § 6:192.

[19] Zweigert and Kötz, *Introduction to Comparative Law*, 536; Bundesgerichtshof [BGH] [Federal Court of Justice], June 1, 1979, BGHZ 74, 370, 373.

[20] Zweigert and Kötz, *Introduction to Comparative Law*, 510.

3.2. Subsequent Impediments Under the CISG and Other Instruments of Comparative Law

The Vienna Convention is a cornerstone of a century of comparative legal development. It reflects ideas, compromises, failures, historical developments, and their adaptation. Its direct and indirect influence on private law relationships beyond sales explains why it is relevant when considering arguments for or against current legal approaches to subsequent changes in circumstances. Its enormous success is based its flexibility. Reference to the CISG implies reference to its text, structure, preparatory materials, commentary literature and case law.

As is clear from its structure, the focal point of the Convention is the breach of contract, defined already in first section of the General Provisions on sale. Its consequence is liability for breach.[21] Exemption from liability is regulated among the "Provisions Common to the Obligations of the Seller and of the Buyer", in Chapter V, Section IV. Article 79. The text of the norm contains every element which has been identified above as commonly adopted conditions to exemption from liability. Article 79 (1) provides: " *A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*" The following paragraphs address, inter alia, the involvement of third persons, temporary impediments, the duty to notify and the relationship to further claims of the injured party.

Article 79 allocates the consequences of non-performance within an objective and self-contained legal framework, balancing the parties' contractual interests. The rarity of the application of the rule, and the fact that changes and impediments do not automatically give rise to exemption, reinforce the exceptional nature of exemption.[22] As has been noted: "*This provision is designed to offer a single test to determine when a contractor is answerable for an obstacle to performance*."[23]

The CISG Advisory Council, in its the recently issued Opinion No 20, elaborates on the provision and explains its application to hardship.[24] It clarifies, first, that the term "*impediment*" refers to any kind of obstacle, and that the rule covers both subsequent impossibility and hardship.[25] The Opinion provides a useful set of factors for assessing whether the conditions of exemption are met and

[21] CISG, arts. 25, 36(1), and 45.
[22] Ulrich Magnus, "The CISG and Unforeseeable Events," *ELTE Law Journal* 2026, no. 1: 11-27, https://doi.org/10.54148/ELTELJ.2026.1.11.
[23] Zweigert and Kötz, *Introduction to Comparative Law*, 513.
[24] CISG Advisory Council, *CISG-AC Opinion No. 20: Hardship under the CISG*, rapporteur Edgardo Muñoz, adopted February 2-5, 2020, https://cisgac.com/opinions/cisgac-opinion-no-20/.
[25] Magnus, "CISG and Unforeseeable Events," 26.

clarifies the applicable remedies. Among other things, it emphasizes the limits of judicial intervention, reinforcing the prevailing view that courts may not adapt the contract in case of hardship.

Instruments of harmonization of international comparative private law also address subsequent impediments and serve as general references, particularly in regulating cases of disruption in performance. They contain certain differences compared to the CISG, aiming to provide more appropriate and efficient responses for reducing disequilibrium or achieving a better allocation of risks. The UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles or UPICC) define hardship as a fundamental alteration in the contract's equilibrium. Article 6.2.3 provides a right to request renegotiation, with reference to the principle of good faith. Two further high level instruments within the EU legal context reinforce the general principles of "*pacta sunt servanda*" and "*clause rebus sic statibus*", as well as the exceptional nature and conditions of exemption. These are the of Principles of European Contract law (PECL), Article 6:111 (1) and the Draft of Common Frame of Reference (DCFR), Article III-1-110 (2). Further detailed analysis falls outside the scope of this study.

It should be added that all comparative instruments and common rules of legal systems related to subsequent impediments begin with and emphasize the importance of party autonomy and party agreement. Having identified the main characteristics and common features of subsequent impediments, we now turn to the Hungarian and Slovakian legal situations.

3.3. Hungarian Law and Practice

Hungarian law expressly recognises both subsequent impossibility and hardship, subject to safeguards that ensure a coherent general approach. These two concepts fall within the scope of breach of contract, understood as non-performance or non-conformity for any reason. In the absence of a contractual provision, exemption from liability for such a breach is granted only exceptionally and primarily falls within the competence of the courts.[26] Under the monist approach of the Hungarian legal system in private law, a single Civil Code governs both civil and commercial obligations. The new Hungarian Civil Code (Act No. V of 2013 –referred as HU CC - is the result of decades of preparatory work and takes into account the most recent developments in European and comparative law.

The Hungarian Civil Code adopts the solution that subsequent impossibility leads to the termination of the contract. The cause of impossibility must amount to irresistible and absolute force of human or natural origin, which cannot be averted by means and instruments available for human beings.[27] Economic

[26] Kúria [Curia of Hungary], BH 2026.8.

[27] Kúria [Curia of Hungary], Pfv.I.20.422/2013/5, published as BH 2014.147, https://kuria-birosag.hu/hu/kuriai-dontesek/209-szerzodeses-jogviszony-tartalma-alatt-felmerulo-vis-maiorkent-mi

impediments, such as deterioration of the obligor's financial position, do not constitute grounds for exemption.

Liability for claims arising from non-performance is determined on the basis of objectively assessed imputability and the conditions for exemption. If neither party is responsible for the subsequent impossibility, they are released from their contractual obligations, and restitution of any performances already rendered becomes due. The conditions of exemption are derived from the rules of contractual liability. These are: that the cause of impossibility was beyond the parties' control, unforeseeable and unavoidable. In the case of alternative performances, frustration of choice entitles the innocent party to accept the remaining alternatives or to invoke termination of the contract due to impossibility. The role of the courts in such cases is to determine whether the contract is terminated by subsequent impossibility and to decide on liability; and exceptionally, on exemption from liability. Judicial practice consistently applies these exemption conditions strictly.[28]

Hardship cases are generally assessed on the basis of conditions similar to those applicable to exemption from liability.[29] Exemption from liability for breach caused by hardship may be granted by courts. Judicial intervention is available only in cases of ongoing, long-term contractual relationships,[30] if "t*he performance of the contract with unchanged conditions would harm his [the obligor's] substantial legal interest*."[31] Balancing the legally protected interests of the parties represents an additional challenge for courts. Purely economic, financial, or financial or market changes fall outside the scope of exemption also under Hungarian law and judicial practice.

Further conditions are well known from other legal systems. The requirement of unforeseeability implies that the obligor was not required to take the event or change into account and could not reasonably have foreseen its adverse effect. Hungarian law traditionally applies a standard of expectation with regard to the obligor, although the foreseeablilty test developed in comparative law has not been accepted. Any impact or contribution by the obligor to the occurrence of the impediment excludes exemption. A relatively recent development in codified law is the explicit recognition of normal business risk as a factor in assessing the conditions for exemption, reflecting judicial practice. A further limitation on granting exemption by is its ex-nunc effect, which further narrows the obligor's ability to rely on exemption. The extent of any contractual modification must correspond to an acceptable level of disproportionality. The task of the courts is

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[28] Hungarian Civil Code §§ 6:179-6:182 and 6:107.

[29] Hungarian Civil Code § 6:192.

[30] The meaning of "long-term" has been debated and elaborated in judicial practice; the official English translation uses "permanent."

[31] Hungarian Civil Code § 6:192.

not for complete elimination of disequilibrium. In this context, courts must carefully examine the interests of all parties, together with all relevant circumstances of the case, in order to reach the least harmful solution. Nonetheless, even a brief review of case law confirms the exceptional application of hardship.

If the number of related cases is relatively high and the hardship or changes affect a larger part of society, the conditions for exemption are to be defined in legislative act, instead of individual court decisions. The Constitutional Court has examined this type of legislative intervention, and in cases of permanent or long-term relationships it has even accepted retroactive effect, provided that strong guarantees of legal certainty are in place.[32] Hardship also appears in the context of preliminary contracts, where a party may be released from the obligation to conclude the final contract by the court, under the same conditions that apply to subsequent and fundamental difficulties that impede performance.[33]

Partial and temporary impediments are present in Hungarian law, as well as the ancillary obligations to cooperate and inform. The Hungarian situation is stable and constant, a kind of first aid limited by guarantees and conditions, in harmony of the comparative law.

Partial and temporary impediments are recognised in Hungarian law, along with ancillary duties such as cooperation and the obligation to provide information. The Hungarian approach is stable and consistent: it operates as a kind of first-aid mechanism, limited by clear guarantees and conditions, and remains in line with comparative legal solutions, in absence of contractual provision concluded by the parties.

3.4. Slovak Law and Practice

The law of Slovakia, shaped by its geographical and historical circumstances, forms part of the academic discourse of private comparative law. A fully modernized codification of Slovak private law could not have been fully developed yet. The applicable private law consists of the Code Civile (hereinafter Svk CC)[34] and the Code of Commerce (hereinafter Svk CommC)[35]. In summary, one can state that the Slovak approach is broadly in line with the general European developments but does not follow them in every respect when it comes to subsequent changes of circumstances.[36] It belongs to those legal systems that give pri-

[32] Hungarian Constitutional Court, Decision 32/1991 (VI. 6.) AB; Hungarian Constitutional Court, Decision 3278/2017 (XI. 2.) AB.
[33] Hungarian Civil Code § 6:73.
[34] Slovakia, Act No. 40/1964 Coll., Civil Code, §§ 561(2), 575-577, https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1964/40/.
[35] Slovakia, Act No. 513/1991 Coll., Commercial Code, §§ 352-354, 356-357, and 373-377, https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1991/513/.
[36] Emőd Veress, ed., *Contract Law in East Central Europe*, Legal Studies on Central Europe 8 (Miskolc-Budapest: Central European Academic Publishing, 2022), 379, https://doi.org/10. 54171/

ority to legal certainty and freedom of contract. Thus, beyond subsequent impossibility, Slovak law intends to counterbalance the out of proportion and excessive claims for performance in hardship situations through general principles of private law. In statutory law, the impossibility plays the dominant role, while hardship appears only in a fragmented manner and is supplemented by general private-law principles applied through judicial practice. For these reasons, the overview of Slovak law must begin with impossibility and subsequent impossibility.

Applied strictly, impossibility must be objective, meaning - consistent with other legal systems - that the obligation undertaken can no longer be performed. When performance was possible at the time the contract was concluded but later becomes impossible due to changed circumstances, the obligor's duty to perform terminates by the force of law.

Legal impossibility may serve as a valid argument if the conditions for the exemption are met, such as the requirement that the obligor could not have foreseen the event and was unable to prevent it. If the legal regulation under which a permission relevant for the performance was not issued already existed at the time of concluding the contract, or the discretional dispositions of a decree were known, the obligor should have taken them into account when assuming their obligations. In such cases, liability for impossibility remains. A 2010 decision of the High Court of Czech Republic, which has also been applied in Slovakia, shows a strong connection to the examples given by Magnus, particularly the one concerning customs duty in the context of Brexit, where the obligor disregarded the applicable rules. Exemption from liability may be granted only "because of sudden and not foreseeable changes in previous practice that had been regarded as constant".[37]

A subcategory to the impossibility is the so-called economic impossibility, where performance remains objectively possible despite subsequent changes, but becomes extremely burdensome for the obligor. In such cases, the obligor does not benefit from the protection granted in cases of complete impossibility. Under Svk CC section 575, par (2), they must still perform, even if it leads to their economic collapse. The intention of the legislator is the strict application of the concept of impossibility, in line with the principle of "*pacta sunt servanda*", as expressed in Svk CC Section 493. This rule, consistent with the general tendencies, leaces the fate of the contract – including the possibility of its modification - in the hands of the parties. The court has no right to ease an obligation that has become burdensome, this flexible option is generally not available in Slovak private law.

"*However, law is not black and white, nor so rigid that it would lack corrective tools allowing it to respond to the dynamics of social relations and to*

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[37] Dušan Marják, "Klauzula rebus sic stantibus," in *Míľniky práva v stredoeurópskom priestore 2012*, pt. 1 (Bratislava: Comenius University, Faculty of Law, 2012), 342-51, 349.

restore contractual balance where it has been disrupted by external factors."[38] Such corrective mechanisms include the general principle of good faith in private law and the principle of fair trading in commercial law. Proper application of the principle set out in Svk CC, Section 3 (1) requires the proportionate exercise of rights. Legal literature supplements this with the requirements of rationality and equivalence. The content of these principles is not fixed by statutory law it is judicial practice that provides them with a unified meaning. When these principles are invoked, all the circumstances of the case must be taken into account, including whether, at the time of concluding the contract, the parties met their obligations of due care and foreseeability.[39]

Another line of legal opinion emphasizes the limited applicability of these principles, referring to the lack of judicial power and the autonomy of contracting parties, although it recognises that their use may occur, albeit only in exceptional cases.[40] It is undeniable that more legal systems surrounding Slovakia and instruments of unified or harmonised comparative law, allow for exceptional judicial modification of contracts in hardship situations. In Slovakia, the application of principles has also its own traditions and reluctance to permit judicial modification is not a unique solution.[41] Italy, Serbia, Slovenia and the English law do not provide the judicial way for exemption, and Switzerland entrusts judicial practice to elaborate the proportionate exercise of rights. Also, another opinion offers a different aspect. In commerce-related cases, the rigidity of the law may be softened by an additional principle: hardship may become so burdensome that requiring personal performance would infringe the human dignity of the obligor. Exemption by court in such cases is not excluded.[42]

Nevertheless, judicial modification and exemption from consequences of failure to perform are available in relation of preliminary contracts. The Svk CC in Section 50a and the Svk ComC in Section 289 and subsequent sections, especially section 292, (5) provides for this exceptional possibility. The two codes rely on two different principles when reasoning such decision. The Sk CC uses the concept "justice" and renders the obligation terminated if the circumstances of the time of conclusion have been changed in such an extension that "*it cannot*

[38] Marják, "Klauzula rebus sic stantibus," 350.

[39] Štěpán Štarha, Ondřej Majer, and Ján Kapec, "Impact of the Extraordinary Situation in the Slovak Republic on Consumer-Supplier Relations," HAVEL & PARTNERS, March 16, 2020, https://www.havelpartners.com/impact-of-the-extraordinary-situation-in-the-slovak-republic-on-consumer-supplier-relations/.

[40] Milan Hlušák, *Úvod do záväzkového práva* (Trnava: Trnavská univerzita v Trnave, Právnická fakulta, 2025), 25, https://doi.org/10.5281/zenodo.17557764.

[41] Kadner Graziano and Bóka, *Összehasonlító szerződési jog*, 412; Klemen Drnovšek and Nataša Samec Berghaus, "Rebus Sic Stantibus in the Age of Artificial Intelligence: The Vital Role of Judicial Discretion in Contractual Justice," *Bratislava Law Review* 9, special issue (2025): 47-62, 52, https://doi.org/10.46282/blr.2025.9.Spec.1033.

[42] Mária Patakyová, Mária T. Patakyová, and Barbora Grambličková, "Human Dignity under the 'Rebus Sic Stantibus' Doctrine," *Bratislava Law Review* 1, no. 2 (2017): 64-73, 72, https://doi.org/10.46282/blr.2017.1.2.85.

be reasonably required that the contract be concluded". In this context, the protection of good morals is implied as a generally accepted standard of conduct.[43] The Svk CommC, by contrast, relies on reasonability as the reason of exemption. The distinction from Svk CC can be explained by the purpose of the Code and its meaning shows similarities to the concept of ordinary business risk written in the HU CC which operates as an exclusion to exemption.[44]

Parties are also subject to ancillary obligations, particularly duties of cooperation, regarding the impossibility, just as in other legal systems. And a final addition, judicial practice does not hesitate to apply the CISG and publishes decisions, including that of relating to the information of obstacle.[45]

4. The Significance of Party Agreement

As an unusual conclusion, let us briefly summarize the decades- and even century-long development of private law, as well as comparative efforts in the field of subsequent impediments, grouped under the concepts of subsequent impossibility and hardship. Supervening events and changes in circumstances occurring after the conclusion of a contract may impede performance or render it excessively burdensome for the obligor, who may thereby become the party in breach. Legal systems and comparative law frameworks offer more or less similar responses to the question of assessing and addressing risk allocation and loss of equilibrium, as well as exemption from the consequences of breach, including termination of the contract in case of impossibility and modification in cases of hardship. Concepts such as legal certainty, *pacta sunt servanda* and *clausula rebus sic standibus*, together with complex system of legal guarantees and conditions, assist the courts in this regard. Less effective responses, such as claim to renegotiate[46], are not universally accepted. However, the main observation is the exceptional nature of exemption, both in terms of the number of accepted claims and the proportion of obligations from which parties are released. Not to mention the difficulties of proving and enforcing claims for damages.

It must be noted that legal scholars, legislators and judges alike make continuous efforts because parties often, or rather, generally, fail to agree ex ante on exemption clauses. Every legal instrument issued on this subject draws the attention to the importance and necessity of contractual provisions concerning risk allocation, exemption, and methods of restoring proportionality.[47] This issue is not far removed from contracting parties. There are traditions in agricultural

[43] Constitutional Court of the Slovak Republic, Order IV. ÚS 55/2011-19, February 24, 2011.
[44] Hungarian Civil Code § 6:192(1)(c).
[45] Okresný súd Komárno [District Court Komárno], March 12, 2009, No. 9 Cb/1254/2008, "Frozen Peas Case," CISG-online 1993, https://cisg-online.org/search-for-cases?caseId=7910.
[46] Péter Miskolczi Bodnár, "Pacta Sunt Servanda - Clausula Rebus Sic Stantibus: A szerződéskötéskori körülmények változására reagáló jogintézmények," *Miskolci Jogi Szemle* 19, no. 2 (2024): 56-69, 67, https://doi.org/10.32980/MJSz.2024.2.56.
[47] Marják, "Klauzula rebus sic stantibus," 349 (citing Jaromír Sedláček, 1924).

related contracts concerning the sale of standing crops. Similarly, parties to life-care agreements include terms and conditions governing unsatisfactory termination. Ongoing contractual relationships may also be paired with insurance agreements.

The importance of the parties' agreement is also highlighted in AI-related contracts and technologies, where, to the best of our current knowledge, the operation, instructional and governance mechanisms of these techniques may themselves give rise to subsequent impediments to performance. These technologies are not yet capable of generating solutions or of preparing and concluding contractual provisions on exemption, and their malfunctioning potentially disturbs the outcome of transactions. The human voice and act are inevitable.[48]

At the level of general principles, one possible response lies in adaptive cooperation between the parties[49], which constitutes a basic duty in situations of supervening impediments. It is not too late to agree on the share of adverse consequences, and sacrifices ex post. However, certainly, the best solution is, of course, to reach such an agreement at the time of contract formation. There are model clauses on hardship containing useful concepts.[50] The sanctity of contract and the freedom to contract functions as an obstacle to effective assistance from public authorities, therefore, parties must be aware of this and prepare for subsequent impediments.

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[48] Drnovšek and Samec Berghaus, "Rebus Sic Stantibus," 50.
[49] Magnus, "CISG and Unforeseeable Events," 26.
[50] International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses* (Paris: ICC, 2020), https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-and-hardship-clauses/.

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General Aspects Concerning the Regulation of Construction Works Contracts in Comparative Law

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Abstract

The article offers a comparative examination of the regulation of construction works contracts in Romanian, French, German, and Quebec law, with the purpose of identifying their common foundations, mutual influences, and system-specific solutions. The research relies primarily on the comparative legal method, supported by logical and doctrinal analysis of the relevant legislation and legal literature. It first clarifies the concept and legal characterization of the works contract in each jurisdiction, paying particular attention to its distinction from employment contracts and contracts of sale. It then compares essential elements of the applicable legal regimes, including the contractor's independence, price determination, allocation of contractual risk, acceptance of the work, liability for defects, payment safeguards, and termination of the contract. The study also provides an orienting overview of standard contractual instruments used in practice, particularly the German VOB framework and the French AFNOR NF P 03-001 standard, without undertaking an exhaustive analysis of their individual clauses. The findings demonstrate that the four legal systems share fundamental principles, such as contractual freedom, the binding force of the contract, and the contractor's obligation to deliver compliant and defect-free work. Nevertheless, significant differences remain regarding the scope and level of detail of the legislation, available remedies, warranty and limitation periods, mechanisms securing payment, and the conditions governing unilateral termination. German law is distinguished by a detailed and relatively modern statutory framework, whereas French law relies more extensively on case law and special construction contracts. Romanian and Quebec law reflect both the influence of French legal tradition and distinct modern codification choices. By systematizing these similarities and differences, the article contributes to a clearer understanding of how legal traditions and regulatory techniques shape construction works contracts and provides a foundation for further comparative research.

Keywords: *works contract, construction law, comparative law, contractor liability, standard contract forms.*

1. Introduction

In the context of current economic development, it's safe to say that the works contract occupies a central place in the dynamics of contractual relationships, having extensive practical applicability in all legal systems. Taken this into consideration, the purpose of the present research is to provide a brief

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analysis of the regulations governing the works contract in various legal systems, identifying the essential similarities and differences between them, as well as their mutual influences.

From a methodological perspective, the research is primarily based on the comparative method, indispensable for identifying common elements and differences between regulations, as well as on the logical method, used for structuring and coherently interpreting the works contract within the broader framework of the law of obligations.

The novelty of the research lies in conducting a comparative analysis between four representative legal systems: Romanian law (through the Romanian Civil Code), French law (through Code civil), German law (through *Bürgerliches Gesetzbuch*), and Quebec law (through Civil Code of Québec).

Between three of these legal systems, there are extremely close connections and influences. Thus, civil law in Québec and Romania has traditionally been marked by the influence of French law, earlier codifications being significantly inspired by the French Code of Napoleon. In the modern stage, however, the Romanian Civil Code has drawn to a considerable extent on the solutions and structure of the Civil Code of Québec, which constituted an important benchmark in the process of recodification of Romanian civil law[2].

On the other hand, important conceptual differences can also be observed, such as the moral conception of the contract in French law (which has also been adopted in Quebec and Romanian law), contrasted with the more technical approach of German law, considered a scholarly system, which eliminated cause from the structure of the definition of the contract[3]. As emphasized in legal doctrine, the diversity of contractual conceptions existing at the level of states is grounded in the very conceptual polysemy of the contract[4].

We may note the applicability of certain principles common to all the systems examined, such as the binding force of the contract and contractual freedom, which constitute constant foundations of contract law. By contrast, legal certainty and contractual fairness, although recognized across all the analyzed legal systems, are reflected and operate with different intensities and nuances from one system to another, depending on legislative choices, doctrinal developments, and the cultural-legal specificity of each national legal system.

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[2] Marinela Cioroabă, Iolanda Boti, and Victor Boti, "De ce Codul civil din Quebec?," *Juridice*, August 12, 2010, https://www.juridice.ro/116575/de-ce-codul-civil-din-quebec.html.

[3] Gina Orga-Dumitriu, "Polisemia contractului, sau despre trei identități reprezentative: Contrat – Vertrag – Contract," in *Liber Amicorum Liviu Pop: Reforma dreptului privat român în contextul federalismului juridic european*, ed. Dan Andrei Popescu and Ionuț-Florin Popa (Bucharest: Universul Juridic, 2015), 687, https://ssrn.com/abstract=2907397.

[4] Orga-Dumitriu, "Polisemia contractului," 682.

2. The Notion of the Works Contract

The works contract is regulated, in German law, in Title 9 Contract to produce a work and similar contracts - Subtitle 1 Contract to produce a work § 631 paragraph 1 of the Bürgerliches Gesetzbuch[5] (BGB), which defines it as follows: *"By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration."* Paragraph 2 of § 631 BGB outlines the notion of the subject matter of the works contract as follows: *"The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service."* Given the manner in which it is regulated, the works contract is regarded as a broad contract, capable of being applied to a large number of situations.

These legal provisions of the German Civil Code have remained unchanged even after the *Schuldrechtsmodernisierung 2002*[6] reform, as the legislator avoided a profound reform of the provisions concerning the works contract, taking into account the possible unpredictable effects on the construction sector. Moreover, despite certain imperfections, the existing legal framework was considered, in general terms, satisfactory, so that only punctual corrections were undertaken, especially with regard to the scope of application of the works contract and its warranty regime in case of defects in the work[7].

The main difference between the works contract under German law and the contract for the provision of work under the French Civil Code can be derived from paragraph 2 of § 631 BGB and concerns the classification of the obligation undertaken by the contractor. In German law, the works contract (Werkvertrag) is limited to obligations imposing on the debtor an obligation of result, thus being more limited in scope than its French counterpart. This is explained by the existence of two types of special contracts in the German Civil Code – the works contract (Werkvertrag) and the service contract (Dienstvertrag), the latter establishing an obligation of means and being appropriate when the result does not depend solely on the debtor's efforts[8].

Specifically, the service contract is regulated separately, in Title 8 Service contract and similar contracts - Section 611 Subtitle 1 Service contract § 611 BGB, marginally entitled Contractual duties typical for a service contract, which provides the following: "*(1) By means of a service contract, a person who promises services is obliged to perform the services promised, and the other party*

[5] German Civil Code (*Bürgerliches Gesetzbuch* [BGB]), official English translation, Federal Ministry of Justice, accessed August 4, 2026, https://www.gesetze-im-internet.de/englisch_bgb/.
[6] Stefan Grundmann, "Germany and the Schuldrechtsmodernisierung 2002," *European Review of Contract Law* 1, no. 1 (2005): 129–48, https://doi.org/10.1515/ercl.2005.1.1.129.
[7] Frank Heseler, "Le nouveau droit du contrat d'entreprise," *Revue internationale de droit comparé* 54, no. 4 (2002): 1005, https://doi.org/10.3406/ridc.2002.17769.
[8] Heseler, "Le nouveau droit du contrat d'entreprise," 1006.

is obliged to pay the agreed remuneration. (2) Service contracts may have as their subject matter any type of services."

In the Civil Code of Québec[9], the rules relating to the works contract are found in Book Five of the Civil Code, devoted to obligations, in Chapter VIII Contract of enterprise or for services. The works contract is a nominate contract, synallagmatic (bilateral), protective in nature (the vulnerable client and the expert contractor), immutable and with instantaneous performance[10], being considered a contract of a polymorphous and versatile nature, capable of covering a variety of legal situations[11].

Specifically, it is regulated by articles 2098–2129 of the Civil Code of Québec, provisions which apply both to the works contract and to the service contract and which partially derogate from the general rules of obligations.

Article 2098 of the Civil Code of Québec defines the works contract as follows: "*A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him."* Defining for the qualification of the works contract is the independence of the contractor, who is not in a relationship of subordination with the client, article 2099 stipulating that *"The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client."*

Therefore, the complete definition of the works contract consists of two characteristic elements: the performance of a work – material or intellectual – and the independence of the contractor from the client during the performance of the work[12].

From the provisions of article 2100[13] of the Civil Code of Québec it follows that the obligation of the contractor, respectively of the service provider, may be either one of means or of result, the contractor being bound to act with prudence and diligence, in the interest of the client, and depending on the nature of the work or service to be performed, he is required to act in accordance with usage and good practice.

The French Civil Code[14] defines the works contract in article 1710 as

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[9] *Civil Code of Québec*, CQLR c CCQ-1991, CanLII, accessed August 4, 2026, https://www.canlii.org/en/qc/laws/stat/cqlr-c-ccq-1991/latest/cqlr-c-ccq-1991.html.

[10] Marie-Hélène Dufour, *Le contrat d'entreprise de construction dans un contexte de grand chantier: Contribution au renouvellement du régime de droit civil applicable à la réalisation d'ouvrages immobiliers d'envergure* (PhD diss., Université Laval, 2021), 147, https://hdl.handle. net/20.500.11794/115724.

[11] Dufour, *Le contrat d'entreprise de construction*, 13.

[12] Dufour, *Le contrat d'entreprise de construction*, 26.

[13] *Civil Code of Québec*, art. 2100.

[14] *Code civil*, Légifrance, accessed August 4, 2026, https://www.legifrance.gouv.fr/codes/texte_lc/

follows: "*A works contract is a contract by which one party undertakes to do something for the other, in exchange for a price agreed between them"*, this article being located in Title VIII: On the contract of hire – Chapter I General provisions, the works contract being regarded as a contract for the hire of services.

The works contract is seen as a contract by which a person (the contractor) undertakes, in exchange for remuneration, to perform independently a specific work, for the benefit of another (the owner of the work), without representing him[15], being classified as a nominate, synallagmatic contract, with successive performance and onerous character[16]. The works contract constitutes a general category encompassing heterogeneous species, including both contracts having as their object tangible goods and contracts concerning an intangible object[17], and capable of establishing either obligations of means or obligations of result, depending on the object of the obligation imposed on the contractor[18]. Metaphorically speaking, the works contract has been described as "*the major instrument of the entrepreneurial spirit – of creation, of risk, of freedom*"[19].

In Chapter III of Title VIII, entitled *On contracts of enterprise and services*, we find article 1779 of the French Civil Code, which states that there are three main types of contracts for works and services: service contracts; contracts for carriers, both land and water, who carry persons or goods; and contracts for architects, construction contractors and technicians, based on studies, estimates or contracts.

This chapter is divided into three sections: one dedicated to the service contract (article 1780 French Civil Code), the second dedicated to land and water carriers (articles 1781–1876 French Civil Code), and the last concerning the works contract (articles 1787–1799-1 French Civil Code). The regulated aspects concern the supply of materials, the allocation of risk, verification of the work, acceptance and the guarantee of perfect completion, fixed-price contracts, the direct action of workers, termination of the contract in case of death, the contractor's liability for persons he employs, the guarantee that the beneficiary is required to provide to the contractor, and the exception of non-performance.

The attention given by the French Civil Code to the works contract has been considered insufficient, given the high degree of use of this type of contract, its development having taken place thanks to the contributions of case law, the Court de cassation benefiting from a relatively broad margin of appreciation

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[15] Philippe Malaurie, Laurent Aynès, and Pierre-Yves Gautier, *Drept civil: Contractele speciale*, trans. Diana Danișor (Bucharest: Wolters Kluwer, 2009), 393.

[16] Delphine Pelet, "Fiche 7. Le contrat d'entreprise," in *Fiches de droit de la construction* (Paris: Ellipses, 2021), 64, https://droit.cairn.info/fiches-de-droit-de-la-construction--9782340057098-page-63?lang=fr.

[17] Malaurie, Aynès, and Gautier, *Drept civil: Contractele speciale*, 387.

[18] Malaurie, Aynès, and Gautier, *Drept civil: Contractele speciale*, 405.

[19] Malaurie, Aynès, and Gautier, *Drept civil: Contractele speciale*, 400.

determined by its summary regulation[20]. Moreover, among the legal systems analyzed, the French one is the most deficient in this matter, most provisions being outdated, while the German Civil Code stands out through an extensive and up-to-date regulation of the relations concerning the works contract.

As regards the provisions of the Romanian Civil Code[21], the relevant section is Title IX Different special contracts, Chapter VI, articles 1851–1880. According to article 1851 paragraph (1) Civil Code, *"The works contract is that contract by which the contractor undertakes, at his own risk, to execute a certain work, material or intellectual, or to provide a certain service for the beneficiary, in exchange for a price."*

The essence of the works contract has been said to consist in the fact that the contractor retains his economic and operational independence with regard to the organization and execution of the work he has undertaken to execute and deliver and performs it at his own risk[22]. The works contract is characterized as a synallagmatic (bilateral), onerous, commutative, successive performance and consensual contract[23].

Numerous works contracts, having as their object either works or services, are regulated by special laws, this being explained by their frequency, importance or particularities. Therefore, the provisions of the Civil Code have the nature of general law rules, and based on the principle *specialis derogat generalis*, where special rules exist, they will apply with priority, being supplemented, where necessary, by the provisions of the Civil Code.

3. Distinction from the Employment Contract

Works and service contracts and employment contracts are both agreements by which one party undertakes to perform something or to carry out an activity for the other party in exchange for payment, making it necessary to identify the main distinguishing criteria used by each legal system.

In German law, the service contract is not to be confused with the employment contract, which is defined in § 611a BGB, the latter involving the performance of an activity determined by another person, in accordance with that person's instructions, within a relationship of personal subordination.

In Quebec civil law, although the independence of the contractor, or more precisely, the absence of a relationship of subordination between the contractor and the contracting party, is commonly and traditionally presented as

[20] Pelet, "Fiche 7. Le contrat d'entreprise," 67.
[21] *Legea nr. 287/2009 privind Codul civil*, republicată, Portal Legislativ, accessed August 4, 2026, https://legislatie.just.ro/Public/DetaliiDocument/175630.
[22] Mircea Mureșan and Sorin Fildan, *Drept civil: Contractele speciale*, 5th rev. ed. (Cluj-Napoca: Cordial Lex, 2009), 250.
[23] Florin Moțiu, *Contractele speciale: Curs universitar*, 9th rev. and expanded ed. (Bucharest: Universul Juridic, 2023), 222.

the fundamental element distinguishing a service contract from an employment contract (where the service contract would cover independent work, while an employment contract would govern work performed under the control of another person, the employer), Quebec doctrine has developed another theory.

According to the current theory, which follows the evolution of the concept of subordination in labour law, the main distinction between a service contract and an employment contract lies more in the concept of enterprise than in that of independence: the contractor is operating a business, while the employee participates in the business of his employer[24].

In French law, the distinction between an employment contract and a works contract lies in the independent manner in which the contractor acts, as opposed to the subordination characteristic of the employee[25]. However, the indicators developed in doctrine to establish the contractor's independence have been considered inconclusive, being appreciated that the most reliable criterion lies in the notion of clientele: the contractor having not an employer, but clients[26].

In Romanian law, the employment contract involves a relationship of subordination between the party paying the employee's remuneration (the employer) and the employee, a subordination which is not found in the works contract[27].

4. Distinction from the Contract of Sale

Since the characteristic obligation of the contract of sale is the transfer of ownership (an obligation to give), the issue has arisen of classifying a contract by which the debtor undertakes not only to manufacture a good (which would represent the characteristic obligation of a works contract), but also to transfer ownership over it. The difficulty of classification arises especially when the contract concerns a future good, that is, a good which is not yet produced at the time of conclusion of the contract. What criteria do legal systems use to distinguish the works contract from the contract of sale?

In German law, the distinction between the works contract and the contract of sale was made on the basis of the provisions of § 651 BGB (in the form resulting from the transposition of the European Directive of 25 May 1999), which established a single criterion of distinction: the fungible character of goods, it being established that, if the goods are fungible, they will be entirely subject to the law of sale, while, in the case of specific goods, the regime of sale will be supplemented by certain provisions relating to service contracts.

[24] Dufour, *Le contrat d'entreprise de construction*, 54.
[25] Pelet, "Fiche 7. Le contrat d'entreprise," 65.
[26] Malaurie, Aynès, and Gautier, *Drept civil: Contractele speciale*, 400.
[27] Dan Velicu, "Contractor Agreement under the New Romanian Civil Code," *Romanian Review of Social Sciences* 12, no. 21 (2021): 45, https://rrss.univnt.ro/CONTRACTOR-AGREEMENT-UNDER-THE-NEW-ROMANIAN-CIVIL-CODE_a491.html.

Following the legislative changes introduced in 2002 through *Schuldrechtsmodernisierung*, § 651 BGB, whose sole role was to delimit the fields of application of sale, on the one hand, and of the works contract, on the other hand, lost its practical importance, given the convergence of the law of sale with that of the works contract[28].

In order to address the difficulties in classifying a contract, Quebec law establishes a criterion of distinction based on comparing the value of the services provided. Thus, according to article 2103 of the Civil Code of Québec: *"A contract is a contract of sale, and not a contract of enterprise or for services, where the work or service is merely an accessory in relation to the value of the property supplied."* Concretely, according to this provision, classification as a contract of sale occurs when the work is merely accessory in relation to the value of the goods supplied. When the value of the materials significantly exceeds the value of the labour, the contract cannot be classified as a works contract, thus establishing a rather quantitative than qualitative approach to determining the nature of a contract[29].

In French law, the absence of express legal criteria of delimitation has left to the legal doctrine the task of developing and shaping them. Thus, for the situation in which raw materials are supplied entirely or partially by the contractor, case law provides two alternative criteria on the basis of which a contract may be classified. The first, the "accessory" rule, states that we are in the presence of a contract of sale when the materials supplied by the contractor have a greater value than his services, whereas materials with a value lower than the cost of labour will lead to the conclusion that we are in the presence of a works contract.

The second rule, which has gained increasingly wider application, is the "specificity rule", according to which, if the work performed is specific, that is, executed to order, the concluded contract is a works contract. Conversely, the execution of a standardized and reproducible work implies the conclusion of a contract of sale[30]. A particular situation is encountered in the case of a works contract for construction works, where, if the materials are supplied by the contractor, ownership is transferred to the client by accession[31].

The specificity criterion, adopted in France, has been considered in Quebec doctrine[32] as offering a more appropriate solution for distinguishing the works contract from the contract of sale, since the distinction is based on the opposition between the uniqueness and originality of the work, on the one hand, and the standardized and interchangeable character of the good, on the other.

In Romanian law, the legal classification of the contract is made, first of

[28] Heseler, "Le nouveau droit du contrat d'entreprise," 1008.
[29] Dufour, *Le contrat d'entreprise de construction*, 40.
[30] Pelet, "Fiche 7. Le contrat d'entreprise," 65.
[31] Pelet, "Fiche 7. Le contrat d'entreprise," 65.
[32] Dufour, *Le contrat d'entreprise de construction*, 41.

all, according to the intention of the parties[33]. The Romanian legislator included in the Romanian Civil Code, through article 1855[34], the rule on the basis of which the distinction between the works contract and the contract of sale can be made, adding, inspired by the Civil Code of Québec, an additional secondary criterion: the value of the goods supplied.

Concretely, if from the intention of the parties it results that the procurement of materials by the contractor has an accessory character, and the main object consists in the performance of the work as a whole, the contract will be classified as a works contract. Conversely, when the procurement of materials constitutes the essential element of the contract, and their value clearly exceeds the value of the labour performed by the contractor, we are in the presence of a contract of sale (of a future good)[35], without the evaluation being strictly arithmetical[36].

5. Regulation of the Works Contract for Construction Works

Starting with 1 January 2018, German civil law included a law of construction contracts (Bauvertragsrechts)[37], by introducing Chapter 2 Construction contract, which regulates the construction contract (Bauvertrag), through § 650a BGB, as follows: "*(1) A construction contract is a contract on the construction, reconstruction, removal or conversion of a building, an outdoor facility or a part thereof. The following provisions of this Chapter apply supplementally to the construction contract. (2) A contract on the structural maintenance of a building is a construction contract if the work is of essential significance for the structure, the continued existence, or the use in accordance with the intended purpose."*

The provisions regarding the works contract for construction works regulate aspects such as: modification of the contract and the right to request modifications to the work, adjustment of the price, the injunction, the builder's mortgage, the builder's security, the determination of the stage of the work and the final invoice, as well as the form of termination of the contract.

Thus, particular attention is given to the procedure for modifying the construction contract at the request of the client, the parties being obliged to reach a mutual agreement where modifications of the work are requested, the contractor

[33] Moțiu, *Contractele speciale*, 221.
[34] *Legea nr. 287/2009 privind Codul civil*, art. 1855.
[35] Victor Marcusohn, *Drept civil: Contracte speciale*, 3rd rev. and expanded ed. (Bucharest: Universul Juridic, 2023), 312.
[36] Ovidiu-Horia Maican, "The Entrepreneurship Contract," *Quality—Access to Success* 17 (March 2016): 76.
[37] Rainer Walther, *Gesetzliche und vertragliche Eskalationsmodelle im privatrechtlichen Bauwesen (Bauvertrag)*, EIKV-Schriftenreihe zum Wissens- und Wertemanagement, no. 51 (Luxembourg: European Institute for Knowledge & Value Management, 2023), 14, https://hdl.handle.net/10419/280794.

being required to make a new price offer, taking into account the decrease or increase of costs. The legislator also provides for the manner in which the price adjustment may take place, as well as the cases in which the contractor cannot be compelled to carry out the requested modifications.

At the same time, a procedure is established for the situation in which the client refuses to accept the work, a procedure through which the condition of the work may be determined, either by both parties or unilaterally, the stake being the maturity of the price.

The contractor may request from the client either the establishment of a mortgage over the constructed land, according to § 650e BGB, or a guarantee of 10% for the payment of claims arising from the construction contract, according to § 650f BGB.

The German Civil Code treats separately construction contracts concluded with a consumer, through Chapter 3 § 650i - § 650o BGB, these being defined as *"contracts by which a contractor is obliged by a consumer to construct a new building, or to perform considerable reconstruction measures on an existing building"*. Special regulation is also granted to architectural service contracts and engineering service contracts (§ 650p - § 650t BGB), as well as development contracts (§ 650v - § 650v BGB), without, however, significantly derogating from the general provisions governing the construction contract.

With regard to construction contracts concluded with a consumer, the German Civil Code provides a series of rules concerning the formation and execution of these contracts, intended to offer additional protection to the client, given his vulnerable position in relation to a contractor who is, most often, a professional.

Thus, as regards the formation of the contract, the requirement of written form *ad validitatem* and the necessity of informing the client are notable. As regards the content of the contract, mandatory clauses concerning the moment of completion of the works are imposed, and the contract will also incorporate the statements contained in the pre-contractual specifications, which may influence the interpretation of the agreement. With regard to the execution of the contract, rules are established concerning the partial payments that may be requested, including the obligation of the contractor, upon making the first partial payment, to provide a guarantee amounting to 5% of the total agreed remuneration, in order to ensure the timely execution and the absence of major defects in the work. Furthermore, the contractor is obliged to prepare and deliver to the consumer the planning documents, both prior to the commencement of the works and before their completion. Last but not least, the consumer's right of withdrawal is regulated.

The works contract for construction works, in Quebec civil law, represents a subcategory of the works contract, being defined as a works contract having as its object the performance of a work of either construction or renovation of an immovable. Articles 2117 and following of the Civil Code of

Québec deal exclusively with works contracts for construction works, these being applicable in addition to the general provisions concerning the works contract, thus refusing to recognize it as having a completely distinct individuality[38].

A series of provisions applicable also to works contracts for construction works are common with the general works contract, such as the regulation of subcontracting, the obligation of information, and the rules concerning the price, with the possibility, just as in Romanian law, of establishing an estimated price, a price depending on the value of the work performed, the services provided or the goods supplied, and a fixed price (based on an estimate). The clauses regarding the termination of the contract in case of death of one of the parties or by rescission are also common to all works contracts. Unlike the French Civil Code, the Civil Code of Québec provides that the death or incapacity of the contractor does not lead to the termination of the works contract, except where it was concluded *intuitu personae* or cannot be adequately continued by the person succeeding him in his activities, in which case the client may terminate it. The right to unilaterally terminate the works contract is stipulated both in favor of the client, even if the works are already in progress, and in favor of the contractor, but only for a serious reason and never at an inappropriate moment, otherwise he is obliged to compensate the damage caused to the client as a result of the termination.

With regard to the provisions applicable to works contracts for construction works that are common to all works contracts, these concern the obligation of the client to proceed with the acceptance of the work and the effects of acceptance without reservations, the risk of loss of the thing, and the moment from which the limitation period begins to run for actions arising from the works contract. At the same time, article 2111 of the Civil Code of Québec grants the client the right to retain from the price, until repairs or corrections to the work are carried out, an amount sufficient to satisfy the objection he has made regarding apparent defects or apparently defective execution existing at the moment of acceptance of the work, except where the contractor provides sufficient guarantees to ensure the performance of his obligations.

The provisions specific to construction works concern joint liability, together with the establishment of certain exemption clauses, of the contractor, the architect, the engineer and the professional technician who, as the case may be, directed or supervised the works, as well as the subcontractor with regard to the works executed by him, for the loss of the works occurring within five years from the completion of the works, regardless of whether the loss results from defective design, construction or execution of the works, or from defects of the land. A warranty against defects in the works existing at the time of acceptance or discovered within one year from acceptance is also established, for a period of one year, in respect of the same persons.

[38] Dufour, *Le contrat d'entreprise de construction*, 14.

The Civil Code of Québec allows, insofar as it is stipulated in the contract, the contractor to request, under certain conditions, partial payments on account of the contract price for the value of the works performed and of the materials necessary for carrying out the work. In turn, the client may retain from the contract price, except where the contractor provides sufficient guarantees, an amount sufficient to pay the claims of the workers, as well as those of other persons who may exercise a legal mortgage over the immovable work and who have notified him of their contract with the contractor.

In practice, works contracts for construction works are usually classified according to the method of project delivery, two models being identifiable[39]. The first, the Design-Build Contract, involves the conclusion of a single contract with a single entity (possibly a group of companies), which undertakes both the design and the execution of the project, possibly by subcontracting certain parts of the work, the client often benefiting from the assistance of a specialist who supervises the development of the project. The second, the Construction Management Contract, is characterized by the division of the work into several parts directly given by the client to different contractors, the coordination of the whole being carried out by a project manager who does not execute the works, but ensures their organization and supervision, and may also perform a consultative role.

In French law, the general rules governing the works contract (articles 1787–1799-1 of the French Civil Code) apply to the works contract for construction works, some of these being specific to construction works contracts, such as those establishing rules regarding the liability of the builder of a structure and the guarantees to which he is subject, regulated by articles 1792, 1792-1, 1792-2, 1792-3, 1792-4, 1792-4-1, 1792-4-2, 1792-4-3, 1792-5, 1792-7 of the French Civil Code. The works contract for construction works serves as a contractual instrument for all parties who may participate in the construction project: designers, supervisors and contractors, as results from the provisions of article 1780 of the French Civil Code. Thus, the works contract for construction works has its particularities, without, however, truly separating itself from the works contract, given the overlap of the applicable rules[40].

As already emphasized, the regulation of the works contract in the French Civil Code, including in the field of construction works, is characterized by a relatively low degree of regulation, many provisions retaining their original form since the adoption of the French Civil Code in 1804 (such as those concerning the risk of loss of the work, the rules regarding fixed-price contracts, termination of the contract by the death of the contractor, the direct action of masons, carpenters and other workers employed in the construction of a building or other work, and the contractor's liability for the actions of the persons he employs).

[39] Dufour, *Le contrat d'entreprise de construction*, 15.
[40] Malaurie, Aynès, and Gautier, *Drept civil: Contractele speciale*, 388.

In 1978, the French legislator established, through article 1792 of the Civil Code, the liability of builders of structures for damages, including those resulting from a defect of the land, which compromise the stability of the structure or which, affecting one of its constituent elements or one of the components of its equipment, render it unfit for its intended purpose, determining the persons falling within this notion through a broad enumeration. The presumption of liability established by article 1792 was extended, through a modification from 2005, also to damages affecting the structural integrity of the components of the equipment of a structure, but only where those components form an integral part of the infrastructure, foundations, structure, enclosure or roof.

Article 1792-4 of the French Civil Code establishes the joint liability of the producer of a structure, of a part of a structure or of a component of equipment designed and produced to meet specific and predetermined operational requirements, where the contractor has implemented, without modifications and in accordance with the producer's specifications, the structure, part of the structure or component of equipment in question. The limitation period for the liability of builders of structures and producers is 10 years.

The French legislator has also established a guarantee of perfect completion, by which the contractor is obliged, for a period of one year from the date of acceptance, to repair all defects reported by the client, either through objections recorded in the acceptance report or by written notification for defects discovered after acceptance.

The beneficiary of a work has been required, through a legislative amendment introduced in 2013, to guarantee the contractor the payment of the amounts due where these exceed a threshold established by decree of the Council of State.

On the other hand, in French law, a series of special construction contracts have been regulated, governing specific situations, while the general works contract for construction works referred to above, enshrined in the French Civil Code, has become a residual option[41], being applicable only where the rules specific to special construction contracts do not apply.

The special construction contracts become mandatory for the parties insofar as the conditions for their application provided by law are fulfilled. Without detailing their specific legal regime, the main special contracts are: the contract for the construction of an individual house *(contrat de construction de maison individuelle*) and the property development contract (*contrat de promotion immobilière*), both provided for in Code de la construction et de l'habitation, as well as the sale of immovable property in the course of construction (*vente en l'état futur d'achèvement*), regulated by articles 1601-1 – 1601-4 of the Code civil.

[41] Pelet, "Fiche 7. Le contrat d'entreprise," 66.

The Romanian Civil Code, in addition to the general provisions concerning the works contract, contains a dedicated section – Section 2 Works contract for construction works, articles 1874–1880, and, complementing these provisions, there are a series of special laws, such as Law no. 50/1991 regarding the authorization of construction works, Law no. 10/1995 regarding quality in construction, and Law no. 350/2001 regarding territorial planning and urbanism.

According to article 1874 of the Romanian Civil Code, by the works contract for construction works, the contractor undertakes to execute works which, according to the law, require the issuance of a building permit. The limitation of the object of the works contract for construction works to those works for which obtaining a building permit is required, established by the Romanian legislator, has been criticized in doctrine[42], it being considered that this does not represent a real limitation, but rather an unfortunate wording.

In the subsequent provisions, namely articles 1874–1880 of the Romanian Civil Code, there are regulated[43], among others, the accessory obligations of the beneficiary, the right of control over the execution of the works, circumstances preventing the execution of the works, the acceptance of the works, as well as aspects concerning the risk of the contract, liability for defects, and the moment from which the limitation period for this liability begins to run.

The rules common to the works contract also apply to the works contract for construction works, insofar as they are compatible with the particular rules provided for this contract. Thus, the provisions concerning the direct action of workers, subcontracting, the failure of the beneficiary to take necessary measures, the procurement, preservation and use of materials, termination or rescission of the contract attributable to the contractor or, respectively, to the beneficiary, the consequences of the death of the beneficiary, as well as the death of the contractor or his incapacity to perform the contract, are fully applicable. The regulations concerning the price, from its enforceability to the establishment of an estimated price, a lump-sum price or a price determined according to the value of the works or services, are also fully applicable.

Additionally, for the works contract for construction works, a series of accessory obligations of the beneficiary are established, as well as a right of the latter to control the execution of the works. The acceptance of the work is carried out in two stages – interim acceptance upon completion of the work, followed by final acceptance, and it is provided that the risks pass to the beneficiary from the date of provisional acceptance upon completion of the work.

With regard to liability for defects of the contractor, the architect, the engineer and the subcontractor, the warranty periods against defects of the work

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[42] Oana Ruxandra Gherghina, *Dreptul construcțiilor: Analiza dispozițiilor legale și a jurispru denței. Ghid de elaborare a contractului de antrepriză de lucrări de construcții (H.G. nr. 1/2018)*, 2nd rev. and expanded ed. (Bucharest: C.H. Beck, 2025), 111.

[43] Violeta Herea, "Special Rules in Building Contractor," *Bulletin of the Polytechnic Institute of Iași—Construction & Architecture Section* 64, no. 4 (2014): 99–105, EBSCOhost.

are those established by special law (10 years), causes for exemption from liability for defects are established, as well as clauses regulating the beginning of the limitation period concerning liability for defects.

According to the provisions of article 2386 of the Romanian Civil Code, architects and contractors who have agreed with the owner to build, reconstruct or repair an immovable benefit from a legal mortgage over the immovable, for securing the sums owed to them, but only within the limit of the increase in value achieved.

6. Some Early Conclusions

In summary, in the following we will refer to those aspects that are common to all the legal systems analyzed, while also highlighting the identified differences.

Overall, all systems enshrine the contractor's liability for defects, which corresponds to the contractor's obligation to deliver a work that is compliant and free of defects. German law provides the most extensive regulation, defining the notion of defect and regulating a series of remedies available to the client (requesting repair, including making the repair himself, termination of the contract or reduction of the price) and establishing a special limitation period of 5 years for construction works. The Romanian legislator, on the other hand, refers to the provisions regarding the warranty against defects of the sold good, establishing special rules only with regard to the moment from which the limitation period begins to run. The Civil Code of Québec provides for joint liability for defects of the contractor, the architect, the engineer and the professional technician, establishing a limitation period of 5 years. The French legislator also pays particular attention to this subject, regulating in detail the liability of the builder of a structure and of producers, the damages covered and the limitation period of 10 years, as well as the guarantee of proper functioning for a period of 2 years. The French Civil Code also introduces the concept of the guarantee of perfect completion, to which the contractor is bound for a period of one year from the date of acceptance.

With regard to risk in the works contract, the regulations in German, Quebec, French and Romanian law start from a common conception: that risk lies with the contractor until the acceptance of the work, with the appropriate distinction depending on the origin of the materials, and all systems attributing legal value to the fault of the client, which will lead to the transfer of the risk to the latter.

The rules concerning the acceptance of the work are also regulated by each legislator in a similar manner, the German system standing out through the adoption of rules that allow the determination of the condition of the work in the event of refusal of acceptance by the client.

The legal systems analyzed enshrined several methods of determining

the price in the works contract, but with different emphases. In German law and Quebec law, the regulation concerning partial payments stands out, a concept that is not regulated by the Romanian and French Civil Codes. The French Civil Code regulates only the fixed price, while the regulation in the other systems also covers rules regarding the estimated price and price determined according to the value of the work.

An element that differentiates some of the analyzed systems is represented by the mechanisms for guaranteeing the payment of the price of the work. Thus, in German and Romanian law, the institution of the legal mortgage in favor of the contractor is regulated, as a means of protection for the recovery of his claim. By contrast, German law (through § 650f BGB) and French law (through article 1799-1 of the French Civil Code) establish the obligation of the beneficiary to provide a guarantee to the contractor, intended to ensure the performance of the payment obligation, mechanisms of guarantee which are not found in the Quebec and Romanian codes.

With regard to the termination of the works contract, German law establishes a flexible regime, both parties being able to terminate the contract for a justified reason, and the beneficiary being able, under certain conditions, to unilaterally terminate the contract at any time until the completion of the work, even without fault. The regulation of the Civil Code of Québec approaches the vision of the German legislator, the client being able to unilaterally terminate the contract even during performance, without the need for fault, while the contractor may terminate only for a serious reason and never at an inappropriate moment. A different approach is found, however, in Romanian law, where termination or rescission is regulated as a sanction for the culpable non-performance of obligations. In French law, there is no special regulation in the field of works contracts, the general rules in the field of obligations being applicable.

7. Standard Contract Forms

Without proceeding to a detailed analysis of standard works contracts used in the field of construction works, it is necessary to emphasize that such contractual instruments are encountered in all the legal systems analyzed. Their role is to standardize and facilitate the conclusion and execution of legal relationships specific to this field, providing a preconfigured framework of clauses adapted to practice. A common element is their optional character, the parties not being obliged to adopt them, yet their use is frequent in practice, due to the advantages they offer in ensuring predictability and contractual balance.

In Germany, an essential role in the field of works contracts for construction works is played by the regulatory framework VOB (*Vergabe- und Vertragsordnung für Bauleistungen*), composed of VOB/A, which regulates the procedures for awarding works contracts, and VOB/B, which establishes the

general conditions for the execution of construction works[44]. Developed by the German Committee for Construction Procurement Contracts and published in *Bundesanzeiger*, these regulations, although they do not have the force of law in the formal sense, are widely used in practice, functioning as a reference contractual standard in works contract in the construction sector[45].

In Québec, the Canadian Construction Association[46] develops various standard contracts, namely: the lump-sum contract, the cost-plus contract and the unit price contract, all applicable to the execution of works by a general contractor within a traditional project, as well as the design-build contract with a lump sum[47].

In France, an important role in the field of works contracts for construction works is played by the AFNOR NF P 03-001 standard, developed by the French Standardization Association and conceived as a model of general clauses applicable to construction works in private law contracts[48]. The parties are free to adopt it in full, partially or to modify it, depending on the needs of the contractual relationship, which gives it the role of a flexible standardization instrument of contractual practice in the field of construction[49].

We also note the existence of the General Administrative Clauses for public supply and public service contracts, adopted by Decree of 30 March 2021 approving the general administrative clauses for public procurement contracts for goods and current services[50], which apply to public procurement contracts.

In Romania, there is no single contractual standard with general and mandatory applicability in the field of private construction contracts, however practice reveals the frequent use of international commercial usages, in particular the FIDIC contractual conditions, elaborated by Federation Internationale des Ingeners Consultants[51].

In the field of public procurement, it is worth mentioning the adoption of Government Decision no. 1/2018 for the approval of the general and specific conditions of public procurement contracts for works, which establishes the standard contractual conditions applicable to works contracts financed from

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[44] Michael J. R. Kremer and Jan Conrady, "Construction Contracts in Germany," *Lexology*, January 24, 2019, https://www.lexology.com/library/detail.aspx?g=c78f124b-b166-49a0-ba4f-58dac596557f.

[45] Oana Ruxandra Gherghina, *Contractul de antrepriză de lucrări de construcții FIDIC* (Bucharest: C.H. Beck, 2020), 44.

[46] Canadian Construction Association, "Canadian Construction Association," accessed August 4, 2026, https://www.cca-acc.com/.

[47] Dufour, *Le contrat d'entreprise de construction*, 16.

[48] Pelet, "Fiche 7. Le contrat d'entreprise," 67.

[49] Pelet, "Fiche 7. Le contrat d'entreprise," 67.

[50] France, *Arrêté du 30 mars 2021 portant approbation du cahier des clauses administratives générales des marchés publics de fournitures courantes et de services*, *Journal officiel de la République française*, no. 0078 (April 1, 2021), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043310341.

[51] Gherghina, *Contractul de antrepriză de lucrări de construcții FIDIC*, 95.

public funds.

8. Instead of a Conclusion

Through the present paper, we aimed to shed light on the notion of the works contract in different legal systems, offering a comparative perspective on the manner in which this legal instrument is conceived and regulated.

The comparative analysis of the legal systems examined reveals the existence of numerous similarities, while the degree of regulation of the works contract for construction works varies significantly. While some codes opt for a more concise and general regulation, supplemented by the rules governing obligations and by doctrinal intervention, others have preferred to regulate in greater detail the legal relationships surrounding construction works.

By observing both the similarities and the differences in the approach to this contract by each legislator, it is once again confirmed that the institution of the (works) contract cannot be fully understood outside the legal system in which it has developed and consolidated over time, being influenced by the legal history and culture specific to each state[52].

Without claiming to exhaust the complexity of the subject, the present paper has aimed to constitute a starting point for further in-depth studies in the field of the comparative analysis of works contracts for construction works.

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Post-Mortem Dignity: Normative Constraints on Perpetual Repose in Romania, France, and Germany

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Abstract

This study investigates the legal challenges surrounding post-mortem dignity in Romania, France, and Germany (Free and Hanseatic City of Hamburg). It examines how these jurisdictions reconcile the protection of undisturbed rest (the permanence of final resting places) with the necessities of cemetery renewal. To this end, the research employs a comparative legal analysis to identify commonalities and divergences within these regulatory frameworks. The paper assesses the impact of the duration of burial rights and the criteria for grave reclamation on post-mortem dignity. The analysis reveals that, while all three jurisdictions recognize post-mortem dignity as a foundational principle, its application in time varies significantly. Romania sets a default seven year minimum before potential exhumation, France a mere five years, and Hamburg enforces twenty-five years of rest. Ultimately, these results show that perpetual repose is not absolute but conditional, defined by normative temporal limits prioritizing land-use requirements over the traditional ideal of perpetual rest. The findings indicate that the scope of post-mortem dignity is essentially determined by a clock: each legal system provides a variable window of protection before land utility is permitted to supersede the right to undisturbed rest. Accordingly, the study proposes normative reforms enabling individuals to secure repose periods that transcend these baseline limits, thereby reinforcing their post-mortem dignity.

Keywords**:** *post-mortem dignity, comparative law, grave, cemetery renewal, mandatory resting period, remedies.*

1. Introduction

Human dignity does not expire where life ends; it follows us into the grave. This principle was echoed by the Parliamentary Assembly of the Council of Europe, which recognized a collective duty toward the deceased, noting that "there is a responsibility to protect human dignity in a broader sense by ensuring that deceased persons are preserved in their place of burial in a manner compatible with their religion."[2] Although the resolution concerned Jewish burial grounds, this legal imperative transcends any single creed, as *post-mortem dignity applies to all interred individuals*, regardless of their religious or philosophical background. Conversely, the absence of religious affiliation or a secular rest-

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[2] Council of Europe, Parliamentary Assembly, *Resolution 1883 (2012): Jewish Cemeteries*, May 25, 2012, https://pace.coe.int/en/files/18723/html.

ing place does not license the state to reduce the deceased to mere land-use objects, for human dignity inheres in the person, not their creed.

The core of this responsibility lies in the preservation of deceased persons in their place of burial, a requirement of post-mortem dignity that safeguards not only the memory of the individual but their physical remains and the very space they occupy, a legally protected site with its own dignity dimension. Exhumation remains a legally exceptional act, restricted by strict controls because disturbing the dead offends the principle that the dead should rest in peace and, implicitly, their dignity.[3] However, the ideal of eternal rest as traditional practice enters into a direct and increasing conflict with the pragmatic demands of modern urbanism and cemetery management[4]. Cemeteries are commonly imagined as places of rest, but in practice they are inherently dynamic and shaped by temporal rhythms.[5] Consequently, the central legal problem investigated in this short study is the *erosion of the perpetual ideal in favour of administrative renewal cycles*. While post-mortem dignity is recognized in theory, its legal resilience is frequently tested by the finite nature of burial land. Under this pressure, *perpetual* repose is transformed into a *temporary* lease – a system where the sanctity of the grave is subjected to a normative clock that dictates when *administrative utility* may supersede *individual dignity*.

While existing legal doctrine has traditionally examined post-mortem dignity through the prism of privacy or criminal law protection against desecration[6], this research offers a novel approach by focusing on the *temporal dimension* of dignity. It moves beyond the static analysis of rights or crimes to investigate the *decay* of legal protection over time. By comparing the different temporal thresholds in Romania, France, and Germany (Hamburg), this short study identifies how the *duration of rest* can be used as primary metric for measuring the state's commitment to post-mortem dignity, a perspective that remains underexplored in current Eastern and Western European comparative literature.

While some authors have addressed the particularities of Muslim funerals and the specific challenges of reconciling Islamic requirements for undisturbed rest with secular administrative timelines[7], this research posits that the

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[3] See Heather Conway, *The Law and the Dead* (Abingdon: Routledge, 2016), 180–81, https://doi.org/10.4324/9781315867656.

[4] See Julie Rugg, "Social Justice and Cemetery Systems," *Death Studies* 46, no. 4 (2022): 871, https://doi.org/10.1080/07481187.2020.1776791.

[5] Danielle House, Yasminah Beebeejaun, Avril Maddrell, and Katie McClymont, "Temporalities of Cemeteries: The Tensions and Flows of Perpetuity and Change in 'Slow' Places," *Mortality* 29, no. 3 (2024): 432, https://doi.org/10.1080/13576275.2023.2170218.

[6] Edina Harbinja, Tal Morse, and Lilian Edwards, "Digital Remains and Post-Mortem Privacy in the UK: What Do Users Want?," *International Review of Law, Computers & Technology* 40, no. 1 (2026): 6, https://doi.org/10.1080/13600869.2025.2506164; Silviu-Dorin Șchiopu, "Unele considerații asupra începuturilor moderne ale protecției penale a respectului datorat persoanelor decedate prin reglementarea infracțiunii de profanare de morminte," *Dreptul*, no. 8 (2023): 124–41, https://www.ceeol.com/search/article-detail?id=1164526.

[7] See, e.g., Chaïma Ahaddour, Stef Van den Branden, and Bert Broeckaert, "'God's Land Is Vast':

temporal window of protection is not merely a niche concern for certain religious denominations. Rather, it is a fundamental characteristic of the modern state's relationship with all deceased persons. By treating the duration of rest as a general legal metric, this study offers a comprehensive framework that transcends denominational specificities to evaluate the baseline level of dignity currently afforded by legislators.

To systematically investigate these issues, the research is organized into two primary analytical sections. The *first section* provides a granular, jurisdiction-by-jurisdiction examination of the minimum duration of rest within the legal orders of Romania, France, and Germany, with the latter focusing specifically on the state legislation of the Free and Hanseatic City of Hamburg. This mapping serves to establish the empirical baseline of the normative clock in each system. The *second section* engages in a synthesis and discussion of the findings, categorized into three pillars: an identification of the commonalities shared across these European traditions, an analysis of the critical divergences that define their unique approaches to dignity, and finally, an evaluation of the legal mechanisms available for securing extended repose.

This research employs a functional comparative legal analysis to examine the response of each system to the shared societal problem of reconciling land scarcity with the sanctity of the grave. By looking into distinct legal traditions representing different historical paths of secularization and administrative centralization, this study reveals how states balance public utility against individual post-mortem protection. Thus, the investigation identifies the underlying logic of post-mortem dignity in a representative cross-section of the contemporary legal landscape: a set of shared principles governing how the law treats a person after death, capturing the individual's transition from a rights-holder to an object of public administration.

Ultimately, this research proposes that the preservation of post-mortem dignity requires a shift from a purely administrative clock toward a more robust framework of individual legal safeguards. Drawing from the comparative analysis, the paper advocates for concrete normative reforms: the establishment of *harmonized minimum repose floors* and the implementation of *prepaid opt-out mechanisms* that embed individual choice within administrative pragmatism. While the former establishes a standardized threshold of protection, the latter renders the deceased's transition from rights-holder to administrative object conditional rather than inevitable. Collectively, these reforms insulate the sanctity of the grave as a substantive expression of human dignity against the shifting exigencies of urban renewal.

Attitudes and Practices of Moroccan Muslims Regarding Burial and Repatriation of the Deceased," *Mortality* 24, no. 1 (2019): 32–60, https://doi.org/10.1080/13576275.2017.1413543; Osman Balkan, *Dying Abroad: The Political Afterlives of Migration in Europe* (Cambridge: Cambridge University Press, 2023), 2, 176, https://doi.org/10.1017/9781009288569.

2. Minimum Durations of Burial Rest

2.1. Romania

In the absence of a state religion, and given that Romania maintains a position of religious neutrality rather than strict secularism,[8] cemetery ownership is primarily divided between administrative-territorial units (municipalities) and religious institutions (parishes).[9] This bifurcated model underpins local regulation of burial durations, as cemetery owners must establish their own rules for organization and operation.[10] Consequently, the regulatory frameworks adopted by the Municipality of Bucharest and the Romanian Orthodox Church – the country's dominant denomination, owning the majority of cemeteries[11] – serve as primary models for illustrating how these distinct administrative and religious authorities exercise their normative autonomy.

The Municipality of Bucharest[12] currently offers two types of grave rights: burial plots for *seven years* (art. 30) and *perpetual* concessions (art. 29). However, the notion of perpetuity proves illusory upon closer examination, as even these concessions terminate if: *a)* a burial site and associated funeral monuments remain abandoned or neglected for over two years (art. 31, para. 1b); *b)* the holder fails to pay the annual maintenance fee for two consecutive years (art. 31, para. 1d).

Specifically, this annual levy is not applied to the upkeep of the individual grave (art. 72, para. a) – which remains the sole responsibility of the rightholder, although the cemetery administration provides such maintenance as a supplemental, paid service (art. 72, para. a) – but rather serves as a mandatory contribution toward the general administration and infrastructure of the cemetery (art. 72, para. b), such as the maintenance of alleys, green spaces, and shared facilities. By requiring the holder to fund the *commons* while separately maintaining their *private* plot, the system decouples the right over the grave from the service of care, further emphasizing the administrative recycling nature of the

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[8] Romania, *Law no. 489 of December 28, 2006, on Religious Freedom and the General Regime of Religious Cults*, art. 9(1), republished in *Monitorul Oficial al României*, no. 201 (March 21, 2014), https://legislatie.just.ro/Public/DetaliiDocument/156588.

[9] Silviu-Dorin Șchiopu, "Burial vs. Cremation in Romania—A Legal Perspective," in *Legal Practice and International Laws*, ed. Cristinel Ioan Murzea and Angela Repanovici (Athens: WSEAS Press, 2011), 242, http://www.wseas.us/e-library/conferences/2011/Brasov1/LAW/LA W-38.pdf.

[10] Romania, *Law no. 102 of July 8, 2014, on Cemeteries, Human Crematoriums, and Funeral Services*, art. 6(3), *Monitorul Oficial al României*, no. 520 (July 11, 2014), https://legislatie.just.ro/Public/DetaliiDocument/159790.

[11] Gérald Tilkin, "Quelles confessionnalités pour les cimetières en Roumanie?," *Teologia* 55, no. 2 (2013): 66, https://revistateologia.ro/downloads/Teologia/2_2013/3_Tilkin.pdf.

[12] Municipality of Bucharest, General Council, *Decision no. 79 of February 29, 2024, Approving the Operating Regulations for Cemeteries and Human Crematoriums*, https://doc.pmb.ro/monitorul_oficial/2024/02/CGMB/HCGMB_79.pdf. Further references to this regulation are cited by article number in the text.

system, where perpetuity is contingent upon continuous contribution. By analogy, cemetery land may be understood as a public-law resource subject to administrative stewardship, maintenance obligations, and limits on alienation, rather than as a purely private asset[13].

Although the new holder is to preserve the existing remains in place upon the forfeiture of a concession (art. 31, para. 2), this requirement does not guarantee that the deceased remains undisturbed. The concept of preservation rather shifts from static non-interference to a pragmatic spatial rearrangement. In order to accommodate a new interment, the previous remains are exhumed and subsequently re-interred at the feet of the new deceased (art. 36, para. 5) within the same plot boundaries. Consequently, while the legal requirement for the remains to stay within the specific grave is satisfied, the physical integrity of the original burial is compromised to facilitate the administrative recycling of the site.

Notably, the municipal administration's power to reclaim neglected sites is not absolute; funerary monuments classified as part of the national heritage, as well as those designated by the General Council of the Municipality of Bucharest as possessing historical or artistic interest, are strictly exempt from these provisions (art. 31, para. 1e). Furthermore, reclamation is stayed for sites with interments in the preceding seven years (art. 31, paras. 1a-b).

This caveat upholds the national sanitary minimum for undisturbed rest: per Article 9(5) of Law no. 102/2014, remains may be exhumed year-round, without public health approval, seven years post-death. Exhumation prior to the seven-year threshold is permissible only after the first anniversary of interment. Furthermore, such procedures are restricted to the winter season – specifically between November 1 and March 31 – and require formal sanitary approval from public health authorities, granted exclusively for the purpose of relocating the remains to a different grave.[14]

Complementing the Bucharest municipal regulations previously discussed, the Romanian Orthodox Church governs the vast majority of the country's burial grounds through its own internal statutes[15], which likewise reconcile confessional imperatives with the same pragmatic pressures of land management. Similarly, in church cemeteries, burial plots fall into two categories: *a)* plots for

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[13] For the theory of public property, see Cătălin-Silviu Săraru, "Public Property Rights: Origins and Developments in the Cyber Age," in *AI, Sustainability and Solidarity in Advancing European Values in a Globalized Age*, ed. Cătălin-Silviu Săraru and Cristina Elena Popa Tache (Cham: Springer, 2025), 110–17, https://doi.org/10.1007/978-3-032-06508-7_9.

[14] Romania, *Government Decision no. 741 of October 12, 2016, Approving the Technical and Sanitary Rules on Funeral Services, Burial, Cremation, Transportation, Exhumation, and Reburial of Human Remains, Cemeteries, and Human Crematoriums*, art. 29(2), *Monitorul Oficial al României*, no. 843 (October 24, 2016), https://legislatie.just.ro/Public/DetaliiDocume nt/182880.

[15] Biserica Ortodoxă Română, *Regulamentul cimitirelor din Biserica Ortodoxă Română* (Bucharest: Editura Institutului Biblic și de Misiune Ortodoxă, 2020), 15–63, https://arhiepiscopia bucurestilor.ro/sites/default/files/sectoare/Regulamentul_cimitirelor_2020.pdf. Further references to this regulation are cited by article number in the text.

indefinite (perpetual) use, which are allocated for an indefinite period (art. 12, para. 1a); *b)* plots for temporary use, which are allocated for a period of 7 years (art. 12, para. 1b). Notably, while the grounds for reclamation – abandonment, neglect, or non-payment – are standardized across all cemeteries by Law no. 102/2014 (art. 19, paras. b–c), the church regulation extends the specific thresholds for such actions to seven years (art. 42, paras. 1e–f). This offers a significantly longer grace period than the two-year window applied in the Municipality of Bucharest.

This apparent extension of repose from two to seven years proves illusory, however, as grave reopening remains subject to the same national sanitary authorization required before the seven-year threshold. This permitting process renders grave reuse during the seven-year window highly uncertain, as public health authorities retain discretionary authority over such operations. A prospective holder would seldom accept the transfer of a tomb whose immediate availability is so legally precarious, as the lack of guaranteed utility strips the concession of its practical value. In other words, the church's generosity in waiting seven years for abandonment and non-payment is redundant because one cannot realistically reuse the grave any sooner anyway due to the health regulation. Thus, church protection aligns precisely with the secular sanitary floor, rendering the denominational distinction nominal.

In accordance with Orthodox tradition, exhumed remains must be returned to their original burial site (art. 36, para. 1). Where displacement occurs to facilitate a subsequent interment, the regulation mandates that the remains be reburied concurrently with the new deceased (art. 36, para. 2). If the cemetery has ossuaries or common crypts, the remains exhumed from a reclaimed burial plot may be transferred there (art. 36, para. 3) – a provision absents from Bucharest's municipal regulations, which mandate reinterment within the original plot. At the same time, parish cemeteries carry a further custodial obligation: they must maintain the graves of Orthodox clergy, prominent figures, and heroes who died for their country (art. 49 para. 1), thereby combining the reuse of ordinary plots with the preservation of memorial graves of special social and religious significance.

Ultimately, while the secular and confessional models diverge in their administrative thresholds and spatial protocols, they converge upon the non-derogable sanitary mandates of the state; this synchronization ensures that the 'normative clock' of burial is fundamentally calibrated by a unified national standard for undisturbed rest of seven years – a substantial departure from the cultural ideal of eternal rest.

2.2. France

Article 1 of the French Constitution declares that France is a *secular* Republic, a principle that manifests in the burial domain through the near-exclusive

public ownership of cemeteries by municipalities[16], with the pertinent rules set forth in the General Code of Local Authorities (CGCT)[17].

Under this regime, the CGCT first mandates the provision of *common ground* composed of individual graves (art. R2223-3) that are collectively rotated for reuse after a minimum of five years (art. R2223-5). This mechanism ensures efficient land use while respecting the national sanitary minimum for repose. Importantly, these are not 'common graves' in the historical sense of mass or anonymous burials, but rather individual graves organized for administrative rotation to optimize municipal space. When cemetery capacity permits, plots may be further allocated as *concessions* to individuals wishing to establish a burial site for themselves and their children or heirs (art. L2223-13). Municipalities may, without, however, being required to establish all categories, grant: *a)* temporary concessions for a maximum of fifteen years; *b)* thirty-year concessions; *c)* fifty-year concessions; or *d)* perpetual concessions (art. L2223-14). For example, besides non-renewable five-year burial plots, the City of Paris offers ten-year, thirty-year, fifty-year and perpetual concessions, subject to land availability. In certain cases, funerary heritage elements of historical or architectural interest may be retained by the City of Paris, which acquires ownership of the concession as of the date of reclamation.[18]

When, after a period of thirty years from the date of the concession agreement and ten years after the last burial on the granted plot (Art. R2223-12), a burial plot has ceased to be maintained, the mayor may formally declare it abandoned and the municipality can reclaim the land allocated to that burial plot. (Art. L2223-17). Thus, while common graves permit exhumation after just *five years* from burial, even perpetual concessions remain precarious: municipalities can reclaim them after thirty years from grant or *ten years* post-final interment, rendering perpetuity equally illusory under neglect.

In practical terms, this means that a non-renewable five-year plot may be reused five years after burial, whereas a perpetual concession – though symbolically more protective – can likewise be reclaimed once ten years have elapsed since the last interment, so that the temporal advantage of perpetuity is relative rather than absolute. This five-year differential reveal that the legal premium paid for 'perpetuity' effectively secures only a marginal extension of undisturbed rest over the standard sanitary minimum once active maintenance ceases. Conse-

[16] For the limited exceptions, see Régis Bertrand, "Le décret de prairial en question (1870–1905)," in *Aux origines des cimetières contemporains*, ed. Régis Bertrand and Anne Carol (Aix-en-Provence: Presses universitaires de Provence, 2016), 192–93, https://books.openedition.org/pup/75956.

[17] France, *Code général des collectivités territoriales*, Légifrance, accessed August 4, 2026, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070633. Further references to this code are cited by article number in the text.

[18] City of Paris, *Règlement général des cimetières de la Ville de Paris*, June 1, 2005, https://cdn.paris.fr/paris/2022/03/09/25e6f25e06bf64607af3e34000aeec5f.pdf.

quently, the distinction between the eternal right and the temporary lease is reduced to a minor temporal buffer, as the French secular state ultimately prioritizes the dynamic recycling of land over the static preservation of a neglected memory.

In the event of reclamation, the exhumed remains are immediately reinterred in a perpetual ossuary within the cemetery. The mayor may also authorize the cremation of these remains, except where the deceased had expressed opposition to the practice; in such cases, the remains must be kept distinct and reburied within the ossuary (Art. L2223-4). This transition to a collective space mirrors the regulatory framework of the Romanian Orthodox Church, where the transfer of remains to ossuaries or common crypts is likewise envisioned as a solution for reclaimed plots. A key distinction remains, however: in France, the mayor must establish a perpetual ossuary for this purpose, whereas the Orthodox rule leaves such transfer as an administrative option, reflecting a more flexible – yet equally pragmatic – approach to the end of a burial plot.

2.3. Germany: The Case of the Free and Hanseatic City of Hamburg

The Preamble of the Basic Law for the Federal Republic of Germany starts with the invocation of a "responsibility before God and man"[19], signaling a departure from the strict secularity of the French model. However, this religious acknowledgment is balanced by the formal prohibition of a state church under Article 140 of the Basic Law, thereby establishing a framework of constructive neutrality where the state remains organizationally separate from religious institutions without being indifferent to them. Against this backdrop of neutrality, burial law remains a state-level responsibility rather than a federal one. Under Article 70(1) of the Basic Law, the sixteen *Länder* exercise their own residual legislative competence in this area, as the Federation lacks explicit constitutional authority over funeral practices.

Hamburg provides a particularly revealing case, since, as a city-state, it combines state-level legislative competence with local cemetery administration. It thereby concentrates regulatory power in a single legal order. Consequently, when the Hamburg legislator adopted its cemetery legislation, the resulting norms were applied directly to its burial grounds. This institutional proximity suggests that the state may have not been a detached regulator observing from a distance, but rather an authority formulating rules for its own municipal needs, thereby ensuring that the legal framework was being forged with an intimate understanding of the pragmatic realities of burial and the management of final rest.

Its Funerals Act[20] provides that the repose period (*Ruhezeit*) begins on

[19] Germany, *Basic Law for the Federal Republic of Germany*, Federal Ministry of Justice, accessed August 4, 2026, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

[20] Hamburg, *Gesetz über das Leichen-, Bestattungs- und Friedhofswesen (Bestattungsgesetz)*, October 30, 2019, Landesrecht Hamburg, accessed August 4, 2026, https://www.landesrecht-hamburg.de/bsha/document/jlr-BestattGHA2020rahmen.

the day of burial and lasts twenty-five years and a grave plot may not be reused before the end of that period, although the competent authority may grant an exception in individual cases (§ 28). Exhumation prior to the end of the repose period requires official authorization and is generally restricted to the months between November and March, except for cases governed by the Code of Criminal Procedure (§ 9).

While church cemeteries are also subject to the twenty-five-year minimum (§ 32.4), the competent authority may permit a shorter duration upon application by the cemetery operator. For example, at the cemetery of the Evangelical Lutheran Parish Association of Rahlstedt the 'normative clock' for final rest is set at twenty years, a five-year reduction that illustrates the practical application of administrative autonomy within church-managed grounds[21]. By contrast, at the Evangelical Lutheran Cemetery of Stellingen, the repose period is the standard twenty-five years[22]. Both church regulations provide that, if a grave is reoccupied after the repose period has ended, any remaining human remains or ashes are to be reburied in the grave; with the cemetery operator's consent they may also be reburied in other graves. In Rahlstedt, the regulation specifies that they are to be reburied under the grave or beside the coffin.

The Funerals Act (§ 27) establishes a positive obligation for all burial plots to be maintained (*Grabpflege*). For *elective plots* (*Wahlgrabstätten*), where the holder of the right of use (*Nutzungsberechtigter*) selects the location and size – often accommodating family burials with extendable rights – the responsibility lies with that holder. For *row graves* (*Reihengrabstätten*), which are assigned sequentially without choice of position and typically hold single interments, it falls upon the person who commissioned the burial. The failure to fulfill the maintenance obligation does not shorten the mandatory repose period, as the statutory protection afforded to the deceased remains in force, ensuring that neglect does not result in the premature reclamation of the burial site.

There can be also honorary graves (*Ehrengrabstätten*) maintained by the competent authority, which are established for deceased individuals who performed special achievements or rendered significant service to the community during their lifetime. Mirroring this logic of state-sponsored dignity, the institution of honorary graves represents the ultimate suspension of the normative clock. In Berlin, for instance, this recognition is granted by a Senate resolution, initially covering a period of twenty years with the possibility of further extension. Berlin hosts over 680 honorary graves, commemorating deceased persons whose burials date back as far as 1785.[23]

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[21] Evangelical Lutheran Parish Association of Rahlstedt, *Friedhofssatzung für die Friedhöfe des Ev.-Luth. Kirchengemeindeverbandes Rahlstedt* (2014), accessed August 4, 2026, https://www.rahlstedterfriedhof.de/satzungen/.

[22] Evangelical Lutheran Cemetery of Stellingen, *Friedhofssatzung des Evangelisch-Lutherischen Friedhofs Stellingen* (2018), accessed August 4, 2026, https://friedhof-stellingen.de/downloads/.

[23] Walter Zimmermann, "Die Sicherung der Grabpflege im Erbfall," *Zeitschrift für Erbrecht und*

3. Temporal Dimensions of Post-Mortem Dignity: Legal Remedies

In all three jurisdictions post-mortem dignity is recognized as a foundational principle that extends human dignity beyond life, albeit at different levels. In Romania, legal doctrine affirms this enduring imperative, positing that the right to dignity – foundational to the deceased protection –entails respect for the body whether living or dead.[24]

In France, both civil and criminal legislation affirm it. The Civil Code in Article 16-1-1 provides that the respect for the human body does not end with death and the remains of the deceased, including the ashes of those whose bodies have been cremated, must be treated with respect, dignity, and decency.[25] The Criminal Code also protects the corpse, tombs, graves, cinerary urns, and monuments erected in memory of the dead within the chapter dedicated to violations of human dignity.[26]

Under German constitutional law, human dignity does not end at death – the deceased holds this right, though temporally limited as memory fades, eventually permitting cemetery evacuations.[27] *A fortiori*, routine exhumations for subsequent burials remain compatible once statutory repose periods conclude.

The comparative analysis thus reveals that post-mortem dignity does not constitute an absolute state of perpetual repose, but rather operates as a transitional right – a foundational imperative offering a robust yet temporary sanctuary that recedes as the deceased shifts from subject of memory to object of public administration. In turn, the state's duty to respect the human in the remains is progressively superseded by the secular necessity of cemetery renewal. Consequently, post-mortem dignity manifests through a bifurcated regime of protection: *temporal inviolability* – absolute prohibition of disturbance during mandatory repose periods spanning 5-25 years across jurisdictions – giving way to *regulated reuse* post-exhumation, wherein corpses may be lawfully exhumed, spatially rearranged, or transferred to ossuaries to enable subsequent interments,

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Vermögensnachfolge, no. 7 (2024): 445.

[24] Călina Jugastru, *Dreptul persoanelor, dreptul obligațiilor: Secvențe în actualitatea Codului civil* (Bucharest: Hamangiu, 2013).

[25] France, *Code civil*, art. 16-1-1, Légifrance, accessed August 4, 2026, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721.

[26] France, *Code pénal*, Légifrance, accessed August 4, 2026, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719. Comparative criminal law further suggests that the corpse and the resting place are distinct objects of protection, so bodily inviolability and grave preservation, although related, may respond to different legal rationales. See Michał Najman, "Division of Offences Carried Out on Human Corpses Due to Their Statutory Object of Protection," *Juridical Tribune—Review of Comparative and International Law* 9, no. 3 (2019): 609–10, https://www.tribunajuridica.eu/arhiva/An9v3/9.%20Micha%C5%82%20Najman.pdf.

[27] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 239, https://doi.org/10.1017/CBO9781316106327.

while retaining inviolable criminal safeguards against desecration and the formal exigencies of respect for human remains.

It is precisely within this tension between inviolable status and administrative utility that we witness the practical manifestation of the problem at the heart of this research: the erosion of the perpetual ideal in favor of administrative renewal cycles. Through this lens, the ideal of eternal rest is revealed to be a receding horizon, increasingly subordinated to the rhythmic, pragmatic demands of cemetery management.

This bifurcated framework exposes the first pillar of comparative analysis: the *commonalities* uniting these divergent traditions despite their varying repose durations. Despite divergent minimal repose durations, Romania, France, and Hamburg share three core commonalities in their approach to post-mortem dignity: *first*, all impose mandatory minimum undisturbed rest periods – prohibiting exhumation except for exceptional reasons during this temporal window; *second*, although perpetual concessions exist in Romania and France, they prove illusory, vulnerable to neglect, non-payment, or abandonment triggers that enable reclamation; and *third*, reclaimed remains are routinely reinterred within the plot, under it, or in ossuaries to facilitate reuse.

These shared structural features – a mandatory temporal floor, fragile perpetuity, and pragmatic reinterment protocols – seem to constitute a continental European consensus subordinating post-mortem dignity's aspirational eternity to land-use imperatives, regardless of secularization paths or confessional influences.

However, the existence of these shared administrative mechanics does not imply a harmonized standard of protection. Rather, the second pillar of this analysis identifies the critical *divergences* that define each jurisdiction's unique threshold for post-mortem dignity. Though burial machinery aligns, the normative clock's velocity varies significantly, reflecting deeper systemic variations in the valuation of undisturbed rest against the pressures of secular utility.

France displays the most aggressive velocity, with a mere five-year minimum for common graves and perpetual concessions reclaimable after ten years post-final interment, prioritizing municipal land recycling in its strict secular framework. Romania's seven-year sanitary floor, uniform across secular and confessional cemeteries, balances confessional traditions with national health mandates, offering moderate protection. Hamburg's twenty-five-year standard – decoupled from maintenance neglect – provides the slowest clock, delivering the strongest baseline protection for post-mortem dignity.

Among these models, Germany's framework – exemplified by Hamburg's twenty-five-year repose – provides the strongest baseline protection for temporal inviolability. Unlike the shorter repose periods in France (five years) and Romania (seven years), which accelerate the deceased's transition to administrative object status, the German standard better aligns with post-mortem dignity receding only as personal memory fades. Moreover, decoupling mandatory

rest from maintenance or payment obligations eliminates temporal inequality, shielding grave sanctity from the bereaved's potential neglect of the tomb or the possibility that heirs may no longer exist.

This suggests establishing *de lege ferenda* a harmonized 20-25 year minimum repose period also across Romania and France as the true baseline for upholding post-mortem dignity. Such a harmonized baseline would particularly benefit those lacking means to acquire extended or perpetual concessions, as well as those without descendants able to maintain their graves, ensuring post-mortem dignity as a universal right rather than a privilege contingent on economic capacity or familial devotion.

All the more so, this baseline should extend to all graves, since the human relation to one's final resting place can likewise form part of personal identity; accordingly, grave removal or premature reuse would amount to a dehumanizing displacement from a place bound up with memory, belonging, and dignity[28]. Furthermore, the dead can be right-holders under the interest theory as interests can persist after death and may include dignity.[29] Temporal inviolability would therefore function not merely as a formal waiting period, but as a substantive safeguard of post-mortem dignity, preserving the grave as a protected site of remembrance even where no family remains to maintain it.

Also, the implementation of prepaid opt-out mechanisms would empower individuals to proactively decouple their post-mortem protection from the precarious dependency on surviving heirs, thereby embedding individual choice directly within the administrative framework. It would allow an individual, during their lifetime, to secure a guaranteed duration of undisturbed repose that transcends the mandatory statutory floor. By prepaying the relevant maintenance levies and land-use fees, the individual could effectively 'opt out' of the administrative clock that would otherwise trigger exhumation and grave reuse. This mechanism would shift the status of the deceased from a 'supplicant' dependent on the charity or diligence of descendants to a 'citizen' whose right to repose is backed by a self-funded guarantee recognized by law.

Ultimately, these mechanisms would ensure that post-mortem dignity remains a substantive expression of the individual's dignity – protected not because they are still remembered, but because they have exercised their autonomy to secure a 'posthumous space' that remains (at least for a while) inalienable against the rhythmic pressures of renewal.

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[28] Raquel Domingues do Amaral, *The Principle of Harmony with Nature as a Legal Foundation: A Proposal for the Ethical and Legal Consideration of Non-Human Living Beings and Ecosystems* (Cham: Springer, 2025), 304, https://doi.org/10.1007/978-3-032-05475-3.

[29] Andrew Fell, "The Rights of the Dead," in *Life and Death in Private Law*, ed. Kate Falconer, Kit Barker, and Andrew Fell (Oxford: Hart Publishing, 2024), 107–13, https://doi.org/10.5040/9781509969357.ch-006.

4. Conclusions

This study has identified that while post-mortem dignity is theoretically entrenched in European legal orders, its practical application is contingent upon a normative clock that governs the transition of the deceased from a rights-bearing subject to an object of public administration. The comparative analysis reveals a bifurcated regime of protection where an initial window of temporal inviolability inevitably yields to the pragmatic, rhythmic demands of cemetery renewal.

The most critical implication of this research is the mapping of temporal inequality. By examining the velocity of burial cycles – ranging from the five-year rotation in France to the twenty-five-year buffer in Hamburg – this study demonstrates that the duration of undisturbed rest is currently a variable metric of the state's commitment to dignity. When the 'perpetual ideal' is made conditional upon active maintenance or continuous payment, post-mortem dignity ceases to be a universal human right and is instead reduced to a precarious administrative asset – a privilege reserved for those with the financial legacy or surviving kin to defend it.

There is a clear pathway for *de lege ferenda* reform toward a harmonized European minimum repose floor of 20–25 years. Adopting the German standard as a benchmark would provide a universal 'memory window,' ensuring that the sanctity of the grave persists until the personal memory of the deceased naturally recedes.

The proposed prepaid opt-out mechanisms offer a practical exploitation route for cemetery operators and legislators. By allowing individuals to proactively secure their own 'posthumous space', the law can decouple dignity from the uncertainty of future familial neglect, empowering the individual to exercise autonomy that survives their own passing.

These reforms ensure that the modern cemetery remains a site of social justice and shared identity rather than a mere logistics hub for urban renewal. Since most individuals will never occupy a 'monumental' grave of historical significance, these safeguards are necessary to protect the 'ordinary' dead from being prematurely erased by the administrative clock – to ensure that post-mortem dignity remains a universal right rather than an elite privilege

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C50 Recruiting of Indigenous Workers Convention, 1936: The Construction of Gendered Working Subjects in Uganda Employment Law

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Abstract

The Uganda Employment Act has two main categories of workers: the workers who move with their families and those who do not. Although studies have revealed that these categories manifest mainly as male employees, how they were constructed has not been examined. Using Joan Scott's concept of gender as a question and archival data, this paper examines the construction of the employee who travels with their family. I found that the employee who travels with their family was constructed in the Uganda Employment Ordinance 1946 as a result of the incorporation of the provisions of the Recruiting of Indigenous Workers Convention, 1936 into the Uganda employment law. I argue that although the original aim was to prevent potential conflict between the Uganda Protectorate and the Catholic Church of the Mandated Belgian Territory of Ruanda-Urundi over allegations of recruiting women and girls for "immoral purposes", the incorporation of the provisions of the Convention created a new legal subject — the male employee with an urban dependent housewife. Although the current legal subjects are gender-neutral, these findings help us understand how some of the rights in employment law in Uganda were constructed and why the working subject continues to manifest in the labour market.

Keywords: *C50 Recruiting of Indigenous Workers Convention, Uganda employment law, construction of working subjects, gender, migrant workers, and cross-border migration.*

1. Introduction

Regulation 25 of the Employment Regulations 2011 made under the Employment Act 2006 provides: where families of recruits have been allowed by the employer to be brought to the place of employment, the employer shall take all necessary measures for safeguarding their safety, health and welfare during the journey.[2]

The above regulation reveals two categories of employees that are envisaged by employment legislation in Uganda-the employee who moves with their family to the place of work and the employee who does not move with their family to the place of work. An employee may be authorised by the employer to move

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[2] Uganda, *Employment Regulations, 2011*, Statutory Instrument 61 of 2011, reg. 25, https://ulii.org/akn/ug/act/si/2011/61/eng@2011-11-18.

their families to the place of employment. If the employee is not permitted to move with their family, they must leave them behind.

Studies mainly on large-scale plantations have revealed these two categories of employees. In a study on Kakira Sugar Factory, Martiniello found that young migrant workers are recruited from non-western regions of the country who perform the sugar cutting. Security personnel are recruited from remote West Nile and Teso.[3] He observed that in addition to weeding and maintenance of sugar fields, women perform other daily activities of food provision, water provision and care of children and elders.[4] Since he reported that women are expected to perform domestic work, these should be the categories of employees who travel with their families. According to records from the website of Kakira, the plantations recruit employees with their families.[5] Although there is no information on whether these recruits are male or female, based on Martiniello's study, women have to perform tasks related to weeding in addition to domestic work, which shows that the recruits are male since they are not expected to perform domestic work.[6] Studies in other sugarcane plantations and forestry also report cases where male employees who do not move with their families.[7] These are also usually the dominant categories of employees.[8]

Although studies have documented the existence of these two categories of employees and have revealed that they are predominately male, how these two categories of employees were constructed in law remains unexamined. Investigating how these categories of employees were constructed help us to understand better why they still exist and why they are predominately male.

This paper examines how the male employee who moves with their families to the place of employment was constructed. I used the Joan Scott's concept of gender as a question and reviewed archival data to conduct the analysis.[9] Using the concept of gender as a question, I asked why are they male employees and

[3] Giuliano Martiniello, "Bitter Sugarification: Sugar Frontier and Contract Farming in Uganda," *Globalizations* 18, no. 3 (2021): 365–66, https://doi.org/10.1080/14747731.2020.1794564.
[4] Martiniello, "Bitter Sugarification," 365–66.
[5] Martiniello, "Bitter Sugarification," 365–66.
[6] Martiniello, "Bitter Sugarification," 365–66.
[7] Giuliano Martiniello, Arthur Owor, Ibrahim Bahati, and Adam Branch, "The Fragmented Politics of Sugarcane Contract Farming in Uganda," *Journal of Agrarian Change* 22, no. 1 (2022): 93, https://doi.org/10.1111/joac.12455; Adrian Nel, "'Zones of Awkward Engagement' in Ugandan Carbon Forestry," in *Carbon Conflicts and Forest Landscapes in Africa*, ed. Melissa Leach and Ian Scoones (Abingdon: Routledge, 2015), 95, https://doi.org/10.4324/9781315740416.
[8] Martiniello et al., "Fragmented Politics," 93; Nel, "'Zones of Awkward Engagement,'" 95.
[9] Joan W. Scott, "Unanswered Questions," *American Historical Review* 113, no. 5 (2008): 1422–30, https://doi.org/10.1086/ahr.113.5.1422; Joan W. Scott, "Gender: Still a Useful Category of Analysis?," *Diogenes* 57, no. 1 (2010): 7–14, https://doi.org/10.1177/0392192110369316; Judith Butler and Elizabeth Weed, eds., *The Question of Gender: Joan W. Scott's Critical Feminism* (Bloomington: Indiana University Press, 2011); Joanne Meyerowitz, "A History of 'Gender,'" *American Historical Review* 113, no. 5 (2008): 1346–56, https://doi.org/10.1086/ahr.113.5.1346.

how was the male employee who moves with their family historically constructed?

The analysis of employment legislation revealed that the male employee who moves with their family was constructed through the incorporation of the Recruiting of Indigenous workers Convention, 1936 into the Uganda employment legislation in 1946. I found that originally, the employment legislation from 1899-1946 was silent one the category of employee. Although it did not explicitly state the category of employee, the Uganda Protectorate Report of the Committee of Enquiry into the Labour Situation in Uganda Protectorate revealed that the employee who manifested in the labour market did not travel with their family.[10] The law did not also mention anything about family members. This demonstrates that the employee that was envisaged in the earlier legislation did not move with their family.

However, the analysis revealed that the employee who travelled with their families was introduced under the Uganda Employment Ordinance 1946. The analysis also revealed that this category of employee was introduced through the incorporation of the Recruiting of Indigenous Workers Convention, 1936 into the Uganda employment legislation. The Employment Ordinance specifically provided for a male employee who travelled with his family to the place of work. I argue that although the incorporation of the Recruiting of Workers Convention was meant to prevent potential conflicts between the Roman Catholic Church of the Belgian Mandated Territory of Ruanda-Urundi and the Uganda subject, it introduced a new subject in law-a male employee who moves with his family to the place of work. This paper is divided into four parts. First, I explain the conceptual framework for the analytical framework adopted. Secondly, I discuss the employee who existed in the earlier legislation. Thirdly, I discuss why and examine how the Recruiting of Indigenous Workers was incorporated in employment law in Uganda. I also identify the new legal subject and how they were constructed. Fourthly, I examine how the working subject was substantively established. I conclude by observing that although the current law is gender neutral, the rights were partly designed around this category of employee, which explains why the employee still manifests. Additionally, the male employee who moves with their family was fully established in law and in the labour market from 1946-2005, which might explain why employers continue to prefer a male employee who moves with their family as opposed to the gender-neutral employee currently envisaged under the Employment Act 2006.

2. Conceptual Framework

The concept of gender as a question about how differences between sexes

[10] Uganda Protectorate, *Report of the Committee of Enquiry into the Labour Situation in the Uganda Protectorate* (Entebbe: Government Printer, 1938).

are constructed was developed by Scott.[11] In 1986, Scott in her seminal article, "Gender: A Useful Category of Historical Analysis", developed a gender analytical framework, which entails examining how differences are historically constructed and what the effect of the differences are.[12] However, the concept of gender was not posed as a question.[13] Scott explained in her 2008 article, "Unanswered Questions", that the concept of gender in her 1986 article was a question. In this article, Scott provides the background for the missing question mark in her 1986 article. She states that when she submitted her article to the American Historical Review in 1986, she was asked by the editors to turn the question into a statement because question marks were not allowed in titles of articles. She complied with the request of the editors. However, she thought that the revision "eliminated a certain rhetorical punch".[14] She observes that a reading of the articles prepared for the 2008 American Historical Review Forum showed that the questions about gender are never fully answered.[15] She notes that this confirmed her earlier position to have a question mark in the title of her 1986 article.[16] She argues:

> I want to insist that the term gender is useful only as a question.[17]

Based on the above assertion, Scott reversed the decision of the American Historical Review by explaining the development of the concept of gender as an analytical category in her 1986 article in a 2010 article, *Gender: Still a Useful Category of Historical Analysis?*[18] In the 1986 article, her project was aimed at developing the concept of gender as an analytical category through asking questions about how differences between women and men are constructed and providing an explanation for the persistence of inequality between men and women.[19] She further claims that: "Gender" is about asking historical questions; it is not a programmatic or methodological treatise. It is above all an invitation to think critically about how the meanings of sexed bodies are produced, deployed, and changed; that, finally, is what accounts for its longevity.[20]

Indeed, in 2010, she reaffirmed her decision to reverse the decision of the American Historical Review by introducing a question mark in the title of an article re-examining her concept of gender developed in her 1986 article. Therefore, in Joan Scott's gender analytical framework, gender is conceptualized as a question. According to Scott the use of gender as a tool of analysis through the

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[11] Scott, "Gender: Still a Useful Category," 7–14.
[12] Joan W. Scott, "Gender: A Useful Category of Historical Analysis," *American Historical Review* 91, no. 5 (1986): 1053–75, https://doi.org/10.2307/1864376.
[13] Scott, "Unanswered Questions," 1422–30.
[14] Scott, "Unanswered Questions," 1422.
[15] Scott, "Unanswered Questions," 1422.
[16] Scott, "Unanswered Questions," 1422.
[17] Scott, "Unanswered Questions," 1422.
[18] Scott, "Gender: Still a Useful Category," 7–14.
[19] Butler and Weed, *Question of Gender*.
[20] Scott, "Unanswered Questions," 1422–30.

use of questions provides "new perspectives on old questions".[21] Restating the concept of gender as a question provides clarity to Scott's understanding of gender. Viewing the concept of gender as a question makes its analysis about how differences between sexes are historically constructed.

Joan Scott's concept of gender as a question provides a useful analytical framework for understanding male employees who with their families.[22] Scott's framework focuses on using gender to ask questions as opposed to using gender to fix meanings.[23] According to Scott, gender is a question: a question about how differences are historically constructed between man and women.[24] She defines gender as "a constitutive element of social relationships based on perceived differences based on perceived differences between sexes, and gender is a way of signifying relationships of power".[25] Based on the first part of the definition of gender, Scott provides four interrelated elements to investigate how differences sexes are historically constructed: cultural symbols, normative concepts, institutional instantiations of gendered meanings, and subjective identity.[26] The cultural symbols provide representations of women and men. The normative concepts fix these gendered meanings, and they are found, for example, in law and education. Institutional manifestations of the gendered meanings construct gender and this in turn constructs subjective identities.[27] Scott argues that subjective identities are substantively constructed through discrimination.[28] The four elements are interconnected.[29] This framework provided an analytical framework for examining the complex relationship between the sexes.[30] Archival data was relied upon to analyse the law.

3. The Employee Who Does Not Move with Their Family in past Legislation

Employment was legally introduced into the British Uganda Protectorate

[21] Scott, "Unanswered Questions," 1422–30.
[22] Scott, "Unanswered Questions," 1422–30.
[23] Scott, "Gender: A Useful Category," 1053–75.
[24] Scott, "Gender: A Useful Category," 1053–75.
[25] Scott, "Gender: A Useful Category," 1067.
[26] Scott, "Gender: A Useful Category," 1067–69; Elizabeth Weed, "From the 'Useful' to the 'Impossible' in the Work of Joan W. Scott," in *The Question of Gender: Joan W. Scott's Critical Feminism*, ed. Judith Butler and Elizabeth Weed (Bloomington: Indiana University Press, 2011), 287–311.
[27] Scott, "Gender: A Useful Category," 1067–69; Weed, "From the 'Useful' to the 'Impossible,'" 287–311.
[28] Joan W. Scott, "Multiculturalism and the Politics of Identity," in *The Identity in Question*, ed. John Rajchman (New York: Routledge, 1995), https://doi.org/10.4324/9780203760215.
[29] Scott, "Gender: A Useful Category," 1053–75.
[30] Natalie Zemon Davis, "Women's History in Transition: The European Case," *Feminist Studies* 3, nos. 3–4 (1976): 83–103, https://doi.org/10.2307/3177729.

(present day Uganda)[31] in 1899. Two laws were enacted in 1899. The first law was the Employment of Porters Regulations 1899. This law was enacted in September 1899. When the first law was passed, the subject in the law was male. However, the male porter only manifested among a few natives.[32] In October 1899, Johnston, the Special Commissioner, re-enacted the Employment of Porters Regulations in October 1899.[33] The contents of the law remained the same. However, Johnston observed in his 1902 book *The Uganda Protectorate,* that it was impossible to make any significant changes to the lives of the tribes that constituted the Buganda Protectorate without entering into an agreement with the Kingdom of Uganda (the same as the Kingdom of Buganda).[34] As a result, Johnston negotiated an agreement between the British Government and Buganda Kingdom: the 1900 Uganda Agreement.[35] According to Article 12 of the Agreement, every person who owned a hut was expected to pay a hut tax of three rupees per year. Because natives did not have money, they flocked urban centres, for example, Mengo and Entebbe, in search for employment to pay their taxes.[36] However, since the employment law provided for male porter, only men were employed as porters.[37] Therefore, following the passing of the Buganda Agreement, the working subject that manifested in the labour market was a male employee with a rural home. The male employee did not move with their family.[38] This category of worker shaped the subsequent legislation until the passing of the Uganda Employment Ordinance 1946, which introduced a new category of employee—the male employee who travelled with his family to the place of work.[39]

Section 14 of the Uganda Employment Ordinance 1946 revealed the two categories of employees. It provided that: …no foreign contract of service or other written contract of service, other than a contract of apprenticeship, shall be binding or valid for a longer period than two years from the date thereof: provided

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[31] The British Government declared the Kingdom of Buganda (also referred to at the time as the Kingdom of Uganda) a British protectorate in 1894, naming it the Uganda Protectorate. In subsequent years, adjoining territories were incorporated to form present-day Uganda.

[32] A. T. Matson, "Baganda Merchant Venturers," *Uganda Journal* 32, no. 1 (1968): 14–15.

[33] The first law was enacted in September 1899 by Berkeley (see the communication held by The National Archives). One month later, in October 1899, the law was re-enacted by Johnston, the Special Commissioner. The reason for re-enactment could not be established from the sources consulted. One possible explanation is that Johnston had been appointed Special Commissioner and instructed to establish a civil government in the Uganda Protectorate.

[34] Harry Hamilton Johnston, *The Uganda Protectorate*, vol. 1 (London: Hutchinson, 1902), 248.

[35] G. F. M. Ennis and W. Morris Carter, comps., *Laws of the Uganda Protectorate in Force on the 31st December 1909, with Appendices Containing Orders of the King in Council and the Buganda, Toro and Ankole Agreements* (London: Stevens and Sons, 1910), x; Uganda Protectorate, *Native Labour Ordinance, 1905*, sec. 56.

[36] Alfred Robert Tucker, *Eighteen Years in Uganda and East Africa*, new ed. (London: Edward Arnold, 1911), 287–88.

[37] Matson, "Baganda Merchant Venturers," 14–15.

[38] Uganda Protectorate, *Report of the Committee of Enquiry*.

[39] See Uganda Protectorate, *Native Labour Regulations, 1900*; Uganda Protectorate, *Native Porters Ordinance, 1905*; and Uganda Protectorate, *Masters and Servants Ordinance, 1913*.

that where the employee is not accompanies by his wife or family the contract shall not exceed twelve months.[40]

Although this section provided for limitation on employment contracts, a close reading reveals two categories of employees: an employee who moves with their family and an employee who does not move with their family. The section was a revision of the employee who moves without their family. This section was a revision of Section 11 of the Masters and Servants Ordinance 1913, the preceding law. Section of 11 of the Masters and Servants Ordinance provided: a written contract of service other than a contract of apprenticeship shall not be binding for a longer period than two years from the date thereof.[41]

Although the Masters and Servants Ordinance does not explicitly provide for whether the employee moved with their family, the law contained no provisions for family members, implying that the law was designed around a male employee who does not move with their family. This is the employee that manifested in the labour market and had become the norm. The Committee of Enquiry into the Labour Situation in Uganda Protectorate, an inquiry conducted when the Masters and Servants Ordinance was in force, observed: under the Master and Servants Ordinance, the maximum period for a written contract is two years. In practice, these contracts are limited to six months in the case of unskilled labour engaged for work in a district other than in which the labourer ordinarily resides. Such labour is not accompanied by wives and families and is, indeed for this reason that the period has been limited to six months.[42]

This observation shows that the male employee who did not travel with the family was fully established in law and in the labour market. However, due to allegations from the Roman Catholic Church that the British East Africa Territories, specifically Kenya, were recruiting women and girls "for immoral purposes", the Uganda Protectorate Government decided to incorporate the provisions of the Recruiting of Indigenous Workers Convention which would prevent the conflict for the Uganda Protectorate. In the next section, I briefly explain the migration of labour from the Belgian Mandated Territory of Ruanda-Urundi, before analysis how the Convention was incorporated into the Uganda Employment Ordinance, 1946.

4. Migration of Labour from the Belgian Mandated Territory of Ruanda-Urundi

The Uganda Protectorate started to rely heavily on migrant labour with the introduction of native agriculture. Article 15 of the Buganda Agreement 1900 divided land into crown land and private individual owners. When interpreting

[40] The maximum contract period was amended in 1953 to three years both for employees accompanied by their families and for employees who were not accompanied by their families.
[41] Uganda Protectorate, *Masters and Servants Ordinance, 1913*, sec. 11.
[42] Uganda Protectorate, *Report of the Committee of Enquiry*.

the Article 15 of the Buganda Agreement, Johnson observed: it will be seen by Clause 15 that if the actual area of the Kingdom of Uganda…be accurately estimated at 19,600 square miles, Her Majesty's Government will have acquired the exclusive control over more than half of that area, viz., of 10,5500 square miles…[43]

From the above explanation, Buganda was divided into two-native owned land and the Crown land. The economic policy of the Uganda Protectorate was to encourage native farmers and agricultural farmers. The Baganda who owned land embarked on native farming.[44] As a result, they employed natives from Ruanda-Urundi on their farms.[45] Originally, government public works relied on forced labour among the natives, called *Luwalo* and *Kansavu*.[46] Under the *Luwalo* system, the natives were expected to provide free labour to maintain public works.[47] Under the *Kansavu* system, the chiefs were expected to compel their subjects to provide labour at a cost. However, in the 1920s (get the details), the Kansavu labour was abolished by an order from the Secretary of State for colonies. As a result, there was an increase in the demand for labour for public works as well. The Government introduced several incentives to attract labour from the Baganda farms for public works, for example providing blankets. They also constructed labour camps to support the flow of labour from Ruanda-Urundi.

However, the need for labour from Ruanda Urundi was intensified during World War II when local communities, from West Nile Region that had originally supplied migrant labour were recruited to support the British Government in their efforts. As a result, emphasis was placed on the migrant workers from Ruanda Urundi. The Government of Uganda set up a programme of constructing labour camps and improving the already existing camps that were infected by ticks. However, due to famine in Ruanda-Urundi and also the British East African territories, the Governor of Uganda decided to close the borders of Ruanda-Urundi and notified the Tanganyika government to stop migrant workers from Ruanda-Urundi entering through their boarders. The fear was that women and children were crossing to Uganda and this would affect Uganda, which was equally facing food shortages because a number of men had been enlisted for the world war. However, the borders were later reopened. The fear of women and children crossing the boarder into Uganda indicates that the government had en-

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[43] Apollo N. Makubuya, *Protection, Patronage, or Plunder? British Machinations and (B)Uganda's Struggle for Independence* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2019), 50.

[44] Uganda Protectorate, *Annual Report of the Labour Department, 1925* (Entebbe: Government Printer, 1925).

[45] Uganda Protectorate, *Annual Report of the Labour Department, 1925*.

[46] Uganda Protectorate, *Annual Report of the Labour Department, 1925*.

[47] Uganda Protectorate, *Annual Report of the Labour Department, 1925*; Uganda Protectorate, *Report of the Committee of Enquiry*; and Uganda Protectorate, *Report of the Uganda Development Commission, 1920* (Entebbe: Government Printer, 1920).

visaged a male employee who does not move with their family in the earlier legislation.

5. Incorporation of the Recruiting of Indigenous Workers Convention into Uganda Employment Law and the Creation of the New Subject of Law

The issue of the regarding British's obligations under the Recruiting of Indigenous Workers Convention was first considered with respect to the British Territory of Tanganyika. Although the trip made by Major Orde was meant for Uganda, he also observed that there were issues that affected both all the three British Territories. One of the issues that he highlighted was the fact that in Tanganyika, that they had recruited later for three years even in cases where the workers were not recruited with their families, contrary to the "International Convention on recruiting and contracts"[48] He also highlighted that the was a possibility "in change of policy on the part of Belgian authorities might preclude the repatriation of the recruits at the end of their as required by the Conventions".[49] A comment on Major Order's report from the colonial office on 26/2/45 observed: it is extremely difficult to bring this labour into line with the requirements of the Recruiting and Contracts Conventions. But ought to be it ought to be done.[50]

While the comment was made in relation to Major Orde Brown's Report on his visit to the Mandated Territory of Ruanda-Urundi,[51] in Major Orde's report to the colonial office, the issue of the Conventions that Britain had ratified, that is the Convention on recruiting and contracts had arisen due to the issue in Tanganyika. He should have raised the issue with the Deputy Governor General of the Mandated Territory of Ruanda-Urundi during the meeting concerning migrants to Uganda to understand the position of the Government on the migrants who had been recruited from Ruanda-Urundi to the Tanganyika on three months contracts without their families contrary to the Contracts Convention, and the incoming Belgian Government policy that would not require the repatriation of migrants, contrary to the Recruiting Convention. This information would definitely benefit the Uganda Protectorate if they chose to recruit within the territory Ruanda-Urundi. Before, the recruitment was happening at migrant camps in

[48] Great Britain, Colonial Office, Major Orde-Brown to the Colonial Office, January 6–8, 1945, The National Archives, Kew, file reference not supplied.
[49] Orde-Brown to the Colonial Office, January 6–8, 1945.
[50] Great Britain, Colonial Office, comment dated February 26, 1945, on Major Orde-Brown's report concerning his visit to the Belgian Mandated Territory of Ruanda-Urundi, The National Archives, Kew, file reference not supplied.
[51] Great Britain, Colonial Office, Major Orde-Brown to the Colonial Office, January 6–8, 1945, The National Archives, Kew, file reference not supplied. [Author query: The manuscript refers to two items of correspondence, but identifies only this one. Please supply the date, parties, and archival file reference for the second item.]

Uganda after the migrant workers had crossed the Ruanda-Urundi.

A communication from the Labour Commissioner regarding the migration of Labour from the Ruanda-Urundi highlighted that there were no significant issues raised for Uganda.[52] He also noted that what was agreed upon in the first meeting between himself and the Deputy-General Governor of the Mandated Territories of Rwanda was that after the World War II, the Uganda Protectorate would start to recruit on contracts in Ruanda-Urundi for employment on European and Asian employers.[53] He noted that there was no agreement reached and that the Protectorate would wait for further advice from the Labour Advisor to the Secretary of State for Colonies. He also observed that the Uganda Protectorate should concentrate on the programmes related to construction of camps. However, he observed issues in Kenya related to recruitment of families from Uruanda-Urundi. He noted that these had raised issues with the Catholic Church. He provided an excerpt from their correspondence with the Labour Superidenent of the company in relation to recruitment of workers with their families: in view of this situation the recent experiences of the Labour Superintendent of a large Kenya employment concern, in the recruitment of some 250 workers with their families in Ruanda in the vicinity of Kigali… By publishing my demand for large families, I may, inadvertently, have laid myself open to the charge (made by the Catholic Missions) of stealing juveniles. But the second charge of stealing women and young girls for immoral purposes in Kenya, was entirely baseless and false, and I do not care to have the Company's (or my own) name mixed up in such affairs. The political tension between the Mandated Government and the Catholic Missions is such that any comparatively innocent newcomer is immediately caught between the two interests, and is in what I can only call, a dangerous position.[54]

In some correspondence from Major Orde Brown, Labour Advisor to the Secretary of State on the report of the Labour Commissioner observed: the superintendent's account of the position in the Mandated Territory is, I should say, fairly accurate; when there, or in Congo, one must be tactful and cautious in all matters concerning both the Administration and the Roman Catholic Church, since the latter is most powerful. It is quite possible that the latter may wish to put a stop to the recruiting for British territory, since the far higher wages offered will conflict local labour requirements, in which the Church has an active interest. In that case, they might very well start the story that women were being collected for immoral purposes; to this it would be possible to reply with a quotation from the International Convention on Recruiting, Article 7,2, 'Where the circum-

[52] Great Britain, Colonial Office, Governor of Uganda to the Secretary of State for the Colonies, February 15, 1946, with attached memorandum from the Labour Commissioner to the Secretary of the Protectorate, The National Archives, Kew, file reference not supplied.
[53] Governor of Uganda to the Secretary of State for the Colonies, February 15, 1946.
[54] Governor of Uganda to the Secretary of State for the Colonies, February 15, 1946.

stances make the adoption of such a policy practicable and desirable, the competent authority shall encourage recruited workers to be accompanies by their families, more particularly in the case of workers recruited for agricultural or similar employment at a long distance from their home'.[55]

Although Clause 2 was omitted, Article 7 alongside other articles were incorporated in the article providing a shield in case of future allegations. One of the possible reasons for exclusion was because of the resistance on recruitment of families by communities and labourers.[56]

Articles 2,3,5,6,7,18,19,20,21 and 23 were incorporated into the Uganda Employment Ordinance with minor revisions. The provisions adopted were related to recruitment of employees with their family members, conditions for movement of recruits and their families, medical examination, registration, role of government officials and leaders of indigenous communities in the recruitment processes, and recruitment of juveniles.

Regarding the recruitment of workers with their families, the law incorporated the provisions related to of families, Article 7 was incorporated with minor modifications; it became section 7 of the Act. Similar to the Article 7, Section 7 provided that "the recruitment of the head of the family shall not be deemed to involve the recruitment of any member of his family."[57] In the Ordinance, family was defined as "the wife or wives and unmarried children, if any, except adult males, of a recruit."[58] In line with Article 7 of the Convention, the Ordinance prohibited the separation of families who have been authorised to move with the employer, except with at the request of the employee or their family members.[59]

However, the Ordinance did not include the sub-clause of Article 7 of the Convention which required competent authorities to encourage the recruitment of workers with their family where circumstances permit on agricultural or similar employment at long distance from their homes. Article 7(2) of the Convention provided that "where the circumstances make the adoption of such a policy practicable and desirable, the competent authority encourage recruited workers to be accompanied by their families, more particularly in the case of workers recruited for agricultural or similar employment at a long distance from their homes and for periods exceeding a specified duration. One possible reason for the exclusion of this clause was because at the time, the focus was on encouraging the government policy on native agriculture. Secondly, the employees actually preferred to leave their families behind. Any active encouragement would have discouraged employees from seeking employment. Secondly, the chiefs of the different communities in Uganda, public and the different religious institutions

[55] Great Britain, Colonial Office, Major Orde-Brown to the Colonial Office, February 27, 1946, The National Archives, Kew, file reference not supplied.
[56] Orde-Brown to the Colonial Office, February 27, 1946.
[57] Uganda Protectorate, *Employment Ordinance, 1946*, sec. 44.
[58] Uganda Protectorate, *Employment Ordinance, 1946*, sec. 1.
[59] Uganda Protectorate, *Employment Ordinance, 1946*, sec. 44.

did not favour the movement of families to avoid affecting the moral fabric of the society. Several articles regulating the movement of the recruits and their families were also introduced into the Ordinance. Section 46, 47, 48, 50, 51 and 53 incorporated Articles 16, 18, 19, 20, 21, and 23 respectively.

Prior to the incorporation of the male employee who moves with their families, the employee under the under earlier legislation did not move with their families. By incorporating the Recruiting of Indigenous Workers Convention into the employment legislation, a new subject was created. The employee who moved with the family operated alongside the employee who does not move with their family who had already been established under earlier legislation.

6. Establishing the Male Employee Who Moves with Their Family Norm

The normative concept of a male employee who moves with their family to the place of employment manifested in the labour market. This category of employee first manifested mostly among the migrant from Ruanda-Urundi. The Uganda Protectorate Labour Annual Report of 1947 noted: the accurate figures of wives and children who accompany workers to their employment is very small, and is very small, and is probably as high among the immigrant Belgian Banyaruanda and Barundi as among any type of worker.[60]

The workers who moved with their families were mainly migrant workers from Ruanda-Urundi because the law was passed to prevent potential allegations that women and girls were being recruited for "immoral purposes".[61]

The number of employees who move with their family continued to increase.[62] As employees moved with their families, identities were constructed. Men identified as employees and women identified as dependent wives because they no longer had access to the land like the earlier category of employees. The men recruited as employees while the women families of the employees meant that the women became dependent on the man for financial resources. Therefore, the men were more powerful than the women. It is this discrimination that substantively established the identities of male employee and dependent urban housewife. Even when the women were incorporated into the labour market, they were viewed as auxiliary to the men. In fact, they were referred to as "wives of labourers" in the annual report sections highlighting women in employment.[63] This degraded the women who had joined employment. They were relegated to

[60] Uganda Protectorate, *Annual Report of the Labour Department for 1947* (Entebbe: Government Printer, 1948), 13.
[61] Orde-Brown to the Colonial Office, February 27, 1946.
[62] See Uganda Protectorate, *Annual Reports of the Labour Department, 1947–1960* (Entebbe: Government Printer, 1947–60).
[63] Uganda Protectorate, *Annual Reports of the Labour Department, 1947–1960*.

casual low-paying jobs when they joined employment.[64] By employing men as employees and women as wives of labourers, men continued to symbolize employment while women symbolized dependent person. In the category of a male employee who left their wives behind, while men symbolized employment, however, women retained some level of independence because they were left behind on the land. However, with the movement of women to the place of employment with their male recruits, women symbolized dependency.

The male employee who moves with their family model was encouraged among the communities that existed within the Protectorate during the earlier years to stablise labour.[65] Employers started to encourage recruited employees to come along with their families by constructing more family households, providing amenities for the families, for example, schools for children and engagement of women in activities that would keep them busy, for example women's groups. Although the provisions were mainly designed around male recruits, government also embarked on the construction of houses where rent would be paid at lower costs to encourage the employees to come along with their families.[66] The more employers built the houses the more employees including those who were not formally recruited with their families moved to the urban areas. This normalized the identities of a male employee with a dependent housewife because the housing units were allocated to men. Elkan observed that women who moved into employment who were not recruited alongside their husbands struggled to get housing because the housing was designed for male employees.[67] Therefore by the time the British declared Uganda an independent state, the male employee an urban dependent housewife had been fully established. However, it should be noted that since the male employee did not receive adequate wages, enough to sustain the family, women sought out employment in casual work. In the 1950s, an experiment was conducted by a company that started recruiting women, although without their families to prevent a labour shortage. These women were not recruited on the same terms with men, they were not offered the same privileges as men, for example, housing or recruited with their families. This shows that while women were recruited, they were they were viewed as a low status, with limited access to the resources that men had. It should also be observed that originally women recruited were not the "wives of the labourers" Elkan noted that these were women who were often divorced, former prostitutes or women, or women who were running away from their families due to the pressure to get married.

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[64] Uganda Protectorate, *Third Report of the Labour Advisory Committee* (Entebbe: Government Printer, 1943).

[65] Uganda Protectorate, *Annual Reports of the Labour Department, 1947–1960*.

[66] [Author query: The manuscript states only "See the journal article." Please supply the author, article title, journal, year, volume, issue, pages, and DOI or URL.]

[67] Walter Elkan, *An African Labour Force: Two Case Studies in East African Factory Employment* (Kampala: East African Institute of Social Research, 1956), 38.

The provisions were carried forward into subsequent employment legislation with no or a few revisions. In 1964, the Employment Ordinance was revised into an Act of Parliament following British declaration of Uganda as an independent state in 1962. The provisions of the Employment Ordinance were not significantly changed, except for change of the name of the law from Employment Act Cap 192, limited of the application of some provisions to government employees and changing the administrative roles to reflect the roles of the new state. Therefore, by choosing to retain the provisions of the Employment Ordinance 1946, the male employee with a dependent housewife norm was reinforced in new independent state. The norm continued to manifest in the labour market, the identities of the male employee and a dependent housewife and the wives of labourers for the women who moved into employment continued to exist. However, in the government annual labour reports post-independence did not carry the identity of women as labourers. The archives data did not also reveal whether this label was employed by employers or the employees. However, what is certain is that the male employees continued to move to the place of employment constructing the identity of a male employee and a dependent housewife. Although the 1960 Ministry of Labour, the only report accessed for the archives for the period when the Employment Act 1964 and the Employment Regulations 1964 were in place, the fact that it was reported that the companies continued to recruit male employees and their was housing for male employees with their families is an indication that the norm was manifesting in the labour market and identities of a male employee and a dependent housewife were being constructed. I also did not find literature that provided highlighted the experiences of "wives of labourers" during this period. However, most likely they continued to perform their roles as wives alongside casual work. The Labour Department Annual Reports from 1947-1960, and the Ministry of Labour Department Report of 1960, the employees who were recruited were predominately the category that left their families behind.

In 1975, the Employment Decree was passed and in 1977, the Employment Regulations were passed. The Employment Decree revised the Employment Act of 1964, and the Employment Regulations revised the Employment Rules 1964. The law did not change except that some provisions from the Employment Rules that were related to recruitment of employees with their families were moved from the main legislation to the Regulations, formerly known as rules. For example, the sections related to the recruitment process, for example, authorization of movement of families, transportation of migrants' workers with their families, care of migrant workers and their families were moved to the Regulations. Provisions that were retained in the main legislation were related to the recruitment of the head of the family, who was the male employee based on the definition of family. When the Employment Decree 1975 and the Employment Regulations 1977 carried forward the provisions of the Employment Act of 1964, they reinforced the male employee who is recruited with his family norm. Similar

to earlier periods, this norm was manifested in the labour market. The fact that recruited male employees moved with their families identities continued to be constructed: men as male employees and women as dependent housewife. Similar to the earlier reports, the records were silent on the indentity of women as "wives of labourers". However, the fact that women were not recruited as employees by law, this means that they continued perform casual work alongside their husbands. Although the Ministry of Labour Annual of 1976 mainly highlights male employees who left their families behind, the fact that they were still housing facilities reported about shows that the male employee who moved with his family to the urban areas seized to increase.

The Employment Decree 1975 into an Act of Parliament and the Employment Regulations 1977 were revised. The new laws came to be known as the Employment Act 1977 Cap 219 and Employment Regulations S.1 291-1. The revision that was made to the law was related to the pronouns used. In the earlier legislations, male pronouns were used because the law was designed around male employees. In attempt to meet its obligations under the Convention on Elimination of All Forms of Discrimination, all laws, including the employment legislations, were revised to include the female pronoun wherever a male pronoun was placed irrespective of the fact that other provisions which contained masculine pronouns were retained. Although there was an attempt to remove the male employee norm, it was embedded in other provisions. Therefore, the male employee who travels with their family to the place of employment continued to be manifested in the labour market. The norm was fully established in the labour market.[68] Therefore, the male employee who moved with their families was retain both in the statute and in the regulations until 2006, when the male employee norm was removed from the main employment legislation.

In 2006, the Employment Act was revised to bring the law in line with the provisions of the Constitution and Uganda's international obligations. According to the Minister of Gender, Labour and Social Development, the law had become obsolete and the purpose of the revisions were to operationalize the provisions of the Constitution and the International Instruments that Uganda was a party to. The 1995 Constitution prohibits discrimination on the basis of sex among other forms of discrimination. Uganda is also a party to a number of instruments that prohibit discrimination.[69] As a result, the Employment Act was revised and all provisions that made specifically made reference to male employees were either removed or the language changed and a gender-neutral language

[68] Martiniello, "Bitter Sugarification," 365–66.

[69] International Labour Organization, *Equal Remuneration Convention, 1951 (No. 100)*, adopted June 29, 1951, NORMLEX, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312245; International Labour Organization, *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, adopted June 25, 1958, NORMLEX, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312256.

adopted.

However, by 2006, the male employee who moves with the place of employment with their families had been fully established. As earlier noted, the male employee was created with the incorporation of the ILO Convention into the Uganda employment legislation in 1946. The Employment legislation of 1946 therefore contained this norm. This norm was carries in all subsequent legislations, manifested in the labour market, and subjective identities fully established based on the discrimination between women and men in employment. By 2006, the law had constructed the male employee who moves with his family to the place of employment for close to 60 years. Therefore, a change in the law did not affect the legal norm that had become a social norm. With or without the law, the norm had already been constructed. This goes to explain why the norm still manifests in the labour market today.

7. Conclusion

The employee who moves with his family under the employment law in Uganda was constructed when the Recruiting of Indigenous Workers Convention was incorporated into the employment legislation. The Employment Ordinance 1946 mirrored several provisions of the Recruiting of Indigenous Workers Convention. Under the Ordinance, an authorised officer would permit the employee to move with his family. When the employee moved with his family to the place of work, the employer was not allowed to separate the employee from his family. The employer was expected to facilitate the travel from the place of recruitment to the place of employment for both the male recruit and his family. Originally, there was one category of employee who moved without his family under the Masters and Servants Ordinance 1913 and earlier legislation.[70] However, with the incorporation of the provisions of the Recruiting of Indigenous Workers Convention in the revisions of the employment legislation in 1946, a new legal subject was created-the male employee with a dependent housewife. The normative concept of a male employee who moves with their family to the place of work was manifested in the labour market. This created the identities of a male employee with a dependent housewife. Even when women entered employment, they were identified as “wives of labourers”. Since women continued to perform domestic roles alongside the employment, they subjective identities were constructed. That of male employees and dependent housewife.

The male employee who moved with their families norm continued to exist until 2005. After the passing of the Employment Act of 2006, the male employee who moved with their family seized to exist in law. However, the norm had manifested in the labour market and identities had been formed. Men had

[70] Uganda Protectorate, *Employment of Porters Regulations, 1899*; Uganda Protectorate, *Native Labour Regulations, 1900*; and Uganda Protectorate, *Native Labour Ordinance, 1905*.

come to symbolize employment with rights predominantly designed around them, for example, working hours and annual leave. As a result, even with the changes in law, employers continue to recruit male employees with their family members. Identities of male employee and urban dependent housewife continue to be designed based on discrimination as men are recruited with their wives and wives when recruited as employees continue to take on casual and low paying jobs and perform both their employment work and domestic work constructing the wives of labourers identity. These identities still exist because they have become social norms in the labour market and because the rights were partly designed around a male employee with a dependent housewife, for example, the working hours. Employees in the current employment legislation are expected to work

The Convention on Recruiting of Indigenous Workers was abrogated in the 2018. While we know how the employee who moves with their families was constructed, we do not understand the effect of the incorporation of the other provisions related to earlier category of employees, that is the employee who moved with the family. There is need a gender analysis of these provisions and provisions carried forward in subsequent provisions and to understand how the implications of the abrogation on employment law in Uganda.

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Green Jobs and Labour Regulation: A Comparative Analysis of Sustainable Employment Contracts in France and Germany

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Abstract

This study examines sustainable employment contracts within the context of green jobs through a comparative analysis of France and Germany. The main objective is to explore how labour legislation in both countries integrates environmental goals with social and occupational standards. The research adopts a qualitative comparative method based on the analysis of policy documents, labour laws, and reports from European and international institutions. The findings show that France emphasizes social sustainability by promoting gender equality and non-discrimination in employment, while Germany prioritizes occupational sustainability through strict worker safety regulations and strong industrial frameworks. These different approaches reflect complementary models of sustainable labour governance within the green economy. The study concludes that sustainable employment contracts require a balanced integration of environmental responsibility, social inclusion, and worker protection. The implications suggest that policymakers should adopt a multidimensional approach to labour regulation to ensure long-term stability, fairness, and resilience in green labour markets.

Keywords: *labour contracts, green jobs, sustainable development, France, Germany, labour law.*

1. Introduction

Both environmental protection and the quest for measures to eliminate labour exploitation must take place simultaneously and not seen as being in opposition. However, despite the clear connections between these two aspects, neither trade union movements nor labour laws have adequately addressed environmental protection. The most reasonable explanation for this lies in the fact that labour law does not deal with the regulation of the ways in which production is carried out, as it focuses on the contractual formalization that results from it. Yet in all the countries analysed some scholars argue for the need to stop thinking that the environment falls outside labour law regulation.

The labour factor, simply conceived as a further cost to be optimized (i.e. reduced) to be implemented, regards nature itself as a competitor. The extra costs of certain environmental protection measures – or even the direct protection of human health outside the company – can have a negative impact on employment and are therefore looked at sceptically by certain social sectors. It is not possible to analyse the relationship between labour and the environment regardless of the

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mode of production in which it takes place. More generally, "there is no greening of the economy without social control of investment: without ecologically sound decisions about what is produced and how it is produced.[2]

The central question that arises, therefore, is how labour contracts can serve as sustainable tools to achieve sustainability in their social dimension, particularly in terms of equality and health protection, within the context of green jobs in France and Germany.

This paper adopts a dual research methodology. First, it follows a comparative approach to identify similarities and differences between French and German legislation. Second, it employs an analytical method to interpret the legal provisions governing labour contracts and to assess their sustainable content.

The study is divided into two chapters. The first introduces the theoretical background of green jobs and their impact on sustainable development, highlighting how labour contracts can function as mechanisms to protect green workers from the risks associated with this type of employment, while also ensuring equal employment opportunities.

Finally, this work demonstrates that the strength of labour contracts lies in their ability to integrate the three dimensions of sustainability, particularly the social dimension. This dimension represents the foundation of decent work, as it enhances worker efficiency through high levels of health protection and equal employment opportunities. Therefore, it is necessary to combine different models to develop coherent and sustainable labour contracts.

2. Theoretical Background of Green Jobs

In October 2007, the online global career and recruitment service Monster TRAK launched "Green Careers," a service allowing both entry-level and experienced job seekers to identify green jobs and green companies.

In making the announcement, the company noted that in a recent survey of its users, 80 percent of young professionals are interested in securing a job that impacts the environment in a positive way, and 92 percent give preference to working for a company that is environmentally friendly. Green Careers, like GreenBiz.com, Treehuger.com, and others, is an indication that the environmental issues are become increasingly important and more routine aspects of job-search and hiring decisions.[3]

Given the international debate on green economy and green growth, there are different notions of how the impact of a green economy on employment can

[2] Juan Escribano Gutiérrez and Paolo Tomassetti, *Labour and Environmental Sustainability: Comparative Report* (Bergamo: ADAPT University Press, 2020), https://aisberg.unibg.it/handle/10446/172785.

[3] United Nations Environment Programme, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* (Nairobi: UNEP, 2008), 33, https://www.ilo.org/publications/green-jobs-towards-decent-work-sustainable-low-carbon-world-full-report.

be conceptually defined and demarcated. The concept of green jobs refers to jobs that are created in the context of the expansion of a green economy in growing environmental industries, to improve environmental impact or ensure compliance with environmental standards in traditional sectors (e.g. environmental management), in other words, to the sectoral understanding of a green economy.[4] Green economy as "one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities." In this connection, a green economy can be thought of as one which is low carbon, resource efficient and socially inclusive. As result, green economy is not a replacement for sustainable economy; it is a means to achieve sustainable development.[5]

In its definition of a green economy, the United Nations Environment Programme (UNEP) emphasises that all the interactions between the economy, society and the environment must be considered, and that a balance between these three dimensions is essential. The conservation of ecosystems thus functions as a condition for securing economic development and employment. This perspective is also shared by the German Federal Ministry for Economic Cooperation and Development. The necessity of green growth strategies is considered against the backdrop of these requirements, where 'existing economic processes are designed with the environment in mind and additional employment opportunities are created in new green sectors. The aim of green growth is also shared by the OECD. Here it is emphasised that the opportunities for economic growth are limited by the exhaustion of natural resources.[6]

The concept of a green job has been variously defined in the literature, which poses challenges in gathering and comparing data on the number of or trends in relation to green jobs. This also means that there is no widely accepted definition of what constitutes a green job. Different international organisations, public institutions, enterprises, and researchers define this concept variously based on the approach that they take. Based on our review of literature, we identified that there are several aspects underlying the ways in which green jobs are defined in different taxonomies and by different authors. Some definitions seem to be narrower, while others are broader in what they consider to be a green job. Moreover, some definitions are looking at a sectoral (or sub-sectoral) level, while others are looking at a more granular (e.g. occupational or skills) level.[7]

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[4] Klaus Jacob, Rainer Quitzow, and Holger Bär, *Green Jobs: Impacts of a Green Economy on Employment* (Eschborn: Deutsche Gesellschaft für Internationale Zusammenarbeit, 2015), 19, https://energypedia.info/wiki/Green_Jobs_-_Impacts_of_a_Green_Economy_on_Employment.

[5] International Labour Office, *Definitions of Green Jobs Used in the Employment and Environment Policy Context* (Geneva: ILO, 2012), 5, 8, https://www.ilo.org/publications/definitions-green-jobs-used-employment-and-environment-policy-context.

[6] Jacob, Quitzow, and Bär, *Green Jobs*, 15.

[7] Andrea Broughton et al., *Literature Review on a Measurable Definition of Green Jobs and on the Impact on Jobs and Skills in the Green Transition* (Luxembourg: Publications Office of the European Union, 2024), 13, https://doi.org/10.2779/417428.

Or the ILO, the notion of green jobs summarizes the transformation of economies, enterprises, workplaces and labour markets into a sustainable, low-carbon economy providing decent work. Green jobs can be created in all sectors and types of enterprises, in urban and rural areas. The creation of direct jobs comes with the production of green goods and services. The creation of indirect jobs flows from the required inputs in the making, handling and selling of these goods. On top of this, more jobs are added by using savings from energy-intensive sectors for more labour-intensive investments (so-called induced employment effect).[8]

Many studies follow the approach of the Green Jobs Initiative, established in 2008 by the United Nations Environment Programme (UNEP) and other. In an early report published in the context of this initiative, UNEP defines green jobs as 'those that contribute appreciably to maintaining or restoring environmental quality and avoiding future damage to the Earth's ecosystems' (UNEP). For example, green jobs reduce the consumption of materials and energy, support decarbonisation processes, reduce waste and pollution, or restore biodiversity.[9]

Consequently, Green jobs serve as a civilized alternative, offering a prominent service in the green economy specifically and the overall economy generally. They preserve the environment and mitigate the risks of all forms of pollution by performing two functions simultaneously: the first involves cleaning and purifying the environment, and the second involves production and the creation of new jobs that are less costly in terms of raw materials because these materials are recycled and reinvested. Therefore, green jobs are considered an alternative for protecting and restoring ecosystems and biodiversity.

In the other hand, green jobs provide crucial services for the economy as they aim to offer numerous new fields, including employment, income, and government revenues, not to mention the workforce that contributes to improving individuals' living standards. In this context, we will present a set of statistics cited by a researcher: " Approximately 8.5 million green employments exist in the United States, with the majority concentrated in companies associated with the manufacturing and dissemination of renewable energy." According to a report from the United Nations Environment Program, approximately 2.3 million individuals have entered employment in the renewable energy industry in recent years. Additionally, nearly 8 million people are expected to be employed in the wind and solar energy sectors over the coming decades.[10]

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[8] International Labour Organization, *The Green Jobs Programme of the ILO* (Geneva: ILO, 2011), 5, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_158729.pdf.

[9] Patricia Urban et al., *Jobs for the Green Transition: Definitions, Classifications and Emerging Trends*, Working Paper 1/2023 (Leiden: TransEuroWorkS, 2023), 7–8, https://transeuroworks.eu/working-papers/.

[10] Ibtissem Metellaoui and Muhammed Rida Al-Tamimi, "Green Jobs Mechanism for Green Economy and Sustainable Development," *Social Sciences and Human Review* 18, no. 1 (2025): 32,

In addition, green jobs focus in the first place on the decent work goals by protecting the workers and the environment in the same time, this is the case for: the ILO's Social Protection Floors Recommendation, 2012, recognizes PEPs as a means of providing basic social security guarantees. However, while all PEPs include a social component, there are often trade-offs between multiple objectives (employment, poverty reduction and the provision of assets and social services). Thus, policy design and implementation require the prioritization of one function over the others, without undermining their potential to achieve secondary or tertiary objectives.[11]

3. Sustainable Labour Contracts

Clearly the rational for a contract is to be expressed in the assertation that is a means by which an agreement between two parties may be enforceable in terms of law.

Firstly, the entitlement of a party to enter a contract of his/her own violation is expressive of the principle of freedom of contract and the liberty we as individuals are entitled to exercise in deciding the way we organise our lives. The ability to enter a contract is further underscored by the individual's constitutional rights.

Secondly, a labour contract affords parties the opportunity of identifying their respective employment rights and duties, thereby providing certainty as to the ambit of the nature of the relationship going forward.[12]

Consequently, labour contracts in the context of green jobs focus on the same philosophy

With same specific features that aim to highlight their sustainable goals (environmental, economic and social).

While, the workers are the pillar of the decent work according to the ILO policies, we should elaborate labour contracts that protect their rights and clarifies their duties. Particularly, we tend associate the word "green "with safety- but what is good for environment is not good for the safety and health for workers who are employed in green jobs. In some cases, already, we have seen new legislation and technologies, designed to protect the environment, resulting in workers being put at a greater risk. Reducing the amount of waste being sent to landfills, for example has resulted in higher rates of accidents and illnesses among workers whose job it is process it.

If green jobs are to be truly sustainable, we need to make sure that they

https://asjp.cerist.dz/en/article/273717.

[11] International Labour Office, *World Employment and Social Outlook 2018: Greening with Jobs* (Geneva: ILO, 2018), 106, https://www.ilo.org/publications/world-employment-and-social-outlo ok-20 18-greening-jobs.

[12] Radley Henrico and Nicola Smit, "The Contract of Employment in Labour Law: Obstacle or Panacea?" *Obiter* 31, no. 2 (2010): 252, https://doi.org/10.17159/obiter.v31i2.12358.

benefit worker's safety and health, as well as the environment. I this fast-developing area, we need to ensure that what is good for the environment is good for workers too.[13]

Therefore, the main basis of labour contracts should focus on equal access to green job opportunities for men and women, and this is what France includes in its national policy, and even Germany has devoted most of its legislation to setting effective occupational health standards for workers in the field of green work.

According to article L 1221-1 from French labour code the employment contract is subject to the rules of common law. It can be drawn up in the form that the contracting parties decide to adopt.[14]

Sources of French employment law include legislation (the employment code) and case law. In addition, there are collective bargaining agreements (conventions collectives or CBA) which have legal effect in most sectors of business.[15]

The main labour contract in France is a permanent one, called "*Contrat a durée indéterminée*" (CDI). This is normal and general form of an employment relationship and concerns 88% of the total wage-earning population. The contract maybe determined by a unilateral decision of either the employer (during the probationary period, dismissal for personal or economic reasons, retirement), or of the employee (during the probationary period, resignation, retirement, judicial termination, taking of deed), or by agreement between the two parties (contractual termination) or by cause external to the parties.

The other contracts are mainly fixed term contracts (*contract à durée déterminée* or CDD).[16]

In addition, fixed term contracts typically offer a lower level of protection to workers in terms of determination of employment as compared to contracts indefinite duration. This is because the employer does not need to provide a justification for ending the employment relationship. Convention No.158 specifies that member states may exclude worker engaged under "a contract of employment for a specified period time or a specified task" from all or some provisions of the convention (Art.2 (2)).However, it also provides that "adequate safeguards" must be provided against recourse to such contacts that would aim at avoiding the protection resulting from the convention (Art.2 (3)).[17]

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[13] Marouane Laabas Guennouni, "Growing Recognition of the Changing Climate's Impact on Workers' Health," European Trade Union Institute, October 16, 2025, accessed April 19, 2026, https://www.etui.org/news/growing-recognition-changing-climates-impact-workers-health.

[14] France, *Code du travail*, art. L1221-1, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006900839 (accessed August 6, 2026).

[15] LexCase, *French Employment Law Overview* (July 2022), 4.

[16] Clémence Berson, "Fixed-Term Contracts and Labour Market Duality in France," *De Economist* 166, no. 4 (2018): 458, https://doi.org/10.1007/s10645-018-9318-y.

[17] International Labour Office, "Fixed-Term Contracts (FTCs)," *EPLex*, accessed April 19, 2026, https://eplex.ilo.org/en/fixed-term-contracts-ftcs.

Finally, employment contracts are the outcome of a micro level interaction between employers and workers. To simplify the following argument, we will assume that the most workers prefer a permanent to temporary one, and focus on the rationale, of the employer.

From the employer's perspective, temporary contracts can serve at least two purposes. First, temporary contracts can serve a buffer that provide employers with numerical and flexibility and ensures that the size of workforce can be adjusted in relation to fluctuations in market demand.

Second, temporary contracts can serve as screening device for employers. Signalling theory suggests that, as workers' productivity cannot be known to employers beforehand, employers use information based on the worker's observable characteristics when deciding on prospective employees. In absence of strong signals, employing workers on a permanent contract entails risk for employers.

The sustainability of green jobs depends on their social content as well as on their environmental benefits. Although these jobs may be found in ecologically-sound sectors and provide environment relevant services, they will be of low quality if they are not accompanied by four basic attributes – living wages, upper-mobility pathways, core labour standards, and the right to representation. The ILO Decent Work Agenda includes not only employment but also workers' rights, social protection and social dialogue. The green job opportunity should establish fundamental labour standards, social protection and decent work as global prerequisites. Working hours which are supportive of family life, health benefits and maternity leave, and supervised health and safety conditions should be fundamental requirements.

Which is reflected the green economy can be an opportunity for women to gain their rightful place in the workforce through better-paid, non-traditional jobs – defined as those where women represent less than 25% of the workforce. Theoretically, women can perform all categories of green jobs in the primary, secondary and tertiary sectors of the economy. Despite perceptions that most green work involves heavy labour and that this is a barrier to female participation.[18]

As the article 25 from Universal Declaration Human Rights clearly indicates: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[19]

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[18] Candice Stevens, *Green Jobs and Women Workers: Employment, Equity, Equality* (International Labour Foundation for Sustainable Development, September 2009), 7–8, https://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Green_Jobs_and_Women_Workers-Employment_Equity_Equality_SUSTAINLABOUR.pdf.

[19] United Nations, *Universal Declaration of Human Rights*, art. 25, https://www.ohchr.org/en/hum

To protect social rights under the labour contracts, we need to provide distributive entitlements and guarantee services to people on the weaker side of a struggle along organised interest. This protection[20] is centralized to the women in French legislation.

In the article 1 from the French constitution of 1958: France is an indivisible, secular, democratic, and social Republic. It ensures equality before the law for all citizens without distinction of origin, race, or religion. It respects all beliefs. Its organization is decentralized.

The law promotes *equal access for women and men to elected offices and electoral functions, as well as to professional and social responsibilities.*[21]

Then the article 3221L-2 from French labour law affirms this rule: *Every employer ensures, for the same work or for work of equal value, equal pay between women and men*.[22]

This implies for the existence of the opportunities to advance inclusive, green transitions while also achieving business gains – and compelling reasons to do so. Companies with a more gender-diverse workforce and leadership do better on risk management, innovation, and problem-solving – characteristics critical in combating the climate crisis. Recent evidence suggests that female employees and leaders are more willing to act on climate and more effective when given the opportunity to do so. Following the Paris Agreement, companies with more gender diversity reduced their CO2 emissions by 5% more than those with more men in management, while firms with improvements in women's share of board membership were more likely to reduce energy consumption, GHG emissions, and water use.[23]

In the other hand, Labour contracts drafted entirely by the employer are the subject to the provisions of the civil code on General Contractual Terms and conditions. Therefore, such contracts must be sufficiently transparent and must not contain any substantial disadvantage to the employee.[24]

Therefore, labour contracts are not regulated by a single labour code but rather originate from different sources. In addition to comprehensive federal

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an-rights/universal-declaration/translations/english.

[20] Nóra Jakab and Bernadett Solymosi-Szekeres, "The Theoretical Issue of Social Security—International and European Perspectives," in *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe*, ed. Nóra Jakab (Miskolc–Budapest: Central European Academic Publishing, 2023), 22, https://doi.org/10.54171/2023.nj.sotsss_2.

[21] France, *Constitution du 4 octobre 1958*, art. 1, https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000019240997 (accessed August 6, 2026).

[22] France, *Code du travail*, art. L3221-2, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006902818 (accessed August 6, 2026).

[23] Franziska Deininger and Ana Gren, "Green Jobs for Women Can Combat the Climate Crisis and Boost Equality," *Development and a Changing Climate*, November 29, 2022, accessed April 19, 2026, https://blogs.worldbank.org/en/climatechange/green-jobs-women-can-combat-climate-crisis-and-boost-equality.

[24] Jens Kirchner, Pascal R. Kremp, and Michael Magotsch, eds., *Key Aspects of German Employment and Labour Law* (Berlin: Springer, 2010), 6, https://doi.org/10.1007/978-3-642-00 678-4.

legislation, German labour law is also shaped by case law, collective bragging agreements and/ or works agreements (*Betriebsvereinbarungen*), each where applicable, as well as by individual employment contracts and the employer's right to give instructions *(Direktionsrecht*).

Furthermore, court rulings and directives on European level have had and will carry on having considerable impact on German labour law.

According to the statutory law, employers must be providing employees with their respective employment's essential working conditions in writing. Employers must take sure to provide employees with written evidence of certain working conditions already one day of the employment (name and address of the contracting parties, remuneration elements and *working time*). Within seven days from the beginning of the employment, employers need to provide written evidence further working conditions (e.g. commencement date of the employment place of work, job title, duration of agreed probationary period). However, in practice this is typically complied with all at once by entering written employment contracts containing the respectively necessary information with employees.

Employees who were in employment relationships already prior to 1August 2022 are entitled to demand such written evidence of their working conditions within a short timeframe of seven days. Non- compliance with the obligations can result in administrative fines of up to EUR 2,000 - for every breach and every employee.[25]

In this case, Germany presents the most efficient model in balancing between rights worker's and green transition implications. The article 12/1 from German constitution under the title of Occupational freedom confirm that: *All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.*[26]

Moreover, it provides the right of work with vocational training in *study courses imparting specific vocational qualifications or in comparable study courses at higher education institutions based on the Framework Act for Higher Education [Hochschulrahmengesetz] and the higher education acts of the Länder.*[27]

For that, the state of Hessen, and accordingly, the district of Darmstadt (including Frankfurt) has enacted an integrated policy framework focused on increased sustainability across all areas of life. While this sounds like a holistic

[25] Addleshaw Goddard, *Labour and Employment Guide—Germany* (November 2022), 1, https://www.addleshawgoddard.com/globalassets/specialisms/employment/labour-employment-guide-germany.pdf.

[26] Germany, *Basic Law for the Federal Republic of Germany*, art. 12(1), https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (accessed August 6, 2026).

[27] Germany, *Vocational Training Act (Berufsbildungsgesetz—BBiG)*, § 3, https://www.gesetze-im-internet.de/bbig_2005/ (accessed August 6, 2026).

approach, there is little mention of specifically preparing workers for green jobs:

- Across the four biggest cities in the district of Darmstadt (Frankfurt, Darmstadt, Wiesbaden and Offenbach), the largest number of people with low qualifications (Helfer) work in the building maintenance sector and the gardening and landscaping sector. Other important sectors include the social services sector, construction, homes and employment services.

- Existing training provisions seem to focus on supporting people to make sustainable choices in all areas of the lives, not just on gaining skills for employment in the green sector. There are some more specific initiatives, such as Green Finance certifications. However, these seem more geared towards high-skilled individuals.

- There is a wide variety of relevant stakeholders related to the green economy in the district of Darmstadt. This includes employers, civil society organisations, local authorities, employment services, training organisations, social enterprises and regulatory bodies. Few interventions in the region focus on supporting people with low qualifications into green jobs specifically.[28]

In addition to this, Germany seeks to protect worker's health rights within the framework of green jobs through its the Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz* – ArbSchG) Occupational Safety and Health Act of 7 August 1996 (Federal Law Gazette I p. 1246 safety), as last amended by Article 32 of the Act of 15 July 2024 (Federal Law Gazette 2024 I No. 236), we contest that Germany focuses in this area on the risk concept as it is known as an vital player in the industrial field, as result the occupational safety and health shall be measures taken to prevent accidents at work and occupational health risks, including measures to ensure decent working conditions.

Therefore, the German legislator highlights the considerable responsibility of the employee due to his duty to make these measures in the same level with the worker's capacities either physically or mentally.

In the other hand the employer must have at his disposal the documents required depending on the nature of the activities and the number of workers which indicate the outcome of the risk assessment, the measures of occupational safety and health determined by him and the outcome of a review of those measures. In cases where the risk is similar, it shall suffice for the documents to contain summary information. The employer shall record accidents in his establishment on account of which a worker is killed or is injured to such an extent that he dies or is fully or partly unfit for work for more than three days.[29]

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[28] Michaela Bruckmayer, Joanna Hofman, and Katrin Feyerabend, *Frankfurt: A Case Study on Green Jobs and Skills Development for People with Low Qualifications* (RAND Europe, 2022), 8, https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1600/RRA1603-1/RAND_RRA1603-10.Frankfurt.pdf.

[29] Germany, *Occupational Safety and Health Act (Arbeitsschutzgesetz—ArbSchG)*, §§ 2, 3, and 6,

4. Conclusion

To conclude, sustainable labour contracts play a vital role in achieving sustainable development goals within the context of green jobs. They serve as an efficient tool to ensure the protection of key legal principles, such as equality between men and women and the right to health for workers.

This is particularly evident in the French labour code, which focuses on the principle of gender equality to guarantee access to green job opportunities. The written form of contracts and the use of temporary contracts provide women with opportunities to develop the necessary skills required for green sectors, underlining their significant role in promoting sustainable industries.

On the other hand, the German model highlights that, for labour contracts to be truly sustainable, they must consider the protection of health rights for green employees. The basis for these protections is found in the civil code and, subsequently, the German labour code. Individual employment contracts in Germany allow green workers to contribute their own perspectives, encouraging social dialogue between employees and employers.

In this regard, combining elements from both the French and German models is advisable, as both aim primarily to balance the dimensions of sustainability, including worker protection. This approach helps to improve the quality of the circular economy and environmental protection — core objectives of any green job that aspires to be decent, in line with ILO policies.

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