Institute of Comparative Law

ISSN 2812-698X

REGIONAL LAW REVIEW

2025

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

REGIONAL LAW REVIEW

- ANNUAL EDITION -

BELGRADE, 2025

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

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

COLLECTION REGIONAL LAW REVIEW

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Institute of Comparative Law in Belgrade, Belgrade, Serbia
in cooperation with
University of Pécs Faculty of Law, Hungary
University of Ljubljana Faculty of Law, Slovenia

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Prepress
Branimir Trošić

Print
Birograf Comp doo Beograd

Printed in 100 copies

ISBN 978-86-82582-35-9
ISSN 2812-698X
ISSN (online) 2812-6998
doi: 10.56461/iup_rlrc.2025.6

Indexed in HeinOnline Law Journal Library

Indexed in Directory of Open Access Journals

FOREWORD

In front of you is the sixth volume of RLR collection of papers. This year we have collected research papers from ten countries. As always, the focus was on the European region, but since law knows no borders in this cycle, we also have papers written by colleagues from other continents.

After six successful years, we can say that the conference has become a tradition. A network of authors from 18 countries has been created, which is growing every year. In this way, we have a real chance to explore contemporary challenges in law, both in legal science and in practice. We can proudly say that we have attracted authors from almost every continent, which speaks volumes about the universality of the topics covered, but also about the popularity of this method of cooperation among lawyers.

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

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

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

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

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

In Belgrade, May 2025

RLR Editor
Dr. Mario Reljanović

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch1

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THE INTERTWINED PATHS OF STATE SOVEREIGNTY AND TECHNICAL SOVEREIGNTY

The article examines the relationship between state sovereignty and technological sovereignty in the context of digital transformation and geopolitical competition. The author analyses the evolution of the concept of sovereignty, which is expanding to include a technological component that has become a key factor in national security and economic resilience. Special attention is paid to the legal aspects of technological sovereignty, including mechanisms to counter external pressure, import substitution of critical technologies, and the formation of a national innovation ecosystem.

Using the Russian Federation as a case study, the article explores strategic and regulatory measures aimed at ensuring technological sovereignty, such as the adoption of the Federal Law "On Technological Policy in the Russian Federation," the development of lists of critical and cross-cutting technologies, and implementing national projects in digitization and scientific-technological development. Some argue that, in modern conditions, technological sovereignty is transforming from an economic category into a systemic element of state sovereignty, requiring comprehensive legal regulation.

The article proposes conceptual approaches to strengthening technological sovereignty through resilience to external threats, ensuring economic competitiveness, and safeguarding national independence. The research findings have both theoretical and practical significance for shaping technological development strategies in the new geopolitical reality.

Keywords: state sovereignty, technological sovereignty, digital transformation, national security, critical technologies, legal regulation, import substitution, geopolitical competition.

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1. INTRODUCTION

At the beginning of the 21st century, technological progress has ceased to be merely a factor of economic growth, transforming instead into a crucial element of national security and state sovereignty. The global digital transformation, rapid development of artificial intelligence, quantum computing, biotechnology, and other critical areas have led to the emergence of a new world order paradigm where technological dominance serves as the foundation of geopolitical influence. In this context, the traditional boundaries of state sovereignty are expanding to encompass a nation's ability to independently determine its technological development trajectory, control strategic infrastructure, and protect its digital sovereignty (Ivanov, 2024).

This issue has gained particular relevance against the backdrop of intensifying geopolitical competition and sanctions pressure, most notably manifested against the Russian Federation after 2022 (Porohovskij, 2023). Restrictions on high-tech product supplies, disconnection from international payment systems, and blocked access to foreign digital platforms and semiconductor technologies have exposed the vulnerability of states dependent on external technological supply chains. These developments have vividly illustrated how technological dependence can be weaponized as a tool of political and economic coercion, challenging the very possibility of exercising sovereign rights in the digital age.

The current stage of international relations is characterized by the formation of "techno-blocs" — groups of countries united around technological leaders (the United States, China, and the EU) that seek to ensure their dominance through control over critical standards, patents, and production capacities. In this regard, technological sovereignty is no longer purely an economic category but is evolving into a fundamental aspect of national security and legal regulation, requiring comprehensive doctrinal understanding and systematic implementation at all levels of state governance (Edler *et al.*, 2021).

The legal aspects of technological sovereignty demand profound consideration within the framework of international law, constitutional norms, and sectoral legislation. Under conditions of sanctions and technological restrictions, a complex of questions arises for the state: what are the legal mechanisms for protecting technological sovereignty under external pressure? How can national legislation be ensured to meet the challenges of the digital age without isolating itself from global innovation processes? What international legal instruments can be utilized to counteract discriminatory restrictions in the technological sphere?

The Russian Federation, facing an unprecedented volume of sanctions, is compelled to actively shape a new model of technological independence, requiring not only economic and industrial measures but also the improvement of legal regulation. The adoption of the Strategy for Scientific and Technological Development, initiatives for import substitution in the IT sphere, the development of a national payment system, and data protection within the framework of "digital sovereignty" — all of this testifies to the search for new legal and organizational solutions (Dudin *et al.*, 2022).

Therefore, the study of the correlation between state and technological sovereignty acquires not only theoretical but also practical significance for ensuring national security.

2. THE CONCEPT OF STATE SOVEREIGNTY

Classical legal doctrine views state sovereignty as a fundamental attribute of the state, encompassing two interconnected components: internal (supremacy of state power) and external (independence in international relations) (Galushko, 2013).

The legal essence of the category of «sovereignty» was among the first to be examined by the French constitutionalist Léon Duguit, who noted that sovereignty is an informal legal category endowed with a distinct authoritative content capable of organizing populations and subordinating one state to another. Sovereignty inherently encompasses the concept of territory. Territory and the nation-state are inextricably linked categories that have developed historically. As Duguit emphasized, a collective can only constitute a state when it exists within defined territorial boundaries. The essence of sovereignty, in his view, was embodied in supreme authority upheld by domestic legal order (Duguit, 1919).

Georg Jellinek further elaborated on this notion, stating that sovereignty is the capacity for exclusive legal self-determination. Thus, only a sovereign state can, within the limits of the legal boundaries it establishes or recognizes - absolutely and freely define the scope of its competence (Jellinek, 2002). Carl Schmitt's seminal contribution to sovereignty theory redefined its political dimension, distinguishing it from mere monopolies on power or coercion. For Schmitt, sovereignty instead constitutes the status of the supreme and ultimate authority within a defined territorial order—an authority vested with the prerogative to make final and irrevocable decisions, particularly in exceptional circumstances, that transcend normative legal frameworks (Schmitt, 2014). This decisionists' approach underscores sovereignty's existential role in determining the very boundaries of legal and political order.

Contemporary legal and political scholarship engages with sovereignty through diverse analytical lenses. From a juridical perspective, sovereignty is frequently conceptualized as the necessary foundation of a politically organized society, embodying the supreme authority that possesses both the exclusive right and the obligation to render definitive judgments on matters essential to collective existence. This authority's autonomous nature — manifested through the capacity for self-determined action — enables the maintenance of internal societal order and institutional coherence, while simultaneously safeguarding the state's independence from external subordination.

From an international legal standpoint, sovereignty serves as a cornerstone of contemporary international public law. This politico-legal attribute enables independent states to exercise exclusive authority in determining their political systems, structuring domestic governance, legislating, asserting territorial supremacy via jurisdictional control, and conducting foreign relations within their sovereign domain (Moiseev, 2007). The supremacy of state power is demonstrated through its universal applicability to all individuals and institutions within the territory, the exclusive right to legitimate coercion, the formalized exercise of authority through prescribed legal channels, and the capacity to invalidate acts by non-state entities that contravene the national legal framework. Concurrently, the independence of state power reflects absolute autonomy in both domestic and international affairs, encompassing sovereign policymaking, the establishment of equitable interstate relations, and freedom from external interference (Zhuleva, 2022).

Prominent scholar Georg Sørensen identifies the core components of sovereignty as «a clearly defined territory, a stable population, and a government possessing constitutional independence and operating within the international community of states» (Sørensen, 1999). Neil Walker offers a nuanced alternative, arguing that sovereignty encapsulates three defining features of the modern state: internal coherence, external independence, and the supremacy of law (Walker, 2003).

In constitutional jurisprudence, sovereignty operates dialectically as both a foundational precondition for state formation and a constitutive element of established constitutional orders. This dual character causes its explicit normative recognition and institutional protection within constitutional frameworks. As the central organizing principle of modern statehood, sovereignty provides the essential juridical basis for understanding the state's ontological status and its fundamental political-legal attributes. It simultaneously legitimizes governmental authority within defined territorial boundaries while serving as the axiomatic foundation for any constitutional system.

The analytical examination of sovereignty requires distinguishing between its two constitutive dimensions: the formal-legal, which represents sovereignty's institutional and procedural manifestations within constitutional structures, and the substantive, which encompasses its practical exercise in governance and power relations. This methodological distinction proves indispensable for resolving theoretical antinomies in sovereignty discourse.

The operational reality of sovereignty emerges most clearly through its fundamental internal-external dichotomy. Internally, the sovereign state embodies the ultimate *pouvoir constituant*, exercising plenary constitutional authority to determine its institutional architecture and normative order. This supreme internal authority, conceptually traceable to Bodin's theory of *maiestas*, establishes an absolute jurisdictional command over all subordinate entities within its territory. Externally, sovereignty manifests as the principle of autonomous statehood in international relations, though this autonomy exists in dynamic tension with the competing sovereignty claims of other states and the normative framework of international law. The contemporary international legal system thus re-conceptualizes sovereignty as a fundamentally relational construct, requiring states to navigate a complex balance between reciprocal limitations on their authority and the preservation of their essential independence (Jacque, 2021).

While historical political entities similarly claimed absolute internal authority, contemporary sovereignty requires more than unilateral control. Modern international law establishes sovereignty as inherently relational, depending on reciprocal recognition among states within the international community. This mutual acknowledgment transforms sovereignty from an absolute claim into a principle that both enables and constrains state power through its interaction with the international legal order. The contemporary understanding of sovereignty thus reflects the complex realities of international relations while preserving sovereign equality as a fundamental protection against external domination (see further: Wallerstein, 1999).

Substantively, sovereignty's internal dimension rests on three essential pillars: (1) exclusive territorial control, (2) unfettered authority over natural resources, and (3) the

monopoly on legitimate legal enforcement. Its external dimension guarantees: territorial integrity, protection from unlawful intervention, and autonomous decision-making capacity in international affairs. As Cardin Le Bret's enduring maxim affirms — "sovereignty is as indivisible as a geometric point" — this concept represents both the fundamental precondition for statehood and its defining characteristic, an inalienable attribute whose loss equates to the termination of international legal personality (Costa & Zolo, 2007). The constitutional order serves as the crucial framework for maintaining this delicate equilibrium between sovereignty's internal and external dimensions in an increasingly interconnected world. However, contemporary sovereignty operates within the practical constraints imposed by international cooperation imperatives. The complex web of treaty obligations, customary norms, and institutional frameworks causes voluntary self-restraint while preserving sovereignty's essential core — a paradox particularly clear during late 20th century globalization. Modern jurisprudence unanimously affirms that genuine sovereignty requires both internal and external dimensions (Podosinnikova, 2024), with federal sub-units lacking independent external relations capacity and constrained by constitutional limitations representing administrative divisions rather than sovereign entities (Jakovlev, 2024).

Sovereignty's key attributes — unity, indivisibility, and inalienability — establish its fundamental constitutional parameters. Unity mandates a single sovereign authority, excluding territorial subdivisions' independent claims. Indivisibility preserves the plenitude of state power, while inalienability permits only temporary, voluntary limitations through international cooperation, as shown by Russia's participation in the Eurasian Economic Union (Galushko, 2021).

The territorial dimension remains paramount despite contemporary challenges, as effective jurisdiction requires control over defined geographical space. Sovereignty violations now encompass both direct military intervention and indirect coercion, undermining national interests. Digital transformation has introduced new sovereignty dimensions, particularly technological sovereignty — a state's capacity to control critical technologies, digital infrastructure, and innovation processes (Varlen, 2023). This emerging paradigm complements traditional sovereignty concepts while addressing 21st-century geopolitical realities, where technological autonomy becomes inseparable from national security and authentic political independence.

3. TECHNOLOGICAL SOVEREIGNTY IN COMPARATIVE PERSPECTIVE

The concept of technological sovereignty has emerged as a central pillar of national security and economic strategy in the 21st century, reflecting the growing recognition that technological capabilities determine a nation's position in the global hierarchy of power. As digital transformation reshapes every aspect of modern society from warfare to economic production, major powers have developed distinct yet interrelated strategies to secure control over critical technologies. The European Union, United States, and China represent three paradigmatic approaches to technological sovereignty, each reflecting unique historical trajectories, political systems, and geopolitical ambitions.

The European Union's approach to technological sovereignty represents a distinctive model that blends regulatory power with economic integration, reflecting both the strengths and limitations of its supranational governance structure. Unlike traditional nation-states, the EU has pursued technological sovereignty primarily through its formidable legal and regulatory apparatus, establishing itself as a global standard-setter in the digital realm. The General Data Protection Regulation (GDPR), implemented in 2018, exemplifies this strategy, creating a comprehensive framework for data protection that has become a *de facto* global standard while asserting European control over how international tech companies operate within its jurisdiction (GDPR, 2016). This regulatory approach extends to the recent Digital Markets Act and Digital Services Act, which aim to reduce European dependence on American tech giants by creating a more balanced and competitive digital marketplace (Digital Markets Act, 2022; Digital Services Act, 2022). In strategic industries like semiconductors, the EU has moved beyond regulation to direct industrial policy, with the Chips Act of 2022 committing €43 billion to double Europe's share of global semiconductor production to 20% by 2030 (Communication, 2022). The European approach reflects what officials term "open strategic autonomy" — an attempt to maintain technological independence while preserving commitments to multilateral cooperation and open markets (European Commission, 2021). This delicate balance illustrates the EU's distinctive challenge: asserting technological sovereignty within a framework of economic interdependence and shared governance that inherently limits member states' individual capacities for autonomous action. The European model shows how technological sovereignty can be pursued through legal and regulatory frameworks rather than purely through state-directed industrial policy, though recent initiatives suggest a growing recognition that regulation alone may be insufficient in key strategic sectors.

China's path to technological sovereignty presents a stark contrast to the European model, characterized by comprehensive state planning, aggressive industrial policy, and an explicit linkage between technological development and national security. The "Made in China 2025" initiative, launched in 2015, encapsulates Beijing's determination to achieve dominance in ten key technology sectors, ranging from artificial intelligence to advanced marine engineering and aerospace equipment (State Council, 2015). Unlike the EU's regulatory focus, China has pursued technological self-sufficiency through massive state investment in research and development, totaling over 2.4% of GDP in 2022, coupled with policies that systematically favor domestic champions over foreign competitors (National Bureau of Statistics of China, 2022). The Chinese government's control over internet governance through the Great Firewall represents perhaps the most extensive national system of digital sovereignty, creating a parallel technological universe that operates according to Beijing's political and ideological parameters (Creemers, 2020). In critical sectors like 5G and semiconductors, China has combined state subsidies with intellectual property acquisition strategies to build domestic capabilities, though with mixed success in areas where it remains dependent on foreign technology, as evidenced by recent U.S. export controls on advanced chips (U.S. Department of Commerce, Bureau of Industry and Security, 2022). China's approach reflects its broader strategic philosophy of "indigenous innovation", which views technological autonomy as inseparable from national security and the

Communist Party's political control (State Council, 2006). This comprehensive, state-led model shows how technological sovereignty can become an all-encompassing national project when pursued by a government with centralized economic planning capabilities and a long-term strategic horizon.

The United States maintains a more market-driven approach to technological sovereignty, though one that has become increasingly interventionist in response to Chinese competition and global supply chain vulnerabilities. American strategy traditionally relied on the strengths of its private sector innovation ecosystem — the world's leading research universities, venture capital networks, and technology corporations — to maintain global technological leadership (Mazzucato, 2013). However, the perceived threat from China's state-capitalist model has prompted significant departures from this *laissez-faire* tradition. The CHIPS and Science Act of 2022, providing $52 billion to revitalize domestic semiconductor manufacturing, represents the most substantial U.S. industrial policy intervention in decades, recognizing that market forces alone could not maintain American dominance in this foundational technology (CHIPS and Science Act). Similarly, sweeping export controls on advanced chips and semiconductor equipment to China, implemented in October 2022, demonstrate how Washington increasingly wields its technological advantages as tools of geopolitical competition (U.S. Department of Commerce, Bureau of Industry and Security, 2022). The U.S. approach also includes robust mechanisms to screen foreign investment in critical technologies through the Committee on Foreign Investment in the United States (CFIUS), and legal frameworks like the Export Control Reform Act of 2018 that enhance control over emerging technologies (Export Control Reform Act of 2018). Unlike China's comprehensive state-led model or Europe's regulatory approach, the U.S. maintains its technological sovereignty through a dynamic public-private partnership that leverages government funding and policy to steer, rather than replace, market forces. This hybrid model reflects America's unique position as both the incumbent technological superpower and a nation seeking to respond to unprecedented challenges from rising competitors, particularly China.

The comparative analysis of these approaches reveals several fundamental trends in contemporary technological sovereignty. First, there is growing convergence among major powers in identifying certain foundational technologies — semiconductors, artificial intelligence, quantum computing, biotechnology — as essential to national security and economic resilience. Second, all actors recognize that technological dependence constitutes a critical vulnerability in an era of geopolitical competition, though they respond with different policy tools reflecting their political systems and economic philosophies. Third, the concept of technological sovereignty is developing beyond simple self-sufficiency to encompass control over standards, data flows, intellectual property regimes, and supply chain security.

The pursuit of technological sovereignty has become a universal feature of 21st-century statecraft, with each major power adapting the concept to its particular circumstances while contributing to an emerging international paradigm where technological autonomy equals political and economic independence. For the EU, this means asserting regulatory power to shape global digital markets while building strategic industrial capacities. For

China, it involves comprehensive state-led development of domestic technological capabilities as both an economic and security imperative. For the U.S., maintaining technological sovereignty requires balancing market-driven innovation with strategic interventions to preserve critical advantages. Together, these approaches illustrate how technological sovereignty has moved from the periphery to the center of national strategy, redefining the meaning of power and independence in the digital age. As the technological competition intensifies, the interplay between these different models will likely shape the future of global order, with profound implications for international law, economic governance, and the balance of power. This global trend toward technological sovereignty has found particular resonance in Russia's strategic evolution, where the concept has been systematically incorporated into national security and economic development frameworks. The Russian approach synthesizes elements from these international models while developing distinct characteristics shaped by its unique geopolitical position and economic structure.

4. THE EVOLUTION OF LEGAL REGULATION OF TECHNOLOGICAL SOVEREIGNTY IN RUSSIA: FROM FIRST MENTIONS TO SYSTEMIC STATE POLICY

The term "technological sovereignty" first appeared in official Russian documents in 1992, notably in a Presidential decree concerning the organization of information gathering and analysis within the context of Russia's political, economic, and technological sovereignty («Questions of the Information and Analytical Center of the Presidential Administration of the Russian Federation» (Rasporjazhenie Prezidenta RF, 1992)). Following the imposition of Western sanctions against Russia, the term "import substitution" has gained widespread use. However, since 2022, "technological sovereignty" has become the dominant term, defining the country's long-term economic development strategy. While import substitution implies finding analogues for foreign products and technologies, technological sovereignty encompasses the creation of domestically competitive technologies and services to foster the innovative development of Russia's infrastructure and achieve independence from foreign companies and states.

Technological sovereignty is increasingly recognized not only as a component of national security but also as a crucial factor determining a country's long-term economic development. This is achieved through the attainment of national development goals, as exemplified by the Russian Federation's national development goals for the period up to 2030 and beyond to 2036. The Presidential Decree outlining these goals specifies the following national objectives:

a) Preservation of the population, strengthening of health, improvement of well-being, and support for families;
b) Realization of each individual's potential, development of their talents, and the cultivation of a patriotic and socially responsible citizenry;
c) A comfortable and safe living environment;
d) Environmental well-being;

e) A sustainable and dynamic economy;
f) Technological leadership;
g) Digital transformation of state and municipal governance, the economy, and the social sphere (Ukaz Prezidenta RF, 2024a).

The Russian Federation's National Security Strategy (Ukaz Prezidenta RF, 2021) presents a similar, yet broader, understanding of technological sovereignty, encompassing its role within the overall national security framework and as a criterion for evaluating the national science and technology security system. Specifically, paragraph 22 states that «the key factors determining the position and role of the Russian Federation in the world in the long term are becoming a high quality of human potential, the ability to ensure technological leadership, the efficiency of public administration, and the transition of the economy to a new technological basis». In the section on "Economic Security," paragraph 62 establishes that «the transition from exporting primary raw materials and agricultural products to their deep processing, the development of existing and the creation of new high-tech industries and markets, along with the technological upgrading of basic economic sectors and the use of low-carbon technologies, will lead to a change in the structure of the Russian economy, increasing its competitiveness and resilience». Furthermore, paragraph 68 emphasizes that «in the context of the global economy's transition to a new technological basis, leadership in the development of science and technology is becoming one of the key factors in increasing competitiveness and ensuring national security». The overall «goal of scientific and technological development of the Russian Federation is to ensure the technological independence and competitiveness of the country, achieve national development goals, and implement strategic national priorities (paragraph 75)». All this necessitates the integration of political and economic strategies into a unified state policy of technological sovereignty.

Government Decree No. 603 of 15 April 2023 identifies priority areas for technological sovereignty projects and the structural adaptation of the Russian economy. These include first-group projects across 13 priority sectors (aviation industry; automotive industry; railway engineering, etc.) (Postanovlenie Pravitel'stva RF, 2023).

It is important to note that while differences exist in the emphasis between foreign and Russian approaches to the concept of technological sovereignty, stemming from variations in political, economic, and geopolitical contexts, both approaches converge on the understanding of technological sovereignty as a key element of national security and economic growth. The Russian approach, unlike foreign interpretations, emphasizes the integration of technological development within the framework of state policy, prioritizing national control over critical and cross-cutting technologies (Potaptseva, Akberdina & Ponomareva, 2024).

Methodologically, the Concept of Technological Sovereignty (Rasporjazhenie Pravitel'stva RF, 2023) is largely based on established approaches within the science of technological development—namely, the concept of technological paradigm shifts. This concept posits that economic progress occurs through the succession of technological regimes, each characterized by specific technology types and production structures (Shumpeter, 2008).

The Concept for Technological Development until 2030, adopted by Russian Government Directive No. 1315-r dated May 20, 2023, establishes a comprehensive terminology system for national technological policy. Central to this framework is "technological leadership", defined as the superiority of technologies and/or products over foreign counterparts in key parameters—functional, technical, and cost-related. The document introduces "technological sovereignty" as a foundational principle, characterizing it as the nation's capacity to maintain domestic control over critical and cross-cutting technologies, including proprietary R&D capabilities and production infrastructure sufficient to achieve national development goals and safeguard strategic interests. This sovereignty manifests through two primary mechanisms: (1) the research, development, and implementation of designated critical and cross-cutting technologies, and (2) the production of high-tech goods based on these technologies, supported where feasible by sustained international scientific cooperation with partner states.

The policy delineates "critical technologies" as sector-specific technological capabilities essential for manufacturing priority high-tech products and services, deemed vital for economic functionality, socioeconomic objectives, and national defense requirements. Parallel to these are «cross-cutting technologies» — defined as transformative, interdisciplinary technological platforms enabling innovative products/services with economy-wide impacts that either disrupt existing markets or generate entirely new sectors. These cross-cutting technologies are projected to reshape Russia's economic landscape and industrial sectors within a 10-15 year horizon. The conceptual framework positions technological sovereignty not as autarky but as strategic autonomy, balancing domestic capability-building with selective international partnerships in a contested global technological environment. (Rasporjazhenie Pravitel'stva RF, 2023).

The Concept highlights the need for a systemic shift in approaches to the country's scientific and technological development: achieving technological parity while facing limitations in scientific resources, personnel, materials, and finances objectively requires the formation of a system of technological priorities and their consistent "end-to-end" implementation across all stages of the scientific and technological cycle.

Following the adoption of the Russian Government Decree No. 317 of April 18, 2016, "On the Implementation of the National Technological Initiative," and strategic planning documents on the development of the digital economy (Pasport, 2019) and the information society (Ukaz Prezidenta RF, 2017), the need to create models for a new environment in the Russian Federation, develop legal norms for new economic sectors, and establish conditions for continuous education to train specialists in demand under current conditions becomes evident (Tihomirov & Nanba 2019).

5. TECHNOLOGICAL SOVEREIGNTY AS AN IMPERATIVE OF MODERN STATE DEVELOPMENT

The urgency of an innovative model for societal development stems from the rapid growth of science and new technologies on socio-economic development over the past 20-30 years. This innovative development model emphasizes the utilization of fundamentally new technologies, the production of high-tech goods, implementing progressive

organizational and managerial solutions in innovation activities, and the intellectualization of all production processes. These technologies have radically and rapidly transformed the structure of the global economy. Inability or delay in a country's structural economic restructuring in accordance with the innovative technological paradigm not only hinders its development but also leads to socio-economic degradation, preventing participation in global economic processes (Pushkareva, 2022).

At the turn of the 20th and 21st centuries, state influence on the formation of a nation's scientific and technological potential intensified, alongside a growing need to stimulate the innovative activity of economic agents and individual citizens. International experience in scientific and technological development shows that the concept of technological dynamism (constant technological revolution) has gained recognition in the governing circles of Western countries. According to this concept, the scientific and technological leadership of developed states – the USA, Japan, and Western Europe – is determined not only by the powerful development of cutting-edge industries but also by the capacity for dynamic and continuous restructuring of all economic sectors to create and diffuse the latest technologies as a key priority of scientific and technological development (Bodrova, 2023).

Technological policy is developing in response to broader reforms aimed at stimulating productivity and economic growth, as well as addressing national challenges (specifically concerning employment, education, and healthcare), and reacting to global issues such as energy security and climate change. New initiatives fostering networking and technological clusters are being implemented. In the context of globalization, this has facilitated the development of these clusters into world-class hubs, rather than geographically dispersed entities. The realization of such objectives promotes successful collaboration between industry and research organizations (Hachaturjan, 2023).

Under these circumstances, technological policy objectives must consider the societal content, defined by society's perception of the fundamental components of the technological system and the criticality of the technologies themselves (Gu, 2024). Technologically advanced countries possessing Critical Technologies (CTs) ensure a stable position on the international stage. For a technology to be considered critical, the selection process must align with political and technological relevance (taking into account priority areas of scientific and technological development), while also being transparent and publicly accessible.

The definition of criticality and approaches to its assessment depend on a country's position and vary from forecast to forecast. Factors influencing the determination of criticality and considered in various forecasts include impacts on competitiveness, the environment, national security, and quality of life, etc. Sometimes, CTs are defined as having the potential for use across many sectors of societal productive activity (general-purpose technologies).

Developed countries consistently prioritize defining key areas for scientific and technological development. A core element of this process is the creation of national lists of critical technologies. These lists are compiled with varying objectives, and the technologies included are selected based on their potential contribution to achieving specific goals. Criteria reflecting both national and sectoral (departmental) specifics are used in

formulating these critical technology (CT) lists. From a certain perspective, such lists serve as a forecast for the country's future technological development, reflecting the most important scientific and technological priorities of national development. The implementation of prioritized state programs for the development of these technologies fulfills the state's coordinating function in high-technology development, based on securing state funding for the development of conceptual, foundational technologies. This state support enables successful competition in high-tech product markets and ensures an adequate level of technological security (Broeders, Cristiano & Kaminska , 2023).

To focus efforts and resources on implementing scientific and technological programs aimed at addressing issues of economic sovereignty and national security, Presidential Decree No. 529 of the Russian Federation, dated 18 June 2024, "On the Approval of Priority Areas of Scientific and Technological Development and the List of the Most Important High-Tech Technologies," was adopted in 2024 (Ukaz Prezidenta RF, 2024b).

This document prioritizes the following areas for scientific and technological development:

1. High-efficiency and resource-saving energy.
2. Preventive and personalized medicine, ensuring healthy longevity.
3. High-productivity and climate-resilient agriculture.
4. Secure acquisition, storage, transmission, and processing of information.
5. Intelligent transport and telecommunication systems, including autonomous vehicles.
6. Strengthening the socio-cultural identity of Russian society and improving its education level.
7. Adaptation to climate change, preservation, and rational use of natural resources.

The decree also distinguishes between critical and cross-cutting technologies. The list of critical technologies comprises 21 items, encompassing areas such as:

- Energy systems;
- Biomedical technologies;
- Agricultural technologies;
- Information technologies;
- Transport systems;
- Social technologies;
- Environmental technologies; and others.

Cross-cutting technologies (8 items) include:

- Synthetic biology and genetic engineering;
- New materials;
- Artificial intelligence;
- Biotechnologies; and others.

Thus, over the past 10-15 years, technological foresight has become an indispensable tool for the Russian Federation in addressing challenges of short- and long-term planning, as well as in making strategic decisions regarding industrial and economic development. The identified critical and cross-cutting technologies possess cross-sectoral significance

and serve as the foundation for technological modernization of production, bringing it to a competitive level.

The current paradigm of rapid qualitative transformations in technological development among leading nations worldwide unequivocally validates the appropriateness of considering innovative high-performance technologies as the driving force for future economic growth. Technological innovations have become the focal point where institutional, economic, technological and organizational factors converge — their optimal combination creates the necessary conditions for effective implementation.

6. TECHNOLOGICAL SOVEREIGNTY AS A SYSTEM-FORMIMNG ELEMENT OF STATE SOVEREIGNTY: CONCEPTUAL FOUNDATIONS AND LEGAL MECHANISMS OF IMPLEMENTATION

Innovation and technological development are complex and multifaceted phenomena, causing the definition of innovative priorities to consider international and regional aspects. This requires the coordination and development of fundamental and applied research, the results of which form the basis of technological development as a whole and have the potential to yield rapid and significant societal benefits. Therefore, state scientific and technological policy, considering the innovative nature of technological changes, must develop the resource and intellectual potential of a specific region in accordance with national priorities for the development of this sphere. Utilizing opportunities for international technological exchange contributes to the accelerated socio-economic development of the country and its regions. International technology transfer plays a significant role in the technological support of socio-economic development (Schot& Steinmueller, 2018).

Socio-economic growth has always been accompanied by technological transformation across all spheres of human productive activity — from the manufacturing sector to lifestyle itself. The level of technological advancement serves as an indicator of a state's development. However, the question of the primacy of the influence of economics and technology on accelerating socio-economic growth remains open.

The extreme complexity of the techno sphere demands a significant increase in the volume of scientific information, necessary not only for its development but also for maintaining its safe operation. Under these conditions, societal needs for the results of scientific research, particularly original developments by domestic scientists, are increasing, thus highlighting the importance of intellectual property protection.

Ensuring conditions for the growth of domestic technological potential and its effective use in the interests of society, considering global experience and innovative priorities in innovation and technological development, aims to effectively implement state scientific and technological policy. This policy focuses on supporting domestic fundamental and applied research, and fostering a national culture within the global information and technological space.

Thus, technological sovereignty of the state, as a component of its overall sovereignty, should be based on three fundamental principles: 1) resilience; 2) development of a competitive economic potential; and 3) ensuring national autonomy.

6.1. Resilience

The socioeconomic development of states in the current geopolitical environment is increasingly determined not only by domestic factors but also by the imperative to counter external threats, including unprecedented sanctions pressure from unfriendly nations. For the Russian Federation, this reality has brought the issue of technological sovereignty to the forefront of national security considerations. Sanctions targeting Russia's access to critical technologies, international payment systems, and high-tech supplies have exposed the vulnerabilities inherent in economic models dependent on global value chains. In this context, national economic resilience must be built upon three fundamental pillars: reducing critical dependence on foreign technologies, components, and financial instruments that may serve as tools of political pressure; developing adaptive mechanisms to swiftly respond to new restrictive measures through diversification of foreign economic ties and creation of alternative logistical and financial channels; and establishing closed technological cycles in strategic industries that ensure basic economic needs and national defense capabilities.

These challenges intersect with global concerns regarding anthropogenic environmental impact, resource depletion, and climate change. Neglecting sustainable development principles exacerbates technological dependence in the long term, as resource-dependent economies become more vulnerable to global market fluctuations, while the absence of green technologies leads to increased environmental costs and restricted access to markets with stringent ecological standards. Consequently, building economic resilience under sanctions requires an integrated approach combining technological self-sufficiency in critical sectors, accelerated transition to sustainable development models, and development of legal mechanisms to mitigate risks of further external pressure. The absence of such measures inevitably increases dependence on external factors, limiting state sovereignty in key political and economic decision-making.

6.2. Developing a Competitive Economic Potential

Amidst geopolitical instability and sanctions pressure, developing competitive economic potential has become strategically crucial for ensuring technological sovereignty. As Michael Porter correctly observed, contemporary global economic competitiveness stems not from natural resources or cheap labor, but from an economic system's capacity for continuous innovation-driven modernization (Porter, 2008) — a principle of particular relevance for Russia in the current technological confrontation.

The formation of competitive economic potential rests upon several key directions: development of high-tech sectors through creation of innovative products, modernization of production processes, and implementation of advanced management technologies; stimulation of innovation through strengthening scientific-technical capabilities, supporting research and development, and creating favorable conditions for tech startups; and establishment of effective innovation infrastructure, including venture financing, technological clusters, and science-business cooperation.

Of particular importance under sanctions is the development of import-independent technologies in strategic sectors such as microelectronics, machine tool manufacturing,

pharmaceuticals, IT, and telecommunications. Global experience shows that successful technological development requires continuous modernization of production capacity, human capital development, effective technology commercialization systems, and favorable investment climate — all of which must be adapted to Russia's unique geopolitical and economic circumstances while maintaining a focus on achieving technological sovereignty as a fundamental component of national security and sustainable development.

6.3. Ensuring National Autonomy

In the current era of intensified global technological competition and expanding sanction regimes, the capacity to ensure national autonomy in scientific and technological development has emerged as a critical determinant of genuine state sovereignty. This imperative necessitates the development of a comprehensive technological model capable of sustaining economic stability and preserving political independence amidst growing external pressures. The contemporary conceptualization of technological autonomy incorporates three essential dimensions that collectively form a framework for sovereign technological development.

First, strategic self-reliance makes up the foundational element, requiring domestic capacity to fulfill critical technological needs across vital sectors, including core industrial technologies, robust information security systems, advanced defense technologies, and essential medical and pharmaceutical innovations. Second, a flexible model of technological sovereignty must be cultivated through systematic development of indigenous scientific potential, careful diversification of international partnerships, and the creation of redundant technological solutions as safeguards against supply chain disruptions. Third, maintaining an optimal equilibrium between autonomy and cooperation demands strategic prioritization of collaborations with reliable partner states, formation of alternative technological alliances, and selective participation in mutually beneficial international initiatives.

The establishment of an effective national innovation system represents a crucial institutional prerequisite for achieving technological autonomy, comprising four interdependent components: a competitive research and development infrastructure, efficient mechanisms for commercializing scientific breakthroughs, modernized educational systems aligned with technological priorities, and flexible frameworks for public-private collaboration. Empirical evidence confirms that a nation's degree of technological self-sufficiency directly correlates with its substantive sovereignty in contemporary international relations. Importantly, technological autonomy should not be misconstrued as complete autarky, but as the strategic capacity to maintain critical technological competencies while engaging in selective international cooperation.

From a legal perspective, the realization of technological autonomy requires comprehensive regulatory modernization, including refinement of legislation governing scientific and technological policy, implementation of specialized legal regimes for protecting critical technologies, enhancement of intellectual property safeguards, and institutionalization of systematic technological forecasting mechanisms. In the present geopolitical context, technological autonomy has transcended its traditional economic dimensions to become an indispensable attribute of state sovereignty, serving simultaneously as a shield

against external coercion and an instrument for preserving national strategic autonomy in an increasingly contested international order.

Technological sovereignty is a complex, multifaceted concept demanding a balanced interplay of economic, technological, and legal mechanisms to ensure national security and sustainable development amidst global challenges. Effective implementation requires comprehensive legal regulation. In the Russian Federation, a significant step in this direction was the adoption of the Federal Law «On Technological Policy in the Russian Federation» (Federal'nyj zakon, 2024) on 28 December 2024, which lays the legal foundation for ensuring the country's technological sovereignty.

This law serves as a system-forming normative act, establishing the legal framework for the realization of Russia's technological sovereignty. It introduces a comprehensive mechanism for state governance in the sphere of technological development, particularly relevant in the context of contemporary geopolitical challenges and sanctions pressure. Of significant interest are the provisions concerning critical (Article 10) and cross-cutting (Article 11) technologies, which define a list of strategic directions for technological development. The institute of national projects for technological leadership (Chapter 4) and projects for the development of cross-cutting technologies (Chapter 5) create a legal basis for concentrating resources on priority areas. A distinguishing feature of the law is the detailed regulation of the powers of government bodies at different levels (Articles 7-8); the functions of organizations with state participation (Article 9); mechanisms for technological cooperation (Article 16); and measures to stimulate innovation (Articles 22-24). The law also modernizes the legal status of key state corporations («Rosatom», «Roscosmos»), underscoring their role in ensuring technological sovereignty.

From a methodological perspective, this law exemplifies comprehensive legal regulation of technological development, where state governance measures are combined with mechanisms of public-private partnership. Therefore, the law establishes the legal conditions for the realization of technological sovereignty as an integral component of state sovereignty in the modern era.

7. CONCLUSION

The research conducted allows for a number of key conclusions that are crucial for understanding the contemporary transformation of the concept of state sovereignty. At the beginning of the 21st century, technological progress ceased to be solely a factor of economic growth, transforming into a key element of national security and state sovereignty. The global digital transformation has led to the formation of a new paradigm of world order, where technological dominance becomes the basis of geopolitical influence, and the traditional framework of state sovereignty expands to include a country's ability to independently determine the trajectory of its technological development.

Analysis of the current geopolitical situation, particularly the sanctions pressure on Russia, clearly demonstrated the vulnerability of states dependent on external technological chains. Restrictions on the supply of high-tech products and disconnection from international payment systems have shown how technological dependence can be used

as a tool of political and economic coercion. Under these conditions, technological sovereignty ceases to be solely an economic category, transforming into a fundamental aspect of national security.

The study of the classical doctrine of state sovereignty confirmed that its key characteristics – unity, indivisibility, and inalienability – acquire new meaning in the digital age. The territorial component of sovereignty is supplemented by a technological dimension, where a violation of sovereignty should be considered not only direct military intervention but also forms of technological coercion.

The Russian Federation is taking systematic measures to form the legal basis for technological sovereignty, which is reflected both in normative acts of a programmatic nature and in documents containing specific substantive legal norms. Thus, the adopted documents create a comprehensive system of legal regulation, including the definition of critical and cross-cutting technologies, mechanisms of state governance, and stimulation of innovative activity. The Federal Law "On Technological Policy", adopted in 2024, represents a significant step in creating an effective legal mechanism for ensuring technological sovereignty. Its significance lies in the detailed regulation of the powers of government bodies, the functions of organizations with state participation, and measures to stimulate innovative activity. However, much will depend on the proper implementation of the provisions and their specification in subordinate acts of executive authorities.

Of particular importance is the consolidation in regulatory acts of three fundamental pillars of technological sovereignty: resilience to external threats, ensuring economic competitiveness, and guaranteeing state independence. As the analysis showed, it is the combination of these elements that allows for the preservation of sovereignty in the context of technological rivalry among global centers of power.

In general, the research confirms that in contemporary conditions, technological sovereignty is becoming an integral component and material basis of state sovereignty. Ensuring it requires a balanced approach, combining the development of one's own scientific and technological potential with selective international cooperation. Further research should be directed towards developing criteria for assessing the level of technological sovereignty and improving mechanisms for its legal protection in the context of global technological competition.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch2

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TRANSPARENCY IN ENACTING LEGAL ACTS ON AI USAGE: THE INTERNATIONAL FRAMEWORK AND ALBANIA'S APPROACH

As Artificial Intelligence (AI) has increasingly become part of everyday life with the purpose of the process of automation and efficiency enhancement, transparency in the enactment of the regulatory framework governing AI remains one of the most significant challenges. The government aims to ensure transparency and accountability in the era of rapid technological advancements, regulating the usage of AI emerges as a critical phenomenon in facing the government with the unknown. This article elaborates on the legal and ethical implications of ensuring transparency while drafting and implementing the AI-regulated framework. It analyses that the responsible institutions have undertaken the measures to introduce the related legal acts that regulate AI into the border actors, such as the interested stakeholders, experts, and the public, in making the drafting and implementation process on the usage of AI by the public administration more inclusive.

The development and applications of AI in Albania are still at an early stage, with several critical factors being an obstacle to its adoption on a larger scale. As the usage of AI in Albania is one headline of the government's aim to use it in the approximation process of the legislation, the Albanian framework on the usage of AI remains vague in the context of its applicability and leaves room for interpretation for further regulations. This article focuses on the challenges that Albania faces in implementing AI systems. It explores the global examples and compares the initiatives taken by the Albanian government in introducing the usage of AI with the EU acquis. The article focuses on the mechanisms, such as public consultations and the regulatory impact assessments (RIAs), to increase transparency and mitigate any risks associated with the unclear regulatory framework in this regard.

Keywords: AI, AI acts, transparency, RIA, consultation, accountability, Albania, EU integration.

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1. GENERAL OVERVIEW

One of the most significant developments that will determine the future of humanity is related to the digital transformation of everyday life, including the digitalisation of public and private services through the use of AI. Internet access, technology, digital skills, and digital services are increasingly prerequisites for life and access to public services (G'sell, 2024). The term 'artificial intelligence' does not have a universally accepted definition but can cover a wide range of systems that use algorithms to enable computers to perform tasks that normally require human cognition, such as perception, reasoning, learning, problem-solving, and natural language understanding (Russell & Norvig, 2016). These systems can range from rule-based systems to more complex learning models, such as Machine Learning (ML) and Deep Learning (DL), where systems improve and adapt based on the data they are fed with (Lighthill, 1973).

For continuity, in this paper, the definition of AI will be replicated as it is found in the EU regulation on AI – the AI Act in its Article 3 (1):

> *"AI system' means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments."* [1]

The digital world of the 21st century, including Artificial Intelligence, is nowadays a tangible reality. Innovative approaches are a reality in both the private and public sectors, to make access to services easier and more efficient. The digitisation of public services and the integration of AI, which is already a reality in various sectors, inevitably present challenges to the protection and effective exercise of the fundamental rights and freedoms guaranteed by the highest laws of every country. In this regard, as per the principle of non-delegation in the legal context, it shall be noted that the public administration and institutions are restricted from fully delegating the decision-making duties that the legal responsibility is vested in the subjects to be transferred to the automated systems. This reserve ensures human monitoring and control, particularly in cases where AI may be involved in legislation (Langer, 2024). For the AI systems to full comply with the legislative framework, such as Data Protection Rules, protection of data sovereignty and other sensitive issues, the governments and legislative makers shall make into account the inclusion of testing the automation systems via usage of sandboxes by clearly defined in the organic legal framework (Jenkins, 2021).

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

2. INTERNATIONAL FRAMEWORK FOR ENSURING TRANSPARENCY IN LEGAL ACTS REGULATING AI

International organisations such as the United Nations, the Council of Europe, and the EU have considered the usage of AI as the landscape emerging phenomenon in every landscape by threatening human rights principles. All instruments enacted by the international organisation function as ground guidelines that provide the need for each government and regulatory body to implement the core ethics and standards by ensuring transparency in the enactment of legal acts in a transparent and accountable way. The issue of transparency in the usage of AI systems is the most fundamental principle in all democratic systems, such as holding open meetings, establishing provisions of information, and the right to access to documents. For example, the EU Treaty of Lisbon of 2007 includes multiple articles that emphasise the importance of transparency principles about personal data processing, along with clear communication and easy-to-understand language. This principle pertains specifically to the provision of information to data subjects regarding the identity of the controller, as well as the purposes underlying the processing. Additionally, it encompasses the dissemination of further information to guarantee fair and transparent processing regarding the natural persons involved, along with their entitlement to receive confirmation and communication concerning the personal data related to them that is undergoing processing.[2]

2.1. EU acquis regulating AI

Transparency is considered an important component of the EU's acquis to trace information (Williams *et al.*, 2022, p. 7). The European Commission's Independent High-Level Expert Group on Artificial Intelligence characterises traceability as a crucial facet of transparency, defining it as "...the capability to keep track of the system's data, development, and deployment processes, typically using documented, recorded identification." The White Paper on Artificial Intelligence of 2020 (European Commission, 2020) considered that it is vital that usage European AI system is grounded in our values and fundamental rights such as human dignity and privacy protection, and supported a Human-Centric AI, which respects fundamental rights, including human dignity, pluralism, inclusion, non-discrimination, and protection of privacy and personal data as worldwide stated values (HiLEG, 2019). The White Paper recognised that the responsible development and use of AI can be a driving force to achieve the Sustainable Development Goals and advance the 2030 Agenda, leading the way to the adoption of the 2030 Agenda. An EU Regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) entered into force on August 1, 2024, and will apply in 2026.

The EU AI Act defines that the AI systems shall be regulated in a form that the legislation to ensures fair and transparent conditions for the development of these systems. It sets standard-setting for AI by ensuring that the lifecycle of AI systems is human-centred, sustainable, safe, secure, inclusive, and trustworthy, and that guarantees respect for fundamental rights, democracy, the rule of law, and environmental sustainability. This AI Act is of key importance

[2] European Union. 2009. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

for Albania as well, due to the European integration process, which the country is following. The legal framework on the usage of AI is implemented in the Union through the AI Act, which fully harmonises the rules for the placing on the market, putting into service and use of AI systems, and other relevant Union acquis, where applicable. The EU AI Act is the predominant framework that defines ethics-based AI systems (Sarra, 2025). In the applicability of the AI systems, the EU AI Act dictates that the systems shall be monitored and that the design requirements shall be sufficiently concrete to be implementable and verifiable (Pop, Sullivan-Paul & Debiasi, 2025). The usage of the AI systems shall include three stages: identification, implementation, and assessment, and their design shall be made by the AI providers by assessing and mitigating the possible systemic risk and reporting obligations in case of serious incidents.[3]

2.2. OECD AI standards

Meanwhile, the OECD Council Recommendation on Artificial Intelligence of 2019, amended in 2024, contributes to setting standards for the use of AI in public government, and requires governments to review and adapt, as appropriate, their policy and regulatory frameworks and assessment mechanisms as they apply to AI systems to encourage innovation and competition for trustworthy AI (Morandín-Ahuerma, 2023). In its documents, OECD emphasises the need to perform AIAs as necessary to evaluate the potential risks and safeguard the public accountability of the AI systems, when and if public administration experiments with the latter (OECD.AI, 2023). These guidelines focus on transparency and accountability by emphasising that the designation of the AI usage should be understandable and trackable (OECD, 2019, p. 4). This would ensure transparency in their use by the stakeholders and better understand the functioning of the systems to a reasonable extent. OECD recommendations emphasise that the AI Actors which are the AI actors which are the subjects who play a crucial role in the AI system lifecycle including here the actors that enact the legal frame on the AI usage define that there is a need for these actors to commit to transparency and accountability when regards to the disclosure of the AI system. The government shall establish an accountable framework for AI usage to be trackable, and safeguard the human rights standards. In this regard also Albania, even though it a not a member of the OECD, shall align towards such guidelines when enacting the legal acts.

2.3. Council of Europe mechanisms

In addition, the Council of Europe has enacted a set of rules on Artificial Intelligence since 2019. The topic has received swift attention from the Council of Europe, mainly considering the dilemma of whether AI is a friend to foe to human rights and freedoms (Council of Europe, 2020). In 2019, CoE adopted a declaration on the manipulative capabilities of algorithmic processes, although it referred to developments in the digital sector as 'advanced level of technologies', it did not use the term AI. It drew attention to the growing threat to the

[3] Article 55 of the EU AI Act, European Parliament and Council. 2024. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 2024/1689 (AI Act).

right of humans to form opinions and decide independently of automated systems, which emanate from advanced digital technologies. It calls the attention of any advanced digital technology to live up to their important functions and influence with commensurate levels of increased fairness, transparency, and accountability, in line with their responsibility to respect human rights and fundamental freedoms, and under the guidance of public institutions. The principle of transparency in using AI is enshrined in these acts and especially in Resolution 2341/2020 and recommendation 2181/2020 which highlight as an important element that will provide for accountability by requiring that the public governments that implement the legal framework on the usage of the AI systems should provide for norms that its usage be explainable, traceable, and understandable by the public and relevant authorities. These instruments focus on the need for AI systems to be auditable and subject to control by public authorities. The documents specify that those deploying AI systems are responsible for their outcomes and must ensure that the systems are designed and operated transparently to facilitate accountability in governance structures.

The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law was adopted in 2024.[4] It is the first international legally binding treaty in AI. It was drafted following the 2021 paper of the Ad hoc Committee on Artificial Intelligence (CAHAI) on the "Possible elements of a legal framework on artificial intelligence, based on the standards of the Council of Europe on human rights, democracy, and the rule of law". CAHAI observed that: "*An appropriate legal framework on AI based on the Council of Europe standards on human rights, democracy, and the rule of law should take the form of a legally binding transversal instrument'* (Methasani Çani & Mazelliu, 2025). This document establishes the minimum standards for regulating and using the AI system and guiding the members' legislation to enact legislation in line with the principles set out in the convention.

3. REGULATING AI USAGE IN ALBANIA

3.1. Normative Acts, AI, and Regulating Frontiers

It is noteworthy to state that there is a need that introduce AI in line with the Albanian fundamental rights and freedoms as enshrined by the Albanian Constitution.[5] The Albanian legal framework has established core legislation for the usage of technology systems in offering its public services *instrument* (Methasani Çani & Mazelliu, 2025). The Code of Administrative Procedure establishes the ground principles and standards in providing public services through electronic service delivery by also highlighting the principles of transparency as a key principle.[6] This code does not provide for the standards for enacting normative acts from the responsible institutions that will further regulate the AI usage. Using

[4] Council of Europe. 2024. Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law. Available at: https://rm.coe.int/1680afae67 (25. 5. 2025).

[5] See Article 15 of the Constitution of the Republic of Albania, *Official Gazette of the Republic of Albania*, no. 76/1998.

[6] Administrative Procedure Code of Albania, *Official Gazette of the Republic of Albania*, no. 87/2015.

automated services from the public administration and introducing some of the algorithmic automation, including AI systems, is a legalised phenomenon through different legal acts, including here a national strategy and two core organic legal normative acts:

1. The Intersectoral Strategy "Digital Agenda 2022-2026" aims to stimulate the country's progress in using AI and improve its information and communication technology infrastructure by enhancing digital services.[7] It was adopted with a government decision in order to increase investments in key areas of advanced computing, artificial intelligence (AI), and advanced digital skills needed to develop them (Methasani Çani, Çuka & Mazelliu, 2025). The draft strategy was published in the public consultation register for less than one month and received no comments or feedback from the stakeholders.[8]
2. The Law on Electronic Governance (amended) – which is the core law that defines the core standards how which electronic governance is regulated, including defining the usage of AI.[9] This law defines that: "Artificial Intelligence is the simulation of human intelligence processes through computer algorithms and systems."[10]
3. The Council of Ministers Decision on the approval of the document of methodology and technical standards in the usage of AI in Albania.[11] This decision of 2024 was promulgated by the CoM in a fast-track process without being consulted with the interested parties on such a decision.

These two normative acts cannot set the rules for citizens' participation in the policy-making process, where the AI systems shall be used, and reference for the use of artificial intelligence technologies, wherever possible, in the information and communication technology systems for enhancing and innovating the digital economy.[12] The AI regulatory framework in Albania has been drafted and promulgated with a very limited consultation face by failing to engage the interested stakeholders in the process and mitigate any risk arising from not improper consultation process. The enactment of the Law on electronic governance resulted from a formal process of consultation with no constructive proposals from the experts in the field.[13] The law enactment resulted from the Strategy "Digital

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[7] Council of Ministers of the Republic of Albania. 2022. Decision no. 370. dated 1.6.2022: Intersectoral Strategy 'Digital Agenda of Albania 2022-2026'.

[8] Regjistri Elektronik për Njoftimet dhe Konsultimet Publike. 2021. Projektvendimi "Për miratimin e Agjendës Digjitale 2021+ dhe Planit të Veprimit 2021+. Available at: https://konsultimipublik.gov.al/Konsultime/Detaje/414 (26. 5. 2025).

[9] See Article 39 of the Law No. 43/2023 on Electronic Governance (2023).

[10] See Article 1/16 of the Law No. 43/2023 on Electronic Governance (2023).

[11] Council of Ministers of the Republic of Albania. 2024. Decision No. 479, dated 24.07.2024: Approval of the methodology document and technical standards for the use of artificial intelligence in the Republic of Albania, *Official Gazette of the Republic of Albania*, no. 479/2024.

[12] Science & Innovation in Development. 2024. DSA/DMA/AIA IN ALBANIA: Western Balkans Digital Rights Cooperation Project. Tiranë: Scidev. Available at: https://scidevcenter.org/wp-content/uploads/2024/09/DSADMAAIA-IN-ALBANIA.pdf (25. 5. 2025).

[13] See: Parliament of Albania. 2023. Projektligj "Për Qeverisjen Elektronike". Available at: https://www.parlament.al/dokumentacioni/aktet/040cd4d5-d3f3-442c-afa9-5fe786d53630 (25. 5. 2025).

Agenda of Albania 2022-2026" as approved by the Council of Ministers with decision No. 370. date 1.6.2022.[14] Even though this law had a strategic nature, it only went through one meeting with the interested stakeholders and was published in the official register for public consultation from October 22, 2021, to November 19, 2021, for less than a month.[15]

The most important document, which provides the standards and procedures for the usage of AI in Albania, is the Decision of the Council of Ministers for the methodology and technical standards on the usage of AI technology in the Republic of Albania.[16] This decision has as a basis the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.[17] The document provides public institutions with several standards and principles on the processes and procedures regarding the defining, measuring, and management of the risks of AI by stating that these sub-legal requests in connection with AI shall be easily understandable, manageable, and properly documented. This decision enshrines the principle of transparency as one of the fundamental principles for individuals, provided that subjects are informed if the system they are using has implemented AI. Furthermore, it implies that public organs should inform individuals where data gathering, or changes related to people, objects, or other entities, appear authentic but are artificially generated or processed. This decision provides vague standards that are used for the lifecycle of AI systems in Albania, such as the transparency and explainability by emphasising that the ethical development of AI systems depends on the transparency and explainability, and their level should be adaptable for the context.

3.2. Principles governing AI usage and regulation in Albania

One of the principles that is promulgated as a fundamental basis that will guide the usage of AI in an ethical and just way is the principle of transparency and explainability.[18] This principle stipulates that the AI users of these services shall interpret the data produced by the AI system and understand that this data has been communicated from these systems, and be able to challenge the results. As can be reviewed from the provisions of this Decision, the content is generic and sometimes leads to a clear understanding of the introduction and the general applicable standards in using AI. The Decision also provides for the degree of the information and the results of the AI systems to be available for the

[14] Council of Ministers of the Republic of Albania. 2022. Decision no. 370. dated 1.6.2022: Intersectoral Strategy 'Digital Agenda of Albania 2022-2026'.

[15] Regjistri Elektronik për Njoftimet dhe Konsultimet Publike. 2021. Projektligji "Për Qeverisjen Elektronike". Available at: https://konsultimipublik.gov.al/Konsultime/Detaje/413 (25. 5. 2025).

[16] Council of Ministers of the Republic of Albania. 2024. Decision No. 479, dated 24.07.2024: Approval of the methodology document and technical standards for the use of artificial intelligence in the Republic of Albania, *Official Gazette of the Republic of Albania*, no. 479/2024.

[17] Council of the European Union. 2024. Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.

[18] Principle 1.3 of Council of Ministers of the Republic of Albania. 2024. Decision No. 479, dated 24.07.2024: Approval of the methodology document and technical standards for the use of artificial intelligence in the Republic of Albania, *Official Gazette of the Republic of Albania*, no. 479/2024.

institutions, businesses, and citizens that interact with such a system. Even though this decision aims to ensure that the entire cycle of AI usage will be transparent and accountable, it cannot provide an Algorithmic Impact Assessment (AIA) on the impact level of the AI system used (Bas *et al.*, 2024). The only requirement that the decision provides is that there must be an interaction between humans and AI to correct the AI system's results that might be incorrect or lead to negative impacts. Furthermore, despite the serious attempts by the government to introduce the use of AI systems in public administration, these attempts have not been successful. For example, introducing AI in Albania's integration process toward the EU included the unsuccessful tender announced by NAIS (National Agency of Information Society) in 2023, worth 2.7 million euros, aimed at implementing an intelligent system to automate the transposition of legal acts (SCAN TV, 2023).

4. CONCLUSIONS AND PROSPECTS

Albania's approach to regulating AI usage remains declarative without in-depth details and concrete policies that would enforce transparency, accountability, and ethical standards. Despite the current regulatory models that Albania offers, which are few and lack transparency in their implementation, the extensive use of AI tools in services that handle sensitive data has drawn criticism. As the impacts and the results of the AI systems are unknown for the humanity, it is of an outmost important that the normative acts to be based on the principle of transparency and auditing especially when regards to establishing the data to be used, understanding the implications of usage of AI from the public and private sectors and make in-depth evaluation of performance of the systems designed to be used. As Google suggests, the Albanian authorities should work closely with the giants of technology to establish transparent protocols that are proportionate, risk-based methodologies that promote AI interoperable AI standards. It is noteworthy that Albanian government institutions have taken steady initiatives to further align the usage of AI systems with EU and international standards. Furthermore, these institutions should be cautious in deploying strong transparency instruments and ensuring access to information that would allow the general public to have understandable and reliable information on AI systems and their usage.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch3

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APPLICABILITY OF ARTIFICIAL INTELLIGENCE IN CORPORATE GOVERNANCE: A PARADIGM OF THE PRESENT

A significant shift in contemporary business practices is represented by incorporating artificial intelligence (AI) into corporate governance. Stakeholder involvement, compliance, risk management, and decision-making are just a few of the areas where AI is relevant. By employing data-driven insights and predictive analytic, artificial intelligence enhances transparency, operational effectiveness, and strategic foresight while mitigating human biases. Among other possibilities and challenges, this approach acknowledges ethical concerns, data privacy, and responsibility. As businesses adapt to this shifting environment, artificial intelligence (AI) becomes a crucial tool in transforming governance systems to meet the demands of the present and the future.

Keywords: Artificial Intelligence, corporate governance, inclusion, transparency, data.

1. INTRODUCTION

In the ever-evolving corporate landscape, integrating artificial intelligence (AI) into governance frameworks has emerged as a transformation force. Corporate governance, traditionally centred on ensuring accountability, transparency, and ethical decision-making among stakeholders, now encounters unprecedented opportunities and challenges shaped by technological advancements. Among these, AI stands as a paradigm-defining innovation that is reshaping the present-day governance narrative.

A striking example of AI's relevance in governance can be seen in its application to fraud detection. For instance, machine learning algorithms have been employed to analyse financial transactions in real-time, helping organizations identify irregularities and prevent fraud before it occurs (Quantum Black, 2024). This shows the powerful intersection of technology and governance, reinforcing AI's potential as a game-changer. According to McKinsey's of Quantum Black 2024 Global AI Survey, 56% of organizations reported adopting AI in at least one function, with governance-related applications gaining traction (Quantum Black, 2024).

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The significance of AI in corporate governance lies not only in its ability to streamline operations and enhance decision-making processes, but also in its potential to detect anomalies, manage risks, and uphold compliance in a dynamic regulatory environment. As companies navigate complexities such as global competition, digital transformation, and increasing stakeholder expectations, the adoption of AI solutions becomes not just an option but a necessity.

This paper is significantly deepen into the applicability of AI in corporate governance, exploring its theoretical underpinnings, practical implementations, and the challenges that accompany its adoption. It positions AI as a paradigm of the present, emphasizing its current significance and its implications for the future of corporate governance.

2. THEORETICAL BACKGROUND

Corporate governance serves as a critical framework for ensuring accountability, transparency, and ethical decision-making within organizations. Historically, it has developed alongside economic, social, and technological changes, adapting to new challenges and opportunities as businesses expand their reach and influence. Today, in the age of rapid digital transformation, artificial intelligence (AI) emerges as a pivotal force that intersects with corporate governance practices.

AI, broadly defined as the simulation of human intelligence by machines, has experienced tremendous advancements in recent years. From machine learning and natural language processing to predictive analytic, AI technologies can automate complex tasks, analyzing vast datasets, and providing insights that were previously unimaginable. These capabilities have profound implications for corporate governance, particularly as organizations grapple with issues such as regulatory compliance, risk management, and stakeholder communication (Deloitte UK, 2023).

However, the adoption of AI in corporate governance is not without challenges. Ethical Concerns follows with the problems that algorithms can inadvertently perpetuate biases present in the data they are trained on. For instance, a study by MIT Media Lab highlighted that certain facial recognition AI systems showed bias against women and people of colour, raising ethical concerns about fairness and exclusivity (Buolamwini & Gebru, 2018).

Automated decision-making, while efficient, can lead to a lack of human oversight that it is mirrored in the concept of over-reliance. This poses accountability risks, particularly in high-stakes situations where ethical judgment is paramount (Deloitte UK, 2023). On the other hand, the rapid pace of AI development often outstrips regulatory frameworks, leaving organizations to navigate uncertain legal and compliance landscapes. Deloitte's 2024 report on AI governance highlights the need for robust AI auditing mechanisms to ensure accountability. By addressing these challenges, organizations can better harness AI's potential while safeguarding against risks, ensuring that corporate governance remains both innovative and responsible, and avoiding liabilities.

2.1. Corporate governance theories and evolution

Corporate governance operates within established theories and models that guide the roles and responsibilities of stakeholders in ensuring effective oversight and management of organizations. Corporate governance is a collection of practices that helps stakeholders to negotiate support for their conflicting interests and enables principals to hold agents accountable for their decisions and actions (Aguilera & Griffiths, 2014, p. 4). These frameworks, including agency theory, stakeholder theory, and stewardship theory, provide the foundation for understanding how artificial intelligence (AI) reshapes traditional paradigms.

2.2. Agency Theory

Agency theory focuses on the principal-agent relationship, addressing conflicts of interest between shareholders (principals) and corporate managers (agents). Integrating AI introduces mechanisms, such as predictive analytic, machine learning, and automated reporting, which significantly enhance transparency and reduce information asymmetry (Jensen & Meckling, 1976).

For instance, real-time financial monitoring tools like AI-powered dashboards can detect anomalies or irregularities in corporate finances, ensuring managers act in shareholders' best interests by addressing potential discrepancies early on (Deloitte, 2022). AI-driven decision-support systems generate unbiased reports, reducing the risk of manipulation and fostering alignment between principals and agents.

Moreover, predictive AI models can forecast potential risks in corporate strategies, enabling proactive governance and decision-making. These advancements strengthen governance structures by aligning the objectives of principals and agents, improving accountability and efficiency by avoiding non-necessary liabilities.

2.3. Stakeholder Theory

Stakeholder theory emphasises the importance of balancing the diverse interests of stakeholders—including employees, customers, communities, investors, and suppliers. AI proves invaluable in this context through its ability to analyse vast amounts of data, predict trends, and process stakeholder feedback — functions that enhance stakeholder management as conceptualized by Freeman (Freeman, 1984).

For instance, natural language processing (NLP) tools assess sentiment across various stakeholder groups by analysing feedback on social media, surveys, or public forums (Quantum Black, 2024). AI algorithms monitor customer preferences and employee satisfaction, offering actionable insights to improve products, services, and workplace environments.

By enhancing responsiveness to stakeholder needs and societal expectations, AI fosters a more inclusive and adaptive governance framework. This includes supporting sustainable practices by identifying and diminishing environmental impacts, ensuring that organizations contribute positively to society while achieving their business goals.

2.4. Stewardship Theory

Stewardship theory posits that managers act as stewards, prioritizing the long-term interests of the organization and its stakeholders over personal gains. AI strengthens this framework by offering tools that emphasize collaboration and sustainable decision-making.

To illustrate this theory, there are some examples. AI-powered sustainability tools can evaluate the environmental and social impact of corporate projects, enabling managers to make ethical and responsible choices aligned with the organization's mission (Deloitte UK, 2023). Predictive models help managers anticipate the consequences of strategic decisions, ensuring they serve the long-term interests of all stakeholders, including future generations.

Furthermore, AI facilitates transparent communication and trust-building by providing real-time updates on organizational initiatives, ensuring that managers remain accountable stewards of corporate resources. Through the lens of these established theories, AI emerges as a transformation force in corporate governance, enhancing transparency, responsibility, and ethical decision-making. Its integration into governance frameworks not only mitigates traditional challenges but also creates rooms for innovation and inclusive growth.

2.5. Applications of AI in Corporate Governance

Artificial intelligence (AI) offers a range of transformation applications that enhance corporate governance by improving decision-making processes, risk management, transparency, and accountability. The reason that artificial intelligence (AI) is being adopted in fraud prevention is simply a need for more advanced, flexible, and real-time detection tools (Odeyemi *et al*., 2024). As long as we can work with machine learning algorithms and big data processing power, AI has increased the level of fraud prevention. The ability for AI systems to analyze volumes of data, detect intricate patterns, and adapt to evolving methods of defrauding makes them an ideal ally in the fight against financial crimes. This AI adoption is driven both by the urgency to become more efficient and effective in finding fraud, as well as the necessity to be ahead of the curve with more sophisticated fraudsters, the run-of-the-mill detection strategies often don't work against (Odeyemi *et al*., 2024).

In this comprehensive analysis, we discuss the context, emergence, ethical considerations, and-applicability of the real-world implications of existing trends that are setting the stage for AI in aiding the defense of the delivery of secure services in the financial services sector. Below are key areas where AI is making significant contributions:

2.6. Decision-Making Support and Predictive Analytics

AI tools, including machine learning algorithms and advanced data analytics platforms, enable corporate boards and executives to make well-informed decisions. By analysing historical data and forecasting future trends, AI provides actionable insights into market dynamics, operational efficiency, and strategic risks (Brynjolfsson & McAfee, 2017).

AI-powered platforms, such as those offered by Palantir or IBM Watson, assess the potential outcomes of strategic decisions, providing simulations and scenario analysis

for corporate leaders (Cihon, Schuett, & Baum, 2021). Predictive analytic enables organizations to identify emerging trends in customer preferences, competitor behaviour, and regulatory landscapes, empowering companies to adapt proactively (PwC, n.d.). Such tools enhance decision-making accuracy, allowing organizations to anticipate challenges and seize opportunities with confidence. AI-powered systems excel at detecting patterns and anomalies in financial and operational data, making them indispensable in identifying fraud and managing risks (Deloitte Netherlands, 2024).

Key examples include issues related to AI systems such as SAS Fraud Framework and to risk assessment tools that can monitor transactions in real-time, identifying potential accounting irregularities or unauthorized activities before they escalate. Risk assessment tools leverage AI to evaluate factors like macroeconomic conditions, geopolitical risks, regulatory changes, and cyber security threats, enabling companies to develop preemptive mitigation strategies (World Economic Forum, 2022). AI's real-time analysis not only enhances vigilance against fraud, but also ensures comprehensive risk management across diverse domains.

Through natural language processing (NLP) and automated reporting, AI facilitates the generation of comprehensive and accurate disclosures for stakeholders. This ensures compliance with regulatory frameworks while promoting transparency in financial reporting, governance practices, and environmental, social, and governance (ESG) initiatives – reflecting the stakeholder-oriented approach to organizational success emphasized by Freeman *et al.* (2007).

Illustrations include AI systems like Workiva automate the preparation of financial statements and ESG reports, reducing human error and ensuring accurate compliance documentation (Cloetens, 2024). AI tools such as sentiment analysis platforms evaluate public and stakeholder perceptions of governance practices, enabling organizations to address concerns swiftly and effectively.

Such innovations build trust and enhance accountability by delivering timely, accurate information to stakeholders. Streamlining Compliance and Regulatory Processes and AI simplifies compliance by automating the monitoring, tracking, and documentation of regulatory requirements. Intelligent systems can instantly detect changes in laws and guidelines, ensuring that organizations remain compliant and avoid legal penalties (OECD, 2024).

Bringing to attention some related examples rely on AI-powered compliance tools, such as Thomson Reuters' Compliance Learning ensure corporate practices align with dynamic regulatory environments. Virtual assistants and AI chat bots enhance communication with regulators and stakeholders by providing instant, accurate responses to compliance-related queries (Gartner, 2022). This automation not only minimizes administrative burdens but also ensures organizations adapt quickly to regulatory updates.

3. CHALLENGES AND RISKS OF AI INTEGRATION IN CORPORATE GOVERNANCE

Integrating artificial intelligence (AI) into corporate governance offers immense potential for innovation but also introduces several challenges and risks. These complexities highlight the necessity of responsible and ethical governance practices to address the potential drawbacks of AI deployment effectively.

A significant challenge is the ethical considerations and biases that arise from the use of AI systems. Since these systems rely on algorithms and datasets, they often inherit biases present in the underlying data or introduced during the design process. For instance, biased AI-driven decisions can disproportionately affect specific groups or stakeholders, eroding trust and transparency in governance processes (Crawford, 2021). Additionally, ethical dilemmas emerge in determining accountability for errors or biased outcomes resulting from AI operations. The ambiguity surrounding responsibility for such issues raises questions about the fairness and reliability of these technologies in corporate decision-making.

Another critical risk involves data security and privacy concerns. The utilization of AI requires organizations to collect and analyse substantial volumes of sensitive data. This dependence increases vulnerability to data breaches and unauthorized access while necessitating strict compliance with regulations like the General Data Protection Regulation (GDPR). Organizations failing to implement robust cyber-security measures risk compromising data integrity and facing significant legal and reputation repercussions (European Commission, 2018).

Moreover, the over-reliance on AI in governance can have profound implications for human roles and decision-making. While AI provides valuable insights, excessive dependence on it risks undermining critical human judgment, creativity, and moral reasoning. Human oversight is essential to maintain ethical and nuanced decision-making, which AI cannot fully replicate (Rahwan, 2018). The automation of governance functions may lead to the displacement of jobs, contributing to skill erosion and fostering concerns about the long-term implications of AI for the workforce.

In conclusion, the integration of AI in corporate governance is a double-edged sword, presenting both trans formative benefits and significant risks (Cihon, , Schuett & Baum, 2021). To maximize its potential while addressing its challenges, organizations must adopt responsible governance frameworks emphasizing ethical AI practices, robust data security measures, and a balance between AI utilization and human oversight.

4. REGULATORY FRAMEWORK AND LEGAL CHALLENGES

Though there is much focus on artificial intelligence as a possible problem, its regulation is still in its infancy. The most important legal and regulatory developments so far are the U.S. Executive Order on AI and the European Union's AI Act. These legal frameworks set fundamental standards and show that lawmakers and regulators are at the early stage of understanding and reducing the natural risks connected with artificial intelligence.

Therefore, they should be seen as a first step rather than a final one. Regulatory bodies are growing more focused on risks connected to artificial intelligence. While the U.S. Department of Justice (DOJ) is aggressively seeking the prosecution of AI-related crimes, the U.S. Securities and Exchange Commission (SEC) is looking into instances of "AI washing".

Therefore, management and boards have to make sure they are not only handling the current legal, regulatory, and enforcement environment but also forecasting areas of vulnerability and possibly further legal responsibility or control.

4.1. Artificial Intelligence Act of the European Union

Regarded as the first complete legislative framework for artificial intelligence, the EU Artificial Intelligence Act (AI Act) sets new standards regarding transparency, oversight, and responsibility for companies engaged in the supply, deployment, distribution, importation, or manufacture of AI systems. The AI Act applies to providers who bring or run AI systems into the EU market, regardless of their establishment or location inside the EU. It might also imply upcoming regulations, thus, companies must grasp its scope and consequences (EU commission, 2024).

August 1, 2024, marked the implementation of the European Artificial Intelligence Act (AI Act). The Act's goal is to encourage the European Union's responsible AI development and application (AI Act enters into force, European Commission, 2025). In order to reduce potential risks to citizens' health, safety, and fundamental rights, the Commission proposed the AI Act in April 2021, and the European Parliament and Council later approved it in December 2023. By giving developers and plodders clear requirements and obligations regarding particular uses of AI, it landed the lessens into the administrative and financial burdens on businesses. Based on an innovative definition of artificial intelligence and a risk-based methodology, the AI Act creates a uniform framework for all EU nations. Most AI systems, such as spam filters and video games with AI capabilities, are exempt from the AI Act's requirements as they show low risk. Nonetheless, businesses have the option to voluntarily implement extra codes of conduct. In this regard,particular transparency risk is shown when utilizing chat bots or other AI-generated content, users need to be made aware that they are interacting with a machine, and they need to be properly labeled. AI systems that are deemed high risk, like AI-based medical software or AI systems used for hiring, are subject to strict regulations. These requirements include the use of risk-mitigation systems, the supply of high-quality data sets, the provision of clear user information, and human supervision. An example of unacceptable risk is linked with AI systems that allow governments or businesses to engage in "social scoring", as for instance , are forbidden because they are seen as a blatant violation of people's fundamental rights. The European Union wants to lead the world in creating safe artificial intelligence. By establishing a strong regulatory framework based on human rights and fundamental values, the EU can build an AI ecosystem that benefits everyone. This means better healthcare, safer and greener transportation, and improved public services for citizens. Companies benefit from higher productivity and more effective manufacturing, as well as cutting-edge goods and services, especially in the fields of energy, security, and healthcare.

Services like energy, transportation, and waste management can be more affordable and environmentally friendly for governments.

A Code of Practice for general-purpose artificial intelligence (GPAI) model providers has been the subject of a recent consultation by the Commission. According to the AI Act, this Code will cover important topics like risk management, copyright-related laws, and transparency. The Commission will incorporate the opinions and findings of businesses, civil society representatives, academic experts, rights holders, and GPAI providers operating in the EU into its upcoming draft of the Code of Practice on GPAI models (EU Commission, 2024).

4.2. United States Executive Order on Artificial Intelligence

President Biden issued a thorough Executive Order on Artificial Intelligence ("AI") on October 30, 2023, meant to create new criteria for AI safety and security, protect privacy, improve equity and civil rights, support innovation and competition, and guarantee U.S. preeminence worldwide.

The Executive Order requires the National Institute of guidelines and Technology to create guidelines, tools, and assessments to ensure the safety and dependability of AI systems before their public deployment. These criteria will then be carried out by several federal agencies, including the Department of Homeland Security and the Department of Energy, across vital infrastructure areas. A means meant to protect consumers from AI-facilitated fraud and deception, the Executive Order authorizes the Department of Commerce to develop policies for content authentication and watermarking to clearly identify AI-generated material. The Executive Order indicates that the U.S. government views artificial intelligence as both a possible danger and a path for innovation and progress by mandating more AI research, the strengthening of competition inside the AI ecosystem, and the development and application of AI to handle world issues.

Simultaneously calling for more artificial intelligence research, the strengthening of competition inside the AI ecosystem, and the development and application of AI to tackle world issues, the Executive Order suggested the U.S. government views artificial intelligence as both a possible threat and a path for invention and progress.

4.3. The SEC's Focus on "AI Washing" and AI Investment Fraud

The SEC's Office of Investor Education and Advocacy published a joint Investor Alert on AI and investment fraud on January 25, 2024. The alert said that “malicious people are exploiting the growing popularity and complexity of artificial intelligence to deceive victims”, warning investors against false or misleading statements about the development and use of artificial intelligence, including unproven claims about new technology innovations. It also underlined how con artists use artificial intelligence tools to create audio and “deep-fake” films for impersonation. Therefore, companies have to be careful with their claims of artificial intelligence and make sure they are supported by data to avoid overstatement."AI washing" has also been the focus of the SEC's enforcement activities. The SEC said in March 2024 that two investment advisers had been charged with spreading false and misleading claims about their supposed use of artificial intelligence.

The SEC has targeted businesses that falsely promote the use of artificial intelligence in financial decision-making in their marketing materials and websites.

Gurbir Grewal, Director of the SEC's Enforcement Division, warned businesses against making "aspirational" claims about artificial intelligence to take use of investor excitement for the growing technology in line with the agency's general strategy for AI. When talking about artificial intelligence, one should make sure the information given is not materially false or misleading regardless of the setting. Given the significant rise in AI-related disclosures–473.5% for Fortune 500 companies — SEC registrants should exercise special care when evaluating such disclosures (Grewal, 2024).

4.4. Criminal Responsibility for Artificial Intelligence: Increasing DOJ Enforcement Emphasis

Officials have great concern that artificial intelligence could enable criminal activity and compromise personal and societal security. Deputy Attorney General Lisa Monaco said in a recent Oxford University speech that "despite its possible advantages, AI is simultaneously increasing dangers to our collective security ... [with] the ability to aggravate current biases and discriminatory practices ... accelerate the creation of harmful content, including child sexual abuse material [and] provide nation-states tools to promote digital authoritarianism, therefore amplifying the spread of false information and oppression" (Monaco, 2024).

Monaco underlined that artificial intelligence is changing the ways of crime commission and the profiles of offenders, can lower the barriers to entry for criminals, and embolden our enemies. The DOJ has taken various actions to address this quickly changing risk area.

DAG Monaco said that although there are existing legal doctrines that could be changed and expanded to reduce AI-related risks, AI "may well be the most transformational technology we've confronted yet" (Monaco, 2024). Though there is more focus on reducing AI-related risks, the DOJ does not automatically need a change of its approach for looking into and prosecuting crimes committed by artificial intelligence. DAG Monaco emphasized that "*like a firearm, AI can also enhance the danger of a crime*" (Monaco, 2024). Thus, prosecutors are told to seek more severe punishments for crimes involving artificial intelligence in order to ensure responsibility and discourage wrongdoers.

Despite the earlier mentioned regulatory developments in artificial intelligence, there is worldwide skepticism about the capacity of authorities to sufficiently reduce risks connected to artificial intelligence. From 28 countries, the 2024 Edelman Trust Barometer found that 59% of respondents viewed government regulators as lacking knowledge on evolving technology to properly govern them (Edelman, 2024, p. 16). The survey found people believe more in companies than in NGOs, government, or media regarding the efficient integration of technical innovation into society. Therefore, corporate boards are front-runners in ensuring global AI good administration.

5. CASE STUDIES OR EXAMPLES

The transformative potential of artificial intelligence (AI) in corporate governance can be observed through various real-world applications.

These cases highlight the practical benefits and challenges associated with AI integration:

5.1. Fraud Detection at Danske Bank

Danske Bank, a leading financial institution, faced increasing pressure to enhance its fraud detection mechanisms in the wake of regulatory scrutiny. To address this, the bank implemented an AI-driven system capable of analysing vast amounts of transaction data in real time. This system employs machine learning algorithms to identify irregular patterns, such as unusual account activities or deviations from normal spending behaviour, that may indicate fraudulent activities (Milne, 2019).

For instance, by cross-referencing transaction data with historical records and behavioral patterns, the AI system can flag potentially suspicious activities for further investigation. This proactive approach has not only improved the accuracy of fraud detection but has also significantly reduced the time required to investigate and resolve cases. Danske Bank's adoption of AI underscores the critical role of advanced technology in strengthening corporate governance and risk management frameworks (Milne, 2019).

5.2. Predictive Analytics at Walmart

Walmart, one of the world's largest retailers, has incorporated AI into its corporate governance practices to enhance decision-making at both strategic and operational levels. Using predictive analytics powered by AI, Walmart can analyse customer behaviour, market trends, and supply chain dynamics to make data-driven decisions.

For example, AI systems analyse historical sales data and external factors like weather patterns and economic indicators to predict future demand for products. These insights enable Walmart's leadership to optimise inventory levels, streamline supply chain operations, and allocate resources effectively. By leveraging AI for predictive analytics, Walmart not only achieves greater efficiency but also aligns its corporate strategies with shareholder and stakeholder expectations.

5.3. AI in ESG Reporting at Microsoft

Microsoft, a global technology leader, has integrated AI into its Environmental, Social, and Governance (ESG) reporting to reinforce transparency and accountability. The company uses AI to collect, process, and analyse vast amounts of ESG data from diverse sources. For instance, AI-powered tools gather information on carbon emissions, energy consumption, and diversity metrics to assess Microsoft's sustainability initiatives (Reynolds, 2023).

These AI systems generate detailed, visually engaging reports for stakeholders, providing insights into the company's progress toward its ESG goals. By making this information accessible and actionable, Microsoft strengthens trust among investors, regulators, and the public. This case illustrates the potential of AI to elevate governance practices by fostering openness and ethical accountability (Reynolds, 2023).

5.4. SEC v. Tesla, Inc. and Elon Musk

This case highlights the role of AI in corporate governance, particularly in monitoring compliance with securities laws. The U.S. Securities and Exchange Commission (SEC) filed a lawsuit against Tesla and its CEO, Elon Musk, for allegedly misleading investors through social media posts. The case underscores the importance of AI-driven compliance tools that can monitor and flag potentially misleading communications in real time. AI systems could have been employed to analyse Musk's tweets for compliance with disclosure regulations, potentially preventing the legal fallout (SEC, 2018, p. 12).

5.5. Lloyd v. Google LLC

This UK Supreme Court case dealt with data privacy and the use of AI in corporate governance. The court examined whether Google's AI-driven data collection practices violated user privacy rights under the Data Protection Act. The ruling emphasised the need for corporations to ensure that AI systems comply with data protection laws and maintain transparency in their operations (Lloyd v. Google LLC, 2021, p. 45).

5.6. Zillow Group, Inc. Securities Litigation

Zillow faced a class-action lawsuit after its AI-powered home-buying algorithm, known as "Zestimate", led to significant financial losses. The case illustrates the risks associated with relying on AI for critical business decisions without adequate oversight. It highlights the need for corporate boards to implement robust governance frameworks to monitor and evaluate AI systems (Zillow Group, Inc., 2022, p. 33).

5.7. European Commission v. Facebook Ireland Limited

This case involved the European Commission investigating Facebook's use of AI algorithms for targeted advertising. The Commission found that the algorithms potentially violated antitrust laws by creating unfair competition. The case underscores the importance of corporate governance in ensuring that AI systems operate within legal and ethical boundaries (European Commission, 2023, p. 28).

6. IMPLICATIONS FOR THE PRESENT PARADIGM

The integration of artificial intelligence (AI) into corporate governance has profoundly reshaped the present paradigm, offering innovative solutions to age-old challenges while introducing new dimensions to governance practices. This technological revolution has affected various aspects of governance, defining the current landscape through distinct implications.

One key implication is the transformation of decision-making processes. AI enhances the precision and speed of governance-related decisions by providing real-time insights derived from complex data analysis. Corporate boards can leverage AI tools to address uncertainties and predict future scenarios, enabling informed strategic decision-making with greater confidence (Rahwan, 2018, p. 8).

Another notable impact of AI is the reinforcement of accountability in governance practices. AI-driven systems promote transparency by automating reporting processes and utilising natural language processing technologies to produce accurate and comprehensive disclosures. These tools help stakeholders evaluate organisational performance and ethical standards effectively, thus fostering accountability within organisations (Crawford, 2021, p. 52).

AI has also revolutionised stakeholder communication. The advent of AI-powered communication platforms, including virtual assistants and chatbots, has facilitated seamless interactions between organisations and their stakeholders. These technologies enable efficient handling of inquiries and foster trust by reflecting a proactive approach to governance expectations (European Commission, 2018, p. 15).

Furthermore, the increasing reliance on AI has prompted a redefinition of roles and responsibilities within corporate governance. While AI supports decision-making and operational processes, it demands human oversight to address ethical concerns and ensure alignment with organisational values. This interplay between technological capabilities and human judgment underscores the importance of maintaining a balance between AI and human involvement (Rahwan, 2018, p. 11).

7. FUTURE PERSPECTIVES

In many important aspects, artificial intelligence (AI) will influence company governance greatly. AI-driven boardrooms might witness AI systems enabling scenario planning and offering strategic recommendations. Freeing stakeholders to concentrate on more difficult problems, autonomous AI systems could carry out decisions without human involvement, monitor risks, and handle compliance duties. By building a clear, safe, and efficient method for tracking transactions and auditing processes, artificial intelligence, combined with blockchain technology, could improve governance practices. Improvements in natural language processing and sentiment analysis by artificial intelligence could result in tailored stakeholder involvement, therefore addressing issues and preserving confidence among various interest groups. Developing ethical artificial intelligence (AI) frameworks will help to solve problems, including bias, responsibility, and justice, therefore guaranteeing that AI systems fit company values and social expectations. AI is anticipated to help worldwide regulatory harmonisation by automated compliance procedures and cross-jurisdictional cooperation enabling tools. AI will improve operational efficiency as it develops, but it will also bring up issues of ethics, responsibility, and the balance between human and technical roles.

Lastly, AI adoption has stimulated efforts toward global standardisation and adaptation in governance practices. Organisations are using AI tools to harmonise compliance across jurisdictions and navigate complex regulatory landscapes, contributing to a more cohesive and standardised approach to governance on an international scale (European Commission, 2018, p. 22).

The present paradigm reflects a trans-formative era where AI is not merely an auxiliary tool but an integral part of corporate governance strategies. However, it also underscores the importance of addressing the ethical, legal, and human implications of AI adoption to harness its benefits responsibly.

8. CONCLUSION

The applicability of artificial intelligence (AI) in corporate governance signifies a transformative shift in how organisations operate and decide. By enhancing transparency, accountability, and efficiency, AI has proven to be a pivotal tool in addressing challenges that traditional governance frameworks often struggle to navigate. From predictive analytics and fraud detection to regulatory compliance and stakeholder engagement, AI empowers organisations to adapt to the complexities of a dynamic global environment.

However, this transformation comes with its own set of challenges. Ethical considerations, data security concerns, and the need for human oversight highlight the importance of a balanced approach to AI integration. As organisations embrace this paradigm, they must prioritise responsible AI practices that align with corporate values and societal expectations.

Looking ahead, the potential of AI in corporate governance is vast and continues to evolve. Organisations that proactively leverage AI's capabilities while addressing its risks will not only enhance their governance practices, but also set a benchmark for innovation and accountability. The present paradigm, shaped by AI, offers an exciting glimpse into a future where technology and governance coexist to create more robust and ethical corporate ecosystems.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch4

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LIFTING THE AI VEIL IN COMPANY LAW

In September 2024, the United Nations published a report titled "Governing AI for Humanity," which addressed the international governance of artificial intelligence. In March 2024, the European Union adopted the Artificial Intelligence Act, which establishes uniform legal rules governing the use of artificial intelligence systems. Governments and companies throughout the world are continuously adopting strategies, laws, and guidelines, resulting in a disparate array of global approaches to AI. Amid this global regulatory diversity, the role of AI in company law raises pressing questions about its governance within corporate structures. This article will give an overview of international and EU standards regarding liability issues that arise through the use of artificial intelligence in company law with the aim of identifying potential opportunities and challenges that could be anticipated in Bosnia and Herzegovina. Are robot-directors and AI board members the future of modern companies? If so, how should their liability be treated? This paper analyses several possibilities for AI liability adding to the discussion of a two-fold problem that will emerge in company law: who is liable if AI is used as a tool to help management and board members in decision making, and second, can AI participate in decision-making without human intervention. This paper argues that AI liability should be approached through an extension of traditional addressees of liability' under the existing doctrines such as duty of care for directors' liability, and the piercing of the veil doctrine for shareholder liability. It establishes suggestions regarding which situations the veil of the corporate entity should be lifted and when shareholders' liability should be extended. It suggests that the focus on AI should be on whether the human actors in the company acted reasonably and with the duty of care in using the technology.

Keywords: EU AI Act, robo-directors, legal personality of AI, AI Liability Directive, Product Liability Directive.

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"Without people, in this world nothing can work, not even computers."
E. Blum

1. INTRODUCTION

The digitalisation of company law was enhanced during the COVID-19 pandemic, when lockdowns, travel restrictions across borders, and other restrictive measures made it difficult for businesses to convene general meetings with physical attendance (European Commission, 2022). Even though virtual-only annual shareholder meetings were already reported in 2001 in the United States of America, (Koevski, Gavrilovik & Spasevski, 2020) they are an important segment of more serious discussions on the role of digital tools and processes in company law. For example, some EU countries (Spain, Germany)[1] have permanent legislation regulating the possibility for hybrid or purely virtual General Meetings for shareholders of listed companies under certain conditions, as is foreseen by Directive 2007/36/EC. Although some authors argue that this practice reveals certain shortcomings—such as unequal opportunities among shareholders (Koevski Gavrilovik & Spasevski, 2020) - it remains a significant step toward the digitalisation and increased efficiency of company law. According to a Study requested by the ITRE committee[2], there are several industries currently digitalising processes through the use of, for example, artificial intelligence (further in text: AI): 1) High tech; 2) Automotive and Assembly; 3) Financial Services; 4) Telecom; 5) Retail; 6) Consumer packaged goods; 7) Travel, transport, logistics; 8) Electric power and natural gas; 9) Infrastructure; 10) Pharmaceuticals and medical products; 11) Healthcare systems and services and 12) parts of the engineering sector characterised by advanced manufacturing technologies and Key Enabling Technologies (KETs) (Eager, 2019, p. 19). Besides the business sector trying to accommodate to rapid change and technological innovation, governments have also jumped on the digitalisation wagon by providing possibilities for online formation of companies. Directive (EU) 2017/1132 on Certain Aspects of Company Law and Directive (EU) 2019/1151 on the use of digital tools and procedures in company law have created a legal and administrative framework that allows citizens of the European Union to establish a limited liability company entirely online (Hasanović, 2024). Through the involvement of international organisations such as the International Financial Corporation, Bosnia and Herzegovina has tried to reform its laws in 2024, by adopting regulations to enhance procedures for online formation of limited liability companies. Digitalisation is seen as a necessary and effective means of eliminating existing corporate governance problems associated with human involvement by enabling faster processing of extensive content related to company registration (Page, 2009; Hickman & Petrin, 2021). Corporate governance, as used in this article, is defined as "the system by which companies are

[1] Spain (Law 5/2021, of 12 April); Germany (Gesetz zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften und Änderung genossenschafts-sowie insolvenz- und restrukturierungsrechtlicher Vorschriften v. 20.7.2022, BGBl. I, 1166).

[2] The document was provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the committee on Industry, Research and Energy (ITRE committee).

directed and controlled." (Code, 1992, p. 15). This paper explores recent developments in company law concerning artificial intelligence and seeks to address emerging concepts of AI liability within corporate legal frameworks. The first section of this paper looks at international and EU standards on AI, emphasising the challenges that arise in regulating AI; the second section discusses AI liability issues, with the third section giving special emphasis on liability issues that may arise in company law. The fourth section presents Bosnia and Herzegovina as a case study to explore AI liability issues in company law, with particular emphasis on situations where AI is employed by company managers and shareholders. The gap that is seen in scholarship refers to situations in which shareholders or owner could potentially be held liable for AI assistance that when the harmful act done by this particular group, resulted in fraud or damage to the companies creditors. In conclusion, the authors emphasise the need for companies to develop internal strategies and compliance mechanisms governing the use of AI in business operations, in order to guide managers and shareholders on the ethical, legal, and professional standards that must be upheld throughout its application.

2. INTEGRATING AI INTO CORPORATE GOVERNANCE AND REGULATION

AI-driven governance tools, such as Vital and Tieto's Alicia T, were introduced before international AI regulations and frameworks. The similarity between these tools is that they are all entrusted with decision-making powers that are not controlled by a human, but rather by a program within a company setting. Vital, a machine making investment recommendations (Leonard-Barton & Swap, 2005), Tieto, a member of the leadership team (Petrin, 2019), Einstein, an AI system taking part in staff meetings (Reid, 2018), and Charlie, an AI conversational agent (Georganta & Ulfert, 2024). With Europe asserting itself as a serious player in deploying AI manufacturing, the EC found itself proposing and developing general principles on robotics and AI (European Commission, Directorate-General for Justice and Consumers, 2021; Hickman & Petrin, 2021). The focus is being directed towards the business necessities that AI has the potential to address, including: data analysis, automation of business processes, customer and employee engagement, and translation (Davenport & Ronanki, 2018; Nilsson, 2009). However, all of them can be put into two major groups (in terms of company law), reflective of the fact whether the work AI does is administrative work or decision-making work. Administrative work that is performed by AI is related to tasks that are repetitive, and therefore time-consuming, for example, in compliance or reporting. In these areas, AI has been shown to be performing better than humans, decreasing mistakes and costs.[3] According to a survey performed by Kolbjørnsrud, Amico & Thomas (2016, p. 3), managers "spend more than half of their time on administrative coordination and control tasks". AI could allow directors to spend more time on genuine business matters. Similarly, the function of company boards is mainly supervising executives (OECD, 2015). AI could inspire a digitalised, innovative company board that is more oriented towards

[3] Companies using robotic process automation (RPA) tools are seeing productivity soar, with some reporting cost reductions of 25-50% and processes completed up to five times faster.

the strategic placement of the company. (Fenwick McCahery & Vermeulen, 2019). When it comes to decision-making powers, they are not a stand-alone task and are very connected to organisational history, ethics, empathy, and traits unknown to AI. However, one prime example of AI with decision-making powers is the Germany-based e-commerce merchant Otto, an AI system that cut stock by 20% and reduced product returns through deep learning, which helped it analyse billions of transactions to predict what products consumers will buy.[4] Norwegian IT business Tieto included an AI-based application called AliciaT in a leadership team, with the job to "perform data-driven decision-making and innovate new data-driven ideas." (Fenwick & Vermeulen, 2019; Mosco, 2020, p. 89) As Joshua Davis states: "The best computers are superior. Human beings cannot beat them. We can only learn from them." (Davis, 2018, p. 174). However, AI superiority is questioned when it comes to decisions that can influence the life (or death) of humans: what decision will the AI make when one life must be lost over another?[5] As Hickman & Petrin (2021, p. 595) state, 'AI and company law' is an emerging area that is set to rapidly gain in importance. Further challenges that can affect businesses that want to embrace technology are related to the high costs of AI scaling. Most businesses do not scale beyond pilot projects because of the technical challenges that are involved in implementing AI in everyday business. Competition also dictates that many companies have to innovate their business models from product-based to service-based business. (Foss & Saebi, 2015). Ethical and legal considerations have also been discussed by scholars (Smith & Miller, 2022; Davis, 2018; Kim, 2016), especially related to facial recognition technology[6] that has proven to be racially biased, but also to illegal employment discrimination.[7] The reason these considerations are important is to emphasise the susceptibility to abuse of AI technology by people in charge. Besides the financial and ethical constraints, a survey of workers revealed that 37% are concerned about losing their jobs to AI within the next five years (Lussana, 2024). But can AI replace humans in corporate leadership? According to Policy Recommendations on AI, of the High-Level Expert Group on Artificial Intelligence (the AI Policy Recommendations), the capability for human intervention in every decision cycle of the system is not desirable, and meaningful human intervention and oversight over AI decisions should be addressed in specific sectors[8] (High-Level Expert Group on Artificial Intelligence, 2019). Regulation of AI has been widely discussed in the last decade around the world. Given the borderless character of this technology, states

[4] The revenue in of the Otto Group in the 2023/24 financial year was around EUR 15 billion. Otto Group. 2025. Key Figures. Available at: https://www.ottogroup.com/en/ueber-uns/kennzahlen.php (9. 2. 2025).

[5] For example, in a car crash, whom will the autopilot protect, a pedestrian or its "driver"?

[6] AIs for facial recognition or social scoring are deemed unacceptably risky and prohibited (Article 5 of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 OJ L, 2024/1689 (AI Act)).

[7] Pauline Kim suggests that a corporation may engage in illegal employment discrimination without anyone ever knowing-or perhaps ever being able to know-that it is doing so because of reliance on Al that is ever-evolving and leaves no record of the basis for its recommendations.

[8] e.g. a human doctor to check a medical treatment decision.

find it very hard to prohibit its use. Citizens with access to the Internet typically have access to artificial intelligence, and so do employees working in companies worldwide. Companies, on the other hand, are increasingly automating their services by employing AI instead of human employees (Haim, 2023). States also recognised that the development of AI bears immense potential for the development of their national economies as well as their geopolitical positions. Recent years have been marked by the adoption and implementation of national strategies of the states that plan to use AI as a significant source of economic development. While AI offers economic and societal benefits, its risks — including privacy violations, discrimination, and security threats- necessitate regulatory frameworks that ensure AI is legal, ethical, and robust. Consequently, governments face a dual challenge: promoting AI innovation while implementing rules that protect individuals and society.

Regulating AI is not a simple task. There are several challenges. First, there is no universally accepted definition of AI, making it challenging to craft targeted laws. The EU has adopted the legal definition in the AI Act after the OECD definition, but the agreement in the scientific community has not been reached. Second, AI is not a singular technology, but a collection of diverse systems with different risks and applications. Not all types of AI systems bear the same level of risk or similar characteristics. Third, AI does not operate in isolation—its impact depends on the broader legal and social environment. It allows interaction between humans and AI systems, between AI systems, as well as between AI systems and other digital environments. In response to AI's challenges, governments are increasingly engaging in regulatory competition and fostering fragmentation (Wachter, Mittelstadt & Floridi , 2020). Some jurisdictions aim to set global standards, much like the European Union did with the General Data Protection Regulation (GDPR)[9] in global data protection laws (Bradford, 2020). Other countries, led by the United States and China, are developing their own regulatory approaches. The competition to regulate AI raises concerns about whether it will lead to a "race to the bottom" — where countries adopt minimal AI regulations to attract investment—or a "race to the top", where high regulatory standards set global norms. While some nations may weaken regulations to foster AI growth, the growing importance of trust in AI suggests that strong regulations could provide a competitive advantage (Smuha, 2019).

Given AI's global impact, disparate national regulatory frameworks may create regulatory fragmentation, impeding innovation and potentially leading to conflicting legal obligations for multinational actors. There is a growing need for international cooperation to develop harmonised AI governance frameworks that balance innovation with fundamental rights and ethical considerations (Floridi, 2019). The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has proposed a Recommendation on the Ethics of Artificial Intelligence.[10] Similarly, the Organisation for Economic Co-operation and Development (OECD) has developed AI principles focusing on fairness,

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). *Official Journal of the European Union*, L 119, 1–88.

[10] UNESCO. 2021. Recommendation on the Ethics of Artificial Intelligence.

accountability, and transparency.[11] The Group of Twenty (G20) has also endorsed these principles, recognising the need for international cooperation in AI governance.[12] Yet, a global binding regulation of AI has not been adopted.

When it comes to the regional legal frameworks, Europe is at the global forefront. Both main regional organisations, the European Union and the Council of Europe, have adopted binding legal instruments. The EU has taken a leading role in AI regulation through initiatives such as the Artificial Intelligence Act,[13] which seeks to classify AI applications based on their risk levels. Furthermore, it adopted legal instruments aimed at the regulation of online intermediaries and digital markets – the Digital Services Act[14] and Digital Markets Act.[15] It also amended the Product Liability Directive 85/374/EEC and is in the process of adopting a new instrument, 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). Moreover, it adopted the Cyber Resilience Act[16] aimed at regulating products with digital elements, and the Data Act[17] and Data Governance Act[18] to regulate data flows. As stated above, the EU approach aims at setting a global benchmark in AI regulation. Almada argues that the AI Act, as a central piece of the EU AI regulation, may not achieve the same level of global diffusion due to institutional and political factors specific to the EU, which render it complex and, to a certain degree, impractical (Almada, 2025). They include the complexity of the AI Act itself (144 pages, 113 articles, and 13 annexes), its design based on the EU values (for example, the legislative assessment of risks does not follow any particular methodologies but reflects political judgments about potential harms from AI), and the legal and technological enforcement capacities that might be too expensive to replicate elsewhere.

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[11] OECD. 2019. OECD Principles on Artificial Intelligence. Paris: OECD.

[12] G20. 2019. G20 AI Principles - Osaka Leaders' Declaration.

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

[14] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). Official Journal of the European Union, L 277, 1–102.

[15] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). *Official Journal of the European Union*, L 265, 1–66.

[16] Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828 L, 2024/2847.

[17] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act). *Official Journal of the European Union*, L 2023/2854.

[18] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act). *Official Journal of the European Union*, L 151, 1–44.

The Council of Europe in 2024 adopted the Framework Convention on artificial intelligence and human rights, democracy, and the rule of law. It is the first-ever international, legally binding instrument devoted to AI regulation.[19] Although it was subject to criticism, the treaty is a step in the right direction as it recognises a need to regulate AI beyond national law, a point which is impossible to neglect in the long term, provided AI is to remain safe for humans (Villalobos & Maas , 2024).

3. AI LIABILITY

To treat liability for accidents has proved not to be a simple task. In the EU, we could attest to several approaches in the previous years. In 2017, the European Parliament passed the Resolution on Civil Law Rules on Robotics (European Parliament, 2017). Although a non-binding document with various ideas, it contains a peculiar proposal concerning treating AI as a person. However, in 2020, the European Parliament abandoned this idea and passed a Resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). Instead of holding AI liable, it suggested that backend and frontend operators should be jointly and severally liable for AI-caused harm. The EC then introduced a third approach, focusing on revising the outdated 1985 Product Liability Directive and introducing a new AI Liability Directive, which was abandoned in 2025. These significant shifts in the EU's approach to AI liability regulation highlight the complexity of the issue.

Such developments, although seemingly unclear, seem to reject the idea of treating AI as a person. Justifiably so. Several strong arguments can be made against it. The debate on recognising electronic entities as persons was initially sparked by philosophical and ethical considerations regarding the status and nature of humans in modern societies. Introducing electronic persons challenges existing anthropocentric concepts of personhood, which are not designed to accommodate entities like AI (Eidenmüller, 2019). Beyond these philosophical and ethical concerns, even if viewed purely as a liability issue without broader implications, the idea has significant drawbacks.

For an electronic person to be held liable, it must possess a pool of assets to compensate for any damages it causes. The question arises of how these assets would be composed and maintained. Manufacturers, users, or third parties would have to provide the initial funds, along with a mechanism for maintaining them, whether through initial capital or mandatory insurance. If the financial burden of establishing and maintaining these assets falls on manufacturers or users, then the necessity of creating a separate legal entity becomes questionable. After all, insurance coverage can be obtained without granting electronic entities legal personhood. Additionally, the issue remains of whether manufacturers or

[19] So far, the official website of the Convention lists the following signatories: Andorra, Georgia, Iceland, Liechtenstein, Montenegro, Norway, Republic of Moldova, San Marino, Switzerland, United Kingdom, Canada, European Union, Israel, Japan, and the United States of America. According to its provisions, the convention will become effective on the first day of the month following a three-month period after at least five signatories, including three Council of Europe member states, have ratified it. Ratification of some of the signatories is currently pending.

users should bear these costs, as they may find ways to redistribute financial obligations through contractual arrangements, depending on how lawmakers regulate the matter. Most notably, granting AI a personality could serve as a shield for manufacturers, absolving them of responsibility and removing their incentive to minimise risks. The existence of separate assets for an electronic person could function as a liability cap for those required to provide them. For manufacturers, this legal framework could create an opportunity for negligent practices, as they would have limited or no liability, reducing their motivation to ensure product safety. Moreover, holding an AI system liable may not lead to improvements in its performance, since its ability to learn and enhance itself depends on pre-set software (Wagner, 2019). As a result, the deterrent effect of the liability system, intended to prevent harm, would not be achieved (Muftić, 2021).

To this day, general rules on criminal and civil liability apply to incidents involving AI systems, in which case the liability is placed with the operator or owner of the device (Eager *et al.*, 2020). However, AI is not just a product that is manufactured and that will keep its properties. It is designed to evolve. A long time ago, the AI was actually considered a legal entity, like a company. Jurists in the 18th and 19th centuries gave the following definition of legal persons: "it has been found necessary, when it is the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality" (Blackstone, 1809, p. 467). Blackstone calls such artificial persons "bodies politic, bodies corporate, (*corpora corporata*) or corporations." (Blackstone, 1809, p. 467). The so-called fictionalists, led by Friedrich Carl von Savigny and Roman scholars, claimed that legal persons are artificial constructs, created by law and dependent on the individuals composing them. It sounds familiar when we now think of AI in those terms. Contrary to those arguments, Maitland and Gierke stated companies are "…as real and natural as is the personality of man' (Maitland, 1900, pp. 335–336; Gierke, 1873). The theory they advocated is called entity theory and dominated legal discussions from roughly 1900 to 1930. According to entity theorists, companies have a will, and their will is a group will (Gierke, 1873). This view was significantly diluted by second-generation entity theorists such as Dewey, who emphasised that Gierkes's "person" signifies a right-and-duty-bearing unit. In order for this unit to be given the rights and obligations of a legal person, it must produce consequences (Dewey, 1925). According to this definition, we could make the case that AI is a right-and-duty-bearing unit that produces consequences.

Authors such as Horwitz (1992) and Millon (1990) emphasised that entity theory legitimated the rise of big business in the early 20th century. This holds much truth if we look back on what the entity theory promotes. If the entity is a person in itself with its own rights and obligations, then it is also liable for its actions. Meaning that its shareholders limit their liability to the amount of their stake. Using analogy, if AI were to be given legal personality, the liability of its owners and operators could be limited to their regular duty of care (through regular insurance for products).

Only in exceptional circumstances (of misuse or abuse) could this liability be expanded through the piercing the veil doctrine, and the owner or operator could bear unlimited personal liability for damages that occurred. Therefore, granting AI legal personality is

theoretically feasible, as non-human entities have previously been granted such status, most notably in the case of corporations and the Whanganui River in New Zealand. Should foreign legislation evolve to grant AI legal personhood, it would be worthwhile to analyse the potential impact such developments could have on corporate law in terms of the formation of companies, shareholder rights, and liabilities. With current legislation in place, AI liability in terms of company law should be approached through an extension of liability of persons with special duties towards the company (in terms of managers), or through the piercing of the corporate veil doctrine (in terms of shareholders and owners). Liability of the management for harm of AI could be placed under the duty of care doctrine. The manager would need to prove that he did everything reasonable to prevent harm to the AI. Various scholars (Lepetić, 2024; Voeneky *et al*., 2022) have identified which mitigating circumstances a director could bring forward in a trial to prove that he acted with duty of care when performing his duties assisted by AI.

4. NOTEWORTHY DISCUSSIONS ON AI LIABILITY IN COMPANY LAW

As of today, there is no fully autonomous AI system known to perform as a director of a company (Petrin, 2024; Bainbridge, 2017). This is even the least realistic scenario for the use of AI, and there are other challenges that need to be addressed, according to Lepetić (2024). However, the EC published a study on the use of AI by companies, to advance knowledge of how businesses, shareholders, creditors, government agencies, and other individuals use AI in company law and corporate governance, in which it predicts that it may be possible in the future to introduce AI as a member to the board (European Commission, Directorate-General for Justice and Consumers, 2021). The probability of AI becoming a director is far-fetched because AI is neither a legal nor a natural person, to which the Directive (EU) 2017/1132 on Certain Aspects of Company Law systematically refers.[20] AI has no legal personality (under European and/or national laws). In a report issued by the European Parliament (EP), the Commission on Civil Law Rules on Robotics discusses the potential for granting robots a particular legal status in the future by applying electronic personality to situations in which they decide on their own or engage in other independent interactions with third parties. Although no Member State's law explicitly prohibits it, the use of AI to replace natural or legal persons in corporate appointments is not possible. Whenever a law refers to a legal subject with the authority to decide or enter into agreements, it only refers to a natural person or a legal entity in line with the fundamental principles of national laws. Using AI as a support tool in management activities is implicitly permitted (European Commission, Directorate-General for Justice and Consumers, 2021; Hickman & Petrin, 2021). This conclusion appears to be supported by the reviewed literature, which states that directors are not inherently barred from using AI in assigning decision-making authority. Using the general principles that underpin board delegation to executives and committees as an example, Möslein (2018) concludes that such delegation is permitted under current company law frameworks, but comes

[20] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 Relating to Certain Aspects of Company Law.

with two main requirements: (i) that the decisions and responsibilities that form the core of the management function (such as defining and overseeing corporate strategy) remain with human directors, and (ii) that directors supervise the selection and use of AI tools, which causes that they possess at least a basic understanding of how the particular AI tools work. Lepetić also makes a point that engaging AI consultants or executive directors specialised in AI systems could bridge the AI knowledge gap of directors. But who is liable when the director implements a decision based on an AI recommendation, or declines a decision despite it? Existing director responsibilities and liabilities in the Member States do not appear to be affected by the use of AI as an assisting tool in decision-making. Directors are held accountable for failing to uphold their fiduciary duties (duty of care) (Gerner-Beuerle, Paech & Schuster , 2013). In order to avoid additional risks, companies must address the relevant provisions of the EU AI Act.[21] Through implementing strong risk management procedures and transparent reporting, companies may successfully negotiate the new regulatory landscape as laid down in Chapters I and II of the AI Act. AI does not have human consciousness. It cannot function without human beings, but what if it becomes so advanced that it can? If and when machine learning develops so much so that AI can demonstrate decision-making processes, who will be liable for decisions made by the machine within a company? Authors such as Cheong (2021) and Bryson *et al*. (2017) have discussed ideas that the board of the future could consist of an AI Director, but also ideas on the incorporation of AI within company law, and ideas on limited liability. In this context, Cheong suggested the AI could be incorporated like a company is incorporated, with given information such as the registration number and who the owners (and or shareholders) of the AI are. In this scenario, like with companies, the owners or shareholders of the AI would request limited liability, because they would not want to be held responsible for the acts of a fully autonomous artificial intelligence being. Similarly with companies, arguments against limited liability related to moral hazard, could apply to this scenario. There are cases in which companies were misused by their owners for illicit purposes. Similarly, this can happen with AI technology. For example, AI Directors could be abused by natural persons, who could use the newly established company as a facade to avoid non-compete clauses.[22] If AI would be granted legal personhood in the future, the tests performed by courts in order to identify whether the piercing of the corporate veil doctrine can be applied or not could serve as a starting point for the development of an AI liability doctrine.

[21] AI Act.

[22] A similar situation arose in *Gilford Motor Co v Horne*, where a former employee attempted to circumvent a restrictive covenant by incorporating a new company to conduct the same business as his previous employer. The court held that the newly formed company was a sham, created with the intent to pursue an unlawful objective.

5. DISCUSSIONS ON AI IN B&H COMPANY LAW

Unfortunately, Bosnia and Herzegovina, unlike its neighbors[23], has not adopted a national strategy on the use of AI. In terms of digitalisation, as a EU candidate country[24] it is required to integrate existing EU legislation into the relevant national law. The company law *acquis* comprises regulations pertaining to the establishment, registration, merger, and division of companies. Consequently, it is of paramount importance to comprehend the challenges confronting Member States related to digitalisation and the usage of AI in company law.

The Company Laws[25] in Bosnia and Herzegovina (further in text B&H) state that a company is a legal entity that independently engages in the production and sale of goods and the provision of services in the market for the purpose of generating profit. It may be established by both domestic and foreign natural and legal persons unless otherwise provided by law (Law on Companies of FB&H, Art. 2, 302). In that respect, and since AI is not a natural or legal person, it is to be concluded that the laws of B&H do not foresee the possibility of AI systems to independently establish a company. However, the law opens a door in that respect since a foreign legal person can establish a company in B&H. In terms of digitalisation processes relating to the establishment of limited liability companies, B&H has harmonised its legislation with Directive (EU) 2017/1132 on Certain Aspects of Company Law and Directive (EU) 2019/1151 on the use of digital tools and procedures in company law. The legal framework encompasses the provision of services at a unified virtual location within the registration process prior to the competent registry court, employing technical methodologies that utilise qualified electronic certificates for the identification of the applicant and the legally valid signing of documents in electronic document form.[26] This system could be enhanced in the future with AI by providing users with options for company names, or checking documentation for clerical errors before submission, checking directors, shareholders and persons with significant control, etc. Although Bosnia and Herzegovina has harmonised its company law with Directive (EU)

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[23] I.e. Serbia and Croatia: Artificial Intelligence Development Strategy in the Republic of Serbia for the Period 2020–2025.; Croatia's Digital Strategy for the period up to 2023.

[24] Directorate-General for Neighbourhood and Enlargement Negotiations, Bosnia and Herzegovina Report. 2024. Available at: https://enlargement.ec.europa.eu/bosnia-and-herzegovina-report-2024_en#-details (3. 3. 2025).

[25] The laws are: Law on Companies of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 81/2015 and 75/2021; Law on Companies of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019, and 17/2023; Law on Enterprises of the Brčko District of Bosnia and Herzegovina – Consolidated Text, *Official Gazette of the Brčko District of Bosnia and Herzegovina*, no. 49/11 and 01-02-815/20. For the purpose of this article, authors will provide a focused analysis on the Law on Companies of the Federation of Bosnia and Herzegovina, no. 81/2015 and 75/2021.

[26] Rulebook on the Content, Form, and Method of Completing the Registration Application, as well as the Conditions and Procedure for Electronic Business Registration in the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 34/24; Regulation on Maintaining the Business Register in the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 93/2023 and 33/2024.

2019/1151, the online formation of limited liability companies is still in its pilot phase (Hasanović, 2024). The owner is still required to sign the documents, and the signature must be authenticated at the municipality or by a notary. Regarding the appointment of directors, members of supervisory bodies, in joint stock companies and limited liability companies, the law explicitly states that they must be natural persons with full legal capacity (Grbo, 2017). The company is represented by the members of the management board, who are primarily bound by the restrictions imposed by the Articles of Association and the applicable mandatory law. The representative of a company may delegate its powers (considering applicable limitations) by giving proxy to another person. A shareholder of a joint stock company may exercise the right to take part in the work and decision-making of the general assembly of a joint-stock company, either personally or through a proxy. In addition to any legally competent natural person, a proxy may be a legal entity registered for brokerage in the trading of securities or an association with the status of a legal entity established and registered for the purpose of associating and representing shareholders, in which cases the powers under the proxy are exercised by the legal or authorised representative of such a legal entity.[27] Similarly to the process of company formation, this provision might pave the way for AI-driven shareholder engagement — for instance, if AI were to be granted legal entity status, or if the creation of AI-managed legal entities became a legal possibility. The Company Laws also provide for the possibility of engagement of a legal entity for audit services of joint stock companies, which, in the future, if that would be an AI led company, could provide for the possibility of full AI audit services. Members of the management board, the president and members of the supervisory board, legal representatives, and authorised signatories are persons with special duties towards the company (Company Law FBiH, art 32) and they must perform their tasks with due care and diligence of a prudent businessperson (Grbo, 2016). Because of this provision, even though the use of AI as an assisting tool in decision-making is not forbidden, it does not exempt persons with special duties toward the company, of liability.

To conclude, in Bosnia and Herzegovina AI cannot replace a director, or the board of a company for that matter, but there are no regulatory restrictions in using AI as a support tool in management activities. Company Laws provide for additional security through an article that defines persons who have special duties toward the company as they must perform their duties diligently, with the care of a prudent businessperson, and in the reasonable belief that they are acting in the best interest of the company. The principle of appropriate management of the company is a standard that enhances the accountability of those in charge of running it.

If AI is granted legal personhood and limited liability, the owners and shareholders of the AI could be held responsible under the piercing the corporate veil doctrine. However, in the situation in which management and the board use AI as an "assistant" the doctrines of duty of care, and piercing the corporate veil, can inspire partial AI liability doctrines. Although company laws in Bosnia and Herzegovina do not have a definition of "piercing

[27] Article 238 Law on Companies of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 81/2015 and 75/2021.

the corporate veil", article 5 of the Company law of the Federation of B&H states that the veil of limited liability of a company will be lifted if the owner or shareholders:

1. abuse the company to achieve a personal goal that is not in accordance with the goals of other members and the company as a whole;
2. manage the company's assets as their own;
3. use the company to defraud or damage its creditors;
4. influence the reduction of the company's assets for their own benefit or the benefit of third parties, or influence the company to assume obligations even though they knew or should have known that the company was not or would not be able to fulfil its obligations (Company Law of FB&H, art. 5).

The law has established that the shareholder will be held accountable if using the corporate form of a company for illicit purposes. Similarly, we could establish the same for using AI in the company (or in general) for illicit or discriminatory purposes. The central question regarding using AI in companies should be, did the human actors (managers, shareholders and owners) in the company:

1. act reasonably and with the duty of care in using the technology?
2. abuse the AI to achieve a personal goal or gain?
3. use the AI to defraud or damage its creditors?

The first question is related to the management of the company. In order to prove the duty of care, the management of the company should have in place a policy for the usage of AI in its corporate structure. This policy should have guidelines on the use of AI, permissible and impermissible conduct, and quality control procedures with the firm. The management's duty of care in using AI includes the responsibility to ensure that the company has established a clear policy and guidelines on the ethical use of AI in its corporate activities. Has the manager who is using AI as an assisting tool, educated himself about the technology, has the technology performed well in similar circumstances or not, has the manager acted in the companies best interest (with the care of a prudent businessperson), etc.

The second question relates to the shareholders and owners of the company. Have they abused AI to achieve personal goals or gains that are contrary to the goals of other members and the company as a whole, for example, if the management has misused AI for discriminatory practices in the hiring process or evaluation of employees? Or have they used AI for illicit purposes, to defraud creditors, for example, if AI is used in the banking industry to cover up fraud instead of detecting it?

Addressing these questions is critical when assessing the liability of managers, shareholders, and company owners and determining their level of care and/or misconduct in a given case. State company laws must evolve to address scenarios where AI has been misused by managers or shareholders. This evolution is necessary to either shield them from expanded liability or to establish safeguards against the misuse of AI.

6. CONCLUSION

Bosnia and Herzegovina continuously tries to keep up with EU standards and trends regarding company law and digitalisation of its processes. Whether it is an online formation of companies or corporate governance, Bosnia and Herzegovina attempts to offer a favourable business environment. AI has entered the business spheres worldwide, offering new insight and opportunities for a more efficient doing business. This article has provided an overview of potential liability implication of AI to company law, focusing specially on the company law of Bosnia and Herzegovina. AI is inevitably going to change the legal landscape across sectors and companies will not remain untouched. Businesses are under continuing pressure to innovate and technological advances provide a mechanism for maximising efficiency, accuracy, and profitability. AI can aid the company's management and shareholders and it has already been recognised worldwide. Companies employ AI to perform various tasks. Likewise, harm related to activities in which AI was involved is inevitable and it requires attention. To determine how to approach it, we should understand fundamental tenets on of the company law and the rules of liability. Companies should also develop internal strategies and compliance mechanisms on the use of AI within their business, in order to inform their managers and shareholders on ethical, legal and professional standards that have to be accommodated throughout the use of AI. Legislators should provide clear liability guidelines so that managers, shareholders and owners can be protected and encouraged to use the technology freely. However, certain protection mechanisms and quality control should become a requirement for companies that are using AI in business operations in order to protect them from its potential negative affects.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch5

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DAVID'S SOVEREIGNTY VS. GOLIATH'S CENTRALISATION REGARDING CBDCS IN THE EU

The regulation of blockchain technology highlights a critical tension between centralised systems, such as Central Bank Digital Currencies (CBDCs), and decentralised cryptocurrencies like Bitcoin. This paper explores the ongoing "David versus Goliath" struggle, where decentralised actors—citizens, small enterprises, and sovereign states—advocate for regulatory frameworks that protect national sovereignty and local autonomy, while centralised authorities, such as the European Union, push for harmonised legal structures that prioritise centralisation. By analysing the evolving legal landscape, this study examines how regulation impacts innovation, financial sovereignty, and the preservation of national authority, offering insights into the future of blockchain governance in public and private law.

Keywords: blockchain regulation, Central Bank Digital Currencies (CBDCs), decentralisation, national sovereignty, technology.

1. INTRODUCTION: SITUATING THE EU'S FINANCIAL REGULATORY AMBITIONS AND NATIONAL AUTONOMY

The relationship between national sovereignty and EU governance has grown increasingly complex. While EU institutions aim to harmonise regulations for financial stability, consumer protection, and market efficiency, Member States like Hungary, Poland, Estonia, and Malta have asserted their right to legislate independently in areas such as fiscal policy, digital innovation, and economic governance (Bénétreau-Dupin, 2021; Dobrzeniecki, 2020). This tension pits smaller nations, seeking to preserve policy autonomy, against EU efforts to standardise regulations across all Member States.

Hungarian Prime Minister Viktor Orbán has framed this conflict as a "David versus Goliath" struggle, portraying Hungary as resisting EU overreach (Orbán, 2017–2018). This

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narrative reflects broader critiques of EU policies, where uniform directives are undermining the sovereign right of Member States to adapt legislation to local context. For proponents of decentralisation, this is not just an economic or political issue, but a matter of national identity.

The rise of blockchain technology and decentralised finance (DeFi) has added complexity. Blockchain-based financial instruments enable economic activities that bypass traditional oversight (Werbach, 2018). For some countries, these technologies offer a way to advance financial services without EU-level regulation. However, Brussels views uniform standards for digital assets as essential to protect market integrity and consumers (European Commission, 2020). The proposed Markets in Crypto-Assets (MiCA) Regulation exemplifies this for EU-wide oversight, sparking debate among Member States that flexible regulations foster blockchain innovation (Hendrickson, 2019). Critics argue that such frameworks could limit innovation and the ability of smaller states to compete in emerging sectors.

The European Central Bank's (ECB) plans for a Digital Euro have heightened sovereignty concerns. Critics argue that a central bank digital currency (CBDC) could limit national monetary authorities' control over domestic money supply and undermine distinct policies (ECB, 2021; Gabor & Ban, 2022). This aligns with Hungary and Poland's broader resistance to EU encroachment in areas like migration, judicial independence, and financial regulation (Hungarian Government, 2020). For these states, the Digital Euro symbolises a trend toward centralising power in Brussels, threatening economic discretion.

This study explores how Member States can preserve sovereignty and regulatory autonomy amid EU harmonisation pressures. While figures like Orbán dramatise the power imbalance, the underlying conflict reflects long-standing debates about authority in a diverse union (Fabbrini, 2019). By examining the interplay between national autonomy, technological innovation, and EU governance, this analysis sheds light on the legal and economic dynamics shaping Europe.

2. GOLIATH'S STRATEGY: THE EU'S PUSH FOR CENTRALISATION THROUGH FINANCIAL REGULATION

The EU's pursuit of uniform financial oversight and regulatory convergence is central to its integration project, aiming for a seamless single market (Chalmers, Davies & Monti, 2019; European Parliament, 2021). Framed as enhancing consumer protection and systemic stability, harmonised rules aim to boost investment trust and reduce regulatory arbitrage risks (European Commission, 2020). For smaller Member States, whose economic profiles differ from larger economies, this centralisation can challenge national sovereignty (Hendrickson, 2019).

Key initiatives include the proposed crypto-asset regulatory framework, which seeks uniform rules for licensing, custody, and market conduct (Armstrong, 2021). By limiting Member States' ability to adopt tailored regimes, the EU aims to create predictability for cross-border transactions at the cost of local innovation (Ferran, 2012; Werbach, 2018).

The European Central Bank's (ECB) plans for a Digital Euro further exemplify centralisation (ECB, 2021). Proponents argue it would streamline cross-border payments, reduce costs, and enhance financial inclusion (Kumhof & Noone, 2018). Critics, however, warn it could undermine national central banks' autonomy, particularly in states like Hungary and Poland that resist deeper monetary integration (Gabor & Ban, 2022; Hungarian Government, 2020). The Digital Euro also raises questions about EU overreach in domestic infrastructure and Member States' regulatory independence.

EU law's supremacy provides Brussels with a legal basis to shape national legislation (Craig & de Búrca, 2020). While this ensures uniform regulation within the single market, it sparks tensions in areas tied to national identity or domestic economics (Fabbrini, 2019). Disputes over judicial reforms in some Member States highlight potential conflicts as the EU expands its influence over fintech (Dobrzeniecki, 2020).

In sum, while unified policies promise market integration and standards, they also reveal enduring tensions between supranational governance and local autonomy.

2.1. MiCA – The Weapon of Regulatory Uniformity

The proposal for a Markets in Crypto-Assets (MiCA) Regulation is part of the European Commission's pursuit of financial harmonisation in the digital asset sphere (European Commission, 2020). At its core, MiCA seeks to create a uniform legal framework for crypto-asset issuance and provision, aiming to bolster consumer confidence, minimise cross-border disparities, and mitigate systemic risks. By specifying rules on licensing, custody, and oversight, the Regulation strives to reduce national divergences, enhancing predictability and efficiency across the single market (Armstrong, 2021).

However, this uniform approach prompts concerns in smaller EU Member States, which historically leveraged flexible policy environments to nurture blockchain entrepreneurship. Estonia, for instance, has played a pioneering role in advancing digital governance through initiatives like its e-Residency program—an innovation that enabled global entrepreneurs to establish and manage companies online with minimal bureaucratic barriers. Moreover, Estonian authorities initially adopted relatively accommodative policies toward crypto-related businesses, making it easier for start-ups to test novel products and attract international investments.

Under MiCA's standardised requirements, these nationally tailored frameworks face stricter oversight and greater compliance obligations, potentially limiting the scope for experimentation in areas like token issuance, digital identity solutions, and cross-border fintech services. Critics argue this shift might deter smaller firms or start-ups that once benefited from Estonia's pragmatic blend of digital infrastructure, light-touch regulation, and global e-accessibility. With the Regulation now setting uniform conditions across the EU, Estonia and other similarly positioned jurisdictions risk losing the competitive edge they once held, revealing the inherent tension between a supranational drive for coherence and the preservation of local innovation ecosystems.

2.2. The Digital Euro: A Direct Threat to National Financial Independence

The European Central Bank's (ECB) initiative to introduce a Digital Euro is central to modernising and harmonising EU monetary systems (ECB, 2021). Proponents argue that a central bank digital currency (CBDC) could enhance payment efficiency, reduce transaction costs, and lessen reliance on private digital currencies (Kumhof & Noone, 2018). The Deutsche Bundesbank suggests that a well-designed Digital Euro could foster innovation while maintaining single market integrity (Deutsche Bundesbank, 2021), positioning it as a milestone in monetary integration.

However, the implications for national monetary autonomy are significant. Critics warn that widespread adoption could undermine Member States' ability to use traditional monetary policy tools, particularly for those with independent currencies or distinct macroeconomic goals (Gabor & Ban, 2022). Hungary's Magyar Nemzeti Bank (MNB) has expressed concerns that the Digital Euro could reduce domestic central banks' influence by shifting core functions to a supranational entity (MNB, 2020). Similarly, Poland highlights risks to local banking services and financial sovereignty, preferring nationally tailored frameworks (Dobrzeniecki, 2020).

These tensions reflect a broader conflict between EU financial integration and Member State autonomy. While the ECB envisions the Digital Euro complementing existing payment systems, critics argue it represents a step toward deeper monetary federalisation without adequate national democratic oversight (Bundesministerium der Finanzen, 2021). The debate centres on governance: who controls monetary policy?

In sum, while the Digital Euro promises efficiency and uniformity, it challenges national financial independence, particularly for states resisting sovereignty relinquishment in economic domains. This tension highlights the EU's use of technology to drive integration, testing the balance between centralisation and Member State autonomy (Gáspár, Szívós & Bujtár, 2021).

2.3. The Legal Precedent: How the EU Uses Law to Override National Sovereignty

Beyond financial regulation, the EU relies on a legal framework to ensure the primacy of its directives. Central to this is the supremacy of EU law, established by the Court of Justice of the European Union (CJEU), which prioritises Union-level rules over national statutes in conflicts (Tridimas, 2019). When adopting legislation— whether in financial oversight, consumer protection, or market harmonisation — EU institutions impose binding obligations on Member States, limiting their policy autonomy (Kochenov, 2016).

This legal hierarchy is rooted in the Treaties—the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) — which grant the EU regulatory competences and empower the CJEU to resolve disputes (Craig & de Búrca, 2020). These mechanisms have historically enforced compliance, even in areas Member States consider central to sovereignty. Critics argue this framework disproportionately affects smaller states, which lack the resources to challenge EU mandates (Kelemen, 2019).

This dynamic extends to emerging fields like crypto-assets and CBDCs, where legal supremacy shapes the scope and enforcement of new directives. While proponents stress

cohesive rules to protect the single market, critics warn that applying EU legal supremacy in nascent areas risks stifling innovation and undermining local democratic processes (Kochenov, 2016). Ultimately, the EU's legal mechanisms highlight power imbalances between Brussels and smaller Member States striving to preserve domestic governance.

3. DAVID'S RESISTANCE: BALANCING NATIONAL AUTONOMY WITH EU SUPREMACY

The principle of European Union legal supremacy, which grants EU legislation priority over conflicting national laws, shapes the ongoing dynamic between centralised harmonisation and local autonomy (Weatherill, 2017). While centralisation—frequently characterised as the "Goliath" strategy — seeks to align financial regulations, enhance consumer protection, and prevent regulatory arbitrage, a series of "David" responses has emerged among Member States and non-member actors wishing to safeguard constitutional values and customized legal frameworks. These responses underscore a key tension in the EU's integrative processes: even as harmonized directives aspire to uniform standards across the single market, the drive for sovereignty ensures that local identity and regulatory creativity remain resilient forces.

3.1. Constitutional Defences in Hungary and Poland

Hungary and Poland illustrate how constitutional clauses can serve as effective barriers against what governments perceive as excessive EU intervention. In Hungary, Article R of the Fundamental Law (2011) explicitly declares that the Constitution shall be the supreme law, a principle used by the Hungarian Constitutional Court to emphasise "constitutional identity" when contesting EU measures related to judicial independence, migration policy, and other sensitive issues (Halmai, 2019). By invoking this concept of identity, Hungary positions its domestic legal order as possessing inherent limits to EU influence.

Poland follows a parallel trajectory. Although Poland acknowledges the principle of conferral under Article 5 of the Treaty on European Union (TEU), its Constitutional Tribunal has, on multiple occasions, ruled that EU mandates may not override fundamental elements of the Polish Constitution (Koncewicz, 2018). Recent disputes — ranging from judicial reforms to the potential introduction of a Digital Euro — reflect Warsaw's apprehension about ceding essential components of sovereignty, especially those connected to Articles 2 and 227 of the Polish Constitution, which govern the remit of the National Bank of Poland (Dobrzeniecki, 2020).

Beyond constitutional arguments, both Hungary and Poland employ sector-specific regulations to assert local oversight. Hungarian lawmakers have adopted statutes prioritizing domestic control over capital markets (Hungarian Government, 2020). Poland's Financial Supervision Authority (KNF), meanwhile, interprets consumer protection and market stability obligations rooted in Article 169 TFEU according to Polish legal traditions. Though critics argue such strategies compromise the uniformity of the single market, supporters contend they are crucial for defending constitutional values and maintaining democratic control.

3.2. Small EU Nations Leading in Blockchain Innovation

While Hungary and Poland primarily assert sovereignty via constitutional mechanisms, smaller EU Member States such as Malta and Estonia illustrate an alternative approach anchored in specialized legislation. Malta's Virtual Financial Assets Act (2018) provides a noteworthy example: by designing a national legal framework for crypto-asset issuance and trading, Malta became a fintech and blockchain hub (Franke, 2019). Citing subsidiarity under Article 5 TEU, Maltese authorities justified their deviation from broader EU guidelines, fostering an environment that attracted international entrepreneurs and venture capital.

Estonia employs a similarly nimble framework, integrating domestic e-governance laws and EU directives to facilitate digital market innovation. Through its e-Residency program, established under Estonian legislation, foreign entrepreneurs can access various government services remotely (Kalvet & Tiits, 2020). This model, which operates under the discretion permitted by Article 114 TFEU, reveals how smaller states can leverage their legislative autonomy to develop pioneering digital economies.

However, the proposed Markets in Crypto-Assets (MiCA) Regulation now illustrates the delicate balance between EU-led unification and national experimentation (European Commission, 2020). Should MiCA leave limited leeway for Member State-specific provisions, it could override the distinctive regimes that enabled Malta and Estonia to position themselves as blockchain frontrunners. Proponents of a standardized EU framework argue that MiCA will enhance overall market stability and consumer confidence across borders, whereas detractors warn that constrained flexibility may hinder further innovation within specialized niches.

3.3 .Integrating Perspectives: Sovereignty's Enduring Role

Taken collectively, these "David" strategies — ranging from constitutional invocations in Hungary and Poland to innovative regulatory frameworks in Malta, Estonia, and even non-member Switzerland—reveal how national autonomy can persist and adapt in the face of supranational harmonization. Although the EU's legal supremacy anchors a cohesive approach to market regulation, constitutional safeguards and sector-focused legislation enable smaller states to assert control over key economic and cultural domains. This interplay underscores the dual potential of centralization: on one hand, it fosters consumer protection and reduces cross-border inconsistencies; on the other, it can constrain local creativity and clash with deeply rooted constitutional identities.

Ultimately, sovereignty continues to exert a potent influence on how Member States and external actors navigate the integration project. Despite the strength of EU institutions and the drive toward uniform standards, local democratic processes, constitutional obligations, and innovative market approaches are not easily subsumed. These resistance strategies highlight that even a powerful "Goliath" of harmonization must reconcile its ambitions with the diverse identities and priorities of Europe's many "Davids." In that sense, sovereignty retains its vital relevance, ensuring that the EU's centralized efforts must continually accommodate a complex mosaic of national interests and legal frameworks.

4. CAN DAVID HOLD THE LINE? CHARTING THE FUTURE OF SOVEREIGNTY AND EU CENTRALISATION

The EU navigates a complex balance between financial integration and national sovereignty. As initiatives like the Digital Euro and Markets in Crypto-Assets (MiCA) Regulation advance, smaller nations risk losing regulatory autonomy. This tension shapes legal frameworks, political discourse, and technological innovation, with resistance hinging on the EU's ability to balance cohesion and decentralised innovation.

EU law supremacy enables Brussels to override national legislation (Weatherill, 2017), ensuring consumer protection but sparking sovereignty disputes. Hungary and Poland invoke constitutional identity clauses to challenge EU mandates, while fintech hubs like Malta and Estonia face pressure to align with harmonisation (Zetzsche *et al*., 2020; Kalvet & Tiits, 2020).

Comparative models highlight governance trade-offs. Russia's Digital Ruble reflects centralised financial control (Bank of Russia, 2021), while the U.S. system, shaped by fragmented oversight, fosters market-driven growth but risks incoherence (Nelson & Sciarrino, 2021).

Within the EU, adaptive policies offer solutions. Lithuania's regulatory sandbox supports fintech innovation under controlled conditions (Bank of Lithuania, 2020), while Portugal's tax incentives and Malta's licensing frameworks attract investment while adhering to EU rules (European Commission, 2021). The Pan-European Blockchain Regulatory Sandbox reflects EU efforts to balance standardisation with flexibility (European Blockchain Partnership, 2022).

Yet, balancing local autonomy with EU-wide standards remains critical. Over-fragmentation may weaken consumer protection, while excessive centralisation risks stifling innovation. Moving forward, four key factors will shape financial governance:

1. Legal adaptability – EU regulations must evolve with digital finance.
2. Proportionality and subsidiarity – National discretion should be allowed where full harmonisation is unnecessary.
3. Collaborative governance – Engaging stakeholders improves compliance and innovation.
4. Global coordination – The EU must remain competitive while maintaining its distinct regulatory framework.

Ultimately, integrating sovereignty and harmonisation through adaptive policies will allow the EU to lead in digital financial regulation.

5. RECOMMENDATIONS FOR LAWMAKERS: BALANCING INTEGRATION AND SOVEREIGNTY

To reconcile financial integration with national autonomy, EU and Member State lawmakers should consider the following principles when shaping future regulations:

5.1. Differentiated Harmonisation

Adopt a tiered approach to regulation, where core consumer protections and systemic stability rules are standardised EU-wide, while allowing flexibility for national innovation regimes (Zetzsche *et al*., 2020). Malta's sector-specific licensing under the Virtual Financial Assets Act (Franke, 2019) demonstrates how tailored frameworks can coexist with broader integration goals.

5.2. Subsidiarity-Driven Sandboxes

Expand regulatory sandboxes (e.g., Lithuania's model) to test localised fintech solutions before EU-wide adoption (Bank of Lithuania, 2020). This aligns with Article 5 TEU while mitigating fragmentation risks.

5.3. Constitutional Safeguard Clauses

Formalise exceptions for national constitutional identities (e.g., Hungary's Article R) in financial regulations, as proposed by Halmai (2019), but with clear EU oversight to prevent abuse.

5.4. Dynamic Review Mechanisms

Implement sunset clauses and periodic reviews for centralised regulations like MiCA to assess their impact on innovation (European Commission, 2020). This mirrors the adaptive approach of Switzerland's FINMA guidelines (FINMA, 2019).

5.5. Sovereignty Impact Assessments

Require ex-ante evaluations of how EU proposals affect monetary autonomy, particularly for CBDCs. The ECB's Digital Euro report (ECB, 2021) could incorporate such an analysis based on MNB's (2020) concerns.

5.6. Asymmetric Transition Periods

Grant longer implementation timelines for smaller economies to adapt to unified standards, as seen in Estonia's e-residency phased compliance (Kalvet & Tiits, 2020).

Lawmakers must recognise that sovereignty is not binary but exists on a spectrum. As Gabor & Ban (2022) note, the challenge lies in designing "permeable boundaries" where EU rules enable, rather than replace, national discretion. The proposed measures would institutionalise this balance.

8. CONCLUSION: THE FUTURE OF SOVEREIGNTY IN EUROPE'S FINANCIAL LANDSCAPE

The European Union (EU) faces ongoing tensions between financial integration and national sovereignty. Smaller Member States leverage flexible regulations to foster innovation but risk losing autonomy as harmonisation advances. Meanwhile, Hungary and Poland challenge the EU's legal supremacy, highlighting constitutional limits on integration. Balancing market stability, consumer protection, and regulatory consistency with national diversity remains a challenge.

Comparative cases illustrate contrasting models. Russia's Digital Ruble reflects firm state control over financial innovation (Bank of Russia, 2021), while the U.S. system fosters innovation through decentralized oversight but risks regulatory fragmentation (Nelson & Sciarrino, 2021). For the EU, these examples underscore the need for regulatory balance.

The forthcoming Markets in Crypto-Assets (MiCA) Regulation aims to unify digital finance rules (European Commission, 2020), yet smaller states — Estonia, Malta, and Portugal — seek to preserve competitive regulatory niches. Mechanisms like regulatory sandboxes, specialised licensing, and the Pan-European Blockchain Regulatory Sandbox help reconcile local experimentation with EU-wide consistency (European Blockchain Partnership, 2022).

The future hinges on dialogue, compromise, and subsidiarity. While EU legal supremacy underpins the single market, flexibility in fintech regulation shows adaptability. Responsible innovation and constructive engagement allow Member States to shape a financial framework that aligns domestic priorities with EU-wide stability, ensuring sovereignty and integration remain complementary rather than adversarial.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch6

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STABLECOINS INSTEAD OF DIGITAL DOLLARS?

The Digital Dollar project was launched in the United States in 2020. The study on introducing digital central bank digital currency was primarily motivated by the need to maintain dollar hegemony and increase the speed of remittances. The stablecoin will solve both problems, and data protection and cybersecurity will be the responsibility of the provider rather than the central bank, but it will not allow unwanted access by the state to customer data. Cryptoassets have emerged as a central theme of the 2024 election, in which the U.S. administration aims to make the country a centre of digital development. The two processes have converged on the point that both stablecoins and the digital dollar can ensure the U.S. dollar maintains its role as the leading means of payment. The analysis examines the characteristics of the digital dollar from the perspective of the U.S. financial system, the possible regulation of stablecoins, and the implications of the emergence of stablecoins for the subsequent introduction of the digital dollar.

Keywords: CBDC, digital dollar, stablecoin, payment stablecoin.

1. TYPES OF MODERN MONEY IN THE UNITED STATES

Modern money is considered to be money without intrinsic value, and is therefore also known collectively as fiat money. An instrument with a monetary function must be able to provide three basic functions to fulfil the role of fiat money. This is the function of a means of payment, also known as a medium of exchange, which enables the exchange of value in the economy to take place by inserting money instead of goods. The reserve or treasury instrument is used to store temporary surplus liquidity. Finally, the clearing function allows the determination of the value of each good or service in a given currency as a common and general measure of value.

There are currently three types of money in the U.S. economy: central bank money, commercial bank money, and digital money from non-monetary service providers. Federal

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Reserve money: cash issued by the Federal Reserve and held by commercial banks and service providers that are part of the Federal Reserve's monetary circuit in the accounts of the Federal Reserve. Commercial paper money, which is claims deposited on the accounts of financial institutions and is therefore already a digital form of money (Board of the Governors of The Federal Reserve System, 2022, p. 9). Balances held by non-bank service providers, which can be converted into commercial or central bank money by using a mobile application through an intermediary service provider. The latter are typically fiat money or cryptoasset and crypto wallet providers from fintech and tech providers (Revolut, Wise, GooglePay) or cryptoassets deposited in wallets of crypto trading platforms/ exchanges (Binance.com, Coinbase.com, Kraken.com).

Behind the fiat money and the silver and gold-backed money of the gold money system, there was a centralised operator - the central bank of the country. In contrast, cryptocurrencies based on blockchain, which function partly as digital money: bitcoin, tether, and various altcoins, are operated in a decentralised way by a computer network. Each block is assigned a unique identifier and an encrypted code to act as a means of payment and a medium of exchange for the crypto asset. The clearing instrument function is only periodically implemented for brief periods of time for cryptoassets that fluctuate in a wide price band (high volatility).

Therefore, in order to reduce the high volatility of cryptoassets, a new type of cryptoasset has been created: stablecoins. Like a money market fund with a value close to or equal to a unit asset value, stablecoins can ensure their exchange rate stability by pegging the value of their stable assets to gold, foreign exchange or a portfolio of these assets and by using the proceeds from the sale of the stablecoins to buy hedging instruments gold, foreign exchange or other assets. The function of stablecoin is similar to that of money market funds in the fiat money system. Financial operators who temporarily do not wish to place their free liquid assets in risky assets in money market funds achieve returns at or above the bank deposit rates. The sole role of stablecoin is to provide a safe, predictable point of entry into volatile crypto-assets with almost guaranteed value (see net asset value per share in money market funds) (Bujtár, 2016, pp. 218-220). Unlike shares in money market funds, there is an important tax aspect to the spread of stablecoin, namely that as long as an investment does not leave the world of crypto-assets, the holder does not have to pay tax on the exchange gains generated there. The income thus earned is not taxable until the crypto asset is converted into fiat money by any means. Another important feature of fiat money is that it can handle the time of cross-border money transfers at the same speed as online payments, effectively acting as digital money in the payment instrument function.

2. MAIN TYPES AND CHARACTERISTICS OF DIGITAL BANKNOTES

There are two possible basic types of central bank digital currency: physical tokens, which can be modelled on cryptocurrencies in general, and non-physical accounts, which are modelled in the currently known form of the central bank's instant clearing system. In addition, the third possible type of central bank digital currency is a hybrid of the above two (token and account), which partly has the characteristics of one and partly of the other.

Compared to the current fiat currencies, the paradigm shift would clearly be for token-based digital coins with the characteristics of crypto-assets (blockchain-based). China is committed to the hybrid type (Digital Currency Electronic Payment - DCEP) (Pan, 2021), and the United States and the European Union are also committed to the token type.

Looking at the way money is issued, three types can be distinguished:

a) the central bank, single-tier CBDC,
b) the two-tier CBDC, i.e., central bank and commercial bank (synthetic)
c) and private CBDCs not issued by central banks.

The acceptance of a private cryptocurrency as a central bank digital currency, even if partially controlled by the central bank, may already imply a partial abandonment of monetary policy. In this case, not only would the central bank give up the benefit of printing money (seniorage), but it would also lose the possibility of regulating the money supply (Friedman & Schwartz, 1987, p. 295). This is why the decision of the Marshall Islands in 2018 to introduce as its second official currency a cryptocurrency issued by an independent entity (Haan, 2019) or, as already mentioned, the introduction of bitcoin as the official national currency in September 2021 in El Salvador or April 2022 in the Central African Republic, seemed rather reckless (Wintermeyer, 2021).

In the case of central bank digital currency, centralised according to the technology on which it is issued, in the case of single- and two-tier settlement, a further question is to what extent it should be blockchain-based or just a centralised electronic money, such as e-krona. If a blockchain-based version is chosen, there is also the possibility that only persons designated by the central bank could be the approvers (nodes) of the shared ledger system, so that centralisation can be ensured.

Of the above types, privately issued and single-tier central bank digital currency have clearly been left off the agenda of research on the introduction of CBDCs in some countries. Private issuance would pose excessive risks in the areas of monetary policy and cybersecurity. Single-tier digital money would render the role of the traditional banking system as an intermediary redundant, a process that would be further reinforced by the proliferation of stablecoins, with liquidity for blockchain-based payment systems likely to be provided by stablecoins rather than by bank deposits or money market funds.

2.1. Features of the Digital Dollar

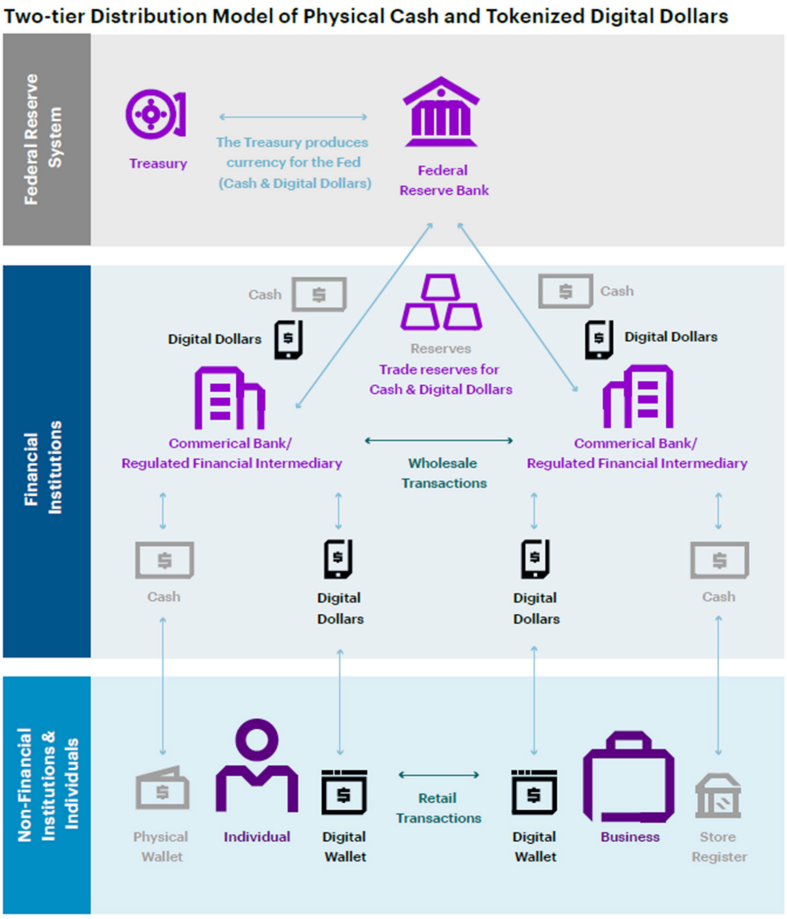
The digital dollar pilot was launched in the U.S. in 2020 as the Digital Dollar Project (Digital Dollar, 2020), coordinated by global financial advisory firm Accenture. Accenture also acts as an advisor to the European Central Bank, the Swedish Central Bank and the Bank of Singapore, and Bank of Canada (2020), which provides a broad insight into the central banks' vision for central bank digital currency in different countries.

In the introduction to the project's white paper, the project identified 4 key objectives for the creation of the digital dollar: a) to support the role of the USD as a global reserve currency, b) to increase time and cost efficiency, c) to provide wider access to central bank money and payment instruments, d) to increase the role of the USD as a cash equivalent in a digital world (Digital Dollar, 2020, p 3).

The project also identified other important aspects for the digital dollar: 1) tokenisation; 2) the use of a financial intermediary system; 3) ensuring data protection for users while respecting the necessary compliance and supervision procedures; 4) the involvement of the private sector; 5) functioning as a new monetary instrument; 6) the openness of the technological solutions in terms of functionality and flexibility in the structures to be created (The Digital, 2020, p. 6).

Based on the above, a digital dollar issued by the U.S. Federal Reserve System with a similar function (token) to paper money would be backed by the full faith and credit of the U.S. government, and would therefore contain the guarantee elements of fiat money from a legal point of view. The digital dollar would be issued by a central bank, which implies that commercial banks and regulated financial intermediaries would be the financial agents performing the circulation and reserve-keeping functions. Retail users and fiat money system operators would be online and offline commercial entities, and the conversion of consumers into fiat money would be carried out through wallet operators. See Figure 1.

Figure № 1.



Source: The Digital Dollar Foundation and Accenture, 2020, p. 9.

In the United States, in addition to the cash payment system, there are instant payment systems that allow financial service providers and all entities to make payments quickly and sometimes net settlement (effectively settling only the difference between bilateral transactions). The wholesale payment system, which is available only to financial service providers, is available to financial institutions with an account with the central bank or other deposit takers, or to U.S. branches of foreign banks. Fedwire, which is owned by the Federal Reserve, is the largest wholesale payment system with about 10,000 members and allows instant net settlement. The CHIPS (Clearing House Interbank Payment System) is a privately owned payment network that also provides net settlement for only 50 members and allows batching of orders for transmission through the Fedwire system.

The NSS (National Settlements Service) is also owned by the FED, but the users in excess of 1,000 are clearing houses and other settlement entities that use it to settle transactions involving multiple counterparties. Consumer and business (retail) payment systems are those that process checks (Check Clearing System), ACH (Automated Clearing House) or wire transfers, privately owned and FED-owned, and finally, privately owned debit card payment systems that clear bank and credit card transactions fall into this category.

These payment systems can process thousands of transactions in a second with high security, so that customers' data cannot be leaked, and the networks are cyber-secure. This is important to underline because it means that a system is already in place at the level of financial service providers, in many cases operated by the central bank, which is secure and, in the case of bank card payment systems, trusted by a very wide range of entities. All this could be a good way of establishing social confidence in introducing a central bank digital currency without the need for a third party (see Fedwire, NSS).

2.2. Advantages and Disadvantages of the Digital Dollar

The 4 main arguments highlighted by the Digital Dollar project are: a) supporting the role of the USD as a global reserve currency, b) increasing time and cost efficiency, c) wider access to central bank money and payment instruments, d) increasing the role of cash in a digitalised world (Radović, 2023, pp. 25-28).

Part of the above is the tokenisation of the digital dollar, which, like cash, supports the maintenance of the dollar's global role, which has declined from 71% (Khan, 2025) to 57.4% (Atlantic Council, 2025) in international reserves, trade and payments settlement since 2001, and provides a real digital alternative to U.S. dollar banknotes in international payments, while keeping a parallel system of them. The token nature could also be a real alternative from a monetary policy perspective, by not only being under the Fed's issuance control but also by enhancing the flexibility of monetary policy by allowing it to deviate from non-interest bearing, maturity-free U.S. paper money, either in terms of interest or maturity (The Digital, 2020, pp. 21, 32). Moreover, all financial service providers within the central bank's scope would be able to issue digital dollars at sector-specific rates, unlike central bank bill money with a uniform interest rate. Another benefit of the digital dollar would be the potential for high mobile phone penetration to provide instant access to 70 million people in the U.S. in a disaster like the COVID-19 epidemic (Klein, 2020).

Interestingly, the Digital Dollar Project highlighted privacy as an important benefit when outlining the balance between consumer privacy and the partial anonymity of the blockchain-based digital dollar and its full availability to central authorities. According to this view, privacy (Digital Dollar, 2020, pp. 20-21) can be ensured even by making digital dollars reportable to the IRS above USD 8,300 and USD 10,000 for cash transactions for individuals and businesses, respectively. The problem, however, is precisely the implementation of digital dollars, which the Boston Federal Reserve and MIT Hamilton project have shown can be implemented in many more types of CBDC than the alternatives under the aspects discussed above (Lovejoy *et al*., 2025).

It is precisely this aspect of citizen privacy that has become such a rallying cry it has been advocated for since Republican Congressman Tom Emmer reintroduced a previous bill in March 2025, the ANTI_CBDC Surveillance Act (CBDC, 2025), to oppose the introduction of the digital dollar in the United States as a CBDC and to prepare for it. However, if we examine why the American Bankers Association's CEO, Rob Nichols, has stated that the disadvantages of central bank digital currency significantly outweigh its advantages (ABA Banking Journal, 2025). This also illustrates the fears that introducing the digital dollar will reduce the role of the intermediary system. Indeed, the introduction of digital money may appear to be a revolutionary change, and, therefore, the fear of its introduction is understandable. Confidence in the financial system can only be built on a well-prepared roll-out campaign following the testing of a solid, robust, scalable digital dollar. Privacy concerns have arisen because of the extensive public access to data used for the digital yuan (Laband, 2022, p. 533), which, based on the Hamilton project's research, is well managed, either by partial data storage or by an external data provider, or by masking the data.

Similar solutions are envisaged by the Bank of Canada (Jiang, 2024, p. 21) for the CBDC when it comes to reconciling privacy and anonymity. Data protection is understood by the Bank of Canada as the shielding of data from all stakeholders (Bank of Canada, 2023). The privacy by design approach is intended to ensure this primacy of privacy considerations in creating the CBDC. Here, however, full protection would result in significant additional costs and less ease of use, so a one-size-fits-all solution has not yet been found. The solutions that have been tested are constant-time, interactive, zero-knowledge proofs relying on a one-way function and asymmetric encryption (Raza, 2023). Therefore, similar to the People's Bank of China (PBOC), the Bank of Canada would not propose identification up to a certain limit. This limit is 500 yuan per payment, 1000 yuan daily, and 10000 yuan monthly for a digital yuan (Ledger Insights, 2021).

It is therefore not surprising that the rapid proliferation of stablecoins (USD 200 billion) in 2024 (mainly USDT and TETHER) has made them a focus of legislation and a kind of alternative to the digital dollar. Furthermore, it is precisely because of their growing weight and macroeconomic risk that the MICA Regulation has become a necessary part of EU legislation.

3. THE DEFINITION OF STABLE FUNDS AND REGULATORY CHALLENGES

The first time that stablecoins came into the focus of legislation was when Facebook's (Meta) LIBRA caused a major scare about a stablecoin linked to a currency basket (Bujtár, 2022, pp. 26-40), and then a second time when the price of FTX's algorithmic stablecoin (De, 2022) collapsed in May 2022 (Corporate Finance Institute, 2022).

And yet stablecoins were created precisely to solve the problem of fluctuating crypto asset prices (Didenko *et al*., 2020, p. 18). By pegging the value of a crypto asset to assets with lower volatility (foreign exchange, foreign exchange baskets, precious metals), they ensure that the significant volatility problem is addressed.

3.1. The Proposal to Regulate Stablecoins in the United States in 2025

In March 2025, three proposals for regulating stablecoins were submitted to the U.S. Congress (Cieplak *et al*., 2025). It is no coincidence that a member of the Board of Governors of the Federal Reserve has already stated in 2021 that a full rulebook (Marte, 2021), i.e., a full banking licence, is unnecessary for stablecoins. The three proposals all aim to regulate payment stablecoins, i.e., stablecoins backed by foreign currency (USD). It is precisely for the above reasons that endogenously collateralised stablecoins (algorithmic stablecoins) are not allowed or are only allowed after a moratorium of 365 days or two years after the law comes into force.

The supervisory body would be the Federal Reserve in the case of the Waters Act only, and the Office of the Comptroller of the Currency (OCC) or the National Credit Union Administration (NCUA) in the other two cases. The Genius Act would authorise federal supervision for assets over $10 billion and state supervision below that amount.

All three bills excluded the possibility of classifying stablecoins as securities or commodities. This was done to exclude the potential supervisory powers of the Securities and Exchange Commission (SEC) and the Commodities and Futures Commission (CFTC). However, the two key safeguarding measures are the monthly reporting requirement on the composition of the liquid portfolio at current par value and the fact that all three bills classify the issuer of stable value securities as a financial institution, which would extend to issuers the immediate reporting requirement of USD 10,000 mentioned above.

4. CONCLUSION OR WHAT EFFECTS THE RISE OF STABLECOINS COULD HAVE ON THE INTRODUCTION OF THE DIGITAL DOLLAR

The rise of stablecoins over the digital dollar is a seemingly surprising turn in the history of blockchain technology regulation in the United States. After all, stablecoins had already been accepted before the legislation was passed, so the legislature was only setting the necessary prudential framework for further growth. From the point of view of the digital dollar, a payment stablecoin could be an excellent catalyst. Privacy concerns could be alleviated, the hegemony of the dollar could be strengthened and a wider segment of the population outside the borders of the United States could adopt a digital dollar-based currency (USD pegged stablecoin), creating the possibility of a successful introduction of a digital dollar based on robust technology by 2028, as the EuropeaCentral Bank envisages for the digital euro.

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CBDC – THE FUTURE OF MONEY?

Central Bank Digital Currencies (CBDCs) hold the potential to renew the centralised financial system while introducing additional risks. Central banks, holding a monopoly on definitive money issuance, can use CBDCs to drive financial reforms and maintain monetary policy efficiency amidst economic innovation. Key factors driving CBDCs include the rise of crypto-assets, the social impacts of COVID-19, and the decline in cash usage. Cryptocurrencies challenge central banks' roles by enabling quasi-instant cross-border payments, prompting a response in the form of CBDCs. CBDCs lack a universally accepted definition, with various interpretations by institutions, and they can be classified based on form, issuer, settlement technology, and accessibility. Over 100 countries are involved in CBDC projects, from research to active implementation. Despite their potential, CBDCs differ significantly from both fiat money and cryptocurrencies in issuance, backing, denomination, and functionality. This research aims to provide information about the new level in the history of money, the potential to fulfil traditional monetary functions, and the definition of CBDCs. snapshot of the legal issues and advancements in CBDC adoption, highlighting key regulatory characteristics worldwide and drawing useful conclusions for both theory and practice.

Keywords: Money, Blockchain, CBCD, Legal Tender, Regulation

1. INTRODUCTION

In the centralized financial system (CeFi system), the money necessary for the functioning of the economy is issued by two institutions: on one hand, the central bank or national bank, and on the other hand, commercial banks. The central bank issues what is known as definitive money, which serves as the legal tender of a country, while commercial banks issue non-definitive money, which essentially represents a depositor's claim to central bank money (portfolio.hu, 2017). In the CeFi system, the central bank holds a monopoly position due to the right to issue money conferred upon it by the state.

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On one hand, CBDC can be a tool for realizing the aforementioned reform efforts targeting the entirety of financial services. On the other hand, CBDC can also be a means for the central bank to maintain its monopoly position and sustain the "matured" efficiency of monetary policy developed over centuries in the hotbed of economic innovation (Bujtár, 2022). This underlying motivation of central banks is reflected in the fact that, prior to the conceptual fixation of CBDC, they showed keen interest in central bank cryptocurrencies (CBCC) (Bech & Garratt, 2017).

There are several factors driving the push for introducing CBDC, and in this case, I would highlight three main external circumstances independent of the central bank. Firstly, the spread of crypto-assets based on distributed ledger technology, the social impacts of the COVID period, and the decline in using cash transactions in the economy. Independently of these factors, the potential applications of digital central bank money had already attracted the attention of several central banks earlier. According to a 2019 report by the Bank for International Settlements (BIS), 70% of the world's central banks are actively exploring the introduction of digital central bank money (Barontini & Holden, 2019).

A 2022 report by the BIS presents the results of a survey conducted in 2021, which reveals that 90% of the world's central banks are now actively interested in the future introduction of digital central bank money (Kosse & Mattei, 2021). Another report from 2023 discusses relevant regulatory perspectives on the ongoing CBDC developments (BIS, 2024). As of May 2024, 134 central banks representing 98% of the world's GDP (Atlantic Council, 2025) were already exploring the possibility of introducing central bank digital currency.

This study aims to present the current advancements of CBDCs globally by showcasing the most successful initial implementations and highlighting the key attributes and legal challenges associated with this form of digital money. It will examine case studies of countries that have made significant progress and explore the regulatory frameworks being established to govern their use. Additionally, the study will address the role of CBDCs in the broader financial ecosystem, providing a comprehensive overview of the state of CBDCs around the world.

2. A BRIEF HISTORY OF MONEY

Throughout history, various goods have been used as a means of purchasing goods and services and paying public dues. Items such as barley or wheat grains in ancient Near Eastern cultures, cowrie shells in the Far East, cattle in medieval Europe, and emergency money printed by the Red Army in Eastern Europe have all served this role. This flexible practice made people less sensitive to the intrinsic value of money, accepting any intermediary that fulfilled the functions of payment, value measurement, wealth storage, and exchange (Szilovics, 2021).

There have been periods where monetary systems were based on money with intrinsic value. In the 7th-6th centuries BC, coins in the Hellenic world were often made of precious metals, and the Roman denarius introduced in 214 BC was minted from silver (Andreau,

1999). However, until the 18th century, even the most developed economies lacked a unified and predictable monetary policy, with the value of coins solely ensured by their gold and silver content. The ruling elite often exploited the economic significance of coinage, leading to a deliberate debasement of national currencies. Only in exceptional moments did some currencies become universally accepted stable measures of value, such as the Byzantine solidus, the Hungarian gold forint, or the British pound.

In the 18th century, monetary policy evolved to ensure the stability of national economies and currencies through precious metals accumulated in banks. The gold standard, introduced in England in 1717, was adopted by European powers in the 19th century, leading to the belief that only money backed by precious metals could be effective. This mindset changed in the mid-20th century, with economist John Maynard Keynes calling the gold standard a "barbarous relic". The end of gold-based monetary systems came on August 15, 1971, when U.S. President Richard Nixon ended the dollar's convertibility into gold (Ferguson, 2019).

The late 20th century saw the renewal of money usage with introducing hybrid or digital currencies, driven by digitalisation, global trade development, and human ingenuity. Cryptocurrencies and CBDCs the latest type of these currencies, have quickly spread for investment purposes. Their creation and acceptance were facilitated by digital advancements and historical monetary practices.

As we are examining the development of money, we see that money initially belonged to the category of real goods as commodity money, whose value was given by the value of the commodity functioning as money. Thanks to its physical properties, utility, and the material, technique, and labour required for its production, commodity money had intrinsic value. Subsequently, money backed by commodities appeared, whose value was given by the trust that the bank issuing the banknote had sufficient backing, meaning it could be exchanged for valuable goods (such as gold) at any time as commodity backing. Although money backed by commodities is worthless in itself, it embodies a claim to a valuable commodity, which lends its value. In the next stage of the development of money, when the commodity backing remained only at the macroeconomic level as general economic backing, money gradually lost its tangible nature, and its physical nature became secondary. Money transformed from a tangible asset belonging to the category of real goods into a financial instrument, which either does not appear in physical form or, if it does, its value is not given by its physical characteristics and production costs. The typical form of money today is account money, which does not have intrinsic value but holds value because members of society trust the given bank, and in a broader context, the safe operation of the entire banking system and economy. Cryptocurrencies represent a novel form of money that relies on digital technology, cryptographic security, and decentralised networks. Their value is primarily based on user trust and the utility they provide within the digital economy.

3. THE MEANING OF CBDCs

Despite strong efforts to regulate CBDCs, there is currently no universally accepted definition of digital central bank money, leading to heterogeneous approaches (Kóczián *et al.*, 2022).

Before examining the definitions, it is important to highlight the key difference between CBDCs and crypto-assets. CBDCs are similar to crypto-assets (especially stablecoins) in that both are digital forms of currency created to be used as a means of payment (Kecskés & Bujtár, 2019). However, the major difference is that crypto-assets are not issued by a central bank, and their purchasing power is not guaranteed by any central bank or centralized authority. This lack of backing contributes to the extreme volatility in the value of crypto-assets. In contrast, CBDCs issued by central banks would essentially represent the digital form of legal tender, with the central bank responsible for ensuring the stability of their purchasing power (Király, 2023).

The BIS definition offers a broad interpretation, viewing CBDCs as a new form of central bank money, which represents a central bank liability denominated in an existing unit of account, fulfilling both the functions of a medium of exchange and a store of value (BIS, 2018). It is worth noting that the BIS Committee on Payments and Market Infrastructures (CPMI) relatively early recognised the long-term transformative potential of digital currencies based on distributed ledger technology on the centralised financial system and financial services (Committee on Payments and Market Infrastructures, 2015). The Reserve Bank of India (2022) considers the BIS definition of digital central bank money as the guiding principle for the Digital Rupee.

The Bank of England defines CBDCs based on four conceptual criteria. According to their approach, CBDCs are characterized by their wider accessibility compared to current central bank deposits, greater efficiency in use for retail transactions compared to cash, operation within a different system than other central bank monies which allows for flexible usage, and the ability to pay interest at a rate different from that of deposits. These criteria highlight the unique features and potential advantages of CBDC over traditional forms of central bank money (Kumhof & Noone, 2018).

The European Central Bank (ECB) uses the following definition for introducing the digital euro as a CBDC: "The term digital euro refers to a liability of the Eurosystem recorded in digital form, complementing cash and central bank deposits". In the ECB's interpretation, the digital euro would be a CBDC usable by the general public — citizens and non-commercial bank enterprises — for retail transactions. This would enable the central bank-managed payment system to be accessible not only to traditional participants, typically commercial banks but also to a broader range of users (European Central Bank, 2022. According to the definition provided by the U.S. Federal Reserve, digital central bank money is a digital form of a claim against the central bank that is accessible to a broad range of citizens (Federal Reserve Board, 2022).

4. COMPARING THE FUNCTIONS OF FIAT MONEY AND CBDCs

For modern currencies to fulfil their role in the economy, they must meet four key monetary functions: serving as a means of payment, a medium of exchange, a unit of account, and a store of value. Since fiat currencies possess all four functions, and sometimes even serve as global currencies, it is important to examine to what extent and how a digital central bank currency (CBDC) would be capable of fulfilling these functions. Regarding the function of serving as a means of payment, means payment is defined as the act of settling an obligation, during which one party transfers a quantifiable product of comparable value to the other party, in accordance with their mutual agreement (Polányi, 1984). A medium of exchange means an important characteristic of money that can be effectively used as a means of payment is its ability to facilitate the exchange of various types of products over time. This is because money is easily divisible, stable in value, uniform, easily transportable, universally recognised, and possesses a value that is either intrinsically inherent or guaranteed by a legitimate external source. As a unit of account, the essence is that money introduces an arithmetic, quantitative way to make the prices of offered goods and services, as well as market processes, comparable and acceptable to everyone involved in the transaction. This facilitates the exchange of products by providing a common measure of value between the items being traded. The practical application of the store of value function means that investors aim to accumulate high-value assets, which are capable of preserving their value over the long term, creating a reserve for future consumption.

In the case of digital central bank money, all four payment functions can be achieved, whether the central bank issues the new money directly (centralized CBDC) or indirectly (decentralized CBDC). Trust in these digital currencies can be further bolstered by the central bank guaranteeing full convertibility, similar to fiat money. Unlike private money, central banks have the authority to elevate a private currency to the status of digital central bank money through mandatory convertibility. However, this approach lacks the central bank's de facto monopoly on money issuance, which is why almost all central banks have rejected this type of CBDC issuance (Bujtár, 2021).

In a centralized CBDC system, market participants can only be involved in operating the intermediary system, alongside commercial banks, as additional service providers in the payment system (such as crypto-asset wallet providers and exchanges), but not as potential issuers. The global currency function is relevant due to the international nature of both digital central bank money and crypto-assets. The role of the USD as a global reserve currency could be challenged by the successful introduction of a CBDC by a central bank with significant economic power or by the international acceptance of a private crypto-asset as a stablecoin (e.g., Facebook's Diem). This ambition is particularly evident in the case of the Chinese CBDC, driven by the economic competition between China and the United States.

5. IMPLEMENTATION OF CBDCs – A GLOBAL ANALYSIS

The commitment to creating central bank digital currency is illustrated by the fact that only small economies have already started experimenting with introducing new types of official currencies - not really prepared (the Marshall Islands in 2018, followed by Jamaica and Nigeria) and El Salvador - with the adoption of bitcoin in 2021 - as official currency (Renterina, Wilson & Strohecker, 2021; Bujtár, 2024).

Beyond pilot projects, the Bahamas and Nigeria have already introduced digital central bank money, known as the Sand Dollar (Central Bank of the Bahamas, 2019) and eNaira, (Central Bank of Nigeria, 2021) respectively. The Sand Dollar is one of the first fully operational CBDCs, launched by the Central Bank of The Bahamas. It aims to increase financial inclusion, particularly in remote islands where access to banking services is limited. The Sand Dollar's implementation provides valuable insights into the challenges and successes of deploying a CBDC in a small island economy. Additionally, a pilot program is currently underway to test the first CBDC used within a currency union. The Eastern Caribbean Currency Union (ECCU) has successfully tested the DCash digital currency through multiple phases, making it a key element in the union's digital transformation.

Among the countries with advanced CBDC projects, China stands out as an example. The development of the digital yuan (e-CNY) began in 2014, and since then, it has undergone testing and is now accepted as an official means of payment in several offline stores and online shops (Fullerton & Morgan, 2022).

In Sweden, the central bank, Riksbank, announced the development of the digital Swedish krona (e-krona) in 2017. This initiative was primarily driven by the decline in cash usage, which fell to a third between 2010 and 2018, and the increasing shift towards digitalization in society, exemplified by the widespread use of the Swish payment application. The e-krona is based on distributed ledger technology and has gone through three development phases, although a decision on its official introduction has yet to be made (Sveriges Riksbank, 2023).

The United States has shown openness to the concept of digital central bank money, with the conceptual U.S. CBDC potentially serving as a tool to maintain the long-term hegemony of the U.S. dollar (FED, 2022).

The People's Bank of China has been at the forefront of CBDC development with its Digital Currency Electronic Payment (DCEP) initiative. This project aims to enhance the efficiency of the payment system, reduce transaction costs, and provide the government with a better oversight of financial transactions. The DCEP has been piloted in several cities, showcasing its potential for widespread adoption and integration into the existing financial ecosystem.

A complex legislative package, the Digital Euro Package, was proposed by the European Commission in June 2023 to allow the legislator to create the legal framework for introducing central bank digital currency. In October 2023, the Governing Council of the European Central Bank announced that, after a two-year assessment phase, it would launch a preparatory period for a further two years. In June 2024, the European Central Bank published the first progress report on the development of the digital euro.

6. FURTHER THOUGHTS ON SOVEREIGNTY, INTEROPERABILITY AND LEGAL STATUS

Regarding monetary sovereignty, CBDCs can enhance a central bank's ability to implement monetary policy by providing real-time data on money supply and demand, which could lead to more effective monetary interventions. Additionally, CBDCs may alter the traditional banking system by reducing the reliance on commercial banks for deposits, potentially leading to a disintermediation effect. Furthermore, the introduction of CBDCs could create competition with private cryptocurrencies and foreign digital currencies, impacting a nation's control over its monetary system. Changes to the banking system may occur as CBDCs could alter how banks operate by reducing the need for commercial banks to hold deposits, potentially disrupting traditional banking. Additionally, the launch of CBDCs could create competition with private cryptocurrencies and foreign digital currencies, which may affect a country's control over its own monetary system (Chu & Rathbun, 2025).

Cross-border interoperability is crucial for the effectiveness of CBDCs in international transactions. There needs to be a set of technical standards to ensure compatibility between different countries' digital currencies. Additionally, countries must collaborate on regulatory frameworks to facilitate the use of CBDCs in international trade and finance, which may require complex negotiations. Without proper interoperability, there is a risk that the global financial system could become fragmented, resulting in inefficiencies and increased costs for cross-border transactions (BIS, 2022).

The legal status of CBDCs must be clearly defined within existing financial regulations, including whether they are considered legal tender and how they integrate into the current financial infrastructure. Legal frameworks will also need to address consumer rights, privacy concerns, and security measures to protect users of CBDCs. Furthermore, the legal implications of CBDCs may extend beyond national borders, causing coordination with international law and regulations (BIS, 2024).

7. CONCLUSION

To sum up, CBDCs hold the promise of transforming the financial landscape by combining the stability and trust of central bank-issued money with the efficiency and innovation of digital currencies. As more countries explore and implement CBDCs, they will need to navigate regulatory challenges and ensure that these digital currencies can effectively fulfil traditional monetary functions. The global interest in CBDCs underscores their potential to shape the future of money, offering a new level of security, efficiency, and inclusivity in the financial system.

CBDCs could provide central banks with new tools to implement and fine-tune monetary policy more effectively, as real-time data on money flows could enhance decision-making and policy adjustments. Additionally, CBDCs have the potential to bring financial services to unbanked and under-banked populations, providing them with access to secure and efficient payment systems. The digital nature of CBDCs can lower transaction costs and increase the speed of payments, benefiting both consumers and

businesses. The traceability of CBDC transactions could help combat money laundering, tax evasion, and other illicit activities, enhancing financial system integrity.

However, introducing CBDCs could disrupt traditional banking models, as individuals and businesses might prefer holding digital currency directly with central banks, potentially reducing the role of commercial banks in the financial system. The successful implementation of CBDCs by major economies could shift global currency dynamics, challenging the dominance of existing reserve currencies like the U.S. dollar. The traceability of CBDC transactions raises concerns about privacy and data security, making it crucial to balance transparency with privacy protections. Furthermore, the implementation of CBDCs will require robust technological infrastructure and cybersecurity measures to prevent fraud, hacking, and other cyber threats.

In conclusion, while CBDCs offer significant benefits and opportunities for the future of money, their successful implementation will require careful consideration of regulatory, technological, and societal factors. Central banks and policymakers must work collaboratively to address these challenges and harness the full potential of CBDCs to create a more secure, efficient, and inclusive financial system.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch8

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VAT & THE PLATFORM ECONOMY: EU FRAMEWORK AND SOUTHEAST EUROPE'S COMPLIANCE STRATEGY

New business models, born and further sophisticated through digital technology, have significantly affected and redefined the digital economy, leading to the phenomenon known as platformization. In December 2022, the EU introduced the "VAT in the Digital Age" (ViDA) initiative, highlighting platform economies as a crucial area for VAT system modernisation. The impact of platform economies on indirect taxation cannot be ignored, especially in Southeast Europe. This paper examines the transformative role of platformization—where new business models are developed through digital technology—on VAT compliance with the aim to explore the concept and role of the platform economy in relation to VAT taxation, highlighting the challenges it poses to the existing tax framework and examining emerging trends in VAT treatment of the platform economy within the EU and its impact for Southeast Europe, particularly on countries with EU candidate status. Key recommendations include simplified compliance regimes, regional cooperation, and adapting tax frameworks to the digital economy. These strategies aim to optimise VAT compliance and support economic growth in Southeast Europe's evolving platform economy.

Keywords: Platform Economy, VAT Compliance, VAT Treatment of Platform Economy.

1. INTRODUCTION

The digital economy is changing the business environment by introducing a new way of doing business and inventing new, highly digitised business models. The continuous development of new business models, developed and refined through digital technology, has profoundly influenced and reshaped the digital economy, leading to the emergence of the phenomenon of platformization, which also encompasses the strategic efforts of platform companies to mediate previously direct transactions (Tiwana *et al*., 2010). This process emphasises connecting large groups of buyers and sellers, transforming platforms into market intermediaries that create and sustain digital ecosystems (Ek & Ek, 2023). The way

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these business models operate poses significant challenges in many areas, shedding special light on VAT, particularly in terms of tax collection, enforcement, and compliance. More specifically, new business models have meant that private individuals and small businesses operating through platforms, until recently exempt from VAT taxation, represent a significant share of transactions on which VAT is not paid, which has a negative impact on traditional businesses (European Commission, 2022). The decentralised nature of digital transactions, the cross-border provision of services, and the use of data as a form of compensation create complexity in defining taxable events, determining the place of supply, and ensuring correct VAT reporting. As a result, tax authorities around the world are working to adapt VAT frameworks to effectively collect revenues in a new segment of the digital economy – the platform economy. Because of the speed of development and differentiation of models, the question arises of how to sufficiently include them in tax treatment while following the principle of neutrality and simplicity. In the context of VAT treatment of a digital platform, several questions arise (i) VAT status of the provider, (ii) VAT status of the consumer, (iii) VAT status of the platform operator, (iv) nature/classification of the facilitation services provided and (v) the party to the transaction paying the facilitation fee.

The aim of this paper is to explore the concept and role of the platform economy in relation to VAT taxation, highlight the challenges it poses to the existing tax framework, and examine emerging trends in the VAT treatment of the platform economy within the EU, as well as their impact and opportunities for Southeast European countries with EU candidate status.

2. DEFINING THE PLATFORM ECONOMY: CONCEPTUAL CHALLENGES AND AMBIGUITIES

Defining business models in the digital economy, as well as the very concept of the digital economy and its dynamic component of e-commerce, is characterised by the absence of a unified definition and the existence of multiple ways and criteria for distinction. The lack of definition affects the possibility of regulation and precise assessments of growth dynamics and volume. The same consideration applies to defining the platform economy. In this sense, the following section provides an overview of existing definitions and conceptual understandings of the platform economy with a focus on definitions from the perspective of VAT taxation.

Organisation for Economic Co-operation and Development (hereinafter: OECD) in its 2018 report systematised new, highly digitised business models as follows:

- Multi-sided platforms connect users and facilitate transactions while relying on network effects,
- Resellers purchase and resell goods with control over distribution,
- Vertically integrated companies combine production and distribution under one entity, and,
- Input suppliers provide essential components for other firms' production processes (OECD, 2018).

In the above systematisation, the platform economy is related to multi-sided platforms that connect users and facilitate transactions while relying on network effects. The Group on the Future of VAT and the VAT Expert Group in 2019, while defining business models that remain only partially addressed by the existing EU VAT framework, distinguish sharing from the platform economy (Group on the Future of VAT, 2019). Later, in a report from 2021, the OECD defines the platform economy as a broader concept that includes sharing and gig economy, outlining both similarities and key distinctions between the platform economy and the sharing/gig economy, particularly in the context of VAT considerations (OECD, 2021). The links between these two economies primarily relate to their belonging to a multi-sided business model, which directly connects service providers and consumers, without the need for a physical presence in the jurisdiction where the transactions take place. Furthermore, both concepts rely on digital platforms to facilitate transactions through advanced technology. On the other hand, the sharing economy and the gig economy are distinguished from the platform economy by the presence of new market participants, mainly individuals and small business, a large volume of low-value transactions, and the physical presence of participants in the jurisdiction in which their assets are located and used both for their private and economy activities.[1]

Accordingly, in 2022, the European Commission published a report, "VAT in the digital age," stating a key characteristic of the platform economy, which refers to a multi-party transaction model involving three or more parties, where digital platforms play a central role. It is a model in which, through their technological, commercial, and legal infrastructure, platforms enable and facilitate trusted exchanges between users who offer or request services (Baretta, 2019, p. 27). These platforms facilitate transactions through monetary payments, barter, or data exchange while aggregating supply and demand, enabling interactions, processing large-scale data, and leveraging network effects. By optimising user experiences and shaping new market structures, digital platforms create flexible business models, often monetising services through commissions or targeted advertising.

Based on the above, the role of digital platforms can be defined as aggregating supply and demand, facilitating and extracting value from direct interactions and transactions between users, collecting and processing large amounts of personal and non-personal data to optimise services and enhance user experience, enabling network effects where each additional user improves the experience of existing users, and expanding the ability to create and shape new markets through more efficient structures by leveraging information technology (OECD, 2019). According to the report (VAT in the digital age, 2022, p. 35), "the most common digital platform's role was to match users, exchange contact details of users, handle payments, and, to some extent, handle complaints".

In distinguishing digital platforms, it is important to consider several aspects:
- The subject of the transaction,
- Participants in the transaction,

[1] However, in the literature that does not have a tax-law approach to definitions, authors argue different points of view e.g. authors (Acquier *et al*., 2017) defined sharing economy as an umbrella construct resting on three foundational cores including platform economy. Further, Acquier *et al*. (2017, p. 4) defined platform economy as "a set of initiatives that intermediate decentralized exchanges among peers through digital platforms".

– Role of the digital platform,
– Sectors in which platforms operate,

Table 1: Criteria for distinguishing platforms (Author's own elaboration)

Subject of the transaction	Participants in the transaction	Role of the digital platform	Sectors in which platforms operate
Trade in goods/ Trade in services or temporary access to assets	B2B, B2C, C2B and C2C	The intermediary that provides an electronically supplied service	E-commerce, transport, accommodation, real estate, finance, professional and household services, and advertising

In the context of how the basic model works in the platform economy, the following transactions, from a VAT perspective, are distinguished:
– The basic supplier offers goods/services through the platform to the buyer (trade in goods/trade in services or temporary access to assets in various sectors),
– The platform is a facilitator and charges a fee, and
– Advertising revenue and data monetisation.

The focus of the rest of the paper is on the role and tax treatment of digital platforms as facilitators in a transaction, focusing on the aforementioned first two transactions, excluding advertising and data monetisation, as well as recent developments in the EU legal framework regarding their role in VAT taxation.

3. CATEGORICAL APPARATUS OF VAT IN THE PLATFORM ECONOMY IN THE EU

In general, to determine VAT treatment, it is necessary to analyse and consider each element that is key to defining a transaction as one that is subject to VAT. Ambiguities such as who is the taxpayer, when that person is acting in their professional capacity; whether the transaction is taxable; where consideration is paid, and a sufficiently direct link is established between the supply and its consideration, undermine the smooth application of VAT (Beretta, 2018, p. 390). In the vocabulary and constellation of platform economy relationships, it is of tax importance to differentiate (i) VAT status of the provider, (ii) VAT status of the consumer, (iii) VAT status of the platform operator, (iv) nature/classification of the facilitation services provided and (v) the party to the transaction paying the facilitation fee.

The categorisation of supply that takes place, given the way the platform economy functions, is one of the important questions that arise. Considering the typical facilitation role of platforms, they charge facilitation fees, which are usually paid solely by the provider. In this sense, the dilemma arises as to which category facilitation fees belong in the context of VAT taxation? In this sense, the dilemma arises whether the services provided by the platform should be considered electronically supplied services or whether they should be treated as intermediaries. From the moment an online offer is defined as an electronically

supplied service, the question of sufficient inclusion and precision of the definition arises. The European Union was the first jurisdiction to categorise the supply via the Internet, following the Ottawa taxation principles, deciding to fit it into the existing category of services, i.e. "electronically supplied service"s, which was the subject of criticism in the literature (Lamensch, 2014; Terra & Kajus, 2021).[2]

The current legal framework, Council Directive 2006/112/EC, still does not contain a definition of electronically supplied services, but lists them in Annex II of the Directive, however, Council Regulation No. 282/2011 establishes criteria for determining which types of services fall into this category as defined in the guidelines.

In practice, according to the research conducted, approximately 80 per cent of platform services were considered electronic services, and 20 per cent of transactions were considered intermediary services (VAT in the digital age, 2022, p. 36). Arguments for the determinant of electronically supplied services are supported by the minimal level of human intervention. The way facilitation fees are categorised affects the applicable place of taxation, which consequently affects who benefits from which rules. In this sense, treating the facilitation fee as an intermediary service would benefit tourist destinations, while designating it as an electronically delivered service would benefit the country of origin of the tourist (Echevarria, 2024). Namely, since 2015, the EU has been trying to consistently apply the destination principle in taxation of electronic services, apart from a deviation from the destination principle with the rule introduced with Directive 2017/2455. It is therefore necessary to clarify this rule and ensure a common criterion. Since the Member States interpret the place of supply of the facilitation service provided by the platforms to non-taxable persons differently, it is going to be harmonised with the VAT in the Digital Age package (hereinafter: ViDA package). In this sense, Article 46a, part of the ViDA reforms, stipulates that the place of supply of the facilitation service provided to a non-taxable person using an electronic interface, such as a marketplace, platform, portal, or similar means, shall be the place where the underlying transaction is supplied in accordance. In simpler terms, the VAT rules regarding facilitation services in B2C transactions follow the location of the goods or service itself. In the case of B2B transactions, the definition of facilitation fees as intermediary or electronic is linked to Article 44 of the Directive 2006/112/EC (Merkx *et al*., 2023). It is important to point out that the wording used in the place of supply is a facilitation service, meaning it is not categorised as an electronically supplied service.

Another important issue is the role of the platform in the context of the transactions between suppliers and buyers that it facilitates. As stated in the introduction of the paper, the role of platforms is increasingly central to digital transactions, replacing traditional offline intermediaries and facilitating previously direct exchanges. From a VAT perspective, transactions carried out through platforms provided by individuals and small businesses are often exempt from VAT. However, the volume of such transactions in certain sectors is

[2] The VAT Committee on its 67 meeting in 2003 set out the guidelines (VAT Committee, 2003) on what is meant by "electronically supplied services", namely: delivered over the Internet or an electronic network1 (i.e. reliant on the Internet or similar network for its provision); and then the nature of the service in question is heavily dependent on information technology for its supplyI.e., the service is essentially automated, involving minimal human intervention and in the absence of information technology does not have viability.

continuously growing, and the absence of their taxation creates market distortion and puts traditional economic actors at a disadvantage. Accordingly, in the report on the role of digital platforms (OECD, 2019), several roles that the platform could play in VAT collection namely:

- liability of digital platforms for the assessment, collection, and remittance of VAT on sales made through digital platforms,
- voluntary collection of VAT/GST through digital platforms,
- legally binding exchange of information with tax administrations,
- education of sellers through digital platforms on VAT/GST obligations,
- Formal cooperation agreements between digital platforms and tax administrations to enable tax administrations to access potential taxpayers.

A platform in the EU VAT legal framework is already obliged under several articles, namely:

- Directive 2021/514, known as DAC7, introduced the requirement for platforms to maintain and submit reports of sales made on behalf of third parties to EU tax authorities. These new requirements were effective from 1 January 2023, with the first reports due from 1 January 2024.
- Directive 2017/2455 establishes the liability of the platform for VAT in situations where the taxpayer, by using an electronic interface (platform, portal, etc.), enables: a. distance selling of goods imported from third countries in shipments worth up to EUR 150B delivery of goods within the EU by a taxpayer without a business establishment in the EU to the final consumer. In both situations, the assumed liability of the platform for VAT in B2C transactions applies,
- For the application of Article 28 of Directive 2006/112/EC, Implementing Regulation 282/2011, in Article 9a, prescribes the general rule that a platform or portal enabling the sale of electronically supplied services acts in its own name but sells services on behalf of the actual service provider. This means that the platform formally becomes the seller for tax purposes and is liable for calculating and paying VAT. However, if the actual service provider is explicitly designated as the supplier and this is clearly stated in the contractual arrangements between the platform and the provider, then the platform is not considered the seller, and the VAT obligations remain with the actual provider.
- Article 242a of the VAT Directive requires keeping records when it facilitates the supply of goods or services to a non-taxable person within the Community via an electronic interface, such as a marketplace, platform, or portal. These records must be sufficiently detailed to enable the tax authorities of the relevant Member States to verify the correct calculation of VAT for such transactions.[3] This obligation coincides with the obligation prescribed by DA7, which justifiably raises the question of the increase in costs for platforms and their disadvantageous position in relation to non-platform businesses (Merkx *et al*., 2023).

[3] The ViDA package amends Article 242a by adding a new paragraph requiring a platform that facilitates the provision of short-term accommodation or passenger transport services within the EU via an electronic interface and is not considered to have provided services under Article 28a, to keep detailed records of those transactions in electronic form and to keep them for 10 years. These records must be sufficiently detailed to allow the tax authorities in the relevant Member States to confirm the correct VAT declaration.

Conducted research indicated that in certain sectors of the platform economy, such as the sector of short-term accommodation and transport, there is an increase in the number of transactions exempted from VAT, which resulted in the loss of income from VAT and distortion of market competition. In this sense, the European Commission, striving to modernise the VAT framework, started drafting a proposal, famously known as the ViDA package, on the form of previously implemented, deemed supplier liability of the platform in collecting VAT, which will be discussed in the following chapter.

4. IS ViDA TRULY A DIVA?

The e-commerce package from 2017 to 2019, which was highlighted in the Digital Single Market strategy, was followed by the Commission's action on the growing role of platforms, namely in the short-term accommodation and transport sectors. In December 2022, the European Commission presented a proposal entitled the ViDA package, which contains three pillars, the second of which focuses on the VAT treatment of the platform economy and will be further analysed.

In the Communication of the Commission (European Commission, 2022), the sectors of passenger transport and accommodation services, which, after e-commerce, are the two largest sectors of the platform economy, are explicitly identified as those in which inequality in the payment of VAT is most evident. Lodging service platforms compete directly with the hotel industry, while passenger transportation platforms compete with private taxi companies. Accordingly, the second pillar aims to amend the VAT Directive and Implementing Regulation 282/2011, providing that platform economy operators in two sectors, namely passenger transport and short-term rental of accommodation, become liable for collecting and remitting VAT to the tax authorities, where the primary supplier does not charge VAT. The main goal of the provision is to equalise competition between traditional and digital ways of doing business in these sectors and remove the obligation for underlying hosts and drivers, who will not be liable for VAT (European Commission, 2024). At the same time, this initiative follows the spirit of the Platform Work Directive, Directive 2014/55/EU on electronic issuing of invoices in public procurement, as well as Directive 2021/514/EU amending Directive 2011/16/EU, the so-called DAC 7.

Significant changes for the platform economy relate to the introduction of platform liability as a deemed supplier for these sectors, the definition of the term facilitator, the definition of short-term accommodation and the road passenger transport sector, as well as exemptions from these rules. The inclusion of the platform economy in this regard will be carried out by amending Directive 2006/112/EU with the following articles: Article 28a, Article 46a, Article 135(2)(3), Article 136b, Article 172a, Article 242a, and Article 306.

The fundamental amendment is introduced by Article 28a, which provides that a taxable person who facilitates the provision of short-term accommodation or passenger transport services by road via an electronic interface, such as a marketplace or platform, will be deemed to have received and supplied those services himself. However, this applies unless the service provider has provided their VAT identification number and declared that they will charge VAT on the supply. In short, it applies when the main supplier is not registered for VAT.

Under this system, the initial deemed supply from the original provider to the facilitator will be VAT-exempt (Article 136b). To prevent abuse, transactions where the platform is considered the supplier cannot be included in the special scheme for travel agents. (Article 306). However, the subsequent supply from the facilitator to the customer will generally be subject to VAT unless an exemption applies in the EU Member State where the service is delivered. This framework does not affect the facilitator's right to deduct VAT (Article 172a). The key question for the application of Article 28a is how the term "facilitator" is defined and under what conditions a facilitator becomes liable.

The term facilitator, defined by Article 9b of Implementing Regulation 282/2011 and in previous VAT e-commerce rules subject to criticism, implies that a taxable person is considered facilitating the supply of short-term accommodation rental or passenger transport services by road if they use an electronic interface (e.g., a marketplace, platform, or portal) to connect suppliers and customers, leading to a transaction through that interface. However, a taxable person is not regarded as facilitating the supply if they: do not set, either directly or indirectly, any of the terms and conditions under which the supply is made, are not involved in authorising customer payments and do not take part, either directly or indirectly, in providing the services themselves. Paragraph 2 of the same article stipulates that the platform's liability does not apply to taxable persons who only provide: payment processing for short-term accommodation rentals or passenger transport services, listing or advertising these services, redirecting or transferring customers to other platforms without further involvement in the supply.

Short-term accommodation, excluded from land exemption under Article 135(3), is defined as the continuous rental of accommodation to the same person for a maximum of 30 nights, while the road transport service of passengers performed within the Union is understood as the part of the service that is carried out between two points in the Union, thus leaving out beverage and food delivery services. Compared to the original proposal, the number of nights in the definition of short-term accommodation has been reduced from 45 to 30 nights and this type of accommodation will be considered having a similar function to the hotel sector, the criteria, conditions and limitations of which will be determined by Member States, which should be notified to the VAT Committee before 1 July 2028 (Article 135(2)). The Commission will publish a comprehensive list by 31 December 2028 based on the information provided by the Member States. On the other hand, the definition of transport service contains the addition of "by road", distinguishing it from other forms of passenger transport. Previously, the transport formulation was subject to criticism due to insufficient precision (Čičin-Šain, 2023).

The Council provided Member States greater flexibility from the original proposal with the possibility of excluding small and medium-sized businesses from certain VAT obligations, differing from the European Commission's proposal. However, if they choose to do so, they must notify the VAT Committee accordingly. Furthermore, the Commission will assess these rules by July 2033. Member States may exclude certain supplies from these provisions under specific conditions.

The process of agreeing on the VIDA package was marked by almost two years of negotiations, especially on the second pillar, and a political agreement was reached at the

ECOFIN meeting held on 5 November 2024, while the European Parliament approved the European Commission's Reconsulted Proposal on the ViDA package on 12 February 2025 on which the European Parliament was initially consulted.[4] Finally, the ViDA package was adopted on 11 March 2025, and the planned implementation of the second pillar should start from 1 July 2028, considering the possibility for Member States to postpone implementation until 1 January 2030.

The analysis of key provisions indicated that several aspects of the ViDA package can be considered problematic:

- the impact of platform liability on market competition between platforms in the two sectors mentioned, which primarily refers to the capacity of less influential platforms and new market players to operationalise the liabilities established by Article 28a, as well as other established forms of platform liability
- different types of platform liability depending on the transaction,
- compliance cost for platforms and impact on their business,
- different criteria of Member States regarding short-term accommodation, which, from previous experience with harmonisation, can further complicate the system,
- the coverage of the transport sector (in comparison with solutions in other countries, e.g., New Zealand) (Čičin-Šain, 2023),
- objection to the direction of the Commission's work, criticising the lack of innovation in modelling the role of the platform while neglecting the abolition of VAT exemptions and the work of the tax administration (Sánchez Gallardo & Echevarria Zubeldia, 2023).

The final assessment of whether ViDA is a diva will be given by the practical application of the presented changes to the VAT framework in the EU.

5. VAT CHALLENGES IN THE PLATFORM ECONOMY FOR SOUTHEAST EUROPE

Compared to the northern part of Europe, the south generally lags in components of the digital economy, while achieving noticeable growth (Hunady *et al*., 2022). In this regard, the European E-Commerce Report for 2024 states that e-GDP remains highest in Western Europe, followed by Southern Europe, with Eastern Europe having the lowest E-GDP and e-shopper penetration as a region (Ecommerce Europe, 2024, p. 8). Speaking about southeastern Europe, research indicates that despite the progress made in creating the basic prerequisites for the digital economy, the enormous potential of digital technology remains untapped (Vidas-Bubanja, Popovčić-Avrić & Bubanja, 2019) and it is noticeable that newer EU Member States, mainly from southeastern Europe, still lag behind the EU average in e-commerce activities, social media usage and cloud computing (Hunady *et*

[4] "Most Member States supported the proposal of updated VAT rules for the platform economy. France and Ireland were concerned that the proposal would distort competition. Several countries asked for more extensive platform reporting to be considered." (Kristoffersson, 2023, p. 148). However, given the significant differences, between the Commission proposal and Council text, the Council decided to consult the Parliament again (European Parliament, 2024).

al., 2022, p. 39). Despite the different pace and digital divide, the digital economy for the countries of Southeast Europe represents both an opportunity for economic growth and a regulatory challenge, in the context of tax system integrity and negative competition effects. Accordingly, VAT revenues are of primary importance. For non-EU countries in the region with candidate status, particularly Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia, adjusting their VAT framework to the common VAT system in the EU is essential. Accordingly, harmonisation is necessary for strategic, economic, and financial reasons. However, the pace of adapting the VAT legal framework to digital business conditions varies. In this regard, Serbia, Albania, Montenegro, and North Macedonia have taken steps and recognised on a different pace electronically supplied services in their VAT laws, unlike Bosnia and Herzegovina, whose legal framework does not include a conceptual definition of electronically supplied services. In accordance with the KPMG report (KPMG, 2025) on the adaptation of the VAT framework to the conditions of digitalisation, the selected countries have taken the following steps:

1. Albania (since January 1, 2015), Montenegro (since August 1, 2017), and North Macedonia (since January 1, 2024) require non-resident vendors to register and collect VAT, regardless of sales amount.
2. Bosnia and Herzegovina's tax authority reiterated on February 2, 2023, that non-resident providers must register and collect VAT.
3. Serbia published updated VAT regulations on December 25, 2024, clarifying definitions and rules for digital and telecommunications services.

Recent changes and activities of the countries indicate that, on different dynamics, focused is on including electronically supplied services, preserving the integrity of the VAT system in B2C transactions while countries have not yet taken steps in the context of the platform economy, i.e. platform liability for VAT in transactions that take place through platforms. Considering the obligation of countries aspiring to EU membership to harmonise their legal frameworks with the EU framework, and at the same time, to preserve the integrity of tax revenues and eliminate market distortions, it is necessary to consider the models and manner of platform liability in the spirit of the previously implemented platform roles as well as ViDA package. Based on the analysed framework, it is necessary to consider:

- the categorical definition of the facilitation service,
- the place of taxation of the facilitation service,
- the form and manner of liability of the digital platform.

In the context of OECD recommendations (OECD, 2019), countries should adapt the platform's assumed liability models to their capabilities and capacities. The EU opted "for a full platform liability model for both electronically provided services and certain supplies of goods" (Merkx, 2022), which determines the way these countries act. One of the key takeaways from the EU experience indicates that for the collection and control of VAT, the size of the VAT gap and its persistence over time suggest that national instruments are not sufficient to fight cross-border fraud, which has been estimated to be effectively and efficiently combated only by coordinated action at the EU level. (European Commission,

2022) In this sense, EU candidate countries from the region, appreciating the size of their market and the way digital platforms operate, could benefit from regional cooperation, especially in cross-border transactions. The focus on regional cooperation primarily stems from the size of the markets and their level of development. In this manner, regional cooperation could enhance compliance, facilitate smoother integration into the EU legal framework, and ultimately, the exchange of experiences between countries facing similar challenges in the same or comparable contexts could lead to valuable insights and solutions. Accordingly, there is a common interest that needs to be exploited with the aim of maintaining the integrity of tax revenues, adequately taxing the growing digital economy, and at the same time ensuring a neutral system that is conducive to the growth of the digital market. In following EU regulations and practices, it is imperative to preserve the simplicity of the system, with the aim of stimulating the growth of the digital sector. Thus, in harmonising their frameworks, states should strive for simplicity of rules, proportionality, and neutrality.

6. CONCLUSION

The dimensions and role of the platform economy have led to a new phenomenon of so-called platformization, which imposes various regulatory challenges, placing VAT policy high on the priority list. From 2021, various forms of platform liability have been introduced into the EU legal framework in the form of VAT administration up to the model of full liability of platforms as facilitators in the of VAT, all with the aim of adequately including the digital sector in taxation flows, eliminating discrimination in relation to traditional business flows and closing VAT gap. Previous experience in application as well as the ViDA package, addresses issues of competitive effects, complexity, and comprehensiveness of rules. In the context of EU candidate countries from Southeast Europe, which according to indicators lag in the capitalisation of digital technologies, the harmonisation of VAT with the digital reality is taking place at a different pace, with a focus on the inclusion of electronic services and the registration of foreign service providers. Decisive for EU membership, and for strategic, economic, and financial reasons, the next inevitable step is to include the platform economy in tax flows. Learning from the EU experience, key recommendations include simplified compliance regimes, regional cooperation, and a focus on neutrality as an essential element of taxing the digital economy.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch9

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THE LANDSCAPE OF DIGITAL SERVICE TAXATION

The rapid expansion of the digital economy has fundamentally altered global business landscapes, compelling governments to reconsider traditional taxation frameworks. The Digital Services Tax (DST) has emerged as a pivotal policy tool designed to address the unique tax challenges posed by digitalization. DST specifically targets revenues generated by digital services, such as online advertising, social media platforms, and digital marketplaces, which often evade traditional tax regimes because of their intangible nature and cross-border operations. By focusing on large multinational corporations that derive substantial profits from user data and digital interactions, DST aims to ensure these companies contribute their fair share of taxes in the jurisdictions where they operate. However, implementing DST is fraught with challenges. Critics argue it may lead to double taxation, trade tensions, and compliance complexities. The unilateral adoption of DST by individual countries has raised concerns about fragmentation and the potential for retaliatory measures, particularly from nations hosting major digital firms. To address these issues, there is a growing call for a coordinated international approach, such as the OECD's efforts to develop a global framework for taxing the digital economy. Despite these challenges, DST offers significant opportunities for governments to modernize their tax systems and secure revenue streams in an increasingly digitalized world. By fostering international cooperation and aligning tax policies with the realities of the digital economy, DST can play a crucial role in promoting tax fairness and sustainability. In conclusion, DST represents a critical step towards addressing the tax challenges of the digital era, and while its implementation poses notable hurdles, a balanced and coordinated approach can harness its potential to ensure a fair and effective taxation system for the digital economy, which this research will examine.

Keywords: economy, technology, digitalization, taxation, compliance.

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1. INTRODUCTION AND KEY FEATURES OF DST's

In response to global tax avoidance, the international community recognized in the 2010s that the fair taxation of digital and large corporations is a global issue that can only be addressed through broad cooperation (Saez & Zucman, 2021). The application of the current corporate tax rules to businesses operating in the digital economy has led to a misalignment between the place where profits are taxed and the place where value is created. Many of these digital businesses derive value from their interaction and engagement with a user base. Under the current international tax framework, the value businesses derive from user participation is not considered when allocating the profits of a business between different countries. This measure will ensure the large multinational businesses in scope make a fair contribution to supporting vital public services. Domestic tax base erosion and profit shifting (BEPS) due to multinational enterprises exploiting gaps and mismatches between different countries' tax systems affect all countries. Developing countries' higher reliance on corporate income tax means they suffer from BEPS disproportionately. Business operates internationally, so governments must act together to tackle BEPS and restore trust in domestic and international tax systems. BEPS practices cost countries 100-240 billion USD in lost revenue annually, which is the equivalent of 4-10% of the global corporate income tax revenue (OECD, 2025).

In recent years, several international organizations have developed programs specifically aimed at combating aggressive tax planning behaviors or strategies (Montenegro, 2021). The OECD has been at the forefront of the fight against tax avoidance and the shadow economy for decades. According to the OECD, businesses must adhere to the letter and spirit of the tax laws and regulations of the countries in which they operate. Compliance with the spirit of the law means recognizing and following the intent of the legislator (OECD, 2011). Multinational corporations should also refrain from lobbying for (excessively) favorable tax rules that disproportionately disadvantage other taxpayers (Gribnau, 2017). The organization launched the Base Erosion and Profit Shifting (BEPS) project in 2013, aimed at reviewing the global international tax framework. Working together in the OECD/G20 Inclusive Framework on BEPS, over 140 countries and jurisdictions implemented 15 Actions to tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment, and address the tax challenges arising from the digitalisation of the economy (OECD, 2025). One of the proposed solutions was to advocate for implementing DSTs, which have visible results, as many countries have already introduced them in some form.

Digital Service Taxes have been permeating the trade environment since 2018, but COVID-19 and the OECD's digitalization of the economy project, commonly referred to as BEPS 2.0, have accelerated the focus on DSTs. The stated aim of DSTs is to ensure that "market" countries get increased taxing rights over the profits of tech-based multinational companies that sell into their local market, and collect data from and target advertisements at local audiences, regardless of their physical presence (PWC, 2025).

DST targets companies that provide digital advertising and digital interface services whose revenues largely derive from user data generated within the territory of imposing

countries. Second, instead of following the permanent establishment rule, it chooses to target digital companies at the group level and collect on their worldwide revenues as long as they are "generated" within the imposing countries' territory. Third, DST is levied at a flat rate on the gross revenues of targeted companies, and no expenses are deductible for the purpose of calculating the tax base (Forsgren, Song & Horváth, 2020).

2. EXAMPLES FOR DSTs

Next to the international initiatives, countries like France, the United Kingdom, and Italy have been at the forefront of implementing DSTs. These taxes typically target revenues generated from specific digital services, such as online advertising, social media services, and the sale of user data. The rates and structures of these taxes vary by country, but they generally aim to tax a percentage of the revenue generated from local users (Tax Foundation, 2024).

In the United Kingdom, from 1 April 2020, the government introduced a new 2% tax on the revenues of search engines, social media services, and online marketplaces that derive value from UK users. The tax applies to a group's businesses that provide a social media service, search engine, or an online marketplace to UK users (PWC, 2020). These businesses are liable to the tax when the group's worldwide revenues from the mentioned digital activities are more than £500 million and more than £25 million of these revenues are derived from UK users. If the group's revenues exceed these thresholds, its revenues derived from UK users will be taxed at a rate of 2%. The taxable revenues will include any revenue earned by the group that is connected to the social media service, search engine, or online marketplace, irrespective of how the business monetizes the service. If revenues are attributable to the business activity and another activity, the group will need to apportion the revenue to each activity on a just and reasonable basis (, HM Revenue & Customs, 2020).

Italy introduced its DST as part of Law No. 160/2019, effective from January 1, 2020. The tax aims to capture revenues from large multinational digital companies that benefit from Italian users and digital markets but may not otherwise be fully subject to the traditional corporate tax regime because of the intangible and cross-border nature of their services. The Italian DST applies to revenues derived from the following specific categories of digital services. Online advertising services: revenue from placing targeted advertising on a digital interface based on data gathered from users. Multi-sided digital interfaces: revenues from the provision of a digital platform facilitating interaction between users, which may result in the supply of goods or services. Transmission of user data: revenues derived from selling or transferring data collected about users and generated through their activities on digital platforms. The taxable base includes gross revenues, excluding VAT and other indirect taxes. Importantly, the DST is levied on the revenues that companies derive specifically from Italian users, making it a turnover-based tax rather than a profit-based one (Vatcalc, 2025).

With the approval of the 2025 Italian Budget Law (n. 207 of December 30th), the Italian government removed the €5.5m threshold for annual revenue from qualified digital services taking place in the Italian territory. This change means that any level of revenue

generated in Italy will now be subject to the DST, provided the global threshold of €750m in worldwide revenue is met. Additionally, the Law introduces new payment terms. An advance payment equal to 30% of the DST owed for the previous year will be due by 30 November of the same calendar year. The balance will be due by 16 May of the year following the reference year (EY, 2025).

France introduced a tax in 2020 with a tax rate of 3% after the provision of a digital interface and advertising services based on users' data. Retroactively applicable as of January 1, 2019. The 2020 DST collection was delayed to the end of 2020 (Ministre de l'Économie et des Finances, 2019). The DST is calculated on the gross turnover of digital services providers. The "GAFA" tax, as it was initially abbreviated, is now "GAFAM" and is an income-based tax that primarily affects the most impactful digital services companies with clients worldwide and significant market share. GAFAM tax, a summary of initials from companies with the largest market share in this business sector, i.e., Google, Amazon, Facebook (now Meta), Apple, and Microsoft, is applicable in France if the likes of the companies above and others in conditions when the registered global turnover of taxable services is above EUR 750 million, and in France above EUR 25 million for certain digital services that are deemed to be placed in the country (1stopvat, 2024).

Also in France, a Finance Act from 2025 introduced a new flat rate of 5% for digital service providers that surpass the threshold indicated by the French General Tax Code starting from January 1, 2025. Also in France, with a tax rate of 1,2% on the revenues paid and free access to recorded music and online music videos implemented January 1, 2024 due to amounts exceeding EUR 20 million.

3. CRITICISMS OF A DIGITAL SERVICE TAXES

Although DSTs are considered a good initiative for addressing the taxation challenges of the digital economy, several criticisms have been raised regarding their implementation. Some contend that their high revenue thresholds result in only very large, and predominantly foreign, companies being subject to digital taxes. This creates a situation where smaller domestic firms, which may also benefit from digital platforms, are largely exempt from these obligations. Furthermore, the narrow scope of these regulations ensures that only businesses operating in specific targeted sectors, often deemed disfavored or controversial, face taxation. This selective approach raises concerns about fairness and equity in the tax system, as it disproportionately affects certain industries while allowing others to operate without similar financial responsibilities. Critics argue that such a framework not only undermines the principle of a level playing field but also limits the potential revenue that could be generated from a broader base of companies benefiting from digital services. Ultimately, this raises important questions about the effectiveness and sustainability of current digital tax policies in addressing the challenges posed by the evolving digital economy (Mason & Parada, 2018).

In the context of international tax law, companies have the ability to contest the DST by invoking bilateral income tax treaties. The specific tax treaty that applies and the claims that can be made are contingent upon the country of residence of the challenging company.

While it is probable that the DST does not fall under the category of "taxes covered" by the most pertinent tax treaties, companies can still mount a challenge by leveraging the non-discrimination clause included in these agreements. This clause typically prohibits countries from imposing tax burdens on foreign entities that are more onerous than those applied to domestic companies, providing a potential avenue for companies to argue that the DST unfairly discriminates against them. As the global landscape of taxation continues to evolve, the interplay between DSTs and existing tax treaties will likely become a focal point for legal disputes and negotiations among nations (Forsgren, Song & Horváth, 2020).

4. FINAL THOUGHTS

In conclusion, the DST represents a significant step towards addressing the unique taxation challenges posed by the digital economy. While it offers opportunities for governments to modernize their tax systems and secure revenue streams, its implementation is fraught with complexities and criticisms. A balanced and coordinated international approach is essential to harness the potential of DSTs, ensuring that they promote tax fairness and sustainability without leading to fragmentation or retaliatory measures. As the global landscape of taxation continues to evolve, the interplay between DSTs and existing tax treaties will likely remain a critical area for legal disputes and international negotiations.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch10

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THE IMPACT OF FURTHER DIGITALISATION OF EU CIVIL JUDICIAL COOPERATION ON NATIONAL PROCEDURAL LAWS: A CASE STUDY OF HUNGARY

The Member States of the European Union are continuously striving for an ever-wider digitalization of judicial cooperation in accordance with the principle of "digital by default". From 1 May 2025 onwards, e-communication will become a priority and in many EU proceedings to facilitate oral hearings in proceedings in civil, commercial and criminal matters with cross-border implications the optional use of videoconferencing or other distance communication technology will be available.

With regard to EU proceedings, it is the responsibility of the Member States (MS) to fill in procedural issues not covered by EU law with national law, provided that this does not undermine the principles of equivalence and effectiveness of EU law. EU MSs are bound by the Charter of Fundamental Rights of the EU and all EU MSs are party to the European Convention on Human Rights.

In light of the above, MS should adapt their national procedural law to the new EU digital procedural possibilities, while considering the fundamental rights jurisprudence of both the Luxembourg and Strasbourg Courts. The national legislator can respond either by creating specific procedural rules or by adapting the general rules of national law. The need for more extensive use of digital solutions is also apparent in national procedures. In this framework, a case study focusing on Hungary will be presented. Therefore, the modification of the general rules is the way to go, which can also contribute to even greater harmonisation of national procedural laws in the MSs, indirectly.

Keywords: digitalization of civil procedure, e-justice, EU law, judicial cooperation, videoconferencing.

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1. INTRODUCTION

The advent of novel social phenomena invariably gives rise to alterations in the legal landscape. The phenomenon of wider digitalisation is reflected not only in legal relations, but also in procedural law. This is due to evolving societal expectations of justice and a growing emphasis on its role as a service. The prevailing expectation in a digital society is that services should be readily accessible, even via online, and delivered expeditiously.

This paper examines a narrow slice of the challenges facing e-justice, namely the use of videoconferencing as a digital mode of in person representation in civil proceedings. The utilisation of videoconferencing systems in legal proceedings is not a recent development; however, the widespread adoption of online videoconferencing tools in civil litigation represents a novel phenomenon that has emerged as a regulatory challenge in the aftermath of the pandemic (Sanders, 2021).

This paper introduces a comprehensive set of digital rules for civil judicial cooperation in the EU. Then, the fundamental rights issues of virtual presence will be introduced based on the ECtHR case law. Finally, the provision of presence by means of online videoconferencing will be explained using the example of Hungary, to demonstrate how it differs from the 'traditional' digital presence rules.

2. THE DIGITAL TRANSFORMATION OF THE EU'S JUDICIAL COOPERATION

The primary aim of European integration was to establish closer economic cooperation between Member States and to create a single internal market. (Liargovas & Papageorgiou, 2024, pp. 29-30). Cooperation in justice and home affairs was not originally provided for in the Treaty of Rome. Although there was no primary legal basis for judicial cooperation, practical reasons, such as the practical operation of the four freedoms (freedom of goods, services, capital and people), and the effective resolution of cross-border disputes, required cooperation between Member States in justice (Stone Sweet, 2004, p. 30). With the entry into force Treaty of Maastricht on 1 November 1993, judicial and judicial cooperation was emphasised as part of the third pillar. The Treaty of Amsterdam, which entered into force on 1 May 1999, transferred most justice and home affairs matters to the first pillar, including judicial cooperation in civil matters and made the maintenance and development of an area of freedom, security and justice one of the objectives of the Union (Kende & Szűcs, 2009, p. 770).

The initial formulation of the periodic objectives of judicial cooperation in both civil and criminal matters was, of course, conducted by the European Council in the so-called Presidency Conclusions, which were named after the city in which they were held. It was within the context of these programs, namely Tampere (European Council, 1999), The Hague (European Council, 2005) and Stockholm (European Council, 2010), that the overarching objectives of European judicial cooperation were established. These programmes have enabled the European Council to further extend the organisational and substantive framework for judicial cooperation, as set out in both the Treaty of Nice and the Treaty of Lisbon, at both primary law level and secondary law level, at both the level of regulations and directives, by setting out new and additional objectives (Mohay, 2020, p. 598).

The Treaty of Lisbon has facilitated the establishment of strategic guidelines in the area of freedom, security, and justice by the European Council (TFEU, 2012, Art. 68). These guidelines are formally designated as the "Guidelines for the European Union's Action in the Field of Freedom, Security and Justice". These "post-Stockholm" strategic guidelines continue to set out the strategic objectives of judicial cooperation, but on an explicit Treaty basis and with a view to a legislative structure that goes beyond the pillar system.

The primary legal basis for judicial cooperation in civil matters is Article 81(1) of the Treaty on the Functioning of the European Union (TFEU), which is based on the principle of mutual recognition of decisions between Member States. Paragraphs 2 and 3 of the Article delineate the areas in which the Union may exercise shared competence with the MS', define the EU's legislative procedural order, i.e. which matters are subject to the ordinary legislative procedure and which to the special legislative procedure, and lay the basis for cooperation in cross-border family law matters.

In the context of this mandate, a series of legal instruments have been adopted in alignment with the objectives set by the European Council, initially in programmes and subsequently in strategic guidelines, on jurisdiction (e.g. the so-called Brussels Regulations), applicable law (e.g. the so-called Rome Regulations), procedural issues (e.g. the taking of evidence, service of documents), alternative European procedures (e.g. the European Small Claims Procedure), the establishment of a cooperation body and associated matters.'

The objectives delineated in these European Council programmes have been translated into concrete EU legal instruments, adopted based on action plans adopted by the Justice and Home Affairs Council, composed of the competent ministers of the Member States, and legislative proposals initiated by the Commission. The introduction of these instruments extends well beyond the scope of this study.

A significant objective of the European Union's civil judicial cooperation is to address cross-border disputes with greater efficiency and expediency (art. 81 of TFEU). In this regard, the EU legal framework has instituted several measures to encourage the integration of contemporary technologies, such as videoconferencing, within judicial processes. Furthermore, the EU has progressively facilitated the utilisation of videoconferencing for EU legal instruments, of which the use in the taking of evidence has been of the greatest importance.

EU law has previously allowed for the transmission of requests by any appropriate means in the framework of the getting evidence in a technology-neutral manner (Art. 6 of Council Regulation (EC) No 1206/2001, 2001) and has not precluded Member States from concluding bilateral or multilateral agreements to further facilitate the taking of evidence, provided that they are compatible with this Regulation (par 33. of Court of Justice of the European Union, 2012). The applicable Regulation on the Taking of Evidence, which has been partly revised in the spirit of digitisation, already oblige, as a general rule, that all communication and exchange of documents should be carried out through a secure and reliable decentralised IT system, such as e-CODEX. On the other hand, with detailed procedural rule, greater emphasis will be placed on the possibility of taking evidence by videoconference.

It is important to underline that the hearing of a party cannot be considered as an evidentiary hearing, and therefore the regulation on the taking of evidence could not be used as a basis for hearing opposing parties by videoconference.

The hearing of the parties is made possible by Digitalisation Regulation in judicial cooperation (European Parliament & Council, 2023), applicable from 1 May 2025, that allows the parties to be heard via videoconference in another Member State without requiring the consent of the other Member State, as for the taking of evidence in the Regulation on the taking of evidence (Art. 19 of EU Regulation 2020/1783).

The Regulation will implement the 'digital by default' principle in cross-border civil, commercial and criminal proceedings (European Commission, 2020). The Regulation provides for the possibility of written electronic communication in judicial cooperation procedures in civil and commercial matters, both between authorities and between natural or legal persons and the competent authorities, and extends the possibilities of hearing by videoconference or other means of telecommunication. This specific mode of hearing is briefly described below.

Instead of the more ambitious scope of the draft Regulation, which covers almost all EU proceedings (European Commission, 2021), the Regulation allows for a narrower scope of cross-border EU proceedings, such as the taking of evidence, the European Small Claims Procedure, and the temporary freezing of accounts, where one of the parties or their representative is in another Member State, to be heard by the court or tribunal by videoconference or other telecommunication technology, at their request or of its own motion (Art. 5(1) Regulation 2023/2844). This provision will make it possible to "hear" parties in cross-border civil and commercial cases by remote hearing, whether by videoconference or other means of telecommunication.

The Regulation defines videoconferencing as an audiovisual transmission technology that allows two-way and simultaneous visual and audio communication, thus enabling visual, audio and verbal interaction (Art. 2(6) of Regulation 2023/2844). However, there is no definition of other telecommunications technology or definition of its content, which is the reason for the technology neutrality of the Regulation. However, the question may arise whether voice-only communication can be considered as an acceptable means of communication. The Regulation maintains the rule that the procedure for conducting hearings by 'videoconference or other means of telecommunication' is governed by the law of the Member State where the videoconference takes place (Art. 5(4) of Regulation 2023/2844).

The Regulation provides for the possibility for the parties to take part by videoconference without the intervention of any other body in specific proceedings. This criterion can be met by the rules on simplified telecommunications presence described below. According to the rules of Hungarian law, as will be described, simplified telecommunication presence by voice communication only cannot be implemented.

3. FUNDAMENTAL RIGHTS ISSUES IN VIDEOCONFERENCING

From the legal point of view, the application of a videoconference system ensures the accessibility of the procedure, the presence of the party, the equality of arms, and the publicity of the hearings. These topics fall within the scope of right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the EU (the Charter) and also fall under the right to a fair trial granted by Article 6 of European Convention on Human Rights (Handbook on European law relating to access to justice, 2016, p. 178).

The Court of Justice of the European Union (CJEU) has undertaken to consider the case law of the European Court of Human Rights (ECtHR) under Article 52(3) of the EU Charter of Fundamental Rights when the rights in the Charter and the Convention are identical. This legal framework expressly provides that the CJEU is obliged to follow the practice of the ECtHR when interpreting rights "having the same meaning and scope" as those guaranteed by the Convention. Given that there has not yet been a CJEU decision based on Article 47 of the Charter in a civil case, I will now refer to the relevant practice of the ECtHR, although it is not possible to avoid referring to decisions in criminal cases in this context (Mason, 2020).

The first time when the ECtHR examined the compatibility of the use of a video link with the right to a fair trial was in 2006, in the case of Marcello Viola v. Italy (ECtHR 2006-XI 123). This case became the origin of the cases, where the question involves the use of a videoconference system. The case is based on a criminal procedure. Applicant was accused of serious crimes, and was subject to restricted prison regime. Alleged violation was that he was forced to use videoconference on his hearing, which created difficulties for his defence.

The general finding of the ECtHR was that the defendant's participation in the proceedings by videoconference as such is not contrary to the Convention, if it serves a legitimate aim and if the arrangements for the giving of evidence are compatible with the requirements of respect for due process. The ECtHR found that the use of videoconference was compatible with the right to a fair trial, because the use of a special hearing method was reasonable, *inter alia*, because of safety measures and to comply with the "reasonable time" requirement. The use of video link was applied only in the appeal hearings, which did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and the applicant had an opportunity to exercise the rights and entitlements. Furthermore, it pointed out there were no technical issues involved, because there were no times when the defence sought to bring to the attention of the court difficulties of hearing or seeing.

The ECtHR in the case of *Sakhnovskiy v. Russia* (ECtHR Application no. 21272/03) cited the above-mentioned findings in connection with the effective presence of an appellate hearing via video conference. The subject of the case concerned the accused applicant's right to communicate with his lawyer. In this aspect, the case introduced new findings. In connection with the right to communicate with a lawyer, the ECtHR emphasised that the Convention is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and if a lawyer could not confer with his client and receive confidential instructions from him without the risk of surveillance, his assistance would lose much of its usefulness. 15 minutes to communicate with their newly appointed lawyer immediately before the hearing deemed insufficient and incompatible with the right to a fair trial. In connection with the video link, which was installed and operated by the state, the ECtHR found questionable the sufficient privacy of the communication and accepted that the applicant might legitimately have felt ill at ease when he had a discussion with his lawyer.

In the case of *Trepashkin v. Russia* (No. 2) (ECtHR Application no. 14248/05) the ECtHR notes that the Convention case-law under Article 6 does not require the same

level of guarantees in the court of appeal as at the trial stage. In the certain case, the ECtHR reiterates the reasoning of an admissibility decision (ECtHR Application no. 26260/02) which says that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole. Here, the ECtHR found no violation of Article 6 in a case where the applicant's presence on the appellate hearing was ensured by a video link, under circumstances where no malfunction of the IT system was found, and the right to effective defence was ensured.'

The first case, where the use of videoconference was examined in connection with a civil case, was the case of Vladimir Vasilyev v. Russia (ECtHR Application no. 28370/05). In connection with the question of the in person presence on the hearings, the ECtHR pointed out the difference between the criminal and civil cases. It pointed out that the right to a frail trial does not guarantee the right to be heard in person at a civil court, but a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. The ECtHR determined that the national court had not considered how to facilitate effective participation by the applicant, even though their presence was necessary, considering the subject of the case. The ECtHR concluded that, despite the existence of alternatives, the national court had not ensured sufficient options for the applicant's involvement. In the ECtHR's view, to hold a session by a video link would have been an appropriate option.

In the case of Yevdokimov and Others v. Russia (ECtHR Application no. 27236/05, and others), the ECtHR reiterated its finding that the use of a video link could be an obvious solution to conduct civil proceedings, where the personal hearing of a party is required. The personal hearing of a party may be required if the claim involves the party's personal experience and, accordingly, whether the court needs to take oral evidence directly from the party. The ECtHR cited its findings taken in the above-mentioned criminal based cases and expressed that the use of videoconference can be compatible with' Article 6 if; the party can follow the proceedings, see the persons present and hear what is being said, but also can be seen and heard by the other parties, the judge and witnesses, without technical impediment.

In the case of *Gorbunov and Gorbachev v. Russia* (ECtHR Application no. 43183/06 and 27412/07), the ECtHR reiterated the described findings. The poor connection of video conference prevents the party to follow the proceedings in an adequate way if the only way of communication between the applicant and his lawyer carried out on a video-conference system installed and operated by the state results in the lack of confidential communication between them. These circumstances, based on the lack of' effective presence and the lack of right to communicate with the lawyer, result in the infringement of the right to a fair trial.'

In the case of *Sakhnovskiy v. Russia* (No. 2) (ECtHR Application no. 39159/12), which is based on the alleged lack of confidential communication between the applicant and his lawyer, the ECtHR pointed out, that it took into consideration the fact, that the state did not provide any evidence that the video link was secured against any attempt at interception, nor did they offer any explanation why it was not possible to organise at least a telephone conversation.

Based on the cited case law of the ECtHR, it seems the use of a videoconference system is an "appropriate option" and "obvious solution" to conduct civil proceedings. As the cited cases also show, the use of a videoconference system always comes together with some restrictions of rights and opportunities for the parties. The interference of the restrictions with Article 6 of the Convention depends on the question of the proportionality. A restriction because of the special way of the hearing can conform with the right of a fair trial if, within the circumstances of the exact case, the restriction is proportional regarding the influenced right.

Although the question is complex, the legal aim and the compatibility with the requirements of respect for due process are the universal measures of the proportionality.

The legitimate aim can be varied, as the examined cases show that the safety measures and the compliance with the reasonable time requirement can be a legitimate aim.

The party's right to an effective presence, as a part of respect to due process, is handled differently in criminal and civil cases, and also in the different stages of the procedure. In civil cases, the in person hearing of the party is not essential, if his side is presented effectively in another way. The guarantees of Article 6 at the different procedural levels of the remedy do not require the same level as at the first instance. The mentioned specialties of the civil cases and the different stages of the procedure lower the threshold of what can be deemed as a legitimate aim to find the use of videoconference systems.

4. SIMPLIFIED TELECOMMUNICATIONS PRESENCE IN CIVIL CASES, THE NEW HUNGARIAN LEGISLATION

Act XVII of 2024 on the Amendment of the Acts on Judicial Matters (the "Amendment Act") amended the Code of Civil Procedure in two respects, with effect from 9 July 2024 regarding the use of videoconferencing. On the one hand, it has extended the possibilities of recording minutes and allows the recording of minutes by continuous recording at all stages of the proceedings. On the other hand, it has introduced a new legal instrument on the use of electronic communications networks and, in the interests of simplification, has introduced a simplified telecommunications presence besides the hearing by electronic communications network.

Hearing by electronic communications network is not a new legal instrument in Hungary. It was introduced by the amendment to the Code on Civil Procedure of 1952, in force since 4 December 2015, with a new type of hearing, the rules for the use of the closed telecommunications network. Introducing this new legal instrument was in line with the ongoing digitalisation of certain non-litigious and litigious proceedings, and the "digitalisation" of participation in hearings was a logical consequence of the increasingly widespread and gradually mandatory use of electronic written communication with courts. In criminal proceedings, the possibility of being heard via a closed telecommunications network was introduced in 2003. The creation of rules for remote hearings in civil proceedings, explicitly mentioned in the Explanatory Memorandum of the new instrument, is linked to EU law. The Explanatory Memorandum points out that the first Regulation on the taking of evidence (Council Regulation (EC) No 1206/2001, 2001), which has substantially applied since

1 January 2004, already provided for the possibility of taking evidence by videoconference and that, in the light of these rules, several EU Member States have made it possible to take evidence by videoconference in civil cases without a foreign element.

The existing Code on Civil Procedure has maintained the legal institution and has kept it under the name of hearing by means of an electronic communications network, with the essential characteristic of hearing by means of a closed telecommunications network, with procedural clarifications.

A judge or assistant judge may order a hearing via electronic communications network (ECN) for expediency, cost-saving, or witness protection. Such hearings can involve parties, witnesses, experts, or objects and must use devices transmitting simultaneous video and audio between the court and a connected location. The person to be heard must appear in a designated room with representatives of the hosting body present. The ECN must enable clear visibility of all participants and the hearing room for the chairperson, ensure confidentiality for closed hearings, and allow distortion of the image or voice of the person being heard if required. Minutes must document the hearing's conditions, including any technical issues and their resolution. Public access is limited to authorised individuals, excluding assisting staff from the hosting authority.

The above legislative decision was embodied in the Amendment Act, which, as of 9 July 2024, extended Chapter XLVII of the Code on Civil Procedure on the use of electronic communications networks by regulating simplified telecommunications presence. As seen from the explanatory memorandum of the amendment, the legislative aim was to simplify the procedure. Although the explanatory memorandum mentions only criminal proceedings among the positive experiences of the use of electronic means, the impact of e-trial, which also applies in civil proceedings because of the COVID-19 pandemic, as described above, cannot be ignored. Furthermore, the change in circumstances outside the legal sphere, where participation by electronic means has become generally accepted because of the pandemic.

The rules of simplified telecommunications presence (STP) are based on the rules of hearing via electronic communications network (ECN) as background rules, but include simplifications and the necessary guarantee-rules resulting from these simplifications. The differences can be summarised as follows.

A hearing through the ECN may be ordered on the motion of a party or ex officio if it is justified by the need to expedite, simplify or reduce the costs of the proceedings or to protect the personal rights of the witness. For this purpose, a separate room in another court or other body, typically' a penalty enforcement institute or a consulate, must be provided, equipped with a special videoconferencing system which ensures that all persons present at all relevant locations during the hearing are fully visible, that the person being heard can be well focused, that the judge conducting the hearing can check all points of the other location and that it is suitable for conducting a secret hearing.

In comparison, the use of STP requires the prior consent of the person interviewed. An order to conduct a hearing by the STP, even in one of the conditions, is only possible if the judge considers it appropriate. What is relevant in this context is whether the court considers that the hearing can be conducted without the presence of the person or a hearing by ECN. There is no need to comply with any special conditions in relation to the videoconferencing

equipment used, as has been shown in the case of the ECN, nor is it necessary to provide multiple camera images together or to allow a secret connection. However, regarding the hearing room, it is a condition that only the person to be heard or a person authorised by law to be present, such as a lawyer, guardian, custodian, sponsor, may be present at the hearing.

The identification process is consistent across both procedures, relying on statements from the party to be heard and legally verified documents, and sealed processing must be ensured. Identification under the STP follows the ECN hearing procedure but also requires identifying circumstances that may prevent conducting an STP. Grounds for exclusion include doubts about identity, voluntariness, or external influence, as well as the presence of unauthorised individuals or inability to verify conditions. To assess these exclusions, the presence of participants and the hearing location must be checked, and grounds for exclusion verified during proceedings by the hearing conductor.

There is no restriction on the number of persons who may be involved in any procedure, several ECN sites may be involved, and several persons may be present via STP. The provisions on the publicity of the hearing apply in both cases, in that publicity must be provided at the designated hearing venue.

5. CONCLUSION

Judicial cooperation in civil matters has already followed technological evolution (van den Hoogen, 2008, p. 65). Using videoconferencing devices, including online videoconferencing devices, which eliminated the need for further intervention of a seized court or other authority in the direct contact between the court and the party, is becoming more and more widespread and involves legal challenges (Fekete, 2023). It has been noted that, in the context of videoconferencing, the hearing of a party no longer depends upon the consent of the Member State of residence of the party, nor does it require the procurement of costly special videoconferencing equipment. However, in the context of evidence collection, at least tacit consent from the Member State concerned by the procedure is required.

The utilisation of videoconferencing facilities in civil proceedings within EU MS is subject to the overarching provisions of EU law, complemented by the detailed rules of national legislations. In principle, videoconferencing must comply with the right to a fair trial, in cross-border civil proceedings as enshrined in the Charter, in purely domestic contexts as protected by the ECHR and interpreted through the case law of the ECtHR.

These innovative procedures contribute to ensuring that justice is delivered in a more efficient and accessible manner. Concurrently, the advent of virtual presence invariably gives rise to novel and distinct scenarios about legal interpretation (Susskind, 2019, p. 55). These include the admissibility of virtual presence, issues of identification, and the feasibility of effective participation. Avoiding abuses and finding a uniform solution acceptable to both the CJEU and the ECtHR will be based on the past case law described and future experience of current proceedings, which will need to be monitored and, where necessary, legislative and jurisprudential consequences drawn. This could be considered as one of the fundamental elements in the harmonisation of national procedural law within Member States, establishing the foundation for a unified EU digital civil procedural law.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch11

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THE FUTURE OF EMPLOYMENT: CLOUD-BASED COLLABORATION – TWO SIDES OF PERFORMING WORK TASKS IN THE DIGITAL ERA**

It can not be denied that digitalisation and artificial intelligence are transforming the traditional workplace and task performance. We live in a digital era, and managing technical achievements with decent work is challenging for all modern societies. This transformation of employment brought us some advantages while performing work tasks. Some authors argue that this transformation of work contributes to more efficient workers, because they feel free to work from home, or any other place they decide to be. On the other hand, there are low chances for workers to disconnect and maintain their personal lives. It is challenging to maintain a balance between personal and professional life because of the lack of legal instruments that protect the private life of an employee. Some authors stressed that this kind of work reveals the need for employers to use the potential of technology to create structured work rather than chaos, which can be achieved with HR management. The real problem that employers must face is the complexity of managing a cloud-enabled workforce, as well as creating consistent communication among team members across different time zones.

This paper will discuss whether cloud-based collaboration is the future of work performance and the advantages and disadvantages of this instrument.

Keywords: digital work, cloud computing, mental health, remote work, digitalisation.

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** This work is a result of research within the project 'Adapting the Legal Framework to Social and Technological Changes with a Special Focus on Artificial Intelligence,' carried out in 2025 by the Institute of Comparative Law with financial support from the Ministry of Science, Technological Development and Innovation (contract number 451-03-136/2025-03/200049).

1. INTRODUCTION

The functioning of labour law has changed over the past several years. We can agree with Neshovska Kjoseva that labour was 'on the move' with the need for lifelong learning skills, labour patterns, and employee migration (Neshovska Kjoseva, 2023, p. 343). The last one is crucial, taking into account that technology has given the opportunity for employees to work in different places than the employers' premises. Due to the pandemic, remote work and the gig economy have seen a significant increase in labour law practice. The traditional concept of labour has been deeply challenged by the need for change. Those changes are numerous, followed by a higher level of legal protection for some categories of employees, like freelancers (Reljanović & Misailović, 2021, pp. 407-432). The new rules of labour are changing the traditional performance of work, but also promoting more attention to mental health (Rajić Ćalić, 2023, pp. 303-319), workplace safety, as well as the need for work-life balance (Nkechi *et al*., 2024, p. 540). There should not be neglected huge impact of artificial intelligence on the workplace. The transformation of employees and the way of performing work tasks started with technological changes. The core concept of labour has been changed through employment contracts, which are no longer the symbol of stability. The employment contract for a non-definite period has been changed by part-time, temporary, and gig economy (Nkechi *et al*., 2024, p. 541)[1] jobs that are challenging the stability of employment (Nkechi *et al*., 2024, p. 541). This stability is more shaken by the existence of zero-hour contracts, in which there is no number of hours prescribed in advance (Nkechi *et al*., 2024, p. 542). In that new labour law atmosphere for work, there is much more need for legal attention when it comes to the supervision of work of nowadays employees, productivity, and also employees' privacy.

The need for more flexibility in labour law brought us to insecurity and income instability, making little space for balancing between flexibility and worker protection. On the other hand, there is a strong connection between digital platforms and collaboration, communication, and data storage (Nkechi *et al*., 2024, p. 543). Using technology in the workplace is inevitable. One can not neglect the advantages of using technology, which can be seen in efficiency, innovation, and collaboration. But, on the other hand, there are privacy concerns. In order to use the advantages, modern societies must be aware of the disadvantages and make an effort to create a balance with adequate provisions (Nkechi *et al*., 2024, p. 544). We agree with those authors who argue that fully remote work must be accompanied by 'strictly labour observation', to provide 'gigification and platformisation' of the labour market (Rainone, 2023, p. 165).

2. TRANSFORMATION OF LABOUR LAW BY TECHNOLOGY

We are witnessing the impact of technology and artificial intelligence on all spheres of society. As technology is developing, so is artificial intelligence, as its core (Živković, 2024, p. 317). We should bear in mind that artificial intelligence is made of information and parameters entered by humans (Andonović, 2020, p. 112). Kovačević states that artificial

[1] The gig economy is characterized by short-term and freelance work, facilitated by digital platforms.

intelligence is at the heart of digitalisation. It strongly shapes the workplace, the essence of working tasks, as well as the communication between employees (Kovačević, 2024, p. 124). George argues the workplace is 'going under metamorphosis', from 'rigid norms from the industrial era' to 'flexible and democratised of the digital age' (Shai, 2024, p. 92). Digitalisation has made the need for workers to adapt to new ways of doing tasks by learning new skills and knowledge, and storing new human capital. Digital technology is transforming the workplace by altering job requirements, creating new jobs and new knowledge, and supporting remote work and collaboration (Padmanabhan, 2023, p. 16). Future, this situation will lead to new jobs, such as data scientists, digital marketing specialists, and cybersecurity analysts (Padmanabhan, 2023, p. 11). This can be seen as a good side of digital technology, which is opening new chances for employment. Working with new technology is faster, cheaper, and operationalization of time for employees, without the need for physical infrastructure (Padmanabhan, 2023, p. 14). On the other hand, there is always a possibility that automation displaces a human worker with a need for training and facilities. We can read statements that automatisation processes and artificial intelligence will 'steal jobs from people' (Božičić, 2023, p. 92). Is that so? Professor Kovačević points out that the impact of artificial intelligence on the labour market depends on human work, as well as on artificial intelligence, and the possibility to be changing one with the other (Kovačević, 2024, p. 89). Most manual work might be replaced by automation, putting those workers in a situation of losing their jobs. These workers are usually those with no education. But, for others, artificial intelligence will mean the need for employees for lifelong learning. In that case, it is not likely that artificial intelligence can replace human work, but it can be one of the additions to the work (Gmyrek, Berg & Bescond, 2023, p. 44). In order to perform jobs that include technology, employees are exposed to constant learning and education, so the real challenge will be to provide training to all those who are willing to learn.

Nonetheless, we should bear in mind the reflection of the COVID-19 pandemic on labour law, starting in 2020. Isolation of humans, taking caution, prohibition of getting ended with remote work and settling down with digital technology and digital workforce (Padmanabhan, 2023, p. 10). The necessity of digital tools such as collaboration and communication grew from month to month, with the need for continuity of effectiveness at work. One author highlighted the importance of automation to achieve business continuity (Padmanabhan, 2023, p. 10), which was one of the main challenges in COVID times. Digital transformation was seen as an adequate response to the crisis caused by the pandemic (Padmanabhan, 2023, p. 10). We can agree that digitalisation and remote work were the only solutions for many people in order not to lose their jobs and maintain financial survival. Now, in the post-pandemic era, a hybrid model of work that includes a combination of remote work and work at an employer's premises is the most wanted (Vandaele & Piasna, 2023, p. 103).

3. THE LEGAL FRAMEWORK OF DIGITAL TECHNOLOGY IN LABOUR LAW IN THE EUROPEAN UNION

The legal framework that defines the use of technology in labour law comes with a variety, but there are two documents that have drawn our attention. One of them is the Artificial Intelligence Act brought by the European Parliament in 2024.[2] This act prescribes the system that uses artificial intelligence, as well as the risks of using this kind of system. The main challenge is the process where the use of artificial intelligence requires an additional level of protection. Kovačević states that this Act didn't take into account all the specificities in the labour law, including platform work (Kovačević, 2024, p. 108). This one is crucial, taking into account problems caused by platforms in recurring processes, data of employees involved, and the lack of transparency with the functioning of the algorithm, decision-making, and supervisory (Božičić, 2023, pp. 91-108). Artificial intelligence is forbidden as a tool to show the emotions of employees. It is prescribed the obligation to inform the representative of employees of the use of new technology in the workplace. These two provisions we consider the most important, taking into account that the States in the European Union are allowed to enact this law or to enact another act with legislation with higher demands. We stand that the crucial thing is the prescription that artificial intelligence systems can be used in the workplace only if there are no risks of jeopardising the protested interest of the European Union, which suggests constant supervision and testing of systems before use (Kovačević, 2024, p. 109).

Although there is no legal provision on cloud-based collaboration yet, we stand that it is important to mention the European Social Partners' Framework Agreement on Digitalisation (Business Europe, SGI Europe, SMEunited, & the ETUC, 2020). When talking about digital technology and artificial intelligence at work in general. It is called the *sui generis* act (Kovačević, 2024, p. 114), signed between European social partners to regulate the use of artificial intelligence in the workplace. It is expected for social partners at the national level to make the conditions for the use of artificial intelligence in control of people taking in mind that these conditions must be 'legal, transparent, secure, safe, legitimate, non-discriminatory, to support ethical standards, sustainable without the place for causing damage (European Social Partner's Framework Agreement on Digitalisation, point 3). Using artificial intelligence is seen not only as a tool for the productivity of employers but also for the efficiency of employees, to make work performance easier, especially when it comes to harmful working conditions. We can conclude that the main request of European social partners when it comes to using artificial intelligence is to provide transparency and awareness of the risks of misuse and control of this kind of system.

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

4. THE MEANING OF CLOUD-BASED COLLABORATION

After the COVID-19 pandemic, we welcomed the remote work era. In order to obtain the same efficiency of work tasks and productivity, there are some suggestions for technological solutions. Cloud-based collaboration tools are one of them, taking into account the importance of communication in remote work (Fearn, 2024). We may find that 'cloud services are a necessity in the age of remote work', because 'working outside of the office has become the new norm' (Box blogs, 2022).

Some authors define cloud computing in general, naming it as 'emerging technology, a tool for „enabling multiple devices to process data' and 'use of the massive computing power to complete tasks with complexity, saving time and costs' (Hu & Yang, 2023, p. 133). Anwar *et al*. state that a computing-based collaboration system is made to 'enhance real-time communication, data management, and collaboration among users' (Anwar *et al.*, 2024, p. 562). Generally speaking, working in the cloud relates work with storing data in servers that are off-site to use them at any time needed (Anwar *et al.*, 2024, p. 562). It is also stated that cloud-based collaboration is a tool for efficiency and productivity. Beyond others, cloud computing stands out for its infrastructure cost efficiency, flexible access, and adjustable storage capacity (Anwar *et al*., 2024, p. 562). Some authors call this evolution of technology 'the advent of cloud computing', which may help all sizes of companies to function remotely, meet the needs of collaboration between businesses, and for IT employees to be outsourced (Banks, Erickson & Rhodes, 2009, p. 1). One thing is sure, cloud-based collaboration is the response to digital era challenges, work-related, ensuring geographic cross-access and communication between employees and institutions without physical limitation. Cloud computing is a helpful tool for remote work or hybrid workplaces, giving support to working tasks as an internet-based service (Box blogs, 2022). The most important thing is that the employer is not obliged to install any additional hardware or to invest in infrastructure. The only thing that matters is the internet connection for employees.

National Institute of Standards and Technology defines cloud computing as a 'service delivery model that is on demand, with broad network access, rapid elasticity and measured user services' (Anwar *et al.*, 2024, p. 563).'

There are many examples of how cloud computing is used, accompanied by AI. Amazon and Delta Airlines use new technology to switch humans with machines and algorithms for customer interactions, as well as Tesla and Toyota, where robots are used to replace humans in manual workplaces such as welding and painting (Selesi-Aina *et al.* 2024, p. 63). Customer service is on the lookout for a replacement because of the development of chatbots that are in place to enhance customer service, especially in healthcare (Selesi-Aina *et al*., 2024, p. 65). As for cloud-based collaboration, namely, Google and Microsoft serve themselves with this kind of work to support virtual teams, developing projects, and simple communications between employees who don't share the same local workplace (Mei, 2024, p. 2; Selesi-Aina *et al*., 2024, p. 63). Some authors in Nigeria point out the importance of cloud accounting related to economic growth, showing reports of reduced rates of unemployment by increasing rates for IT professionals (Olaoye, 2024, p. 17). Cloud computing 'allows remote access to financial data, enabling employees to work

from anywhere, fostering collaboration and potentially attracting foreign investments' (Olaoye, 2024, p. 17). Cloud computing is used in China's education, and it is said to be the element for the improvement of the quality of teaching and learning through 'cloud computing-assisted teaching'. Called an effective transmission, cloud computing-assisted teaching provides personalised teaching power through cloud computing and storage functions, remote learning, and allows students to access courses on computing platforms anytime and anywhere (Selesi-Aina *et al*., 2024, p. 63). Cloud-based applications are also used in manufacturing design and industrial projects, enabling real-time interaction meetings between design engineers worldwide (Mourtzis *et al*., 2020, p. 551).

4.1. The adaptation of employees to new technology at work

There is no doubt that technology has changed the labour law. It is questionable how the employees accept new ways of work performance. It is said that the main challenge in accepting new technology is the fact that employees are unable to perform work in the traditional way of working (Padmanabhan, 2023, p. 15). We should highlight the way how cloud-based technology affects employees and what strategies should be used by employers to use new technology most efficiently.

The fact is that digital technology consumes digital skills and expertise, so employers are in search of employees with knowledge of data analysis, cybersecurity, AI, and machine learning (Padmanabhan, 2023, p. 16). Some researchers have pointed out that there is resistance from employees when it comes to the use of cloud-based technology (Pokharel, 2024, p. 3). That is no wonder, taking into account that employees are facing new, unexpected changes. Stress and anxiety are related to adapting to new technology, focusing on the direction of these changes (Pokharel, 2024, p. 21). Employees don't adapt easily to new technologies. In the beginning, it should be noted how important the fact is that all employees are familiar with cloud-based technology that is used for work performance, including all the changes that are made with this new way of doing work tasks. Having all workers involved means that many of them will be able to give advice or explain how some challenges can be overcome (Pokharel, 2024, pp. 3-4).[3] Second, in theory, it has been some factors in the readiness of employees to adopt new technologies (Pokharel, 2024, p. 5):

- Employees must be sure that new technologies can help them perform work tasks more easily, or that the new ways will improve their work performance.
- Training and education programs are crucial for accepting new technology, as well.
- Active communication between employees. That affirms the above-mentioned that all employees must be involved in the transition to modern technology.
- The involvement of employees in the decision-making may also be one of the factors that can prevail in adapting to cloud-based technology.

[3] There is Lewin's change management model, which includes three phases of acceptance of changes and the process of adopting new ways of performing work tasks: unfreezing, changing, and refreezing.

5. THE ADVANTAGES AND DISADVANTAGES OF CLOUD-BASED COLLABORATION

It is highlighted in some papers that cloud-based technology is 'promising' (Pokharel, 2024, p. 5). This is especially related to the possibility of access to all data that is shared with cloud services by the employees who have active accounts and are connected (Pokharel, 2024, p. 5). Privacy concerns are pointed out as a major challenge of cloud-based collaboration because this system often requires large amounts of personal data (Selesi-Aina *et al*., 2024, pp. 4). This is especially referred to as picking, packing, and shipping in the supply chain. The authors point out how important personal data is and the potential risk that can be incurred if this information is not managed well.

We should also keep in mind that new technology, accompanied by artificial intelligence, may replace some workplaces of humans, changing the traditional performance of work, especially when it comes to manual labour (Selesi-Aina *et al.,* 2024, p. 64). This is potentially challenging for those workers who are low-skilled and have no access to new technology or the knowledge needed to use it (Selesi-Aina *et al*., 2024, p. 67). That is one of the challenges that humanity is faced with, the replacement of some workplaces, which can lead to an increase in unemployment and more unemployment. Furthermore, this situation brings new challenges with the vulnerability of some employees to face termination of their working contract, making financial inequality more visible (Selesi-Aina *et al*., 2024, p. 66).

On the other hand, AI, robotics, and cloud computing are said to be ways of enhancing productivity at work, reducing costs of work, as well as improving work safety (Selesi-Aina *et al*., 2024, p. 67). This way of performing work tasks ensures remote work, making it possible for employees to collaborate. Future, new technology is said to be flexible with the power of inclusive work that can be used in work-life balance policy, making it possible for an employee to balance their private and professional duties (Selesi-Aina *et al*., 2024, p. 64). It is also noted that cloud-based collaboration can unite the work of all employees, making at the same time, resilient. We can agree that cloud-based collaboration, along with AI, is transforming the workplace, increasing the need for employees to adjust to new knowledge and skills. In that way, employees might use these tools by doing repetitive tasks, focusing on activities that can not be replaced by AI (Selesi-Aina *et al*., 2024, p. 66). Some authors state that the most significant advantage of cloud computing is seen in reducing costs (Selesi-Aina *et al*., 2024, p. 67). This is especially meant for those employers that conduct manual labour, such as agriculture, where robots can efficiently replace the human workforce (Selesi-Aina *et al*., 2024, p. 67). In that way, employers may rely on robots and other instruments of AI and cloud computing in order to cut labour costs. As for the safety of the workplace that is more likely to be achieved using new technology, it has been pointed out the work of robots in hazardous work environments and because of difficult conditions of work such as high or low temperature, toxic substances, and similar (Selesi-Aina *et al.,* 2024, pp. 65). Talking about safety, the authors stressed predictive systems that can prevent accidents and failures, exemplifying a proactive approach (Selesi-Aina *et al*., 2024, p. 65). George reveals one more advantage of cloud computing, unlocking 'collective potential',

which is seen in better communication between employees, through the possibility of co-editing shared documents (Shai, 2024, p. 102).

We can agree with those authors that the potential of cloud-based collaboration should be used as a way to improve the performance of work, as well as 'social welfare and human well-being' (Selesi-Aina *et al*., 2024, pp. 64). That leads us to another conclusion: new technology should not be seen as a replacement for human labour, but rather as the integration of companies and employees, making inclusive work possible.

6. CONCLUDING REMARKS

Using digital technology is today's reality. Using it becomes a must. We agree with those authors who suggest that both employees and employers must adapt to new technology through lifelong learning, embracing digital skills and knowledge to stay competitive (Padmanabhan, 2023, p. 17). That affects the need for an almost total reorganisation of work tasks. The labour law is truly taking the metamorphosis process from the industrial to the digital era, with constant changes that require innovation. The follower of this innovation is getting new knowledge and skills. An inevitable consequence is going to be to differences between employees who can adapt to new technologies at work and those for whom this change will be too hard (Kovačević, 2024, p. 124).

Cloud-based collaboration, as a pivotal technological development, brings a lot of advantages, such as enhanced productivity and lower costs for employers. We state that disadvantages must be controlled by taking measures at the state level, following the risks of use, and reconsidering the measures from time to time. Primarily, we find investment in education and training crucial for employees to accept new technology at work. Constant education of employees benefits to employer too, as they stay up to date with the tools of digital technology. Further on, we agree with those authors who suggest an ethical framework to use digital technology responsibly, lowering the possibility of unfair treatment (Selesi-Aina *et al.,* 2024, p. 64). As for the fear of replacing human work with artificial intelligence, it is at the heart of digital technology, we stand that it is more likely that using artificial intelligence will be an addition to the work of humans, a tool that can make their job easier, for humans to focus on more important things that can not be replaced. The impact of artificial intelligence on manual work remains an open question, with a high possibility that manual workers will be replaced by artificial intelligence.

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DISEQUILIBRATED CONTRACTUAL TERMS AND PLATFORMS' OBLIGATIONS UNDER DIGITAL MARKETS ACT

The paper approaches the problems of disequilibrated contractual terms and platforms' obligations under the Digital Markets Act, seen through the lens of the provisions concerning the platform's legal statute. Particularly, the analysis concerns the specific set of obligations imposed on online networking services and online advertising services, activating particularly in platform-to-business contracts. First, the significant imbalances and contractual asymmetries that the disequilibrated terms generate can encompass economic imbalances which consist of significant disproportions and ostensible asymmetries between the contracting parties, assessed in correlation to the agreement procedures and subsequently, during performing the contractual obligations. Second, we argue that the imbalance in the allocation of contractual risks in digital services contracts may emerge from clauses which affect the parties' right to resort to extrajudicial remedies to induce the digital services provider to perform correlative obligations. Third, when referring to the taxonomies applicable to economically imbalanced clauses, the paper discusses the reverberations of imbalances, generated by clauses allowing the service supplier to unilaterally select contractual terms without recognising the prerogative of unilaterally cease the contractual relations. Forth, the paper approaches the indirect economic imbalances caused by informational asymmetries manifested at the precontractual stage.

Keywords: disequilibrated terms, digital platforms, Digital Markets Act, digital services, platform-to-business contracts.

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1. INTRODUCTORY REMARKS

Informational asymmetries are inherent to platform-to-business relations, mostly imputable to the differences in the financial dimensions of the contractual parties. The legal approach of these asymmetries oscillates between the need for a legislative reaction to the emergence of legal issues that exceed the egalitarian competences of the legal normativity; sinuously, the EU legislator needed to approach a perimeter dominated by the vulnerability of the medium or small-sized digital platforms with average comprehension and negotiation powers, most frequently described as the fragile party of the platform-to-business contractual relationships. Simultaneously, these harmonised norms dominate a legal space where significant imbalances and contractual asymmetries generated to unfair platform-to-business terms are ostensibly noticeable, and which may be divided into the following categories:

(a) the purely economic imbalances, which consists of significant disproportions between the services of the professional contracting parties, assessed symmetrically at the formational stage and subsequently, during performing the contractual effects. Referring to the economic imbalance typology, we note they can be divided into:
   (i) direct economic imbalances[1], generated, for example, by clauses allowing the digital services supplier to unilaterally increase the price of the services without recognising the other party's prerogative to resort to unilateral termination of the contractual relations if, because of the increase applied, the final price is excessively onerous in relation to the price agreed by the parties at the time the contract was concluded;
   (ii) the indirect economic imbalance[2] caused, for example, by those clauses prohibiting the user from offsetting the debt against a claim that the medium or small-sized platform had towards the dominant digital platform;

(b) imbalances in the allocation of contractual risk, triggered, for example, in the presence of clauses that remove the medium or small-sized platform's right to invoke the exception of non-performance of the contract in order to suspend its own services, or in order to induce the dominant platform to perform its correlative contractual obligations; the insertion of a similar term has the effect of generating a significant imbalance, since, although the supplier does not voluntarily perform its obligation under the contractual provisions, the dominant platform could oblige the correlative party to fulfil its own obligations under the adhesion contract;

(c) procedural imbalances,[3] which are directly related to the status of litigants of the contracting parties, with the consequence that those terms restricting the medium or small-sized platform's access to evidence, respectively clauses limiting the taking of evidence to clarify the disputed elements etc., are identified as unfair terms included in the category of procedural disequilibria;

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[1] Recital (39) of the DMA concerning prohibitory practices imposed by dominant platforms.

[2] Recital (52) of DMA regarding the ranking of products offered by dominant platforms.

[3] Recital (42) of DMA regarding the prohibited resorting to terms which inhibit or hinder users in seeking available judicial redress, by means of confidentiality clauses.

(d) the liability imbalances (Duivenvoorde, 2022, p. 44) which the medium or small-sized platforms are confronted with, in the sense that, by concluding standardised or adhesion contracts unilaterally drafted by the dominant platform, the liability regime may be altered while favouring the dominant platform.

Relevant to the EU legislator's attempt to manage the dangers arising from manipulative contractual incompleteness in platform-to-business relationships, by establishing an obligation to complete the specific contracting conditions (Campos Carvalho, 2020, p. 864), are the provisions of Regulation (EU) 2019/1150, which establishes harmonised standards on transparency and fairness digital services in P2B (platform-to-business) relationships (Monti, 2021, p. 16), in particular those mentioned in articles 7 to 10 of Regulation (EU) 2019/1150. Relevancy is similarly attached article 14 of the Digital Services Act (DSA), which contain salient provisions regarding the performance of the mandatory obligation to introduce specific clauses in the contractual field, without allowing the parties, in particular platforms acting as intermediaries or access controllers, to circumvent the EU provisions by deliberately omitting to include clarifications on the management of essential aspects of the platform-to-business transaction concerned (Papadopoulos & Kofina, 2024, p. 228). Congruently, in Recital (45) of Regulation (EU) 2022/1925 (DMA), the increasingly remarked opacity of the platform-to-business terms has been emphasised, which is imputable mainly to the practices of dominant platforms, beginning with the advertising stage[4] (Zardiashvili & Sears, 2023, p. 842) and continuing with the contract formation stage (Bostoen, 2023, p. 264).

2. SPECIFIC EXIGENCIES ADDRESSING THE TRANSPARENCY OF PLATFORM-TO-BUSINESS TERMS

2.1. Requirements connected to the informative formalism

When compared to the informative formalism applicable to contracts between professionals and consumers (Brenncke, 2024, p. 129), in platform-to-business relationships, the focus is not primarily on consecrating a reasonable level of comprehensiveness and transparency, but rather on preventing strategies meant to manipulate the contractual omissive text in favour of the dominant digital service provider or the gatekeeper on the digital services market (Goicovici, 2021, p. 285). Therefore, we are witnessing a protective function of the EU regulation that establishes the obligation to introduce specific clauses increasing the level of transparency (Hornkohl, 2024, p. 72), by avoiding contractual incompleteness in platform-to-business relationships, doubled by a moralising function of these specific norms, which are addressing the manner of drafting the general contracting conditions between differently sized digital services professionals, targeting potential strategies to manipulate the contractual evasiveness[5]. When focusing on the role played

[4] Recital (61) of the DMA addressing dominant platforms' obligations in P2B relations.

[5] Recital (13) of the DMA concerning the resorting to contractual terms drafted in unilateral and detrimental manner.

by the obligation to insert specific clauses increasing transparency (Helminger, 2024, p. 107) and the role assigned to information formalism in the relations between differently sized digital platforms, particularly with platform-to-business relationships, it is essential to warn or inform the contractual partner in detail about the legal implications of certain contractual provisions, or legal implications that the professional party may anticipate (Mik, 2020, p. 114). Ostensibly, the EU harmonised regulation on consecrating an obligation to introduce specific clauses on the restriction or conditioning of access to data or access to digital services in platform-to-business relationships anticipates the potential undesirable reverberations of the contractual evasiveness to which platforms with the status of gatekeepers could resort, giving rise to the premises to manipulate the situation of contractual incompleteness for the benefit of dominant digital services providers.

For a coherent example of the obligation to insert ancillary clauses in P2B contracts, the text of article 7, para. 1 of Regulation (EU) 2019/1150, concerning the descriptive insertion of the contractual differentiated treatment assigned to users in the category of medium or small-sized platforms while concerning the provision of digital services, while highlighting the rationale for resorting to differential treatment. Illustrative of the obligation to avoid contractual incompleteness regarding specific clauses is Article 8 let. (a) of Regulation (EU) 2019/1150, which prohibit providers of online intermediary services from imposing retroactive amendments to the general terms and conditions of business accepted by users, except where the amendments result from the application of an overriding legally mandatory obligation, without generating a contractual imbalance. Second, the provisions of Article 8 let. (b) of Regulation (EU) 2019/1150 establish a prohibition applicable to the digital intermediary platforms to resort to contractual incompleteness in terms of the clauses and conditions under which the unilateral termination of the P2B contract may take place, when the holder of the right of termination or unilateral termination is the user, respectively the medium or small-sized digital platform. Similar provisions are also contained in the text of Article 8 let. (c) of Regulation (EU) 2019/1150, which prohibits digital intermediation platforms from omitting to include in the general terms the liability-managing conditions of business which are unilaterally drafted[6]. Nor can the clauses relating to access to personal data (Goicovici, 2022, p. 46) or non-personal data be omitted from P2B contracts,[7] as provided for in article 9 of Regulation (EU) 2019/1150, as digital platforms do not maintain discretionary options on the exclusion of these terms from the contractual field.[8]

It is also worth mentioning the mandatory nature of the obligation to insert explanations motivating the possible choice of intermediating platforms to introduce restrictive clauses on access to digital services or to resort to exclusivity clauses, which would moderate or eliminate the possibility of contracting platforms to conclude similar transactions with the dominant platform's competitors, although for a limited period, according to the specifications of article 10 of Regulation (EU) 2019/1150. Similar provisions originate in

6 Recital (45) of the DMA approaching the transparency of costs related to digital advertising services.

7 Recital (36) of the DMA concerning the treatment of end-users' personal data by dominant platforms.

8 Recital (72) of the DMA concerning the transparency of profiling practices.

Article 14 of the DSA, digital platforms being required to insert information regarding: (i) the legal treatment applicable to algorithmic decision-making and the management of data subjects' requests for human intervention on the algorithmised decision and its possible review (Argelich Comelles, 2023, p. 194); (ii) the internal system for solving complaints and notifications addressed by users. The final thesis of article 14, paragraph 1 of the DSA reproduces the requirements of transparency and avoidance of manipulative strategies based on any ambiguous, incomplete, or evasive clauses, highlighting that the information in question must be presented in clear, simple, intelligible, accessible, and unambiguous language and in an easily accessible format. Relevant for the management of situations of contractual incompleteness in the perimeter of the provision of digital services are also the provisions of article 14, paragraph 5 of the DSA, which are addressing the conduct of dominant platforms, specifying that the latter are expected to inform the recipients of the services on the general terms and conditions related to specific liability regimen for contractual non-performance.

In the given context, the provisions of EU law applicable to platform-to-business contracts are evocative of the concern to temper the tendency of intermediating platforms, especially those in the category of 'very large online platforms' (VLOPs), to resort to manipulative strategies by amplifying the ambiguity of the contractual clauses with the intention of manipulating in their own interest the evasive nature of the general or specific contracting conditions. Platforms for intermediation of access to digital services, on account of the discretionary aspects attributed to drafting the P2B clauses proposed for acceptance to the recipients in the adherent category, respectively to the companies that use these intermediated digital services in relation to consumers, become the 'dominant contractual party'. The emphasis on the configuration of the contractual content reveals that the contractual incompleteness in P2B relationships is manifested also for endogenous reasons, due to asymmetric information, hence the need to regulate the obligation to inform the users/recipients of digital services on general or specific contracting aspects selected as relevant or indispensable by the EU legislator, as illustrated by the texts of the normative acts mentioned in the previous paragraphs. Interrogations may arise, however, as to the relevant remedies in the event of deliberate disregard of the exigencies related to the obligation of transparency incumbent on dominant digital platforms. Scrutinising the available judicial remedies, as parsimonious as these may appear, remains a difficult task, in terms of identifying specific approaches to those infringements, while the salient question may be raised: to what extent could the national courts resort to legal mechanisms and remedies that would lead to the filling of contractual gaps in the agreements at issue? Imposing on the dominant digital platforms the obligation to initiate negotiations or to supplement the informative clauses and bring them into compliance under the means of paying default damages for each day of delay could represent a 'classical' remedy adapted to these types of situations; nevertheless, it would not necessarily be the most effective in the long-term perspective. Neither the DSA nor Regulation (EU) 2019/1150, contain specific sanctions addressing the issue of adapting or supplementing the content of ostensibly 'incomplete' P2B contracts. In our opinion, concerning the EU legislator's preoccupation to keep within the competence of the Member States the selection of relevant legal

remedies for sanctioning deviant conduct of the providers of digital services placed on a favoured contractual position, the applicable sanctions can be 'imported' from the ordinary contractual liability regimen, with the specification that, in our view, the appropriate sanction would be that of the *inter partes* unenforceability of ambiguous or deliberately evasive clauses which, in the content of the platform-to-business adhesion contracts, would be unilaterally drafted by the dominant platforms.

Another observation concerns the fact that the informative formalism in platform-to-business contractual relations implies the obligation to expressly insert, in the unilaterally drafted contractual text proposed to the other party, of the minimum mandatory information selected by the legislator, to inform the latter on the relevant rights and obligations generated by accepting the offer and, finally, designed to protect the informed consent of the vulnerable contractual party. Ostensibly, the informative formalism specific to P2B clauses cannot be subsumed to any of the classic categories of contractual formalism, such as the substantial formalism, or the agreement-validating formalism, or the formalism related to the enforceability of rights against third parties, as forms the structure of which the informative formalism does not imitate; particularly, in the case of the P2B informative formalism, the emphasis falls on the warning of the non-dominant party on the configuration of its contractual obligations and on the potential exercise of its rights, while signalling the existence of the procedural remedies, the taxonomy of which may be included in the general contracting terms.

2.2. Facets of the dominant platforms' pre-contractual obligation to provide transparent information

The resurgence of the obligation to include express mentions in the content of the P2B contracts blurs the possibility of the dominant platforms to opt for omitting the clauses listed by the EU or national legislator, the slippage into the area of contractual incompleteness not being allowed in this perimeter. In addition, it should be mentioned that informing the correlative party at the pre-contractual stage is, in the segment represented by the formation of P2B contracts, doubled or seconded by the informative formalism, which revolves around the obligation of the dominant platform to make relevant information accessible to the other party, which would warn the latter on the existence of rights and obligations the importance of which the legislator evaluated as decisive.

For endogenous reasons, the obligation incumbent on the dominant digital platforms to provide the medium-sized or the small-sized platforms with certain information at the pre-contractual stage is intended to enable the latter to compare the various concurrent offers received, to select the one most appropriate to its specific economic interests. As regards the obligation to provide the other party with certain information at the time of acceptance of the offer (incorporation of mandatory information, as an expression of the information formalism), its regulation would make it easier for medium-sized or the small-sized platforms to become aware of the existence of the rights and obligations incumbent on them under the P2B contract formed (ensuring that the latter are provided with the information necessary for exercising their legal prerogatives, especially the right to withdraw from the P2B contract). While being substantially attached to the obligation

to inform, the informative formalism is frequently associated with the requirements of the obligation of transparency incumbent on the dominant platforms, relating to the duty to explicitly inform the users on the minimum contractual prerogatives established by the mandatory legal norms. The antagonism installed in the 'classical' civil law between formalism and voluntarism is less visible from the territory of informational formalism, understood as a protective formalism of the will of the contractual party whose contractual posture is marked by fragility due to the latent informational asymmetries in the process of forming the platform-to-business contracts.

Contractual incompleteness strategies are incompatible with the requirements of informational formalism in platform-to-business relations, since this type of formalism requires submission to the formal character requirements for a specialised technique aimed at protecting the medium-sized or the small-sized platforms' consent at the stage of forming contracts with the dominant platforms providing digital services. It concerns a mechanism of legal origin consisting of the obligation of the dominant platform to insert, in the contractual text offered to the other party, including in the digital version of that text, specifications provided for by the special legislation, the purpose of which is to inform the latter about specific rights and obligations generated by certain contractual clauses, perceived as presenting a particular degree of risk for the vulnerable party. The information formalism cannot be fully absorbed by the obligation to exhibit information on unilaterally drafted terms, incumbent under the DMA, the violation of which constitutes an unlawful act of a tort nature, which implies the possibility of engaging the tort liability of the disobedient platform, while the sanctions applicable to the ignorance of the information formalism cover a sufficiently wide range, starting from the sanction of extending the term of withdrawal of the other party's consent, and continuing with the *inter partes* unenforceability of the clauses not expressly reproduced in the contractual text, respectively with the contravention fine imposed on the digital services providers.

3. AVOIDANCE OF CONTRACTUAL INCOMPLETENESS IN PLATFORM-TO-BUSINESS RELATIONS

3.1. 'Blurred' components of general contracting terms

When the reasons for contractual incompleteness are emerging from the area of economic interests, or from informational asymmetries characterising the specific versions of contracting, the degree of completeness of platform-to-business contracts can be seen as variable, depending on the level of contractual transparency. In the perimeter of the formation of P2B contracts, the elements that present the most significant problems for identifying the legal remedies to address the invalidation of the contract are those involving the 'blurred' component of general terms, starting from the fact that the economic reverberations of certain clauses are not fully understandable or intelligible for the correlative party.

According to specialised literature, multiple problems have been identified for the use of disequilibrated terms in P2B agreements (Kerber, 2021, p. 31), starting from the need

to outline adequate rules for engaging liability resulting from the unilateral selection of general terms that will determine the performance of digital contracts, as a type of liability that can be engaged for undesirable effects (De Streel *et al.*, 2024, p. 17) that could not be anticipated by the other party that was not able to predict the undesirable economic effects (Eckardt, 2024, p. 4).[9]

The selection of contractual clauses and the identification of the (apparently) optimal level of contractual completeness in P2B relationships may imply a decrease in the level of transparency attached to the automated ranking of contractual terms[10]. As mentioned in the previous sections, providers of digital online intermediating services are prohibited from resorting to contractual incompleteness or omission of terms from the category specified in the harmonised legislation. Firstly, the specific requirements applicable to the obligation to avoid contractual incompleteness, incumbent on dominant platforms, refer, according to article 5, paragraph 2 of the Regulation (EU) 2019/1150, to the identifying of the criteria which are predominantly significant in establishing the hierarchy of the offers. Second, article 5, paragraph 3 of the Regulation (EU) 2019/1150 remains applicable in cases where, at the time of the selection of the contractual terms, the main parameters include the possibility of influencing the position in the hierarchy by paying an annuity, by the companies using online intermediation services or by the professional users of websites, an annuity for the benefit of the dominant provider, situations in which the provider of digital intermediation services is required to exhibit a description of the effects of such remuneration on the hierarchical position of offers on the intermediating platform.

3.2. Relative visibility of ranked offers, and the relevance assigned to search results on the digital platform

It should be noted that the provisions of the EU normative act refer to the terms involved in the ranking of products, starting from the finding that this hierarchy of offers significantly influences users' choices and, indirectly, the size of the market share held by platforms whose offers are automatically ranked on the intermediation platform. The relative visibility of ranked offers, and the relevance assigned to search results on the digital platform for intermediation of transactions resulting from the use of algorithmic sequencing, decisively marks the contracting decisions. On the other hand, from the perspective of maintaining an adequate level of transparency between competitors, in the light of the requirements of fair competition (Bagnoli, 2021, p. 136), the predictability of algorithmic selections implies that providers of online intermediation services establish the hierarchy in a non-arbitrary manner, as specified in recital (24) of the Regulation (EU) 2019/1150. Providers of digital

[9] For instance, the unforeseen behavior of sophisticated agents in the category of platform-to-business algorithmic contracting could lead to unlawful discriminatory practices, and the *ex-post* remedies, such as the right to challenge the algorithmic decision and to have the decision reassessed by a human agent, are not always effective. The opacity of the formation of platform-to-business contracts does not allow, in principle, to identify or fully decipher the way of selecting the P2B contractual terms, which have become mandatory for the parties to the transaction, and this level of uncertainty (despite the economic advantages, speed and facilitation of contracting) remains high even in the case of the use of more transparent intelligent agents.

[10] Issues such as the transparent ranking of search results is addressed in article 5, paragraph 1 of Regulation (EU) 2019/1150.

intermediation services[11] for P2B transactions are thus required to explicitly mention, at the pre-contractual stage of the formation of intermediation contracts between these platforms and competitors on a given digital market, the main ranking parameters, to increase predictability for companies using online intermediation services, in order to allow them to better understand how the intermediation mechanism works when ranking and comparing the practices applied in this regard by different digital services suppliers. Additionally, it is apparent from recital (25) of the Regulation (EU) 2019/1150 that the description of the main ranking parameters should also include an explanation of the possibilities that companies supplying digital services may access to obtain a readjustment of the position of their offers in the algorithmically established hierarchy and to actively influence the position in the hierarchy in exchange for payments, as well as the relative effects of such a situation, without transgressing the limits represented by the requirements of fair competition. Similar explanations are explicitly mentioned in recital (70) of the DSA, from which it follows that digital platforms have an obligation to transparently inform users on the manner under which recommendation systems influence the way in which information is displayed on the platform and how it can influence the way in which information is presented to users (De Streel & Larouche, 2021, p. 48), including the cases when the information is prioritised on the basis of profiling and the online behaviour of the recipients of the digital services.

The involvement of intelligent virtual agents in the selection of contractual clauses may generate imbalances that require the assessment and auditing of such systemic risks that may fuel discrepancies between the contractual positions of the parties whose transactions are intermediated by digital service providers of considerably expanded dimensions (Ribera Martínez, 2024, p. 272), which, in accordance with the specifications in recital (84) of the DSA, are required to pay attention to the transparent configuration of the product recommendation and advertising settings, focusing on related data collection and fair commercial practices. Similarly, it is the task of these digital service providers in the category of VLOPs and VLOSEs (very large online search engines) to assess whether their general terms of use and implementation are adequate (Niels & Kleczka, 2025, p. 4). It is also specified in the text of the mentioned recital that, when assessing the systemic risks identified, dominant digital services providers are expected to properly disclose these vulnerabilities in their internal risk assessments.

It is also worth emphasising that the selection by VLOPs and VLOSEs of the algorithmic systems involved in the pre-contractual phase of P2B relationships is not immutable, as they have the obligation to reconsider the selection of algorithmic agents and to improve this selection or to periodically adapt the automated decision-making systems (especially those in the self-learning category).

[11] Core platform services include a closed-list of ten digital services, which include access to online search engines, online social networking services or web browsers.

4. OBLIGATION TO PROVIDE EXPLANATIONS CONCERNING THE HIERARCHY OF RESULTS GENERATED ON THE PLATFORM

As resulting from recital (24) of Regulation (EU) 2019/1150, the notion of 'dominant parameters' referred to in the explanations should be understood as referring to any specific mechanisms selected in relation to the hierarchy of results accessed on the platform. It should be noted that there are certain limits to this obligation to make explicit the intervention of algorithmic systems in digital transactions intermediated by digital platforms, as specified in recital (27) of Regulation (EU) 2019/1150. Antagonistically, it is mandatory to disclose the intervention of algorithms when the bid rankings have been manipulated to the detriment of consumers' interests, according to the provisions of article 5, 6th para. of Regulation (EU) 2019/1150. Furthermore, avoidance of restrictive practices affecting fair competition is pivotal for the DMA regulation (Bostoen, 2023), accentuating the importance of addressing the vexing problem of remedies (Strand, 2024, p. 126) applicable to contractual incompleteness and evasiveness in platform-to-business agreements.

More precisely, the hierarchy of results generated on the platform may be considerably altered or influenced by the possibility of modifying the position in the hierarchy by resorting to the onerous mechanism of an annuity, by the companies using online intermediation services or by the professional users of websites, and for the benefit of the dominant provider, which represent hypotheses where the provider of digital intermediation services is required to exhibit a narrow description of the reverberations of the mentioned onerous mechanisms on the hierarchical position of offers on the intermediating digital platform. Transparentising the ranking criteria which influence the results list on the products and services available intermediating platform remains a major preoccupation under the DMA when approaching the fairness of P2B relations.

5. CONCLUDING REMARKS

The architecture of the rules applicable to platform-to-business contracts, while centred on contractual freedom and on the egalitarian essence of the contractual position of the parties, has been anticipated the need to re-balance the forces between medium-sized or small-sized digital platforms and the dominant platforms, from the perspective of preventing the resorting to disequilibrated contractual terms. Compliance with the requirements of the principle of transparency of contractual clauses can be practiced voluntarily by dominant digital platforms; nevertheless, it would be an inhomogeneous solution in the absence of imperative or mandatory legal obligations. Contextualising the need for accuracy, transparency, comprehensibility and equilibrated contractual terms, the DMA's lineage is designed to remedy the disequilibria inherent to contractual settings involving differently sized digital platforms. Given the transparency-increasing ambition of the DMA texts, it remains crucial to observe, when scrutinising the specific obligations imposed on the dominant digital platforms, that accent has been placed on the roles played by the informative formalism attached to the formation of the platform-to-business contracts.

Ambiguities in the text of the P2B general terms of contracting may give rise to the opportunity of exploiting the evasiveness of the agreed clauses in the benefit of dominant platforms, while being ostensibly detrimental to the medium-sized or small-sized digital platforms interacting with the dominant players. The narrative of strategical use reserved for the contractual incompleteness remains centred on the desiquilibria favoured by the lack of contractual transparency, thus altering not only the premises for a fairer competition on the digital services market, yet also compromising the desiderata attached to the equilibrated platform-to-business relations, a scenario that may end up in marginalising the medium-sized or small-sized digital platforms' presence on the relevant market. There were arguments indicating that the economic (directly or indirectly generated) desiquilibria fuelled by the deviance of dominant platforms from the exigences of the transparency principle may be tempered by resorting to the mandatory nature of the obligation to exhibit pertinent information, incumbent on the dominant platforms at the pre-contractual stage. Endogenously disequilibrated terms, which may allow dominant digital services businesses to easily escape the rigorous perimeter of the transparency principle, as set in the DMA provisions, may be identified as indicators of the malevolent conduct to which the dominant platforms may be tempted to resort in platform-to-business relations. Aiming at neutralising the effects of the 'programed' contractual incompleteness, regulatory tools such as the informative formalism applicable to P2B agreements may help promoting a fairer setting for the access to intermediating digital services. Undoubtedly, the accent should be placed on clarifying the contractual terms which approach the fair nature of the specific conditions when ranking third-party offers on the dominant platforms, not allowing dominant players to resort to ambiguously drafted terms favouring their contractual posture, while being detrimental to the legitimate interests of medium-sized or small-sized digital platforms, when acting in their capacity of commercial partners on the digital services markets.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch13

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REGULATION OF FREE SPEECH IN THE DIGITAL ERA: THE RULE OF LAW, NATURAL LAW AND THE MORALITY OF LAW

As new technology continues to expand, states across the world are grappling with the need to regulate different aspects of the technological realm. Recently, there has been a proliferation of new technology regulations restricting freedom of speech. There is an undeniable distinction between the rule of law and the rule by law. Directing government power through statutory law requires adherence to specific formal characteristics of lawful regulations. The rule of law, however, is not satisfied by technical and formal requirements only. While demanding these requirements, an exercise of legitimate government power furthermore requires that the law be substantively just. This means the law must be rational, align with the natural law, possess the morality of law, and inherently respect fundamental human rights. In terms of the doctrine of natural law, it is the principal duty of the State to protect and improve the fundamental human rights of its citizens. The government acts contrary to its natural purpose, the function for which it exists, if it enacts irrational, unjust laws that violate fundamental human rights. A government's contempt for basic human rights is a convincing indicator of the lack of the rule of law in that nation.

Keywords: New technology regulations, freedom of expression, rule of law, natural law, morality of law.

1. INTRODUCTION

"Digital rights" is generally used to allude to the manner in which the basic fundamental human rights guaranteed in the legally binding International Covenant on Civil and Political Rights (the 'ICCPR') are interpreted in the contemporary digital age, where vast aspects of human existence are mediated by recent digital technological advancements such as social media and the internet. Digital rights mirroring fundamental human rights are central to protecting fundamental human rights, as few aspects of modern life are

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unaffected by continually advancing technology, social media, and the internet, which determine how individuals converse, take part in public discourse, and work.

Digital technologies and communication networks were mostly free and unregulated when they first appeared. While the European Union (EU) and its Member States have since enacted various laws regulating the digital arena, it still presents unique opportunities for both the advancement and violation of fundamental human rights. The internet and social media have created vast opportunities for freedom of expression and for ordinary citizens to present facts and truth in the face of monopolized and government-controlled media. At the same time, digital technology statutes have been abused to advance anti-human rights legislation and practices that severely limit freedom of expression and silence those who speak truth to power (Media Defence, 2025). In recent years, it has become clear that bureaucrats in many so-called Western democracies have abused digital legislation to advance their interests at the expense of fundamental human rights under the guise of combating online hate speech, disinformation, and misinformation. It has been postulated that the real intent of some of the technology-related legislation is to silence critics, those contradicting the official false narratives with facts, and those asking fundamental questions relating to the ruling elite's legitimacy to govern and their contentious policies and practices (Lewis, 2025, p. 7). The impact of this spurious technology-related legislation is that the fundamental human right to freedom of expression on social media and the internet is violated, often excessively and illegally (Lewis, 2025, p. 7). The European Digital Services Act ('DSA'), enacted in 2024, has been welcomed as a pioneering law intended to "govern the content moderation practices of social media platforms" and eradicate illegal content and misinformation. However, underneath the cover of safeguarding democracy, fundamental human rights and freedoms are at risk of being eroded. The EU Commission avers that the DSA is necessary to "protect democracy" from online "hate speech", "disinformation", and "misinformation" in the digital era. It aims to establish a safer electronic environment by holding very large online platforms such as Alibaba, Amazon, Apple, Google, Meta, TikTok, and X responsible for any violations. However, by directing the elimination of vaguely defined "harmful" information and "illegal content," the DSA establishes a regulatory framework for the extensive suppression and restriction of truthful and legal speech under the banner of protecting democracy. The result may well be a sterilized and illegally controlled and manipulated internet and social media, where the fundamental human right to freedom of expression is illicitly repressed and violated (Portaru, 2025).

The EU and its various Member States have been at the forefront in passing a panoply of laws in the face of rapid technological advancements. In terms of a slew of new legislation to combat online disinformation and hate speech, criminal behaviour, subject to arrest and detention, in the EU now includes:

- praying silently near an abortion clinic (even in your own home) (Lu, 2025);
- quoting a bible scripture in public (Korpar, 2022);
- misgendering a biological male 'identifying as a female' (Shaw, 2021); and
- insulting someone online, reposting fake quotes, or spreading malicious gossip (Alfonsi *et al*,, 2025).

Important questions that need to be addressed include whether International Human Rights Law ('IHRL') guarantees the right to freedom of expression and opinion in the digital sphere, what are the requirements for a law to be just, what is an unjust law, and whether the current legislation curbing free speech in the digital era, (resulting in the prosecution of citizens voicing opinions contrary to the acceptable mainstream narrative), are aligned with the rule of law, the natural law and the morality of law.

2. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

2.1. International Human Rights Law

Article 2(1) of the ICCPR determines States Parties "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, or other status". The positive legal obligations of the Covenant in general and Article 2(1) to 2(3) are binding on every State Party as a whole. It applies to all branches of government (executive, legislative, and judicial) (Orakhelashvili, 2006, p. 50).

Article 19 of the ICCPR explicitly specifies that "1. Everyone shall have the right to hold opinions without interference," and that "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Among the other articles that contain guarantees for freedom of opinion and/or expression are articles 18, 17, 25, and 27.

The UN General Comment No. 34 on Article 19: Freedoms of opinion and expression importantly notes that:

> *"Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society...Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights."*

The comment further notes that although freedom of expression is not one of the "non-derogable" rights mentioned in article 4 of the ICCPR, "...there are elements that (...) cannot be made subject to lawful derogation under article 4". According to the comment, freedom of opinion is such an element. In a 2016 resolution, the UN Human Rights Council (UNHRC') confirmed that:

> *"[T]he same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice..."*

The UN Human Rights Council's Rabat Plan of Action republished in 2020 also advocates for a significantly elevated threshold for any restraints on the right to freedom of expression (United Nations Human Rights Council, 2020). While it is evident that freedom of expression is protected by a substantial body of treaty law, it is also regarded as a key principle of customary international law, which is recurrently pronounced in treaties, as well as quasi-legal instruments. The Universal Declaration of Human Rights Article 19, the Convention on the Rights of the Child Article 13, as well as the Convention on the Rights of Persons with Disabilities Article 21, all specifically protect the fundamental human right to freedom of expression.

2.2. EU Regional Human Rights Law

2.2.1. The European Convention on Human Rights

The European Convention on Human Rights ('ECHR'), signed by 47 Member States of the Council of Europe, protects freedom of expression through Article 10. The European Court of Human Rights ('ECtHR') has asserted numerous times that the internet provides an extraordinary platform for the exercise of freedom of expression, holding that:

> *"in view of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally." (ECtHR 2009, 2015).*

Article 10 of the ECHR protects not only the "content of information" but also the "means of transmission or reception" (Bayer *et al.*, 2021, p. 27). The ECtHR interprets the right to freedom of expression broadly and derogations to it narrowly. In Handyside v. the UK, the court asserted that the basic right to freedom of expression relates not only to "information" or "ideas" that are well received or considered as innocuous, but also to those that disrupt, insult, shock, or offend the Government or any segment of the populace. Such are the dictates of multiplicity, open-mindedness, freedom, and tolerance, without which a "democratic society" cannot exist. The ECtHR also confirmed in *Salov v. Ukraine* that protecting freedom of expression under Article 10 of the ECHR also encompasses the distribution of information that is highly likely to be mendacious (Bayer *et al.*, 2021, p. 24). In *Dink v. Turkey*, the ECtHR held that Member States have a positive legal duty to "create a favourable environment for participation in public debate, (...) enabling [people] to express their opinions and ideas without fear."

2.2.2. The Charter of Fundamental Rights of the European Union

The fundamental human right to freedom of expression, which is also enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, includes the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

The Court of Justice of the European Union ('CJEU') in *Connolly v. Commission*, also affirms the critical significance of the right to freedom of expression as an indispensable cornerstone of an open and democratic society, relevant to all communication, including

communication that 'disturb', 'shock', and 'offend'. In close alignment with the ECtHR case law, the CJEU held that any limitations to this important right must be interpreted restrictively.

2.2.3. EU Human Rights Guidelines on Freedom of Expression

The Council of the European Union's 2014 "EU Human Rights Guidelines on Freedom of Expression Online and Offline" expressly determines that:

> *"The ...arbitrary arrest of ...individuals because of his or her exercise of the freedom of expression constitutes a violation of Article 19 UDHR and ICCPR...*
>
> *Any legislative restriction on freedom of expression must be provided by law, may only be imposed for the grounds set out in international human rights law, and must conform to the strict tests of necessity and proportionality...*
>
> *All human rights that exist offline must also be protected online, in particular the right to freedom of opinion and expression." (Council of the European Union, 2014).*

According to these guidelines, examples of the unjust legislative actions include:

- Inconsistent and abusive application of legislation used to censor criticism and debate concerning public issues;
- Laws that foster a climate of fear and self-censorship among media actors and the public at large;
- Regulations that allow for the total or partial, ex post-facto censorship and banning of certain forms of speech; and
- Laws imposing prohibitive, levies, fines or other forms of economic sanctions (Council of the European Union, 2014).

3. RULING THROUGH LAW VERSUS RULING IN TERMS OF THE RULE OF LAW

When regulating different aspects of the technological realm, it is crucial to discern that "ruling through law" and ruling under "the rule of law" are two vastly different constructs. All government is necessarily by law, as a power that fails to be permitted by law is not government power. All laws enacted by the executive cannot automatically be categorized as morally just or governance in accord with the "rule of law" (Young, 2012, pp. 259-280). The Nazi-era laws enacted in Germany in the 1930s met the formal conception of law but lacked the substance and the virtue of law aligning with the "rule of law." In the words of Martin Luther King Jr, there are just laws and unjust laws. "A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral law. An unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust" (King, 1963).

Directing government power through statutory law in the digital era requires adherence to specific formal characteristics of lawful regulations. The formal element of law is satisfied when laws (regulations) conform to specific technical and formal requirements. Laws should *inter alia* be:

- properly promulgated;
- general in application;
- forthcoming;
- unambiguous;
- stable;
- transparent;
- fair; and
- be presided over by an independent judiciary.

The rule of law, however, is not satisfied by technical and formal requirements only. While demanding these requirements, an exercise of legitimate government power furthermore requires that the law be substantively just (Young, 2012, pp. 259-280). Characteristically, this means the law must be rational, align with the natural law, possess the morality of law, and inherently respect *jus cogens* norms and fundamental human rights.

In regulating electronic communication in the current epoch of technological innovation it remain essential to distinguish between laws that hold the "efficacy of the law" – which entails lawful, moral, rational, statutory acts by the executive – and laws that lack morality and efficacy yet possess the "force of the law" – which involves immoral and irrational, legislative acts by the executive (Agamben, 2008, pp. 37-39). In Roman doctrine, these legislative acts had "the force of law because it pleased the sovereign" (*quod principi placuit legis habet vigorem*) (Agamben, 2008, p. 39).

From a modern-day moral and legal perspective, statutes regulating new technologies and communication on social media platforms that lack "the efficacy of the law" (morality of law) do not qualify as "law" that aligns with the "rule of law" even though they contain the "force the law" given that they meet the formal requirements of law and are enforced by the executive. Put differently, for a law to align with the "rule of law" it requires an inherent moral value in addition to meeting the formal criteria of law. Agamben encapsulates the principle well:

> *"...the concept of 'force of law' as a technical legal term defines a separation of the norms vis obligandi, or applicability, from its formal essence, whereby decrees... which are not formally laws nevertheless acquire their 'force'." (Agamben, 2008, p. 38)*

An example of this phenomenon was the fascist Third Reich, in which Adolf Eichmann repeatedly propounded that "the words of the Fuhrer have the force of law" (Agamben, 2008, p. 39). During the first six years of Hitler's reign, the government at every level – Reich, State, and municipal – adopted hundreds of laws (regulations) that violated the human rights of the Jews in Germany. The first significant law to violate the human rights of Jewish citizens was the "Law for the Restoration of the Professional Civil Service of April

7, 1933" which eliminated Jews and the "politically unreliable" (those with contradictory views) from the public service. The numerous inhumane antisemitic Nazi-era laws that the German Reichstag duly passed between 1933 and 1939 had the "force of law" even though they lacked the "efficacy of the law".

History shows that laws and regulations that violate fundamental human rights lack the "efficacy of the law," and as such create an anomic society in which there is a disintegration or disappearance of the juridical norms and values, where the "force of law" is applied without the "rule of law"(van Aardt, 2022a, p. 288).

4. THE DOCTRINE OF NATURAL LAW

Natural law offers the necessary moral foundation on which all authorities should structure just juridical laws in regulating new technologies. All fundamental human rights come from God through natural law, which is absolute and unalterable (Swarts, 2010, pp. 145-148). Natural law is the basis of all legitimate human laws, and any law related to technological innovations and freedom of speech that breaches the natural law principles is unjust and illegitimate.

Plato (c. 428–347 BC) linked the "rule of law" tenet with the "natural law" (Márquez, 2012, pp. 341-364). In supporting the rule of law in his book "Laws", he assumes laws should be capable of mirroring the requirements of reason (Stalley, 1983). Laws defend the rule of law insofar as the governing laws are in accordance with natural law (Annas, 2017, p. 72). Plato asserted that law must have "virtue" or "complete justice" as its goal to conform with the "rule of law". Laws should always be "sound" or "good" and not "unsound" and "bad" as the latter are not laws, but "spurious laws" with no legal authority. According to Plato, "the state in which the rulers are most reluctant to govern is always the best..., and the state in which they are most eager, [through the proliferation of legislation] the worst". Plato deemed tyranny the "worst disorder of a state" as tyrants lack "the very faculty that is the instrument of judgment" (sound reason) and used the term "Anomia" to refer to people who do not know the moral law. In determining whether a government system has become tyrannical, a good test is "sound reason" (Annas, 2017).

Aristotle (384–322 BC), whose arguments in support of the rule of law are the arguments of a natural law theorist, in his book "Politics" posited that, "He who commands that law should rule may thus be regarded commanding God and reason alone should rule" (Letvin, 2005, p. 21). Law [as the pure voice of God and reason] is defined as "Reason free from all passion" (Letvin, 2005, pp. 21-46). Aristotle classified the different systems of government as either "right" or "wrong". "Right" constitutions adhere to the rule of law (natural law) and serve the common interests of all citizens, while "wrong" constitutions serve only the selfish interests of a particular person or group of persons. To Aristotle, tyranny is the illogical, capricious, and arbitrary power of a government that is "...responsible to no one, [and that] governs with a view to its own advantage, not to that of its subjects, and therefore against their will". Aristotle believed that tyranny is the "very reverse of a constitution". He noted that where the laws have no authority, there is no constitution or legitimate legal construct. Laws should reign supreme "when good" but when "laws miss

the mark" they are not binding (Zanghellini, 2016, pp. 13-14). Aristotle emphasized these laws must uphold just principles and standards, such that "true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws" (Tamanaha, 2004, p. 9). According to Aristotle, any form of government will be perverted when the "rule of law" (natural law) is not respected and adhered to where the "rule of law" becomes the "rule of men" (Wexler, 2006, pp. 116-138).

Cicero (106 BC–43 BC) confirmed that the natural law, present in each man's heart and determined by reason, is universal in its principles, and its authority extends to all human beings; it expresses the dignity of the person and determines the basis for their fundamental human rights:

> *"For there is a true law: right reason. It is in conformity with nature, is diffused among all men, and is immutable and eternal; its orders summon to duty; its prohibitions turn away from offense .... To replace it with a contrary law is a sacrilege; failure to apply even one of its provisions is forbidden; no one can abrogate it entirely." (Cicero, Liederbach, 2007, p. 782)*

According to Thomas Aquinas (1225–1274), all state power should be a ministry or service because it is derived from God for the happy ordering of the life of its citizens. The purpose of the State is, therefore, moral because of its origin and originator (Aquinas, 1274). Aquinas explains that a "*law is nothing but a dictate of practical reason emanating from the ruler who governs a perfect community*" (Liederbach, 2008, p. 785). As Charles Rice correctly postulates:"Morality is governed by a law built into the nature of man and knowable by reason. Man can know, through the use of his reason, what is in accord with his nature and therefore good ..." (Rice, 1999, p. 30)

In regulating the technological realm, it is the duty of the government to enact rational laws so that individuals may live a happy and fulfilling life, which is the true end of civil society. The State must lay the foundations of the happiness of its citizens by maintaining law and order through just, rational governance that aligns with natural law (Swartz, 2010, pp. 145-157). Aquinas categorically submitted that:

> *"Human law is law only by virtue of its accordance with right reason, and thus, it is manifest that it flows from the eternal law. And in so far as it deviates from right reason, it is called an unjust law; in such case, it is no law at all, but rather a species of violence." (Aquinas, 1274).*

In terms of the doctrine of natural law, it is the principal duty of the State to protect and improve the fundamental human rights of its citizens. The government acts contrary to its natural purpose, the function for which it exists, if it hurts rather than helps a single one of its citizens for the sake of benefiting all the others (Swartz, 2010, pp. 149-150). The State is always subject to the rule of law in relation to what type of regulations it may issue (*quantum ad vim directivam*), and the "*vim directivam*" is directly related to the rule of law. All just human laws, also in the era of technological innovation, are nothing more than "the expression of the natural order of justice", which limits the State's authority (Swartz, 2010, p. 150). The concept of the rule of law is inseparable from the concept of natural law.

State must always obey the natural law and cannot exercise power over anyone unless the law permits it (Swartz, 2010, pp. 149-150). State cannot create or abolish inviolable human rights, such as the right to freedom of expression, by law, mandate, or convention; they can only confirm the existence of fundamental human rights and protect these rights. The State, therefore, cannot lawfully act erratically, irrationally, or arbitrarily when regulating different aspects of the technological realm (Swartz, 2010, p. 150). To do so would be incompatible and contradictory with the basic concept of the rule of law, which is a central value of any constitutional democracy.

The misuse of the law may occur in two ways:

- First, when that which is mandated by law is opposed to the object for which that law was constituted. A digital law that violates fundamental human rights, such as the right to freedom of expression, is opposed to the object of the law and, therefore, unjust. According to Aquinas, in such a situation, not only is there no obligation or responsibility to obey the law, but one is obligated to defy it (Swartz, 2010, p. 148).
- Second, when those in authority enact laws that exceed the competence of their authority. When a government demands adherence to a digital law law, that violates basic human rights, that it did not have the legal and constitutional authority to make in the first place (Swartz, 2010, p. 148).

The aim of the rule of law is always to protect individual rights by requiring the government to act in accordance with the natural law. This is a fundamental principle of the rule of law.

Natural law affirms the reality of an omnipresent moral law, ascertainable through reason, while legal positivism suggests that the legality of law originates solely from human decree and human enforcement, denude of morality (Green, 2008). In the social media era, where freedom of speech is being eroded through many unjust laws that violates basic fundamental human rights, the natural law serve as a reminder to the positive legal order that it is not the final benchmark or arbiter of the rule of law and justice and that the positive law is subject to assessment, and possibly annulment, by reference to the higher standard of the natural law.

5. THE MORALITY OF LAW

In his 1964 book "The Morality of Law", former professor of Law at Harvard University, Lon Fuller, asserts that for regulations to be moral, they must promote the objectives of humanity (Fuller, 1964, pp. 33-91). In expanding his theory of the rule of law, Fuller emphasized legislators must respect rationality and human autonomy as a logical necessity for those who seek to create a legitimate legal system. For regulating new technologies in public and private law to succeed as a form of social ordering, States must appeal to the rational dimensions of individuals by empowering those individuals to understand why the law has been enacted and what the law demands so they can conform their actions to its demands (Fuller, 1964). Only when the State treats the law's subjects as rational, self-regulating agents will its directives lead to compliance, thereby supporting a culture of legality

(Fuller, 1964, Fox-Decent & Criddle, 2018, pp. 765-781). According to Fuller, there is an inner morality that makes law viable. If citizens do not feel a moral compulsion to observe the law, the law could not endure. Government regulations relating to new technologies must contain specific moral standards to "create law" and to be regarded as moral and legitimate. The regulations in the digital era must therefore:

1. express general, not *ad hoc*, commands;
2. be announced and published;
3. not be enacted retroactively;
4. be comprehensible and rational;
5. not conflict with other laws (such as binding IHRL and EU Law guaranteeing the right to freedom of speech);
6. not demand the impossible or conduct that violates fundamental rights of the affected party (such as laws prosecuting individuals for exercising their fundamental human rights to freedom of speech and freedom of religion);
7. be fairly constant and not be regularly altered; and
8. be administered in a just, congruent manner (Fuller, 1964, p. 39; also see: Dworkin, 1965; Finnis, 1980, pp. 270-271; Rawls, 1999, pp. 208-210; Raz, 1977, pp. 214-218).

A law aiming to regulate new technological advancements, the internet, and social media that does not meet any of these eight *sine qua non* would be ineffective from the perspective of contributing to a legitimate "legal system" since it would offer no rational basis for citizens to adjust their behaviour in response (Fuller, 1964, pp. 38-41). The eight essential *desiderata* are also morally important and sequential since a person's moral imperative to obey edicts depends on whether the regulations could rationally attract conformity. As Fuller explains,

> *"[T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute." (Fuller, 1964, p. 39).*

Fuller observed that these foundational principles of a lawful "legal system establish a kind of reciprocity between government and the citizen with respect to the observance of rules" (Fuller, 1964, p. 39). Should authorities fail to regulate with mandates that meet the eight *sine qua non*, their bond with their citizenry would lack the mutuality required to establish legal authority (Tucker, 1965, pp. 272-276). When the State breaks this "bond of reciprocity", nothing is left to ground the citizen's duty to adhere to laws (Fuller, 1964, p. 40).

To merit recognition as legitimate, laws enacted by Member States must offer rational grounds for compliance. Laws that unreasonably violate fundamental human rights, such as the right to freedom of speech, that are essential to the functioning of an open and democratic society based on human dignity, equality, and freedom, cannot satisfy this requirement. For example, there is no rational basis for concluding that people have moral obligations to comply with laws that authorize their own torture, enslavement, arbitrary detention, being subjected to criminal prosecution for voicing an opinion online,

quoting a bible scripture, or praying in your own home in the vicinity of an abortion clinic. These kinds of laws do not offer rational grounds for compliance and cannot credibly be interpreted as actions taken in the best interest of the individuals being subject to them. (Fox-Decent & Criddle, 2018 pp. 765-781). Consequently, arbitrary detention and prosecution pursuant to the enforcement of unjust laws that violate the fundamental human right to freedom of expression undo the reciprocity that is essential to sustain legal order.

6. CONCLUSION

As eloquently asserted by John Stuart Mill; "*the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error*" (Mill, 1863, p. 33).

The fundamental human right to freedom of speech is indispensable for the practical fulfilment and realization of a wide spectrum of fundamental human rights, including freedom of thought, conscience and religion, freedom of assembly, the right to hold opinions without interference, the right not to be subjected to arbitrary or unlawful interference with privacy, family, home, or correspondence, nor to unlawful attacks on honour and reputation, the right to participate in public life, as well as the right to vote and all related political rights. Democracy cannot exist devoid of these rights. Although not absolute and subject to lawful restriction in exceptional circumstances, freedom of speech comprises one of the foundations of an open and democratic society based on freedom, equality, and human dignity. Without freedom of expression, a cognizant, active, and involved citizenry is not possible. Therefore, even untruths and misinformation should be allowed since they are part of the procedure of learning the truth in the battle of ideas (Bayer *et al.*, 2021, p. 18; van Hoboken *et al.*, 2019, p. 39). Limitations on free speech can only occur under narrowly defined derogation criteria that comply with IHRL and the principles of proportionality and balancing.

Any State or Union of States that criminalizes free speech through a plethora of unjust laws and prosecutes its own nationals for speaking, writing, or holding "unacceptable" opinions can no longer contest it stands for protecting fundamental human rights and the rule of law.

In "De Monarchia" (1312–1313), Dante Alighieri asserts that "...who-ever intend to achieve the end of [the] law, must proceed with the law (*quicunque finem iuris intendit cum iure gratitur*)". Central to the conception of the constitutional legal order is that the executive and every sphere of government are constrained and restricted by the principle that they may exercise no power and perform no function outside that conferred upon them by the rule of law. The State cannot exert control over its citizens unless the law permits it to do so. Every law should be enacted for the common protection of citizens' basic human rights. If it fails in this aspect, it does not have the capacity to bind (*virtutem obligandi non habet*) (Agamben, 2008, p. 25).

If the State acts without authority emanating from the rule of law, it acts lawlessly, something a constitutional democracy cannot tolerate. When State laws violate peremptory norms of international law, such laws are illicit and unlawful. They are void *ab initio*, as embodied in the doctrine of *jus cogens* (Fox-Decent & Criddle, 2018, , Sinclair, and Sinclair, 1984). The peremptory norm designates the ascendancy of the law, which even the sovereign can neither abrogate nor modify, and renders any contradictory state edict illegitimate. (Yarwood, 2009, pp. 146-181; Meron, 1986, pp. 25-27; Stephens, 2004, p. 2).

There is an undeniable distinction between the "rule of law" and the "rule by law" (Tamanaha, 2004, p. 3). The rule of law elevates genuine law above politics. The law stands above every powerful politician, philanthropist, and government agency. Rule by law, in contrast, implies the selective use of law as an instrument of governmental power. It means that the State uses the law to dominate its citizens but does not allow the law to be used to control corrupt State officials (Waldron, 2002, pp. 137-164). The law, so applied and measured through the lens of natural law and the morality of law, is exposed: not as a rational juridical system but as an ideology that supports and makes possible an unjust political system. The law is merely a tool used by a corrupt establishment to achieve its political and financial objectives while maintaining its power and covering the injustices perpetrated with a mask of legitimacy (Unger, 1986; Hutchinson, 1989; Oetken, 1990; Tushnet, 1990). But this type of "law" is not "law" but a type of pseudo-law devoid of the essence of law.

The principle of rationality and non-arbitrariness is an important ordering principle in IHRL(van Aardt, 2022, p. 280). The rule of law demands rationality. In determining whether a law is just, a good test is "sound reason" or, put differently, the reason of law (*vim et rationem legis*). Can government laws be rationally explained and defended when confronted with independent, objective facts? To merit recognition as legitimate law, regulations from states must offer rational grounds for compliance. If laws lack reason, it has no capacity to bind (*virtutem obligandi non habet*). Legislation that unreasonably violates citizens' fundamental human rights cannot satisfy this requirement. Unjust laws that penalize citizens for praying in their own homes, that prosecute citizens for quoting bible scriptures, and that imprison citizens for factually referring to a biological male as a male, are patently absurd and devoid of any reason. These kinds of regulations do not offer rational grounds for compliance and cannot credibly be interpreted as actions taken in the best interest of the citizenry.

Lawlessness ("anomia") ensues not where the citizenry commits crimes, but where law itself is perverted by those in power. In normative terms, the rule of law requires that states rule through substantively just, ethical, moral, and justice-orientated laws that align with the natural law. All governments across the globe must respect and adhere to the rule of law, as the rule of law shields citizens against oppression and tyranny. A government's contempt for basic human rights evidenced by enacting myriads of immoral laws that violate natural, or God-given, rights to life and liberty, is a convincing indicator of the lack of the rule of law in that nation. This deprivation of lawfulness is also a breakdown of justice, as respect for fundamental human rights is definitive to the requirements of lawfulness. On the contrary, respecting fundamental human rights means that law and justice essentially rule.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch14

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DIGITALISATION OF PUBLIC ADMINISTRATION: OPPORTUNITIES, CHALLENGES, AND DEVELOPMENT OF E-GOVERNANCE IN SERBIA**

The paper explores the digitalisation of public administration as a multidimensional reform process aimed at enhancing legality, transparency, efficiency, and accountability in the public sector. It emphasises that successful digital governance requires not only an adequate legal and strategic framework and properly designed public policies by the state authorities, but also the integration of artificial intelligence and the active participation of civil servants and citizens alike. Artificial intelligence is examined as a transformative tool capable of improving decision-making, regulatory enforcement, and service delivery, while also raising critical ethical and legal concerns, including algorithmic bias and data privacy, while the role of civil servants is highlighted as pivotal to the implementation and legitimacy of digital reforms, underscoring the importance of their professional development and adherence to democratic values.

The paper further analyses the case of Serbia, assessing its strategic and normative efforts to modernise public administration through various legal and policy initiatives. Despite notable advancements in digital infrastructure and service availability, the Serbian experience reveals persistent challenges, such as bureaucratic inertia, system interoperability issues, uneven service quality, and low digital literacy among citizens.

Lastly, the study concludes that digital transformation must be approached as an inclusive and adaptive process, grounded in democratic principles and requiring coordinated engagement from all stakeholders to ensure a transparent, efficient, and citizen-centric public administration.

Keywords: Public Administration, Digitalisation, Artificial Intelligence, Civil Servants, Serbia.

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** This work is a result of research within the project "Adapting the Legal Framework to Social and Technological Changes with a Special Focus on Artificial Intelligence," carried out in 2025 by the Institute of Comparative Law with financial support from the Ministry of Science, Technological Development and Innovation (contract number 451-03-136/2025-03/200049).

1. INTRODUCTORY REMARKS

Public administration must be founded on the principles of democratic culture, which implies that it must be freed from the constraints of bureaucracy, corruption, and political-party dogmatism (Perović, 2018, p. 526). In many countries, these goals have been only partially achieved, while in some cases, one can even speak of their predominant non-fulfilment. Therefore, the digitalisation of public administration has become a process that must adapt to the imperfections of social environments and administrative-legal systems in many countries, as well as to the needs of citizens. Furthermore, in practice, there are struggles when it comes to the implementation even of adequate legal framework and strategic documents regarding digitalisation, which can be prescribed not only to civil servants and other personnel but also to citizens and their ignorance. This results in a slow development of e-government, with parties gradually adjusting to its functioning.

It is evident that the electronic exchange of data enables fast, reliable, and accurate data transmission, upon which public administration bodies and institutions base their administrative procedures (Marković, 2021, p. 121) and that the introduction and regulation of digitalised public administration became a necessity in modern societies, but the digitalisation itself must be implemented with consideration of social, economic, political, cultural and historical circumstances of a given environment. Thus, in a wide range of them, especially in Western Balkan countries, it is important that the public administration modernisation is carried out progressively.

Primary objective of integrating information technologies into public administration is to enhance legality, transparency, accountability and efficiency (Vukašinović Radojičić & Marković, 2019, p. 286), and the achievement of this objective, or even its partial fulfilment can take a considerable amount of time.

The success of the digitalisation process is contingent upon the governments` capacity to effectively address challenges, formulate data protection strategies, mitigate digital inequality, and invest in the development of digital competencies (Lutsenko, 2024, p. 2).

Governments around the world have acknowledged the importance and potential of e-Government, as it, when effectively designed and implemented, improves the efficiency and accessibility of public services, administrative procedures, and processes. Moreover, it fosters greater trust among citizens in government institutions, enhances their engagement in governance, and facilitates substantial cost savings for users, citizens, businesses, and the state (Đurašković, 2016, p. 5).

Considering the legal aspect, electronic administration development plans and strategies need to be well defined and executed. This includes defining activities that will be undertaken to establish a proper legal framework, creating an online platform through which the provision of services and the realisation of parties' rights and legal interests will be carried out in an efficient and purposeful manner, as well as conduction of training of relevant personnel within the administrative authorities.

2. THE ROLE OF ARTIFICIAL INTELLIGENCE IN DIGITALISATION OF PUBLIC ADMINISTRATION

The possibilities for the digitalisation of public administration are extensive and encompass a legal framework and practices that will enable digitalisation to enhance the efficiency of public administration operations and the quality of services provided to citizens and economy (Abbate *et al.* 2014, pp. 49-60). In this regard, the emergence and dynamic evolution of artificial intelligence (AI) in the context of public administration digitalisation, particularly in the present day, cannot be overlooked. On one hand, it is regarded by many as a transformative phase in digitalisation, while on the other, its mechanisms and automatism might redefine the foundations of public administration, particularly for decision-making processes (Bencsik, 2024, p. 13).

Introducing AI allows the significant acceleration of routine procedures in which a decision on a client's request is based solely on objective facts, such as the submitted documentation or data in registries and records, particularly when the criteria for approving the request are indisputably met.[1]

Thus, AI can significantly contribute to improving the quality of public administration performance and paving the way to simplified provision of public services that will be adhered to modern tendencies.

There are various ways in which AI can be utilised. It can be employed as a decision-support tool in the creation and design of public policies for optimising public services, increasing the efficiency of public administration, or as a support for implementing regulations.[2] From the perspective of public administration, increasing its efficiency and supporting regulatory enforcement can be identified as two of the most important tasks of AI. Furthermore, these two elements are closely interconnected, as the consistent enforcement of regulations implies the efficient functioning of public administration.

Moreover, AI contributes to transparency and fraud detection. Machine learning algorithms can detect irregularities in financial records, identify compliance risks, and flag potentially fraudulent activities, strengthening public sector accountability.

However, integrating AI in public administration also presents ethical, legal, and governance challenges. Especially worth mentioning is that potential issues may emerge within decision-support systems, as AI technologies inherently reflect the biases of their creators or societal prejudices embedded in the training data. Given that AI systems learn from data, these biases can be institutionalised and further deepened by the rapid expansion of data-driven information systems integrated into the decision-making process (Veale, Van Kleek & Binns, 2018, pp. 1-14). Moreover, the use of AI technologies may lead to the violation or limitation of fundamental rights, such as the right to privacy and the protection of personal data.

Issues like algorithmic bias, data privacy, and lack of explainability must be addressed to ensure fair, trustworthy, and inclusive digital governance. This calls for a careful balance between technological innovation and democratic values.

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[1] Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the period 2020 to 2025, *Official Gazette of the RS*, no. 96/19, p. 18.

[2] Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the period 2020 to 2025, *Official Gazette of the RS*, no. 96/19, p. 11.

3. THE ROLE OF CIVIL SERVANTS IN PUBLIC ADMINISTRATION DIGITALISATION

Civil servants play a central role in the digital transformation of public administration. As the bridge between government policy and public service delivery, they are both facilitators and implementers of digital change. Primarily, civil servants contribute by identifying areas where digital technologies can improve efficiency, transparency, and citizen engagement. They provide crucial insights from their frontline experience, helping shape digital initiatives that are realistic, user-centred, and aligned with public needs. Second, they are responsible for adapting existing administrative processes to new digital tools. This often involves redesigning workflows, ensuring data security, and integrating legacy systems with modern platforms. Civil servants also play a critical role in ensuring that these transitions uphold public values, such as equity, accountability, and inclusiveness. Moreover, civil servants act as change agents as they must embrace new digital competencies and innovation within often rigid bureaucratic systems, and support colleagues through capacity-building and training. Last, civil servants are key to building public trust in digital government. Their transparent and ethical handling of digital services and data protection issues directly affects how citizens perceive and interact with the digital state.

In order for civil servants to properly execute the aforementioned roles, they must act according to principles of legality, impartiality, transparency and political neutrality. This implies carrying out tasks based on and within the framework of laws and other regulations, while respecting the rules of the profession, ethics and political neutrality, in order to enable the development of professionalism, impartiality and quality of work (Milovanović, Ničić & Davinić, 2011, pp. 53-54). In that sense, civil servants should be aware of and be trained to bear in mind the significance of public interest and the right to justice when applying the relevant legal regulations to the given case.

Besides that, knowledge, skills and professional development of civil servants are essential for performing complicated tasks, especially the ones related to digital platforms usage. Training and professionalisation of personnel must be based on adequate legal regulations that allow the establishment of a stable and effective public administration system. Additionally, while executing particular training programs, relevant regulations must be adapted to the needs and demands of an administrative authority.

The path to successful professional development depends not only on civil servants and their willingness and motivation to perform tasks conscientiously, efficiently and with regard to moral and ethical standards, but on the state authorities, their politics in relation to public administration and its professionalisation, institutions that provide training programmes, civil servants and their will and motivation. All of these factors are mutually connected and can lead to an effective public administration system only if they are taken into account equally.

4. PUBLIC ADMINISTRATION DIGITALISATION IN SERBIA

4.1. Strategical and Normative Framework

In Serbia, user-oriented e-Government is of relatively recent origin (Milovanović, 2023, p. 13). The development of modern public administration began with the adoption of the first Public Administration Reform Strategy in 2004, back when the state itself was in a very poor social and economic condition. The Strategy prescribed that the process of modernizing public administration is primarily based on the implementation of modern information and communication technologies in its operations (Vukoičić, 2020, p. 174), thereby laying the foundations for the commencement of modernisation efforts and the adoption of contemporary trends for the public administration. Subsequently, it was essential to establish a new legal framework that would regulate the functioning of public administration and local self-government, as well as to adopt a series of strategic documents related to the reform process, which would facilitate the alignment of public administration with modern trends and standards.

Public Administration Reform Strategy for 2021-2030, the Strategy for the Development of Electronic Government in the Republic of Serbia for 2023-2025, Strategy for the Development of Electronic Communications in the Republic of Serbia for 2010-2020, and the Information Society and Information Safety Development Strategy for 2021-2026 collectively outline the primary directions and objectives for the successful improvement of electronic communications and securing a more competitive position in the global economy, while the Strategy for the Development of AI for 2020-2025 underlines the necessity of ensuring the reliability of services, safeguarding user privacy and data, and providing users with the option to engage with a human representative when designing, developing, and implementing AI-based public services.[3]

Key development objectives related to e-Government focus on finalising the institutional and legal frameworks, establishing functional interoperability, creating essential e-Government registers, developing new services tailored to user needs, and increasing knowledge among both public administration employees and citizens. Digitalisation reform efforts have also been pursued through the e-Government Program, alongside the establishment of standards for reducing administrative barriers, integrated into the decision-making process via Regulatory Impact Analysis (Milovanović, Nenadić & Todorović, 2012, p. 271).

The strategic framework for e-Government in Serbia is based on European standards and integrates the legal acquis of the European Union (Vukašinović Radojičić & Vučetić, 2023, p. 228). Furthermore, in order to establish efficient electronic administration, a significant number of laws were adopted, the most important ones being Law on General Administrative Procedure (LGAP), Law on Administrative Disputes, Law on Electronic Documents, Electronic Identification, and Trust Services in Electronic Business, Law on Electronic Government and Law on Electronic Communications.

[3] Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the period 2020 to 2025, p. 18.

The primary objective of Serbian administrative procedural legislation is to expedite administrative procedures, enhance the protection of parties involved in the provision of public services, establish the fundamentals of administrative contracts, and safeguard the rights of parties in various areas governed by special administrative procedures (Vukašinović Radojičić & Vučetić, 2023, p. 229). If these tasks cannot be performed properly outside of the digital world, there can be no expectations that the digital transformation and electronic provision of services will be conducted in a manner which leads to suitable electronic public administration system that will protect the public interest, but simultaneously protect citizens´ rights and legal interests and facilitate their realisation.

4.2. Results

In recent years, the overall quality of administrative public services in Serbia has shown improvement, with the values of most indicators falling within the highest range in the region.[4] Public administration has been improved through the legal framework, infrastructure, and interoperability, as well as the optimisation and digitalisation of administrative procedures and services (Milovanović, 2023, p. 13). However, service quality is not uniformly high and there are disparities when it comes to provision of the same services in the different parts of the country.

LGAP, in force since February 2016, serves as the primary regulation for administrative service delivery, aligning with the principles of good administration, and its most notable achievement (which extends beyond its legal effects in the strict sense) is the comprehensive implementation of digitalisation across all aspects of administrative decision-making, which has significantly improved the efficiency and effectiveness of administrative proceedings, elevating them to a new standard, while substantially reducing costs for citizens, and even more so for entrepreneurs (Vučetić, 2021, p. 194). The Law on Electronic Government (LEG) outlines data regulations but has not been amended since 2018, thus not reflecting the most recent international and European standards. Similarly, the Law on Electronic Documents, Electronic Identification, and Trust Services in Electronic Business remains harmonized with the newly adopted EU Regulation 2024/1183. Despite these legislative omissions, the foundations for digital government in Serbia are solid. Online availability of administrative services has increased from 70% to 83% over the past three years,[5] the interoperability platform and Government Data Centres adhere to European standards, and citizens can now authenticate and provide consent online via a government mobile application. The e-Government portal "eUprava" is operational, and it offers single sign-on functionality, categorises services according to types and life events and facilitates access to various government portals. The Consent ID mobile application, which enables

[4] Monitoring Report, Public administration in Serbia 2024, Assessment against the Principles of Public Administration, SIGMA, OECD, pp. 90-91. Available at: https://www.oecd.org/en/publications/public-administration-in-serbia-2024_02001fe4-en.html (1. 5. 2025).

[5] Monitoring Report, Public administration in Serbia 2024, Assessment against the Principles of Public Administration, SIGMA, OECD, p. 99. Available at: https://www.oecd.org/en/publications/public-administration-in-serbia-2024_02001fe4-en.html (1. 5. 2025).

citizens to authenticate and sign documents via their mobile phones, has nearly reached 1 million activations.[6]

Nevertheless, citizens still experience technical difficulties while trying to sign-in to eUprava portal even though they possess the qualified electronic certificate, which is another way to access this portal, besides the previously mentioned Consent ID mobile application that cannot be activated online, since citizens are required to visit a post office in order to get the parameters for its activation, which presents another issue that must be addressed in the near future.

The overall extent of digitalisation and the user-friendliness of services vary. While some services have been streamlined and digitalised, others remain bureaucratic, requiring citizens to fill and submit multiple forms and provide information already held by public administration[7] and the execution of certain services is progressing more slowly than anticipated. Such services include: electronic submission of applications for enrollment in kindergarten; electronic registration of a child's birth; electronic submission of requests for the replacement of outdated, physical firearm documents; requests for the delivery of extracts from civil registers, etc. These types of e-services are often characterised by incompleteness, unreliability (frequent delays in data processing, frequent changes to portals), and limited availability (Vukoičić, 2020, pp. 185-186).

It should also be pointed out that there are a considerable number of citizens who are not sufficiently familiar with electronic public administration, the services it offers, and how they can access it and submit requests for specific actions. Additionally, the instructions provided on online platforms often employ "legal" language, which can be unclear to users, and the excessive textual content on public authority websites complicates the retrieval of necessary information (Marković, 2021, p. 117). On the other hand, citizens rarely go in-depth into these instructions and opt to visit the administrative authority in-person and submit their requests at the service counters, which causes long queues. This problem is especially widespread in smaller towns and municipalities, but it's also present in Belgrade and other Serbia's larger cities. Hence, the creation of functional electronic public administration greatly depends on citizens and not only on civil servants and state authorities, since citizens are the ones that need to attempt to adapt to digitalisation and electronic provision of services, which has remained a long-lasting issue.

Regarding businesses, the overwhelming majority of them recognise the benefits of the e-government process, and consider substantial long-term cost savings as its main advantage. In addition, the benefits of utilizing e-government appear to be independent of the type of business activity, sectoral affiliation, or enterprise size (Đurašković, Viduka & Gajić-Glamočlija, 2021, p. 46).

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[6] Monitoring Report, Public administration in Serbia 2024, Assessment against the Principles of Public Administration, SIGMA, OECD, p. 96. Available at: https://www.oecd.org/en/publications/public-administration-in-serbia-2024_02001fe4-en.html (1. 5. 2025).

[7] Monitoring Report, Public administration in Serbia 2024, Assessment against the Principles of Public Administration, SIGMA, OECD, pp. 90-91. Available at: https://www.oecd.org/en/publications/public-administration-in-serbia-2024_02001fe4-en.html (1. 5. 2025).

5. CONCLUSION

The aim of aligning public administration with European modern standards is to simplify the administrative procedure, partially de-formalise, rationalise, and expedite it, but without compromising efficiency, legal certainty and legality (Tomić, 2012, p. 63). Achieving these objectives should be encouraged by the digitalisation of public administration and the establishment of an electronic system through which the administrative procedure and the realisation of rights and legal interests of parties will be streamlined and rationalised.

As this paper has outlined, the successful implementation of digital governance requires not only a robust legal and strategic framework but also the effective deployment of advanced technologies, such as artificial intelligence, along with the active engagement of both civil servants and citizens.

Artificial intelligence emerges as a transformative force within this context, offering substantial benefits in terms of efficiency, policy support, regulatory enforcement, and service personalisation. Still, its integration must be accompanied by a careful consideration of ethical, legal, and societal risks, especially those concerning algorithmic bias, data privacy, and accountability. Likewise, the role of civil servants remains indispensable, as they are the primary agents through whom digital policies are executed and public trust is either cultivated or eroded. Their competencies, values, and continuous professional development are critical to the success of public administration reform.

The Serbian case illustrates both the progress made and the ongoing challenges in the digital transformation of public administration, as it shows that further work is needed in order to ensure the consistent application and adherence to the fundamental principles of administrative procedure, particularly the principles of legality, efficiency, effectiveness and assistance to the party, given that these principles are of crucial importance for establishing a stable and high-quality modern public administration that will be fully functional in its digital form and completely aligned with modern international and European standards. While significant strides have been taken in establishing legal frameworks, digital infrastructure, and online platforms, there remain critical issues related to system interoperability, uneven service quality, and digital literacy among citizens. Additionally, bureaucratic inertia and the persistent gap between legal standards and technological implementation continue to hinder the full realisation of digital governance.

Ultimately, the modernisation of public administration through digitalisation must be approached as an inclusive and adaptive process - one that not only leverages technology but also invests in people, institutions, and the socio-political environment in which it operates. Successful digital transformation depends on fostering collaboration across all sectors of society, ensuring equal access to digital services, and upholding the principles of legality, transparency, and democratic accountability. Only through coordinated efforts across all stakeholders can digital public administration truly fulfil its promise of greater transparency, efficiency, and responsiveness in the service of democratic governance.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch15

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ROAD TOWARDS A DIGITALLY ENHANCED FUTURE FOR MARRIAGE CONTRACT IN SERBIA

The integration of smart contracts and artificial intelligence (AI) into family law represents a major advancement in the digital transformation of legal procedures for marriage contracts. The blockchain technology enables smart contracts to function autonomously as self-executing agreements that deliver benefits through automated processes and transparent systems, and secure transactions. AI integration with these agreements enables real-time adjustments through adaptability because it allows automatic changes based on financial, legal, or personal circumstances. The implementation of family law through these agreements creates essential legal problems regarding their enforceability and jurisdictional differences, and their ability to handle marital relationship dynamics.

The paper studies the basis of smart contracts alongside their potential AI-enhanced adaptability and automation capabilities. It also studies the Serbian marriage contract legal regulation. The research investigates the legal obstacles and jurisdictional problems that emerge when these technologies are used in family law by making comparisons with other civil law jurisdictions. The article also evaluates important ethical issues related to algorithmic bias and privacy concerns before it concludes by analysing the advantages and disadvantages of AI-enhanced smart contracts for marriage contracts in Serbia.

Keywords: smart contracts, artificial intelligence, marriage contract, legal enforceability, family law digitalisation.

1. INTRODUCTION

The legal scene is changing significantly and showing growing incorporation of digital technologies in many spheres (Stjepanović, 2024, p. 180). From commercial transactions to administrative procedures, the efficiency and transparency offered by digital technologies are reshaping traditional legal practices. Family law, often perceived as a more conservative legal area, is also witnessing a gradual shift towards embracing technological

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advancements. This presents both opportunities and challenges, particularly in the context of foundational legal instruments, such as marriage contracts.

Smart contracts and AI are at the forefront of the digital wave. Smart contracts (computer code stored on a blockchain) are designed to automatically execute the terms of an agreement when predefined conditions are met (IBM, 2025). These self-executing agreements operate on principles of automation, transparency, and security, leveraging the distributed and immutable nature of blockchain technology (Lawrence, 2024). It is crucial to understand that, while the term includes "contract", smart contracts are not really legal agreements but rather technological tools that can automate transactions (Szabo, 1996). Because of this, AI complements smart contracts. AI enables machines to do things that require human intelligence. When used for legal agreements, AI can make smart contracts better and more adaptable, as it can analyse data and make decisions based on it.

2. THE CORE PRINCIPLES OF SMART CONTRACTS IN LAW

A smart contract can be defined as a piece of code stored on a blockchain or other distributed ledger technology that automatically executes the terms of an agreement when certain predefined conditions are met (this "if/when, then" logic forms the basis of their operation) (Levi & Lipton, 2018). Main characteristics of smart contracts are: automation (the contract execution without the need for manual intervention when the conditions are fulfilled); transparency (the code and transactions are usually visible on the blockchain); security (due to the cryptographic nature of blockchain technology); and immutability (once deployed, the contract code cannot be altered) (GeeksforGeeks, 2024). A good analogy to understand the basic principle of a smart contract is a vending machine (Tysver, 2024). As a vending machine automatically dispenses a product after receiving the payment, a smart contract automatically performs an action when the specified conditions are fulfilled.

Distinguishing between a general smart contract and a smart legal contract is important. While a smart contract is a technological tool, a smart legal contract is one that satisfies all the legal requirements for a binding agreement within a specific jurisdiction and can be enforced by a court or tribunal (Hedera, n.d.). The UK Law Commission's report on smart legal contracts identified three potential forms: a natural language agreement with performance automated by code, an agreement written solely in and performed by code, or a hybrid contract combining both natural language and code (Law Commission, 2021).

In order to be legally recognised as a binding agreement, smart contract has to meet the fundamental requirements of contract law (offer, acceptance, consideration, and the intention to create legal relations) (Law Commission, 2021, part. 3). Acceptance might be demonstrated through the signing of a transaction with a private key, deploying the smart contract to a distributed ledger (Lowell Milken Institute for Business Law and Policy, 2018, p. 16) The legal validity of electronic transactions and signatures plays a crucial role. Laws like the Uniform Electronic Transactions Act (UETA) in the United States and the Law on Electronic Document, Electronic Identification, and Trust Services in Electronic Business in Serbia provide legal recognition to electronic signatures and records. Therefore, while

smart contracts offer a technologically advanced way to automate agreements, their legal standing depends on their adherence to established legal principles and regulations governing electronic transactions.

3. AI APPLICATIONS FOR SMART MARRIAGE CONTRACTS

AI has enormous potential to enhance the functionality and adaptability of smart contracts, especially in the context of marriage contracts. AI can automate various processes within smart contracts beyond simple conditional logic, leading to faster and more efficient execution of agreements (Patel, 2024, p. 1).

Adaptability and dynamic decision-making are other crucial enhancements offered by AI. Traditional smart contracts operate based on predefined rules, but AI enables them to analyse real-time data from various sources and adapt to changing circumstances (Patel, 2024, p. 1). This adaptability is particularly relevant for marriage contracts that might need to develop over time based on changing circumstances.

AI can also play a vital role in enhancing the security and preventing fraud associated with smart contracts (Patel, 2024, p. 1). AI algorithms can analyse smart contract code to identify potential vulnerabilities before deployment and continuously monitor transactions for suspicious activities or anomalies in real-time. This proactive approach can significantly strengthen the security of digital agreements (Patel, 2024, p. 1). Furthermore, AI can assist with legal compliance and interpretation. AI-powered tools can analyse regulatory frameworks, identify relevant legal requirements, and ensure that smart contract terms align with applicable laws (Patel, 2024, p. 3). Natural language processing (NLP) capabilities of AI can bridge the gap between legal language and computer code, enabling smart contracts to interpret complex legal clauses and respond to regulatory changes in real-time (Patel, 2024, p. 2). This ability to understand and apply legal rules makes AI a valuable tool for navigating the complexities of creating legally sound smart contracts.

3.1. The Serbian legal framework for marriage contract

In Family law of Serbia in Art. 3, marriage is defined as a union between a man and a woman. The Serbian family law stipulates two regimes for marital property: the legal regime and the contractual regime. The legal regime includes both separate property and joint property (Art. 29, Family Law). Default regime is community property, where assets acquired through work during the marriage are considered jointly owned by both spouses.

Serbian family law also provides for the contractual regime, allowing spouses or future spouses to regulate their property relations on existing or future property by signing a marriage contract. A crucial requirement for the validity and enforceability of a marriage contract in Serbia is that it must be concluded in the form of a notarised (solemnised) document (Art. 188, pt. 2, Family Law). During the notarisation process, a public notary is legally obligated to explicitly warn the contracting parties that the agreement excludes the legal regime of joint property, and this warning must be noted in the confirmation clause of the document. Furthermore, if the marriage contract pertains to real estate, it must also be registered in the public register of real estate rights to be fully effective against third

parties (Paragraf Lex, 2021). By entering into a marriage contract, spouses can deviate from the provisions governing the division of joint marital property, agreeing to different ratios of ownership or specifying that property acquired directly through the work of one spouse remains their sole property. The mandatory requirement for notarisation stands as a key formal condition for the legal validity of such contracts.

3.1.1 Potential avenues for amendments to accommodate digital innovations

Serbia has established a legal framework for recognising electronic documents and signatures through the Law on Electronic Document, Electronic Identification, and Trust Services in Electronic Business. This law acknowledges various electronic signature types, granting qualified electronic signatures (QES) the same legal weight as handwritten signatures. QES relies on qualified creation devices and certificates from authorised trust service providers.

While this framework supports many digital transactions, its application is limited when other specific laws mandate higher levels of formality. The Law on Electronic Documents stipulates that its provisions regarding the legal effect of electronic signatures and seals do not apply to legal transactions for which a *separate, specific law* requires a particular form, such as a certified signature, a publicly certified (solemnised) document, or a notarial deed. Consequently, transactions typically requiring these high formalities under other Serbian laws – a category often encompassing contracts for real estate transfers, testaments, inheritance-related documents, and certain family law agreements like marital property contracts – cannot currently be concluded using only the electronic signature provisions of this law. They must adhere to the stricter procedural requirements defined in the relevant governing legislation (e.g., the Law on Notaries, Family Law). This presents a significant challenge for realising fully digital marriage contracts in Serbia under the current legal landscape, as such agreements often fall under these high-formality requirements.

Studying trends in other civil law jurisdictions reveals a growing movement towards incorporating digital processes into marriage-related procedures. For instance, Saudi Arabia has made notable progress in digitalising marriage registration, with the Justice Ministry launching an e-link with the National Information Centre for automatic registration of certified marriages, aiming for a paperless digital marriage contract in the future (Ministry of Justice, Saudi Arabia, 2017). The UAE provides a comprehensive online service through the Abu Dhabi Judicial Department for requesting and documenting marriage contracts, including options for remote marriage ceremonies conducted via video conference and the immediate digital delivery of the marriage contract to the spouses (Ministry of Justice, UAE, n.d.). This system allows for the submission of applications online using digital IDs, electronic payment of fees, and flexibility in scheduling appointments with approved notaries (Gulf News, 2024). China has also revised its marriage registration policy to allow couples to wed where they live instead of returning to their hometowns, with plans to further streamline the process through improved digital infrastructure for online appointments and interprovincial data verification (Ministry of Justice of the People's Republic of China, 2025). These examples show a clear trend in

civil law systems towards leveraging digital technologies to enhance the efficiency and accessibility of marriage-related legal procedures.

To accommodate digital innovations for marriage contracts in Serbia, potential legal amendments would be necessary. This would likely require a coordinated approach, potentially involving amendments not only to the Law on Electronic Documents but also, crucially, to the specific laws (like the Family Law or the Law on Notaries) that currently mandate the high-formality procedures. Such amendments could explore explicitly, allowing the creation and validation of marriage-related documents in a digital format, perhaps utilising QES or other secure digital methods for authentication and verification.

The concept of "smart legal contracts", which embed legal terms directly into code and self-execute upon specific conditions, could also be explored. While the current Serbian legal framework effectively excludes electronic signing for marital property agreements due to the deference to high-formality requirements in other laws, the possibility of future amendments, drawing inspiration from international best practices and the developing landscape of digital law, cannot be discounted. Such amendments would need careful consideration to maintain legal certainty, ensure the authenticity and integrity of digital agreements, and uphold necessary safeguards. Exploring the potential for secure and legally recognised "digital notarisation", as seen in some other countries, could also be a key element in bridging the gap between the digital realm and Serbia's formal legal requirements for marriage contracts.

4. CHALLENGES ARISING FROM THE APPLICATION OF SMART CONTRACTS AND AI IN FAMILY LAW

One of the main principles of Serbian family law is the principle of free and informed consent for both entering marriage and concluding marriage contracts (Art. 3, Family Law). Ensuring that this consent is genuinely given and fully understood becomes a complex challenge in the context of smart contracts, where the terms are encoded in computer language that may be inaccessible to individuals without technical expertise. The automated nature of these agreements raises concerns about whether both parties truly comprehend the implications of the coded terms and are providing their consent freely. This is particularly true if AI is involved in drafting or adapting the contract, as the intricacies of the AI's decision-making process might not be transparent to the individuals entering the agreement.

Serbian law sets specific legal requirements for the capacity to enter marriage and contracts, such as reaching the age of majority and possessing mental competence (Art. 11, Family Law). It is hard to make sure if people who are using a smart contract have legal capacity, especially in the online world where there is no central control and people can be anonymous. Traditional methods of verifying identity and capacity, such as the personal appearance before a notary public required for Serbian marriage contracts, may not be directly applicable in a purely digital setting. Using AI systems to assess capacity also raises questions about the reliability and ethical implications of such automated assessments.

Serbian law recognises duress as a ground for the relative nullity of marriage, indicating the importance of ensuring that consent is not obtained through coercion (Art. 38,

Family law). Preventing and detecting undue influence or coercion in the negotiation and execution of a smart marriage contract requires careful consideration. While AI might potentially be used to identify unusual patterns or language indicative of coercion, the inherent complexities of human relationships make this a nuanced challenge. The digital medium might even introduce new avenues for exerting undue influence, potentially through sophisticated manipulation tactics. Therefore, robust safeguards and mechanisms for verifying genuine consent and capacity are crucial for the validity of AI-enhanced smart marriage contracts in Serbia.

The application of smart contracts and AI in family law presents significant challenges to traditional dispute resolution mechanisms. Courts, which typically rely on interpreting natural language and applying established legal principles, may struggle to handle disputes arising from smart contracts, particularly when they involve understanding and interpreting complex code and addressing technical intricacies (Ballaji, 2024, p. 1015). The ongoing debate surrounding "Code is Law" versus "Law is Law" highlights the potential conflict between the automatic execution of code and broader legal and equitable principles (Hassan & De Filippi, 2017). Moreover, a fundamental characteristic of many smart contracts is their immutability; once deployed on a blockchain, they are often very difficult, if not impossible, to modify or reverse, even in cases of errors, bugs, or unforeseen circumstances that might lead to unfair outcomes (Harris Sliwoski Blog, 2023). This lack of flexibility contrasts sharply with the ability to amend or seek remedies for breach in traditional contracts.

Jurisdictional issues represent another significant hurdle. Smart marriage contracts executed on decentralised blockchain networks can involve parties located in different countries, making it challenging to determine the applicable jurisdiction in the event of a dispute (LegalGPS, 2024). The lack of a central authority in many blockchain systems further complicates matters. One potential way to mitigate this issue is by including a clear choice of law clause within the smart contract, specifying which jurisdiction's laws will govern the agreement (Temte, 2019, pp. 108-109). However, the enforceability of such clauses in the context of decentralised and potentially anonymous parties remains a complex legal question.

5. ETHICAL CONCERNS

Integrating AI into marriage contracts raises significant ethical concerns, particularly regarding the potential for algorithmic bias. AI algorithms learn from huge amounts of data, and if this training data reflects existing societal biases, the AI system may inadvertently perpetuate or even exacerbate these biases in the marriage contracts it helps to draft or adapt (Fred, 2025). These biases could manifest in various aspects of the contract, such as the financial terms, the division of property, or even clauses outlining the responsibilities and expectations within the marital relationship. For instance, if historical data used to train an AI system reflects gender pay gaps or traditional gender roles in household responsibilities, the AI might inadvertently suggest contract terms that reinforce these inequalities. A key challenge in addressing algorithmic bias is the lack of transparency in

some AI algorithms, often referred to as the "black box" problem, which makes it difficult to understand how the AI arrives at its recommendations and to identify and rectify any inherent biases (Wischmeyer, 2020, p. 75). This lack of transparency can erode trust in the fairness and equity of AI-enhanced marriage contracts.

Marriage contracts inherently involve the exchange of sensitive personal information, including detailed financial records, personal histories, and future intentions. When these contracts are created, stored, and potentially analysed using digital platforms and AI systems, ensuring the privacy and security of this data becomes paramount (Quach *et al*., 2022, p. 1307). Data protection regulations, such as the European Union's General Data Protection Regulation (GDPR), which may have implications for Serbian citizens or residents, impose strict requirements on the processing and protection of personal data. Using AI in analysing marriage contract data must comply with these regulations, ensuring that individuals' rights to privacy and data security are respected. Storing marriage contract data on a blockchain, while offering benefits in terms of immutability and transparency, also raises privacy considerations due to the inherently public nature of many blockchain networks. Robust encryption techniques and careful consideration of what data is stored on the blockchain are essential to mitigate these privacy risks.

5.1. Impact on Individual Autonomy and Dignity

The increasing reliance on AI in drafting and executing marriage contracts raises questions about its potential impact on individual autonomy and dignity. There is a risk that individuals might become overly reliant on AI-generated terms and recommendations, potentially diminishing the role of their own judgment and discretion in making these deeply personal agreements. The automation and efficiency offered by AI should not come at the cost of dehumanising legal services and overlooking the emotional complexities and unique circumstances inherent in marital relationships [82]. Concerns have also been raised about the potential for AI agents to gain increasing autonomy in legal processes within Web3 environments, potentially replacing the crucial role of human legal professionals and raising questions about accountability and ethical oversight (Medium, 2025). It is therefore crucial to strike a careful balance between harnessing the benefits of AI in enhancing marriage contracts and preserving the fundamental principles of individual autonomy, dignity, and the essential human element in these deeply personal legal agreements.

6. BENEFITS AND LIMITATIONS OF SMART CONTRACTS AND AI IN MARITAL AGREEMENTS

The intersection of technology and family law has become a subject of increasing academic scrutiny. Scholarly articles and legal research are exploring the potential benefits and limitations of integrating technologies like smart contracts and AI into various aspects of family law, including marital agreements (Bell, 2019, pp. 103-132). This body of research often highlights the potential for increased efficiency, cost savings, and transparency through the use of these technologies. For instance, smart contracts offer the promise

of automated execution and reduced reliance on intermediaries, while AI can assist in analysing complex legal documents and predicting potential outcomes.

However, academic discourse also emphasises the significant limitations and challenges associated with this integration. Legal uncertainty surrounding the enforceability of smart contracts under existing legal frameworks is a recurring theme (LegalGPS, 2024). The technical complexities of smart contract code and the potential for errors or vulnerabilities are also frequently discussed. Ethical concerns related to algorithmic bias, data privacy, and the potential impact on individual autonomy and the human element in legal processes are prominent in the literature (Bell, 2019, p. 127). Furthermore, the inherent immutability of many smart contract platforms raises questions about the ability to adapt to changing circumstances or rectify errors once a contract is deployed.

The academic community is actively debating the extent to which traditional contract law principles can be effectively applied to smart contracts and whether new legal frameworks are necessary to address the unique characteristics of these digital agreements. Research also explores the potential role of AI in enhancing the adaptability and intelligence of smart contracts, but with a cautious eye towards the ethical implications and the need for human oversight. While empirical studies and pilot projects examining the practical application of smart contracts and AI in the specific context of marital agreements are still relatively limited, the growing body of academic work provides a valuable foundation for understanding the potential and the pitfalls of this technological evolution in family law.

7. FEASIBILITY AND IMPLICATIONS FOR SERBIA'S LEGAL AND SOCIETAL LANDSCAPE

Evaluating the feasibility of introducing AI-enhanced smart contracts for marriage agreements in Serbia requires a careful consideration of several factors. The current state of technological infrastructure and digital literacy within the country will play a crucial role in the adoption and accessibility of such innovations. Furthermore, the readiness of the Serbian legal system to embrace and regulate these technologies is paramount. While Serbia has made strides in recognising electronic signatures, the explicit exclusion of marital property agreements from electronic signing under current laws presents a significant hurdle that would need to be addressed through legal amendments. A thorough analysis of the potential costs and benefits from a legal, economic, and social perspective would also be necessary to determine the overall feasibility and desirability of this digital transformation.

Introducing AI-enhanced smart marriage contracts could have huge implications for Serbian society. On the one hand, it could potentially increase access to legal services by offering more standardised and potentially cost-effective ways to create marital agreements. The automation and transparency offered by these technologies might also lead to greater efficiency and reduced costs in the overall process. However, societal attitudes towards using technology for such personal and legally significant matters in Serbia will need to be considered. Concerns about privacy, security, and the potential erosion of

the traditional role of legal professionals in providing personalised advice and guidance would also need to be addressed through public awareness campaigns and robust legal safeguards.

To navigate this digitally enhanced future, the Serbian government and legal community could consider several steps. These include conducting thorough research and pilot projects to explore the practical application of AI-enhanced smart contracts for marriage agreements, initiating public consultations to gauge societal attitudes and concerns, and engaging in interdisciplinary collaboration between legal experts and technology developers to identify and address potential challenges. Importantly, a careful review of the existing legal framework, particularly the laws governing electronic signatures and the notarisation of marriage contracts, would be necessary to identify potential avenues for legal amendments that could accommodate these digital innovations while upholding the fundamental principles of Serbian family law and protecting the rights and interests of individuals.

8. CONCLUSION

Integrating smart contracts and AI in marriage contracts in Serbia holds significant promise for creating more efficient, transparent, and potentially adaptable legal agreements. These technologies offer the potential to automate processes, enhance security, and even allow for dynamic adjustments based on changing circumstances. However, the path towards this digitally enhanced future is fraught with legal, ethical, and societal challenges that must be carefully navigated.

While the current Serbian legal framework provides a foundation for contractual regulation of marital property, the mandatory requirement for notarisation and the exclusion of marital property agreements from electronic signing pose immediate hurdles for the widespread adoption of fully digital smart marriage contracts. Addressing these legal constraints through thoughtful amendments, while ensuring the continued protection of individual rights and the integrity of the legal process, will be crucial.

The ethical considerations surrounding algorithmic bias, data privacy, and the impact on individual autonomy and dignity cannot be overlooked. As AI plays an increasingly prominent role in shaping these agreements, it is imperative to develop robust safeguards and ethical frameworks to prevent discriminatory outcomes, ensure the security of sensitive personal information, and preserve the essential human element in these deeply personal legal commitments.

The road towards a digitally enhanced future for marriage contracts in Serbia will require a balanced approach that embraces the potential of technological innovation while carefully considering and addressing the associated legal, ethical, and societal implications. Through thoughtful research, open dialogue, and strategic legal reforms, Serbia can chart a course that leverages the benefits of digitalisation to modernise its family law practices while upholding its core values and protecting the interests of its citizens.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch16

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KEY ASPECTS OF THE IMPACT OF THE CONSTITUTIONALITY OF DIGITAL EVIDENCE ON THE EFFICIENCY OF CRIMINAL JUDGMENTS

The legal system must adapt to rapidly evolving technologies, balancing human rights protection, particularly privacy and fair trial rights, with efficient crime prevention. Digital evidence collection requires constitutional compliance, such as obtaining search and interception warrants, while ensuring confidentiality and dignity. A key challenge is maintaining the authenticity of digital evidence through a proper chain of custody and technical expertise to prevent alteration. Digital evidence enhances criminal justice efficiency by enabling rapid data collection and analysis, but challenges like data overload and statutes of limitations persist. The rights of the accused, including defense and presumption of innocence, must be upheld in digital cases amidst global issues like inter-jurisdictional data access and international treaty compliance. This paper examines how digitization has driven global legal systems to adopt digital evidence, highlighting authentication challenges and the need for Bosnian and Herzegovinian legislators to revise laws based on the European Court of Human Rights and Constitutional Court jurisprudence. Through case studies from Bosnian and Herzegovinian courts and prosecutors' offices, the paper illustrates both effective and problematic practices in handling digital evidence.

Keywords: Digital evidence, IT expertise, criminal justice, constitutionality, jurisprudence.

1. INTRODUCTION

Accelerated globalization and digitalization bring benefits but also challenges in managing personal data, raising concerns about privacy, security, and misuse as digital evidence. States must critically review regulations to balance societal interests with individual rights and freedoms. It is not uncommon for legal regulations not to keep up with this accelerated development of technologies, and for legal norms and regulations, which should be the basis for establishing standards for protecting personal data, to be quite incomplete and outdated.

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This results in an inadequate definition of digital evidence, and a lack of practical experience in the proper collection, processing and preservation of this type of evidence, ultimately threatening to undermine the balance between security and privacy and thereby potentially violating the rights and freedoms guaranteed by the Constitution and the European Convention on Human Rights (ECHR) and its protocols.

Different states have established different legal mechanisms for collecting evidence in criminal proceedings, as well as different approaches to what is considered illegal evidence and how it is treated. In this context, the definition of the concept of illegal evidence varies in different legal systems and legal definitions.

Because of these differences, it would be almost impossible for the European Court for the Human Rights (ECtHR) to establish uniform standards applicable to all legal systems of the member states, which would lead to imposing certain rules on national legislation. Therefore, it is logical to leave the regulation of this institute to national legislation. By comparing the amended legal solutions, it can be concluded that they are not mutually harmonized and that they differ both in terms of the (seriousness) of the criminal offenses for which special investigative measures can be ordered, and in terms of the deadlines for their implementation.

The practice of the European Court of Justice in relation to special investigative measures, and in this context, the use of illegally obtained evidence and the quality of the law, is extremely rich. However, what is common to this entire practice is the standards and general principles established by the ECtHR and which should be adhered to (Knežević & Dumanjić, 2019, p. 83).

The largest number of applications submitted to the ECtHR are those in which the appellants point to the illegality of evidence within the meaning of Articles 6 and 8 of the ECHR obtained through the application of special investigative measures.

Numerous decisions that the Constitutional Court of BiH has made within the appellate jurisdiction confirm the importance of constitutional protection of fundamental human rights and freedoms in criminal proceedings when applying special investigative measures (Adžajlić Hodžić *et al*., 2021, p. 19), taking positions on certain issues and creating case law as a "guide" for the actions of regular courts, which, referring to the jurisprudence of the Constitutional court of BiH and the ECtHR, also take on the important role of guarantor/protector of the right to privacy and fair trial, and ultimately contribute to harmonizing the norms and practice of court proceedings with the Constitution of BiH, international standards of the ECHR and the practice of the ECtHR.

In the context of Article 8 of the ECHR and the examination of its violation, in many decisions of the ECtHR, but also the Constitutional court of BiH, have determined that the use of special investigative measures constitutes interference with the right to private life, home and correspondence, whereby this right guaranteed by the ECHR (and to which the rights and freedoms guaranteed by Article II/3.f) of the Constitution of BiH correspond), is viewed as a qualified convention right. This definition implies the freedom of the state to interfere with the exercise of this right, and the C explicitly states when such interference is to be considered necessary/justified.[1]

[1] See: Art. 8, para. 2 of the ECHR - the right to respect for private and family life. Available on: https://www.echr.coe.int/documents/d/echr/convention_bos (28. 3. 2025).

Whether such interference by the competent authorities serves a legitimate aim will be assessed from the circumstances of each specific case, whereby it is understood that the law should contain guarantees against misuse, ie, precisely prescribe the discretionary powers of the competent authorities. Therefore, the law that prescribes the implementation of these actions must be sufficiently clear so that the individual is aware of *"in what circumstances and under what conditions public authorities have the authority to resort to such measures"*.[2] The competent authorities are obliged to fully respect the procedure prescribed by law, i.e., the standards of the ECtHR and the Constitutional Court, in terms of the legality of the interference, examining whether there are legitimate aims for determining these actions and whether taking these actions is "necessary in a democratic society".[3]

The Constitutional Court of Bosnia and Herzegovina, in Decision No. U 5/16 on June 1, 2017, declared item d) of Article 117 and paragraph 3 of Article 118 of the Criminal Procedure Code unconstitutional for violating Article I/2 and Article II/3.f) of the BiH Constitution. It was found that Article 117 disproportionately interfered with privacy rights, lacking the strict necessity to protect democratic institutions, while Article 118 failed to differentiate applicable criminal offenses and used a vague criterion of "particularly important reasons". Amendments to the criminal procedure laws addressing these issues were made between September 2018 and February 2021.[4]

2. PROTECTION OF THE RIGHT TO PRIVACY AND CONSTITUTIONAL GUARANTEES

The right to privacy is a universally accepted human right. Basic privacy protection standards are already defined by the United Nations Universal Declaration of Human Rights, as well as the ECHR and its protocols, which directly apply in Bosnia and Herzegovina and have priority over all other laws.[5] In July 2004, Bosnia and Herzegovina ratified the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its amendments (of June 15, 1999) and the Additional Protocol to the Convention (of November 8, 2001). The Constitutions of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and Republika Srpska guarantee

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[2] *Dragojević v. Republic of Croatia,* European Court of Human Rights, Application no. 68955/11, Judgment of 15. 1. 2015, para. 81

[3] *Szabó and Vissy v. Hungary,* European Court of Human Rights, Application no. 37138/14, Judgment of 12. 1. 2006.

[4] Criminal Procedure Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18; Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of Bosnia and Herzegovina*, no. 34/2013 - consolidated text and 27/2014; Law on Amendments to the Criminal Procedure Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 74/20; The Law on Amendments to the Criminal Procedure Code of the Republika Srpska, *Official Gazette of the Republika Srpska*, no. 66/18 and the Law on Amendments to the Criminal Procedure Code of the Republika Srpska, *Official Gazette of the Republika Srpska*, no. 15/21.

[5] Art. II/2 of the Constitution of Bosnia and Herzegovina, Aneks IV Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini and *Official Gazette of Bosnia and Herzegovina*, no. 25/2009 – Amendment I.

the right to privacy, encompassing personal and family life, home, and correspondence for all persons within their respective territories.[6]

Protection of the right to privacy and family life, home, and correspondence is one of the fundamental rights, the realization of which is a prerequisite for the proper functioning of every democratic society.

It is clear from the provisions of all the above-mentioned documents that this right can be broken down into three basic segments, namely:

- private life;
- family life;
- home; and
- correspondence.

When it comes to protecting the right to privacy, the practice of the ECtHR had the most important influence on the creation of internationally recognized standards. According to the opinion of the ECtHR, private life represents a broad concept, which is impossible to give a final definition.[7]

In general, the practice of the court has led to the expansion of the concept of privacy to:

1. physical and moral integrity of the person;
2. collection of data required by the state;
3. access to personal information;
4. regulating names and surnames.[8]

3. LEGAL CERTAINTY AND RELIABILITY OF EVIDENCE

Legal certainty ensures a stable, predictable legal system with consistent law application, allowing individuals to anticipate legal consequences. Reliability of evidence, rooted in its legality, is vital for fair trials, enabling courts to make just decisions based on lawfully collected evidence. Together, they prevent unfounded judgments and uphold fairness in legal proceedings.

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[6] See: Article II/3f of the Constitution of Bosnia and Herzegovina, Aneks IV Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini and *Official Gazette of Bosnia and Herzegovina*, no. 25/2009 – Amendment I.; article II/A2 of the Constitution of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina,* no. 1/1994, 1/1994 - Amendment I, 13/1997 - Amendments II-XXIV, 13/1997 - Amendments XXV and XXVI, 16/2002 - Amendments XXVII-LIV, 22/2002 - Amendments LVI-LXIII, 52/2002 - Amendments LXIV-LXXXVII, 60/2002 – correction of the Amendment LXXXI, 18/2003 - Amendment LXXXVIII, 63/2003 - Amendments LXXXIX-XCIV, 9/2004 - Amandmani XCV-CII, 32/2007 - correction 20/2004 - Amendments CIII and CIV, 33/2004 - Amendment CV, 71/2005 - Amendments CVI-CVIII, 72/2005 - Amendment CVI, 88/2008 - Amendment CIX, 79/2022 - Amendments CX-CXXX, 80/2022 – correction and 31/2023 - Amendment CXXXI.and article 13 of the Constitution of the Republika Srpska, *Official Gazette of the Republika Srpska*, no. 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05.

[7] *Costello-Roberts v. The United Kingdom,* European Court of Human Rights, Application no. 13134/87, judgment of 25. 3. 1993, para. 36.

[8] Opservatorij ljudskih prava: Bosna i Hercegovina. 2012. Pravo na zaštitu privatnog života. Available at: https://opservatorij.wordpress.com/pravo-na-zastitu-privatnog-zivota-08/ (26. 5. 2025).

The ECtHR, when it comes to the protection of legal certainty, mostly relies on the provisions of Article 6 of the ECHR. This article regulates the rights of persons in criminal and civil proceedings, whereby paragraph 1 states that *"every person has the right to a fair, public trial before an independent and impartial court established by law, which will examine his case within a reasonable time, either in connection with the determination of civil rights and obligations, or in the case of an indictment for a criminal offense"*. ECtHR focuses on safeguarding human rights by addressing significant violations of the ECHR, particularly when national courts act contrary to its provisions. It promotes fair trials, consistent judicial practices, and legally grounded decisions to ensure legal certainty and protect individuals from arbitrary or unduly prolonged court procedures.

In relation to the topic of this paper, the ECtHR in the case of *Ringwald v. Croatia*[9] made interesting observations on its role in protecting individuals' rights under the Convention. The Court stated that its function is not to correct errors of fact or law allegedly made by national courts, except insofar as those errors lead to a violation of the protected rights and freedoms. ECtHR rejects the role of a "court of fourth instance" and will not review national court judgments under Article 6(1) of the Convention unless their conclusions are manifestly arbitrary and unreasonable, emphasizing that Article 6(1) guarantees a fair trial but does not regulate evidence admissibility or assessment, which is governed by national laws. The majority of ECtHR applications involve claims of unlawful evidence obtained through special investigative measures, alleging violations of Articles 6 and 8.

The right to a fair trial is the right most frequently invoked by applicants to the Court. In view of the above, it is not surprising that there is a very rich case-law on the application of this article.[10] The general elements of the concept of a fair trial that are common to the parties in all judicial proceedings are: a) the principle of adversarial proceedings, i.e. the right of the parties to be present at the proceedings and to be heard before the decision is taken, b) the principle of equality of arms and c) the right to a reasoned decision. Some add to the above elements, d) the prohibition on the use of unlawful evidence, although the Court has not yet expressed the aforementioned prohibition as a separate general element of the concept of a "fair trial" (Mrčela, Tripalo, & Valković, 2016, pp. 29-30). Due to the different legal definitions and rules by which states regulate the institution of illegal evidence, the ECtHR cannot establish uniform standards applicable to all legal systems of the member states, as this would lead to imposing certain rules on national legislation.

4. BALANCE BETWEEN THE EFFICIENCY OF CRIMINAL JUSTICE AND THE PROTECTION OF HUMAN RIGHTS

The efficiency of criminal proceedings is influenced by many factors, and in the literature, authors who have dealt with this in this region have observed this in the context of Article 6 of the ECHR and trial within a reasonable time, i.e. the short duration of the

[9] *Ringwald v. Croatia,* European Court of Human Rights, Application no. 14590/15, the judgment of 22. 1. 2019.

[10] Interights. 2010. *Article 6 of the European Convention on Human Rights - the right to a fair trial*, Handbook for Lawyers, INTERIGHTS. p. 2.

proceedings, most often in light of the defendant's right to a trial within a reasonable time. However, this should also be observed in relation to other subjects, because the efficient completion of criminal proceedings is in their interest, as well as the interest of society as a whole. The protection of the rights of the subjects of the proceedings and the efficiency of the criminal proceedings are in conflict. One cannot speak of an efficient criminal procedure if the rights of the defendant and other participants in the proceedings have been violated. Perhaps the best explanation of this relationship is from the period of the former Yugoslavia, when Cvijović (1985, p. 70) stated that the efficiency of criminal proceedings should be understood as a measure of the speed of proceedings, which ensures full respect for the lawfulness of the conduct of criminal proceedings and adjudication, and contributes to reducing the time from the moment of committing the criminal offence to the final adjudication to a realistic framework.

An efficient criminal justice system is vital for the common good, but it must prioritize human rights to ensure fair trials, balancing efficiency with fundamental freedoms to maintain confidence in justice and uphold the rule of law. Among other things, in the case of *Bykov v. Russia*[11], the ECtHR introduced a specific test to assess whether the proceedings as a whole were fair.

The test involves answers to these questions:

1. What is the alleged illegality of the evidence, and was any ECHR right, particularly Article 8, violated?
2. Could the applicant challenge the obtained evidence?
3. How significant was this evidence in the proceedings? Was it decisive for the outcome, and was there other supporting evidence?

The Court has already held that *"the general principles of fairness enshrined in Article 6 apply to all criminal proceedings, whatever the nature of the offence in question. Concern for the public interest cannot justify measures which nullify the very essence of the applicant's rights of defence… as guaranteed by Article 6 of the Convention.*[12]

When it comes to special investigative measures, which primarily include secret surveillance of communications and the use of undercover investigators in the case of *Ramanauskas v. Lithuania*[13] before the ECtHR, the Court acknowledged the difficulties faced by the police in seeking and collecting evidence for detecting and investigating criminal offences. In order to carry out this task, the police increasingly have to use undercover investigators, informants, and secret investigative techniques, particularly in the fight against organised crime and corruption.[14]Accordingly, the use of special investigative methods, in particular undercover techniques, does not in itself constitute a violation of

[11] *Bykov v. Russia*, European Court of Human Rights, Application no. 4378/02, judgment of 10. 3. 2009.

[12] *Bykov v. Russia,* European Court of Human Rights, Application no. 4378/02, judgment of 10. 3. 2009, para. 93.

[13] *Ramanuskas v. Lithuania*, European Court of Human Rights, Application no. 74420/01, judgment of 5. 2. 2008.

[14] *Ramanuskas v. Lithuania,* European Court of Human Rights, Application no. 74420/01, judgment of 5. 2. 2008, para. 49.

the right to a fair trial. However, because of the risk of police incitement that such techniques entail, they must be used within clearly defined limits in order to avoid a violation of the right to a fair trial.[15]

In its case law, the ECtHR has developed several criteria for protecting secret surveillance of communications, which must be prescribed by law in order to prevent abuses[16]. In this regard, the ECtHR examines whether the domestic legal solution clearly defines (Bećirović, 2024, p. 81):

1. The nature and type of criminal offenses for which a search warrant may be issued;
2. Category of persons whose communication can be intercepted;
3. Limitation of the duration of the interception;
4. Procedure for collection, use, and storage of collected data;
5. Precautions when transferring data to other parties;
6. Circumstances in which the obtained data can, or must, be deleted or destroyed.

If evidence is collected as part of a targeted interception of communications for national security reasons, the same six minimum requirements apply, but two more are added:

1. Plans for monitoring the implementation of secret surveillance measures;
2. Mechanisms for notification of intercepted communications and their content, as well as legal remedies provided for by national law.

In the case *A.L. AND E.J. v. France (dec.)* British applicants who failed to avail themselves of a domestic remedy in France, which could have effectively challenged the transfer of data under the European Investigation Order (EIN) issued by the United Kingdom and against the data discovery measure, the appeal was dismissed as inadmissible.[17] The decision of the ECtHR on the request of the British A.L. and E.J. against France - 44715/20 and 47930/21 was made on September 24, 2024, and it is related to the decrypted communication application "EncroChat", which also applies to all other decrypted communications, including the "SKY ECC" application. The decision confirmed that the legality of the procedure by which France obtained the evidence cannot be questioned. The court emphasised that this aligns with the practice of the Court of the EU, which holds that the principle of mutual recognition prevents authorities from reassessing the legality of how another Member State collected evidence under an EIN. For the first time, the ECtHR also addressed, though not substantively, whether exchanging evidence obtained through special investigative actions complies with the law.

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[15] *Ramanuskas v. Lithuania*, European Court of Human Rights, Application no. 74420/01, judgment of 5. 2. 2008, para. 51.

[16] *Huvig v France*, European Court of Human Rights, Application no. 11105/84, judgment of 24. 4. 1990; *Kruslin v. France,* European Court of Human Rights, Application no. 11801/85, judgment of 24. 4. 1990; *Valenzuela Contreras v. Spain*, European Court of Human Rights, application no. 27671/95, judgment of 30. 7. 1998; *Weber & Saravia v. Germany*, European Court of Human Rights, application no. 54934/00, decision on admissibility of 29. 6. 2006.; *Association for European Integration and Human Rights & Ekimdzhiev*, European Court of Human Rights, Application no. 62540/00, judgment of 28. 6. 2007. *Big Brother Watch v. the United Kingdom (GC),* European Court of Human Rights, judgment of 25. 5. 2021.

[17] *A. L. AND E.J. v. France* (dec.), European Court of Human Rights, Application no. 44715/20 and 47930/21, judgement of 24. 9. 2024.

5. RIGHT TO DEFENSE AND USE OF DIGITAL EVIDENCE

Digital evidence represents a new concept of evidence, which has become ubiquitous in criminal proceedings, as there is no area of crime without a digital dimension (Casey, 2011, p. 3). Few studies have been done on how constitutional protections shape the admissibility of digital evidence, affecting the speed and outcome of criminal judgments. In one of the few (Novak, 2019), it turned out that overall, digital evidence does not seem to play a large role in federal criminal appeals filed within the U.S. Courts of Appeals (only 147 of the 45,030 federal, criminal cases affirmed or reversed for the years 2010 through in 2015). Digital evidence (e.g., from smartphones, social media, or IoT devices) can accelerate investigations by providing detailed data, but constitutional protections require warrants or specific legal conditions for searches, which can slow down evidence collection.[18]

There are different approaches in Bosnia and Herzegovina when it comes to handling digital evidence, and they are mainly based on the unequal views of judicial functionaries on this type of evidence, especially prosecutors, bearing in mind that in the legal system of BiH, the competence for conducting investigative proceedings is fully entrusted to them (Kavazović *et al.,* 2019, p. 353). The prosecutor manages, conducts, and supervises the investigation (see more: Simović, 2014; Lakić, 2014). This practically means his active and continuous engagement in planning and conducting the activities of authorised officials, i.e., selecting investigative actions for collecting digital evidence, but also supervising their efficiency and legality[19]. In addition to the prosecutor, so-called experts also play a significant role in handling digital evidence. Namely, the evidentiary action of searching computer systems, devices for storing computer and electronic data, mobile phones, and other similar devices according to criminal procedure provisions can only be undertaken with the help of these persons[20]. The term "expert" is not defined in the criminal procedure codes, although it is used in several provisions contained in Articles: 34 (1) and (3), 51 (3), 86 (4) and (6), 94 (1), 185 (2), 187 (1), 355 (3), 356 (2), 373 (2) of the CPC of BiH. Sijerčić–Čolić defines an expert as a person of a certain profession who is called by the criminal procedure authority to clarify certain technical or other expert questions that arise in connection with the evidence obtained, or when questioning the suspect or accused or when undertaking other investigative actions (Sijerčić-Čolić, 2008, p. 431).

[18] Delgado, A. The Impact of Digital Evidence in Today's Criminal Cases. Aaron & Delgado Associates. Available at: https://www.communitylawfirm.com/blog/impact-digital-evidence-todays-criminal-cases (26. 5. 2025).

[19] Art. 35. (2) (a) of the Criminal Procedure Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18.

[20] Art. 51(3) of the Criminal Procedure Code of Bosnia and Herzegovina. The same provision is contained in other procedural laws: Art. 65. (3) of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina,* no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14. (hereinafter: CPC FBiH); Art. 115 (3) of the Criminal Procedure Code of the Republika Srpska ("Official Gazette of the RS", 53/2012, 91/2017 and 66/2018) (hereinafter referred to as: CPC RS); Art. 51 (3) of the Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina, *Official Gazette of the Brčko District of Bosnia and Herzegovina*, no. 34/2013 - consolidated text and 27/2014 (hereinafter referred to as: CPC BD BiH).

6. LENGTH OF THE PROCEDURE AND THE ECTHR

The ECtHR recognised the complexity of the computer software that was created and allegedly used for the company's fraudulent accounting and tax evasion as a factor in the time it took for the tax inspectorate to assess whether its accounting records were in order and, if not, how much tax could have been avoided. However, this was not considered sufficient to justify the inspectorate taking almost twenty months to reach a conclusion on the matter, and this delay contributed to the finding in *Gančo v. Lithuania*[21] that the criminal proceedings had been unreasonably prolonged, contrary to Article 6 § 1. In light of the right to a fair trial, challenges like maintaining a chain of custody, ensuring data integrity, and respecting privacy rights can complicate digital investigations, potentially delaying cases if evidence is deemed inadmissible due to constitutional violations (Stoykova, 2023).

7. PRACTICE OF CONSTITUTIONAL AND CRIMINAL LAW IN BOSNIA AND HERZEGOVINA

By reviewing the practice of the Constitutional Court of Bosnia and Herzegovina, we found that it was not established that the criminal proceedings lasted an unreasonably long time due to procedural errors in the collection of digital evidence. It is encouraging that there are few cases like the one we will shortly present, but because of the system of legal remedies here it could happen that the procedure lasts longer, that the first-instance decision was convicting and the second-instance was acquittal (the Supreme Court of the Federation of Bosnia and Herzegovina would still decide), and also that the decision was revoked (note that, unlike the Republic of Srpska, a case in the Federation of Bosnia and Herzegovina can only be revoked once or twice, the second-instance court has to decide on its own, the exception is the situation when the case goes to the Supreme Court). As a case study, we can cite a new example from practice in the Federation of Bosnia and Herzegovina. Namely, in a case that was first instanced before the Municipal Court of Tuzla, and based on the indictment of the Cantonal Prosecutor's Office of Tuzla,[22] a verdict was reached in which the accused was acquitted of liability upon appeal by the Cantonal court of Goražde[23] (the Supreme Court of the Federation of Bosnia and Herzegovina delegated the case to this court), because of major failures by the prosecutor's office in Tuzla. For example, the prosecutor's office collected digital evidence originating from computer systems and mobile devices in such a way that the injured party photographed them and submitted them to the prosecutor's office as evidence. The Municipal and Cantonal Courts correctly concluded that the collection of evidence from the aforementioned systems can only be carried out by searching them, which is carried out by order of the court, whereby a copy of the documents located on the searched computer system or mobile device is made, and which is secured by entering a hash value for the purpose of later verification of authenticity, thus ensuring such data for further secure expert examination. The fact that the prosecution did not conduct a search of the computer

[21] *Gančo v. Lithuania*, Application no. 42168/19, the judgment of 13. 7. 2021.

[22] According to information from the CIN website, the acting prosecutor was sanctioned twice, and the second time he was given a public written warning for abuse of the TCMS.

[23] Judgment of the Cantonal court of Goražde, no. 32 0 K 427600 24 Kž 2 of 3. 7. 2024.

systems, or telephones, on which the injured party received the aforementioned messages, indicates that the evidence submitted in printed form, which was created electronically, was not collected in a lawful manner and could not be used in these proceedings nor could a court decision be based on them.

8. CONCLUSION

Judge Tim Eicke of the ECtHR points out that Article 6 of the ECHR guarantees the right to a fair trial, but does not lay down rules on the admissibility of evidence or its assessment. The Court has clearly adopted the position that, as long as the trial of an individual as a whole is "fair", the admissibility of evidence and its assessment are matters that should primarily be dealt with by national law and national courts. The Constitution of BiH does not contain specific provisions relating to digital evidence, but general rules relating to human rights and freedoms, including the protection of privacy and freedom of communication, may affect how digital evidence is used. Article 8 of the ECHR, which is integrated into the legal system of BiH, guarantees the right to privacy, which may be relevant when considering the legality of the collection and use of digital evidence. For digital evidence to be admissible in court, there must be validation of the source of the evidence, the accuracy of the data, and a way to protect it from unauthorised changes. Digital evidence, such as emails, videos, computer or mobile device recordings, must be properly verified, and the process of collecting and storing data must be transparent to ensure its validity in court.

In Bosnia and Herzegovina, there are indications and examples suggesting that improper or controversial collection of digital evidence can affect the length of judicial proceedings, especially in cases of organised crime and corruption. Based on the available information, we can conclude that certain controversies related to digital evidence still exist. In the last few years, there have been investigations in Bosnia and Herzegovina that used digital evidence, such as encrypted messages from applications such as Sky and Anom. According to reports, this evidence was often collected through international cooperation with foreign law enforcement agencies, raising questions about the legality and procedures of the collection. At the annual conference of the Judicial Forum for BiH in 2022, it was emphasised that the courts must decide whether such evidence is admissible and whether there has been a violation of the suspects' human rights. In some cases, the public and the media expressed dissatisfaction with the slow reactions of the BiH Prosecutor's Office to publish digital evidence, such as the Sky correspondence. This shows that the perception of improper or slow collection of evidence can further complicate and prolong proceedings, as public pressure and political interests often intertwine with judicial processes. In conclusion, although there is no direct and universal established conclusion that the improper collection of digital evidence in all cases in BiH caused lengthy procedures, and especially not that the duration of the procedure due to digital evidence was unreasonably long considering the parameters of the Constitutional Court of BiH and the ECtHR, there are concrete examples and legal frameworks that show that such situations can significantly slow down the process. Long duration may arise because of necessary legality checks, appeals by parties, or even international cooperation that requires additional time.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch17

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HOW RIGHT IS THE RIGHTS OF CHOICE? CONSTITUTIONAL AND OTHER LEGAL REMEDIES IN THE CASE OF THE GREEK MINORITY IN ALBANIA

The respect of minorities' rights (and especially national minorities as part of them) has always been a challenge in both international and domestic legislation. One of the most important features of belonging to a national minority is the concept of self-declaration, which is associated with both objective and subjective criteria. Despite being sanctioned inter alia by the Framework Convention for the Protection of National Minorities (FCPNM), both notions, but especially the subjective one, comprise within themselves not well-established social, political, and legal concepts and procedures. In the present article, we shall try to analyze what those criteria are and to what extent the State can interfere with them. We shall also try to see and evaluate the limits of both objectivism and subjectivism together with the advantages and disadvantages of the right of choice as a result thereof, with a special focus on the Greek national minority in Albania and the respective legislation.

Keywords: national minorities, FCPNM, right of choice, objective and subjective criteria, Greek minority, Albania.

1. INTRODUCTION

The study of ethnicity is a difficult exercise that combines both historical, political, social, and, of course, legal elements. In general, ethnicity is part of the collective identity of people created through the centuries by language, religion, traditions, and other elements, unlike nationality, which has on its center the State and its institutions. Ethnicity remains a fluid concept that aligns itself with the path of the society and its changing imperatives. In the case of Albania, the legal aspect of ethnicity has gone through important changes. Initially, it was considered part of the personal data of the citizens defined by the declared ethnicity of the parents and inherited to by the children in a direct and immutable form. With the passage of time and the enrichment of the Albanian legislation with more human rights protection mechanisms, it has become a matter of conscience based on objective

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and subjective criteria which accompany citizens living either inside or outside the historical minority areas. The purpose of this article is to legally evaluate those changes and put those criteria into a more legally oriented framework, having as a point of reference the solidarity of those groups as per their ethnic belonging based on common elements of tradition, religion, language, etc.

2. GENERAL CONCEPTS OF ETHNICITY

In the beginning, we should consider a certain difference in the context between "ethnicity" and "nationality". While nationality is a relatively new phenomenon, connected to the creation of the nation-state and the impact of state related structures in fostering it to the people the national belonging idea, ethnicity and ethnic sentiments are not, since we find primordialist conceptions of groups of people based on ties of kinship, language, religion, race, common experience, and common ground as early as antiquity (Berstein & Milza, 1995). It is because of this approach that the concept has developed from the essentialist or "natural" ethnicity of the nation-building myths. These myths present nations as perennial and "natural" entities, simply waiting for the right political opportunity to "awaken." The current discussion has also transcended racial and phenotypic (objective biological characteristics that express genetic inheritance, e.g. skin tone, hair colour, eye colour, etc.) definitions of the identity of population groups. On the contrary, ethnicity is currently discussed in conceptual terms. Ethnicity is, therefore, the conscious expression of collective identity, the way in which groups of people consciously decide to manifest their collective identity in relation to other groups of people at various historical junctures. Consciousness contains the basic limitation of self-determination. As Benedict Anderson, among others, has shown, self-identification/self-perception often results from the adoption and acceptance of external hetero-identifications ("ethic" perception) (Anderson, 2006, p. 40). Jonathan M. Hall, on the other hand, attempts to define ethnicity by devoting a larger part to the phenomenon of ethnicity, the history of its study and the mechanisms of formation and dynamic evolution of ethnic groups (McInerney, 2003). Before proceeding further, it is necessary to say a few words about Fredrik Barth's "instrumentalism". According to Barth (who is considered the father of modern ethnology), ethnic groups are primarily subjects of historical events. Ethnic groups are formed because their constituent populations at a specific moment have an interest in uniting. Ethnogenesis is circumstantial, situational, and often evanescent (Levine, 1999). In order to ensure the coherence of the subject, a strong sense of solidarity is required from its constituent members. Emphasis is placed on the existing similarities of the members (e.g., language, religion, customs, etc.) while existing differences are downgraded (always language, religion, customs, etc.). At the same time, new similarities and new bonds are invented and usually presented as long-standing traditions. The above process is summarised in the saying "imagined communities with invented traditions" which connects the title of Benedict Anderson's book "Imagined Communities" with Eric Hobsbawm's principle of "invented traditions" area (Anderson, 2006, p. 36). Often this process is described by the saying that "the past is interpreted differently at different times, so that it remains constantly meaningful.

What instrumentalism also emphasises is the flexibility and adaptability of ethnicity. When the subject we call an ethnic group finds itself in new circumstances, then it can change the existing tradition, for example, to integrate new populations or to exclude old members, or finally, to secure rights in a region.

3. CONSTITUTIONAL AND LEGAL CHANGES AND THE RIGHTS OF CHOICE

The concept of nationalism and ethnicity became the subject of public debate and legal or social evaluation in Albania right after the fall of the communist regime (1991) as part of the more general context of the rights of conscience and speech. In the initial stages of the democratisation process in Albania and the legal reforms that followed the fall of the communist regime, the country was mainly oriented towards a broad protection of human rights and minority rights for two reasons:

1. The first reason is the very fact that during communism, the Albanian legislation on human rights protection was simply an empty page, so almost everything had to be rewritten as a domestic obligation to have that kind of legislation.
2. The second reason combines both political and legal needs in showing mainly to the international community the goodwill and responsibility of Albania in respecting the generally accepted norms in the aforementioned area (Ziogas, 1995).

Based on this reasoning, the Albanian Parliament in 1993 for the first time in Albanian history passed the law nr. 7692, date 31. 3. 1993 on "Basic human rights and freedoms"[1] and made it an integral part of the Law nr. 7491, date 29. 4. 1991, "On the main constitutional disposition"[2], which was serving at the time as an interim Constitution of the State (Parliament of Albania, 2010).

As it is specifically mentioned in the preamble of the "Constitutional Dispositions" the country recognises the immediate need of such legal settlement mainly due to: *"Considering that during the savage 46 years of a communist dictatorship of the Party-State, in Albania have been violated and denied through State terror all civil, political, economical, social, cultural and human rights … decided the inclusion of this law on human rights as a separate chapter of the law on the main constitutional provisions"*(Parliament of Albania, 2010).

This change in the legislation included a very important provision mentioned under article 26, specifically sanctioning in its paragraph 2 that: *"Ethnicity is decided based on the accepted international norms"*[3]. During the discussion of the aforementioned provision, a strong issue was raised between the MPs representing the Greek minority into the Albanian Parliament and another group of the so-called "nationalistic hard core" of the Democratic Party representatives. The minority MPs stressed this article must specifically refer to the freedom of choice as for nationality(ethnicity)[4], in a clear and

[1] Law nr. 7692, date 31.3.1993 on "Basic human rights and freedoms".

[2] Law nr. 7491, date 29.4.1991, "On the main constitutional disposition".

[3] Law nr. 7692, date 31.3.1993 on "Basic human rights and freedoms".

[4] In this case as in general in the present research with the term nationality/ethnicity means the national belonging of the people in clearly differentiating it from the citizenship.

open form, with the other side not accepting the very existence of the second paragraph (Parliament of Albania, 2010).

The conclusion was a middle political ground, mainly trying to bring the two parties as close as possible to a political consensus, which had to be then reflected into the law (Parliament of Albania, 2010). It is evident that such provision is mainly inspired by the Document of Copenhagen, article 26/1,[5] and the right of choice. The most important aspect, in fact, was the shifting of such a problem from the domestic into the international legal framework, giving major importance to the latter. Such legal settlement can be considered as an important step forward in protecting minority rights but still remains a vague article and with a lot of discretion as to its implementation and/or interpretation (Dule, 2010). The new Albanian Constitution of 1998 and its amendments thereafter do not refer anymore to this kind of settlement,[6] pursuing the path of neither positive nor negative discrimination. The first law, "On the civil status"[7] of the democratic Albanian State in force from 2002 to 2009, has no reference to ethnicity as part of the main generalities of a person, making the issue of ethnicity thereof not a mandatory element. Such absence made ethnicity a pure case of self-declaration, such as religion, which also is not to be found in any legal and personal document of the Albanian citizens.

The Albanian legislation on this subject initially changed from an internationally oriented legal doctrine, as mentioned above, into a strictly domestic one, settled by article 58, paragraphs 1, 2 and 7, of the Law Nr. 10129, date 11. 5. 2009, "On the civil status", which abrogated and replaced the previous law. The article specifically states that the child takes the ethnicity of the parents, or in case parents have different ethnicities, that of the father, with the right to change it at the age of 18, as long as a special note has been placed on the register.[8] So, we have witnessed the passage from a general, vague norm of international law, into a rigid and genuine *ius sanguine* norm of the domestic legal system (Spahiu, 2011).

By sticking so strictly into the sanguine origins of the ethnicity, which are the fruits of a purely administrative act created from the moment a child is born, having consequences for the rest of his/her life, the right of ethnicity declaration as a product of conscience and freedom of choice becomes really limited (Dule, 2010). Considering that people living outside the acknowledged minority areas were always registered as Albanian nationals during communism (Ziogas, 1995) and enjoyed neither the right of choice, nor the right of being recognised as part of the minority, the problem shall still exist; "*parents' heredity*" will follow them all the time (Idrizi, 2025). Of course, the entire legal settlements, as evident from the above analysis and the aforementioned theory on minorities' rights, are based on personal rights and not group or community rights. In fact, this legal reform and the actual status of the Albanian legislation are genuine evidence of the personal rights theory (Lerner, 1995).

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5 CSCE/OSCE. 1990. Document of the Copenhagen Meeting of the Conference for Security and Co-operation in Europe (CSCE).

6 The Constitution of the Republic of Albania of 1998.

7 Law nr. 8950, date 10.10.2002, "On the civil status".

8 Law nr. 10129, date 11.5.2009, "On the civil status".

In order to meet the high standards of human rights as those sources from articles 25 and 35 of the Albanian Constitution, the Constitutional Court of Albania on its decision Nr: 52, Date: 01.12.2011 decided that the term: "ethnicity based on the ethnicity of the parents" as foreseen by the Law on Civil Status art. 42/2 and 58, jeopardise the juridical security of the citizens as enshrined in the aforementioned articles of the Constitution.[9]

Therefore, when it comes to the right of choice according to the actual legislation, such has become strictly a matter of conscience and as such cannot be subject to official declaration and personal data of the citizens.

4. GREEK MINORITY OUTSIDE 'MINORITY AREAS' AND PROBLEMS OF COMMON CONSCIENCE

In treating the issue of the minorities outside the historically considered "minority areas" composes a hard task, mainly as it regards the legal support of this principle *per se*. Almost all the international agreements, treaties, or declarations refer to the minorities only to that territorial extent already recognised by the States in terms of exercising their collective rights (Ermacora, 1983).

Article 27 of the International Covenant on Civil and Political Rights (1966) refers to minorities where they exist. Taking this as the initial spot, Roukounas argues that, starting here, governments have considered the interpretation of this article only in the already accepted and recognised minority areas within their states (Roukounas, 1995). An obvious example is the recognition of the Austrian minority in Alto Adige (Italy) based on the treaty between Italy and Austria in 1947 (Tomuschat, 1984).

But, what's the level of treatment for the persons if taken for granted they belong to a certain minority, but they do not live within the prescribed minority areas? In order to analyse this, first we need to decide on the way how such individuals can be considered as part of the minority to their personal level and bounded only by their feelings, conscience, or belief.

When it comes to specifically the Greek minority in Albania, perhaps it is worth to describe in brief those main common elements that created the Greek nation and see how they apply either historically or today into that part of the population living in the areas of Himara in South Albania, which is not officially considered a "minority area" (Veremis, 1995).

Historically, the main characteristics of the forming of the Greek nations were starting from the most important one: religion, language, common traditions, and historical conscience (Dimaras, 1995). By religion, it is meant the Orthodox Christian faith of the Eastern Church and language, the Greek one having its roots in antiquity and coming into our era in its modern form, but always as a natural development of the same language (Dimaras, 1995). The people living in the described area of Southern Albania seem to have in common at least the first two key elements. The mother tongue spoken in part of that region, mainly in the city of Himara itself and the other two villages Dhermi and Palasa is Greek, in a form of a certain dialect (Georgoulis, 1995). In this respect, we should consider that in almost all minority areas, the Greek element is not the only one living in the specific lands, but it is mixed with other Albanian populations. On the other side, religion

[9] Constitutional Court of Albania, decision nr. 52, dt. 01/12/2011.

is entirely Orthodox (Georgoulis, 1995) by tradition in the aforementioned cities and/or villages. According to Leonodas Kalibretakis: "*the regions where the Greek minority comprises the majority are not exclusively fully concentrated as a whole, but they are interrupted by overlapping Albanian communities. The case of Himara is the par excellence example, but the same can be said about other regions also…"* (Kalibratakis, 1995).

According to the Municipality of Himara' webpage, only in the village of Dhermi (Drymadhes) there are at least 35 Orthodox churches and a strong feeling of orthodoxy is evident if someone travels into the area: *"…An interesting fact here is that Drimadhes has numerous churches, about 35, one in about 20 families…"* (Himara, 2025).

If we try to link the aforementioned reasons and criteria to the article 32, paragraph 1, of the Document of Copenhagen as per the right of choice then the matter becomes really realistic: Individuals having the right of choice within a very specific framework of circumstances which connect them to a specific nation, which are not in a dominant position and furthermore exploiting the definition of Prof. Capotorti: *"numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language"* (Capotorti, 1995).

The problem arising with the Document of Copenhagen remains in the fact that it does not constitute a *jus cogens* norm. The Document is a clear political act with no explicit binding force, barely falling under the soft-law category and making only general observations and engagements (Heraclides, 1997, p. 40). But on the other hand, states are bound to act positively as for the treatment and their relations to persons belonging to all kinds of minorities, as agreed upon by the Framework Convention for the Protection of National Minorities (1995). The combination of political engagement for the settlement of disputes or the achievement of standards must be the main driving force of any legal act that can spring from such political will. Therefore, laws either national or international should be restricted or widened, respectively, to the case; as a result, not only of international legal acts *per se but* also from the "political" legislator giving source and birth to those acts (Balkanweb, 2025).

So, the right of every individual concerning their ethnicity or minority belonging has its own dimension in its personal rights and is strictly accompanied by the exercising of such rights in the community, at least according to the current general theory of international law.

5. THE CONTINUATION OF LEGAL ACTS AND THEIR BINDING FORCE IN THE CASE OF HIMARA

The continuity of the obligations by the Albanian state is strongly connected to two main elements such as:

The continuity of the Albanian State *per se,* which is already extensively elaborated in the respective chapter above.

The continuity of the legal obligations of the State as for the status and rights of its minorities.

After the Albanian independence and its Declaration in front of the LoN of the year 1921, minority schools continued to exist along with the other recognised schools in even today's areas, like in the region of Himara (Georgoulis, 1995), as well as in other regions inhabited by Greeks or Grecophones (Glenny, 2000, p. 414) and they were also subject to the results of the PCIJ advisory opinion on the Greek Minority schools' case.

In supporting such an argument, the Albanian government included the reopening of the schools of this region on its tasks as resulting from the aforementioned opinion (Georgoulis, 1995).

Greek language schools in the region continued to function up to the first years of the communist regime, and they were finally closed in the year 1946 (Georgoulis, 1995). The closing of those schools did not refer to any international treaty or even standard, but they simply fell into the general disrespect and lack of legitimacy in human rights issues, which was a characteristic of the communist regime and its dictatorial nature (Annual Register of Elementary education).

Therefore, if taken into account the two initial issues of continuity (both of the Albanian State and its international obligations), it results that the area was already part of the minority area, regardless of the fact that it was detached geographically from the rest of the historical minority area; nevertheless, it formed a quite concentrated region mainly based on the two villages (Dhermi and Palasa) and the city of Himara.

If the case of the Albanian Declaration in front of the LoN (1921) direct applicability can be found under the famous article 26 of The Vienna Convention on the Law of Treaties, "*pacta sunt servanda*".[10]

So, we have at least two elements in considering this part of the country as a minority area, and most importantly, the people living there as belonging to a certain minority. The first is a kind of emotional and a matter of conscience by their use of Greek as mother tongue and the strong belonging to the Orthodox tradition which combined thereof create a first common characteristics of that specific nation[11].

It must be noted than when referring to the mother tongue we have present as for the definition of this concept the recommendation of the European Parliament (EP): *"Communication in the mother tongue: Communication in the mother tongue is the ability to express and interpret concepts, thoughts, feelings, facts and opinions in both oral and written form (listening, speaking, reading and writing), and to interact linguistically in an appropriate and creative way in a full range of societal and cultural contexts; in education and training, work, home and leisure…"*[12].

The second is more legal or legalistic by the continuity of the international obligations of Albania. This second element must also be connected to a third fact of the same nature: almost all the aforementioned international treaties and/or agreements convey one point: the situation of minorities has to be improved by the passing of time and not deteriorating (Roukounas, 1995, p. 300). This has a logical conclusion the effective protection of human

[10] The Vienna Convention of the law of Treaties of 1969.

[11] The Vienna Convention of the law of Treaties of 1969.

[12] Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning (2006/962/EC)", *Official Journal L 394,30/12/2006 P.0010 -0018.*

rights and minority rights which comes, among others, from the preamble of the FCPNM specifically mentioning that: "…*Being resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states*"…[13]

As far as all precaution measures are already taken by the member States, and to the extent that such rights either do not pose a threat to the territorial integrity or sovereignty of the State, or do fully respect the rule of law within the State, there is no legal barrier to their implementation.

6. CONCLUSION

In conclusion, it can be stressed that the concepts of nationality and ethnicity have gone through important changes in the path of history. Despite being State fostered of developed under traditional forms, these concepts create today important legal consequences and as such they should be legally treated and protected. The Albanian post-communist legislation has undergone the same process of adoption, focusing on minority people who have lived within the historical minority areas and those outside such areas. The concept of self-declaration has made belonging to a national minority either inside or outside traditional minority areas a pure matter of conscience in combining both objective and subjective elements of that concept. As all matters of conscience, it remains a strictly personal issue, protected by both international and domestic legislation and no discrimination can be applied in law and practise.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch18

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CONTINUITY OF CHILD PROTECTION BY THE AFRICAN CHILDREN'S COMMITTEE: BEYOND 18 YEARS?

This contribution explores the intersection of child protection and young adulthood, focusing on the African Children's Charter's definition of a child as anyone under 18. It delves into Erik Erikson's Psychosocial Development theory, specifically the sixth stage, to gain insight into the challenges of transitioning from childhood to adulthood. It then examines the African Children's Charter and the African Children's Committee's jurisprudence, analysing communications, General Comments, and a landmark South African court decision. Furthermore, it scrutinises African Union initiatives, such as Agendas 2063 and 2040, to understand their implications for child protection beyond the age of 18. Ultimately, the paper concludes with recommendations on how to address the ongoing vulnerability of young adults and ensure their protection and well-being.

Keywords: continuity, institutional, jurisprudential, normative, psychosocial.

1. INTRODUCTION

The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides a robust normative framework for promoting and protecting the rights of children in Africa (Mezmur, 2019). As a forward-looking legal instrument, the African Children's Charter goes beyond merely codifying children's rights to taking a context-specific approach to child rights, explicitly considering the unique realities faced by African children (Lloyd, 2002). She highlights the African Children's Charter's context-specific approaches to addressing unique challenges faced by children in Africa. Specifically, the Charter prohibits harmful practices, such as child marriage and female genital mutilation (Lloyd, 2002; OAU, 1990). This approach recognises the need for long-term, evolving solutions to address the complex challenges faced by African children, such as harmful traditional practices, armed conflict, and child labour, to mention but a few (Nanima, 2021).

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A key feature of the African Children's Charter is its preventive and promotional mandate as far as it requires states to take preventative actions against child abuse and neglect (OAU, 1990, Article 16). The African Children's Committee monitors compliance and guides states on emerging threats to the promotion and protection of the rights of the child (OAU, 1990, Articles 32 and 42(b)). This proactive approach ensures that the Charter remains relevant and effective in addressing emerging child protection challenges in Africa (OAU, 1990).

Furthermore, the African Children's Charter incorporates the rights to life, survival, and development, ensuring that child protection extends beyond immediate violations to encompass long-term rehabilitation, empowerment, and inclusion (OAU, 1990, article 5). This holistic approach acknowledges the importance of addressing the long-term development needs of African children, encompassing education, birth registration, and access to social services, among others.

The African Children's Charter also acknowledges the lived realities of African children, recognising context-specific vulnerabilities such as harmful traditional practices, armed conflict, and gender-based violence (OAU, 1990, preamble; Mezmur, 2020). Furthermore, the Charter is not merely reactive but also preventive, calling for state action to halt violations before they occur (OAU, 1990, Articles 32 and 42(b). The African Children's Charter emphasises the four fundamental principles of child rights, including the best interests of the child (OAU, 1990, Article 4), the right to life, survival, and development (OAU, 1990, Article 5), non-discrimination (OAU, 1990, Article 3), and the right to participation (OAU, 1990, Articles 4(2) and 7). The Charter's emphasis on preventive measures aligns with its broader goal of safeguarding children before violations occur. Overall, the African Children's Charter provides a critical framework for promoting and protecting the rights of children in Africa (Johnson & Sloth-Nielsen, 2020).

Ultimately, the African Children's Charter has a significant influence on future policy agendas, including the African Union's Agenda 2063 for Africa's Development (African Union, 2013; ACERWC, 2015d). These plans use the Charter as a foundation to ensure that children's rights remain central to Africa's long-term growth and stability. By recognising the importance of children's rights in achieving Africa's development goals, the African Children's Charter continues to play a vital role in promoting and protecting the rights of children across the continent.

Considering the previous conversation, it is essential to reflect on what can be done for individuals who have reached the age of majority, transitioning from childhood to adulthood. This situation is made more challenging by their need for support and protection of their identity, particularly concerning their experiences or actions before their 18th birthday. To this end, this paper examines the institutional, theoretical, normative, and jurisprudential approaches to continuity, with a focus on the African Children's Committee. It explores the role of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in monitoring child rights, as well as theoretical justifications derived from developmental psychology and human rights theory, alongside the legal foundations under key articles of the African Children's Charter and its General Comments. A jurisprudential analysis of both African and international case law further

informs this discussion. The paper also contextualises this debate within Agenda 2063 and Agenda 2040, evaluating long-term protection strategies. It advocates for context-specific protections beyond the age of 18, urging African states and the African Committee on the Rights of the Child to adopt flexible, needs-based approaches for vulnerable youth.

This article centres exclusively on victims, specifically individuals requiring legal protection, and explores the scope of protection afforded to children under the African human rights system from childhood to adulthood (Finkelhor *et al*., 2005; Chan, 2019). The focus highlights situations where legal protection remains crucial, even after a child reaches the age of majority, due to ongoing vulnerability stemming from prior victimisation. The analysis extends beyond instances of law violation to include potential failures of the law to provide adequate protection, underscoring the continued need for legal safeguards beyond the perpetrator-victim dichotomy.

*The principle of continuity in child protection*The principle of continuity in international law can be seen in different contexts. First is the notion of continuing violations, which are deemed to be ongoing due to their lasting impacts on individuals (ACHPR, 2005). Continuing violations go beyond a singular point in time, extending over a duration (Yamamoto, 2011). In *Velásquez v. Honduras,* the Inter-American Court gives examples like the persistent denial of property access, the ongoing non-enforcement of court rulings, or the lack of legislative action mandated by the international or regional instruments (IACHR, 1988). In *Zitha and Zitha*, the African Commission on Human and Peoples' Rights notes that this differs from instantaneous acts, which do not last over time, even though completing such an act might require some duration (ACHPR, 2008). A continuing violation, on the other hand, occurs and remains in effect until it is halted. The former United Nations Special Rapporteur on Torture stated that considering 'disappearances' as an ongoing offence makes sense, since neglecting to recognise detention and not revealing the fate or location of detainees are essential parts of the offence itself (IACHR, 2005).

Another context is where a state's obligations are expected to endure, irrespective of changes in circumstances or governments. This perspective underscores that states remain responsible for upholding their commitments under international law and that their obligations do not terminate due to shifts in their internal or external situations (Altiparmak, 1999). Consequently, a state may be held accountable for continuing violations, even if the initial breach occurred years earlier.

A third and particularly vital context is the protection of children's rights, where the principle of continuity ensures that children who have received specific protection or promotion of their rights do not abruptly lose these safeguards upon reaching the age of majority (Centre for Child Law, 2019). Instead, the protection and advancement of their rights should persist, ensuring a smoother transition and ongoing support as they enter adulthood. Consequently, there exists potential for retroactive application: in some instances, new laws or treaties may be applied retroactively to address continuing violations. This contribution centres on the third aspect of continuity, specifically examining the extent to which the promotion and protection of children's rights should continue beyond the age of majority (Centre for Child Law, 2019). This paper delves into this issue in depth as far as the concept of continuing violations underscores the importance of accountability

and the necessity for states to address ongoing breaches of international law. To this end, the African Charter on the Rights and Welfare of the Child is dedicated to promoting and protecting the rights of children. However, the Charter's definition of a child as someone below the age of 18 raises questions about whether protection ceases when a child turns 18.

2. CONTEXTUALISING ERIK ERIKSON'S PSYCHOSOCIAL DEVELOPMENT THEORY

By design, this contribution draws on the psychosocial development theory to add voice to the discussion on the need for continuity in the promotion and protection of the rights of individuals who transition to adulthood, but due to circumstances that render them victims or perpetrators, there is a need to consider the extension of that protection. This analysis will enhance our understanding of why it is important to maintain protective measures for individuals as they transition into adulthood. By delving into this theoretical framework, it is hoped that one will better comprehend the necessity of ongoing protection beyond childhood and challenge the assumptions that limit current protective measures. The discussion below introduces the said theory that emphasises the importance of safeguarding individual rights throughout this transition.

Central to the study are two fundamental research questions. The first asks whether the African Children's Charter protects children beyond the age of 18. The second examines how the African Children's Committee interprets and applies the principle of continuity of protection in cases where a child is victimised by a perpetrator. The first question examines the extent to which the Charter's provisions safeguard the rights and welfare of individuals transitioning from childhood to adulthood. The second aims to understand the African Children's Committee's strategy for maintaining protection for children in situations where violations persist or where existing monitoring and legal frameworks are inadequate.

2.1. Why Erik Erikson's Psychosocial Development Theory?

This theory aligns with the child rights-based approach, which considers the child's overall well-being and growth. This is exacerbated by its engagement with the eight stages of development, which reflect the centrality of the child rights-based approach and the needs presented by children as they transition into adulthood (Erikson, 1950; Erikson, 1963). In addition, Erikson's theory is relevant to the child rights-based approach in its emphasis on the role of social and cultural factors in shaping human development (Erikson, 1950; Erikson, 1963). This helps one to appreciate the vulnerabilities and strengths of individuals at different stages of development, from childhood to adulthood. Recognising the vulnerabilities and strengths of children at different stages of development, it provides a valuable framework for understanding the child rights-based approach. This emphasises the importance of meeting a child's physical, emotional, and psychological needs at every stage of development, aligning with the principle of the best interests of the child (Erikson, 1950; Erikson, 1963).

2.2. Overview of the Psychosocial Development Theory

This theory suggests that young adults aged 18 to 21 remain in stages of identity formation, with the first stage elucidating aspects of trust vs. mistrust, which occurs from birth to one year. The second stage of autonomy vs shame and doubt follows this, and toddlers explore independence and cultivate autonomy or feel shame and doubt if faced with restrictions (Erikson, 1950; Erikson, 1963). The third stage is the initiative vs guilt stage, which occurs between three and six years, where children take on responsibilities and develop initiative (Erikson, 1950; Erikson, 1963). The fourth stage, from six to twelve years, is identified as the industry vs inferiority stage, where there is a cultivation of skills and competence, resulting in a sense of industry or feeling inferiority from failure (Erikson, 1950; Erikson, 1963). The fifth stage is the identity vs. role confusion stage, which typically occurs during adolescence, from approximately twelve to eighteen years. Children explore their identities and shape a sense of self, or they may undergo an experience of role confusion (Erikson, 1950; Erikson, 1963). The first five stages squarely fit within the ambit of the normative bounds of promoting and protecting the rights of the child in the context of the added value and the use of a child rights-based approach (Mezmur, 2017).

The sixth stage, which forms the space of entry and engagement for this conversation, is the intimacy vs. isolation stage, which lasts from 18 to 40 years (Erikson, 1950; Erikson, 1963). The seventh stage, known as generativity versus stagnation, occurs between the ages of forty and sixty-five. During this period, adults can either contribute meaningfully to society and foster generativity, or experience stagnation when they feel unfulfilled (Erikson, 1950; Erikson, 1963). Finally, the eighth stage presents the entry into the integrity vs. despair stage after 65 years. In this stage, older adults reflect on their lives and develop integrity or feel despair if regretful (Erikson, 1950; Erikson, 1963).

2.3. Centrality of the sixth stage to this study

This stage illustrates that protection is not only for the well-being of the child but also an acknowledgement that, as a young adult, one is still developing the skills and resilience needed to navigate adulthood. Furthermore, considering the complexities of modern society, including the impact of technology and social media, it's essential to recognise that young adults may require ongoing support and protection to ensure their safety and well-being. This is in line with the AU Youth Charter, which advocates for protecting the youth (African Union, 2006). Under Article 46 of the African Children's Charter, human rights instruments adopted by member states of the African Union may be applied in ensuring the promotion and protection of children who are transitioning to adulthood (African Union, 2006). Notably, the African Youth Charter complements the African Charter on the Rights and Welfare of the Child, providing a continuum of protection and support from childhood to young adulthood. By tagging protection to a demographic group of persons from 15 to 35, the Charter ensures young people receive the support and care they need to thrive, even after reaching the age of 18.

The shortcoming of the Psychosocial theory is that the sixth stage extends to a large group of individuals (from 18 to 40 years), and as such, one cannot generalise to the small

group of 18- 21 years. Other theories may bridge this gap, such as the Human Rights Theory, which emphasises the concept of continuity of vulnerabilities, highlighting that individuals do not suddenly cease to be at risk simply because they turn 18 (UNICEF, 2020). In addition, the principles of intersectionality suggest young adults may encounter systemic challenges that intersect with their age, gender, and other factors, necessitating ongoing legal protection (Crenshaw, 2019).

3. THE NORMATIVE APPROACH: LEGAL BASIS FOR THE PRINCIPLE OF CONTINUITY

The African Children's Charter highlights the scope of protection afforded to individuals as far as it emphasises the obligation of states to implement the African Children's Charter in national laws (OAU, 1990). As indicated earlier, the African Children's Charter also employs a child rights-based approach that inculcates the four principles of non-discrimination, the best interests of the child, the right to life, survival and development, and consideration of the views of the child (OAU, 1990). Other articles that offer normative guidance posit the need for promotion and protection in various spaces such as identity and nationality (OAU, 1990, Articles 6 and 7), protection of children affected by armed conflict (OAU, 1990, Article 22), from harmful cultural practices, and refugee children (OAU, 1990, Article 21). The common denominator in the provisions above is the word 'child'. Who a 'child' is may give a sense of direction.

The African Charter on the Rights and Welfare of the Child defines a child as a person below the age of 18 (OAU, 1990, Article 1). This provision creates the bounds of the subject supposed to benefit from the promotion and protection of rights under the African Children's Charter (OAU, 1990, Article 2; Chirwa & Bakta, 2024). It is suggested that this is one of the most important provisions of the treaty as far as it defines the subject to which rights and duties enshrined in it apply as far as, without a subject, rights and duties (in an instrument) neither have meaning nor relevance (Chirwa & Bakta, 2024). Once the subject is identified, the rights of that subject as a child or an individual should be implemented with qualifications that are consistent and equal without any form of discrimination (Chirwa & Bakta, 2024). For this conversation, the question remains whether the African Children's Charter extends this protection to individuals beyond 18 years. A response that looks at the two ends of the spectrum, with childhood on one end and adulthood on the other.

The bigger question would be whether extending the application from children as persons below 18 to young adults as persons from 18 years onwards would not be ultra vires and incompatible with the objectives of the African Children's Charter. This question is raised on the bounds of the fact that the parties to the African Children's Charter ratified it from the perspective that promotion and protection of the rights of the definite subjects would be children as defined in Article 2. It is argued in the interim that an attempt to extend protection to the person above the age of 18 would be against the bounds of the African Children's Charter, as far as it would violate the definition of a child. If this issue is attended to from the perspective of childhood a definition of childhood would point to a timeline where one lacks capacities skills and powers of adulthood and considers this

position as a deficit and presupposes that a transitory state of being that is not yet full or complete might be requires protection (Archad, 2015). Although the general perspective seems to be that the direct promotion and protection of the rights would end at the attainment of the age of 18, no hard and fast rule requires that protection should stop a state, community or individual from continuing such protection. It is therefore argued that a look at the working methods of the African Children's Committee and how it has dealt with the definition of childhood would be instructive in ascertaining its spirit regarding any possible expansive implementation of protection to a person who is above the age of 18 and not a child.

4. THE JURISPRUDENTIAL APPROACH: CASE LAW AND LEGAL PRECEDENTS ON CONTINUITY OF PROTECTION

This section looks at the current decisions from the African Children's Charter, selected General Comments and an evaluation of a specific decision from South Africa that is instructive in this regard. The paper now turns.

4.1. An evaluation of communications from the African Children's Charter

While the binding nature of the decision is beyond the scope of this paper, it is acknowledged by the African Children's Committee that by ratifying the African Children's Charter, states parties automatically accept the competence of the Committee to receive and consider individual and inter-state communications (Viljoen, 2012).

As of February 1, 2025, the African Children's Committee had received twenty-three communications, and eleven had been concluded on their merits (ACERWC, 2024). Out of the eleven concluded communications, three are not in English, and by design, the author elects not to include them in this analysis. These include *The Institute for Human Rights and Development in Africa (IHRDA) against the Republic of Burundi*, *APDF and IHRDA on behalf of AS (a minor) against the Republic of Mali* (ACERWC, 2020a) and *Taha Fadul, Nisreen Mustafa, Somia Shampaty and Nawras Elfatih on behalf of Abbas Mohamed AL-Nour Musa Al-Emam, Modathir Alrayah Mohamed Badawi and Fadoul Almoula Aljaili Nourallah* (ACERWC, 2020b).

Out of the remaining eight communications, the author takes a doctrinal approach and identifies communications which have a perpetrator or a victim who was below the age of 18 and at the time of filing the communication had transitioned to adulthood. In line with this position, the author looked at communications that were filed on behalf of a specific and large group of children in a given state. Four communications matched this criterion because they entailed general child populations, and it was established that there was no mention of support to children who subsequently turn into adults (ACERWC, 2024). These include, the *Institute For Human Rights And Development In Africa (IHRDA) And Open Society Justice Initiative On Behalf Of Children Of Nubian Descent In Kenya v The Government* (ACERWC, 2009), *Legal And Human Rights Centre And Centre For Reproductive Rights (On Behalf Of Tanzanian Girls) v The United Republic Of Tanzania* (ACERWC, 2019) and *Hansungule & Others (on behalf of Children in Northern Uganda)*

v Uganda, (ACERWC, 2005). The same position extended to two amicable settlements in the communications against Malawi and Sudan, as these were about the affected child population in the territories of the said states (Nanima, 2023). These two communications are *Expedite Justice, The Al Khatim Adlan Centre for Enlightenment and Human Development, The International Refugee Rights Initiative, African Centre for Justice and Peace Studies, Horn of Africa Civil Society Forum and National Human Rights Monitors Organization v Sudan,* Communication No: 0011/Com/001/2018 (ACERWC, 2018) and the *Institute for Human Rights and Development in Africa v Malawi* Communication No. 004/Com/001/2014 (ACERWC, 2014).

This leaves four communications, out of which three communications all involved children or persons below the age of 18 as the complainants. The three communications include *Sudan African Centre for Justice and Peace Studies (ACJPS) on behalf of Ms. Umjumah Osman Mohamed against the Republic of the Sudan*, (ACERWC, 2020c), *Minority Rights Group International And SOS-Esclaves On Behalf Of Said Ould Salem And Yarg Ould Salem v The Republic Of Mauritania* (ACERWC, 2015a) and the *Institute For Human Right And Development In Africa And Finders Group Initiative On Behalf Of TFA (A Minor) v The Government Of Republic Of Cameroon* (ACERWC, 2015b). There is only one communication which involves a child-turned-adult who is a victim (and not a perpetrator. This is in the *African Centre Of Justice And Peace Studies (ACJPS) And People's Legal Aid Centre (PLACE) v The Government Of Republic Of Sudan* (ACERWC, 2015c).

In the *Sudan communication*, a critical issue arose regarding the nationality of children whose parents originated from areas that were re-designated as part of South Sudan (ACERWC, 2015c). Despite their parents' desire to maintain their Sudanese nationality, they were denied this status, resulting in their children also being deprived of Sudanese nationality. At the time of filing in 2015, the complainant, born in 1994, was 21 years old. Furthermore, at the handing down of the final recommendations of the African Children's Charter, the Complainant was 24 years old (ACERWC, 2015c, para 10 and 105F). Although the complainant had reached adulthood, the African Children's Committee chose to examine the case in detail, recognising its potential to set a precedent and inform the experiences of children in similar situations in the future. However, the Committee's decision was notably silent on continued protection for child victims, particularly in cases involving perpetrators (ACERWC, 2015c). To address this gap, it is necessary to consult other working methods and guidelines of the African Children's Committee, which may provide further guidance on ensuring continuity of protection for vulnerable children.

4.2. An evaluation of selected General Comments

The African Children's Charter has demonstrated adaptability to emerging issues through its jurisprudence, with its General Comments expanding interpretations of children's rights into new domains such as digital spaces and climate change. For example, General Comment 7 recognises online sexual exploitation as an evolving violation of children's rights that requires new legislative protections. It calls on states to take measures to protect children from sexual exploitation. To this end, it emphasises protecting the child as a victim rather than as a perpetrator. It is important to determine whether the General

Comments of the African Children's Charter underscore the need for continued protection of children's rights upon reaching 18 years of age. For instance, General Comment 7 highlights the necessity of protecting a child into adulthood, marking a transition into this phase of life. It calls on governments to develop multi-year, multi-sectoral national plans to combat child sexual exploitation and abuse (CSEA), both online and offline, incorporating input from children, civil society, and the private sector (General Comment, 7, 2003, para. 165).

This provision establishes a new level of protective continuity for a child who is a victim on one hand and the perpetrator on the other. First, the call for governments to develop integrated national plans to combat child sexual exploitation and abuse (CSEA), both online and offline, implies that protection measures may extend beyond childhood and into young adulthood.

Second, a multi-sectoral approach is essential to ensure the continuity of protection by fostering collaboration among the government, the private sector, civil society organisations, and the children themselves. This approach acknowledges that protection is a shared responsibility that extends beyond childhood and into young adulthood.

Third, the inclusion of children and young adults in the decision-making process is essential. Governments should consult with them and consider their perspectives when developing national plans. This acknowledges that children and young adults possess agency and should take part in decisions that affect their lives.

The joint General Comment on Female Genital Mutilation calls on states to use administrative measures that protect both the girl and the woman. The relevant provisions call on states to 'establish measures to provide support to girls and women who experience FGM' (General Comment Female Genital Mutilation, 2024, para. 43). This call to provide support to both girls and women indicates an intent to extend protection even after the girl transitions to womanhood. The General Comment also recognises that the effects of the vice may go beyond the childhood of an individual because 'FGM has serious and negative psychological effects on the affected women and girls' (General Comment Female Genital Mutilation, 2024, para. 47). This recognition by the Committee is an implicit way of calling for state parties and civil society to follow up on implementing the General Comment in a manner that ensures that children benefit from protection even when they transition to adulthood.

4.3. Revisiting Centre for Child Law and Others v Media 24 Limited and Others

South Africa offers an interesting court decision that is instructive on aspects of protecting the rights of the child beyond the attainment of the age of 18. In *Centre for Child Law and Others v Media 24 Limited and Others*, the applicants sought an order from the Constitutional Court to declare that section 154(3) was constitutionally invalid as it did not protect the identity of child victims in criminal proceedings (Centre for Child Law, 2019, paras 2-4). This application was on appeal from the Supreme Court of Appeal, which had dismissed an earlier appeal about ongoing anonymity protection to child participants once they turn 18 years of age.

The brief facts of the case are that in 1997, the second applicant, K.L. was taken from her biological parents whilst in the maternity ward at a hospital. She was raised by the

woman who abducted her, whom she understood to be her mother. In 2015, when K.L. was 17 years old, she was found by her biological parents. Her abductor was criminally charged and prosecuted, and K.L. was a potential, but unconfirmed, witness in the trial (Centre for Child Law, 2019, paras. 3-7). Concerned by the media attention, the CCL wrote to all major media houses and sought an undertaking that they would not reveal K.L.'s identity- something that was not done. This led to the filing of a case seeking an order of constitutional invalidity of section 154(3). The Constitutional Court was of the view that the section infringes the best interests of the child and their rights to privacy and dignity, in which limitations were neither reasonable nor justifiable (Centre for Child Law, 2019, paras. 3-7). It confirmed that section 154(3) was constitutionally invalid to the extent that it did not protect the identity of child victims in criminal proceedings. The Parliament was given 24 months to cure the defect. In the interim, a reading in to section 154(3) was made, and it provided that 'no person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness or a victim at or in criminal proceedings who is under the age of eighteen years' and that '(a)n accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court' (Centre for Child Law, 2019, para. 6).

Three points may be discerned from the foregoing: First, there is a subjective analysis of the best interest of the child as a position that goes beyond 18 years, if it is importance to ensure that their best interest should be maintained upon attaining majority age and ensuring that a child as a victim or a perpetrator is protected by the Court by preventing re-traumatisation, stigma, and harm to their dignity and privacy. Second, the decision recognises that the transition from childhood to adulthood brings continued effects of childhood experiences that may persist into adulthood. In line with the principle of the right to life, survival and development, ongoing protection is necessary to promote the holistic development and well-being of young adults (Shonkoff *et al*., 2012). Third, this decision emphasises the need for child protection policies and laws that prioritise the best interests of the child, the right to life, survival, and development, non-discrimination, and the right to participation.

The decision also aligns and redefines the Charter's emphasis on preventive measures that align with its broader goal of safeguarding children before violations occur (Johnson & Sloth-Neilsen, 2020). Furthermore, this decision has far-reaching implications, with a potential impact on child rights beyond South Africa. It is argued that the Constitutional Court's declaration that section 154(3) is constitutionally invalid reiterates the ability of one arm of government to prompt parliamentary reform to strengthen legislation related to child protection and identity rights. This is not the first time that decisions from South Africa have informed the development of international law. In *S v M*, Justice Albie Sachs stated children are not a mere extension of their parents, umbilically connected to swim or drown with them, but are persons distinct as rights holders with their own agency (SAFLII, 2007).

5. THE ROLE OF AGENDA 2063 AND AGENDA 2040 IN ENSURING CONTINUITY OF PROTECTION

Agenda 2063, a strategic framework for Africa's development, envisions "An Africa whose development is people-driven, relying on the potential of its youth and children" (African Union, 2013). The implementation of Agenda 2063, the African Union's strategic framework for long-term development, is a pivotal chance to emphasise child protection and empowerment in Africa's socioeconomic evolution (Ufomba, 2020). This development agenda envisions a thriving, united, and peaceful Africa, highlighting the importance of safeguarding and empowering children for the continent's future (Uwa & Iloh, 2022). By making child protection a core focus, Agenda 2063 recognises the need for an all-encompassing strategy that tackles the specific challenges and vulnerabilities that African children encounter.

In the context of implementing Agenda 2040, the African Children's Committee's strategic framework latches on to Agenda 2063 and offers a critical foundation for ensuring the continuity of protection for vulnerable children beyond the age of 18 (Nanima, 2050; African Union, 2013). As a framework that complements Agenda 2063, the emphasis of Agenda 2040 on continuity of protection beyond 18 years ensures that children transitioning into adulthood do not fall through the gaps; rather, they receive ongoing support and protection to navigate the challenges of young adulthood (ACERWC, 2015d). The effective implementation of Agenda 2040 requires a concerted effort to develop and strengthen protection mechanisms that cater to the unique needs of young adults, ensuring a seamless transition from childhood to adulthood. The engagement of children and youth in Agenda 2063's Aspiration 6 acknowledges that child protection efforts should not cease at the age of 18. The connection between child rights and youth engagement suggests that protections must extend into young adulthood, particularly for those facing ongoing risks, such as orphans, trafficking victims, and former child soldiers (ICTJ, 2025; African Union, 2013).

The institutional frameworks supporting post-18 protection, as called for in Agenda 2040, recognise the ongoing vulnerabilities of individuals transitioning out of childhood. An effective child-friendly national legislative, policy, and institutional framework must acknowledge the necessity for post-18 transitional support in areas such as education, legal identity, and social welfare (ACERWC, 2015d).

The prioritisation of birth registration in Agenda 2040 provides children with a legal identity that continues into adulthood. The emphasis on nutrition, health, and education acknowledges that ensuring well-being before the age of 18 is insufficient; long-term investments are essential (ACERWC, 2015d). If the goal is survival and well-being, then protections must extend beyond childhood, ensuring that young adults are not abandoned once they reach 18, particularly in areas such as education, healthcare, and legal identity protection.

6. CONCLUSION AND RECOMMENDATIONS

The African Children's Committee acknowledges that the effects of human rights violations can persist even after a child transitions into adulthood. While the African Children's Charter is not designed to explicitly provide for the promotion and protection of individuals beyond the age of 18, one is not precluded from offering implied protection through a nuanced and well-reasoned approach. This approach can be informed by emerging normative, jurisprudence and theoretical perspectives, as shown above. In practice, the African Children's Charter can imply protection for young adults through its application and development of jurisprudence. Specifically, in cases where a child is a victim or complainant and has experienced human rights violations, protection should extend beyond the age of 18. This is reiterated by the psychosocial theory that highlights the importance of continued protection for individuals who have experienced trauma or violations during childhood.

It is argued that the African Children's Committee can draw on persuasive jurisprudence, including domestic case law, to ensure that children who are perpetrators are protected beyond adulthood. Ultimately, the committee's efforts would be strengthened by embracing enforcement mechanisms that hold states accountable for their obligations under the charter.

Furthermore, from a jurisprudential perspective, there are encouraging signs that some African judicial systems and civil society organisations recognise the need for ongoing protection beyond the age of 18. While a direct normative position in the African Children's Charter is not possible, it is argued that implied engagement should be adopted as long as they speak to the added value of the African Children's Committee and the use of the child rights-based approach.

State parties should adopt integrated policies that address their comprehensive needs, which include the provision of targeted transitional support to young adults and strengthening capacity-building efforts among governments, civil society, and communities to promote holistic development. In addition, domestic jurisprudence should be used as a point of engagement to inform the organic development of protections of young adults who have transitioned from childhood. Governments should prioritise extended identity protection for child victims and witnesses beyond the age of 18. This is crucial to prevent re-traumatisation and stigmatisation.

State parties should also develop comprehensive child protection frameworks that cater to the unique needs of juvenile offenders turning 18. This can be achieved through the demonstration of the importance of providing access to education, vocational training, and psychosocial support to facilitate successful reintegration into society. Where the victimisation relates to vices like child trafficking, the provision of sustained assistance, such as counselling, education, and economic empowerment programs, to help survivors rebuild their lives and regain their dignity is encouraged. By implementing these measures, governments can ensure a seamless transition for children as they navigate young adulthood, safeguarding their well-being, dignity, and prospects.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch19

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INTRODUCTION OF PERFORMANCE EVALUATION FOR EMPLOYEES IN CROATIAN PUBLIC SECTOR AND PROFESSIONAL SOLIDARITY

Newly adopted Croatian Law on salaries for employees in the civil service and public sector, which entered into force at the beginning of 2024, introduced salary bonuses linked to performance evaluation for both sectors. While civil service employees already had regular performance evaluation in place, public employees did not have such evaluation. In addition to legal provisions, in October 2024 the Government introduced Regulation on Procedure, Criteria and Method of Performance Evaluation which is to enter into force at the beginning of 2026 and caused significant public outcry, particularly in certain sectors like high education.

The primary research question of this paper is whether professional solidarity can be put to the test by introducing performance evaluation fully dependent on the internal mechanisms of performance evaluation and without a proper discourse of external appeal mechanism. Further, we will explore if proposed evaluation in institutions of higher education where work tasks are mainly independent and difficult to assess has the potential to further disintegrate professional solidarity, which is already vulnerable to ongoing weakening of the collective bargaining and professional associations.

Keywords: solidarity, performance evaluation, public employees, Croatian legislation, high education.

1. INTRODUCTION

Newly adopted Croatian *Law on Salaries for Employees in the Civil Service and Public Sector* from 2024 introduced salary bonuses linked to performance evaluations for both sectors. The same year, the Government introduced *Regulation on Procedure, Criteria and Method of Performance Evaluation,* which should enter into force in 2026 and has already caused significant public outcry, particularly in certain sectors like high education.

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The proposal defines that the immediate supervisor is obliged to continuously monitor the work and work attitude of the employee, to encourage quality and efficient performance of work tasks and work attitude, and to indicate in writing the omissions and irregularities of the employee. The most concerning provision of the Regulation is that negative performance evaluation would lead to immediate dismissal.

While introduction of performance evaluation in the public sector should increase professionalism, high-quality performance and accountability in the public sector, its regulation should be as comprehensive as possible and in line with labour law standards to minimise possibility of violation of workers' rights in two crucial areas of labour law – protection of fair working conditions and protection against unfair dismissal. Procedure for performance evaluation dismissal needs to be very well legally elaborated and needs to contain all safeguards protecting, on one side, the rights of workers and on the other side, the interests of the employer, in this case, the state. Insufficiently regulated performance evaluation can easily jeopardise the International Labour Organisation (ILO) standards, the European Union (EU) standards enshrined in the EU Charter of Fundamental Rights and other applicable legal instruments.

In the first chapter, we analyse theoretical foundations for performance evaluation in public service and links with performance-related pay. Second chapter focuses on theoretical foundations of performance evaluation, third on provisions of proposed new Croatian legislation applicable to introduction of performance evaluation and the fourth chapter applicability of newly proposed legal provisions to administrative and technical employees of high education and science institutions, In the fifth chapter, we provide labour law analysis of performance evaluation for teaching and research employees. In chapter six, we explore how the introduction of performance evaluation can be a test of the solidarity principle in labour law.

Research in this paper is based on qualitative legal research methods, combining the methods of analysis and synthesis, inductive and deductive methods, and descriptive methods.

2. THEORETICAL FOUNDATION OF PERFORMANCE EVALUATION IN PUBLIC SERVICE AND LINK TO PERFORMANCE RELATED PAY

Introduction of performance evaluation and the performance-related pay in civil and public services has important implications, such as increasing public administration efficiency by increasing the work performance of its employees and better motivating public officials to perform well, invest in their professional development, and get financially rewarded for high-quality work. Further, it might affect talent attraction to public administration and merit-based remuneration, as well as a decrease in public administration costs by cutting down seniority promotions (Marcetic & Manojlovic-Toman, 2019, p. 136). Other benefits include improvement of skills and competencies of public servants, which are again linked to better functioning administration. Performance evaluation is closely linked to merit-based recruitment in public service, particularly at the managerial positions where performance and pay decisions should be made impartially, objectively and professionally.

Manojlovic (2016, pp. 289–297) emphasised crucial importance of continued monitoring, assessment and evaluation of a work of public employees, but under the precondition it is clearly pre-defined, objective, measurable, and linked to organisational priorities and strategic goals, which requires specifying of expected results which all leads to the second phase which is the use of collected information to conduct performance evaluation.

The shortcomings of linking pay to performance are primarily the non-existence of a clear description and analysis of work processes and procedures on who does what, i.e., which public service employee does a certain work task while holding a certain position (Buric & Kuzir, 2019, p. 260). Additionally, we have a lot of potential obstacles on the side of supervisors, starting from several types of bias, subjectivity, and partiality. Another issue of concern is the notion that only a depoliticised public service can be fully efficient and professional because, in a politicised public service, we have a lack of interest and specific skills to conduct proper performance evaluation. Unless we approach performance evaluation from the highest possible standards of professionalism, coupled by the pre-determined and clear evaluation criteria, the actual goal of introducing such a method will not be achieved.

OECD (2005, pp. 75–82) considers that the introduction of payment-related pay requires fundamental adjustments or changes in methods of work and work ethic, a clear goal and results-oriented approach, including the ability to measure them and accountability for results. It also outlines two main models of performance-related pay: the first with the merit-based permanent basic remuneration increase, and the second is payment of lump sum bonuses, which are not part of the regular salary and depend on the performance evaluation (OECD, 2005, pp. 55-56).

3. LEGAL BASIS OF PERFORMANCE EVALUATION OF CIVIL AND PUBLIC SERVANTS IN CROATIA

The National Recovery and Resilience Plan 2021-2026 of the Government of the Republic of Croatia, approved by the European Union, as part of the reform measures "New models of salaries and work in the civil service and public services", planned to integrate work efficiency and performance with remuneration and job promotions of all employees in public administration (i.e., both civil servants and employees of public services). The standardisation and reform of the remuneration in public administration should implement the principle of equal pay for equal work, and introduce equal opportunities for rewarding employees who have excellent work results within the public administration.

The newly adopted Law on Salaries of Employees in Civil and Public Services (*Official Gazette* No. 155/2023) (further: Law on Salaries) introduced the evaluation of the work efficiency of civil servants and employees in public services, and for the first time a single regulation applies to all public services in the Republic of Croatia. The procedure, criteria, and methods of evaluating the performance of public service employees are regulated by the Law on Salaries of Employees in Civil and Public Services (*Official Gazette*, No. 127/2024) (further: Regulation).

Article 10, paragraph 13 of the Law on Salaries stipulates that, besides the general criteria for assessing the efficiency of work, because of the specificity of the work of specific public

services, special criteria for the efficiency of the work of civil servants and employees will be established by by-laws. The general criteria for assessing the efficiency of work of employees shall apply to all public services, and they are: efficiency in work performance, reliability, and punctuality (Article 19 of the Regulation). Special criteria are innovation, creativity, written communication, communication skills, and teamwork. The criteria for assessing the work attitude are: attitude towards work obligations, attitude towards clients of service users, attitude towards supervisors, attitude towards subordinates and attitude towards their peers (Article 21 of the Regulation), while managerial criteria: organisation and management of work, decision-making ability, ability to motivate employees, ability to establish work procedures and supervise their execution, and work efficiency (Article 23 of the Regulation).

Under Article 4 of the Regulation, the proposal for the performance evaluation of an employee is made by the employee's immediate supervisor, along with the employee's self-assessment for the previous year. The immediate supervisor is obliged to monitor the work and conduct of the employee during the year and keep records with comments on work, recommendations, and exceptional achievements, under the provisions of Article 6 of the Regulation. The proposed evaluation should be shared with the employee, who has the right to make a complaint within three days.

The Regulation stipulates the obligation of the head of the public service to establish a Committee for Proposing the Final Assessment (Article 7) and more committees depending on the number of employees and the number of separate organisational units. The primary task of the Committee is to review the self-assessment, the report, and the evaluation proposal and determine the final proposal for the employee's performance evaluation by a majority vote of its members. The composition of the Committee has been pre-determined, consisting of an odd number of at least five members, with one member being a representative of the Workers' Council or a representative of the trade union in the event that a Workers' Council has not been established.

In accordance with Article 9 of the Regulation, the final proposal for the employee's performance evaluation is determined by the Commission and submitted to the head of the public service (or an authorised person). If the final proposal for the performance evaluation of the Commission differs from the proposal of the employee's supervisor, the proposal shall be accompanied by the proposal of the employee's supervisor, as well as the employee's statement if the employee has provided a statement. When the final proposal for the employee's evaluation is "excellent," the Commission shall submit it to the Evaluation Proposal Review Committee before submitting it to the head within the stipulated deadline. The reasoned decision should be shared with the employee, but there is no external appeal body to which the employee being assessed can submit a complaint or appeal against the grade. Performance evaluation needs to be recorded in the Register of Public Sector Employees for the purpose of awarding points in accordance with the provisions of the law and regulations.

The Regulation by the Article 14 stipulates that an employee may receive a rating "unsatisfactory" only if he/she was, no later than three months before the end of the year for which the evaluation is being performed, warned in writing of the possibility of receiving a negative rating and was also warned of the need to improve the work performance. The report must contain information on when the written warning was issued, and whether

the employee eliminated irregularities and omissions at work, i.e., justified a rating higher than "unsatisfactory" by subsequent work performance. If the performance of a civil servant or public service employee is assessed as "unsatisfactory," his/her employment contract shall be terminated and he/she would be dismissed in accordance with the Labour Law.

The Law on Salaries regulates what constitutes the basic salary, how the basis for calculating the salary and the coefficient for calculating the salary are determined, and what the basic salary supplements are. It also establishes a work efficiency supplement that is paid based on the employee's work efficiency performance evaluation, and it is calculated as surplus paid on the basic salary, increased depending on the length of work experience. Depending on the grade with which the civil servant or employee was assessed for the previous calendar year, he/she acquire a certain number of points (Article 19 of the Act). Article 29 of the Law establishes limits on salary promotions during one calendar year, of a maximum of 5% of the total number of employees can receive the grade "excellent", and a maximum of 15% can receive the grade "particularly successful". It is the obligation of the head of the institution to establish a Committee for Reviewing Evaluation Proposals, responsible for reviewing the "excellent" and "particularly successful" evaluations. The Law also stipulates a onetime cash payment to reward employees for their work results.

The Regulation in Article 17 lists exceptions when assessing periods of maternity/paternity, parental or adoption leave or leave that is equal to the right to paternity leave, half-time work, half-time work for increased child care, leave for pregnant women, leave for an employee who has given birth or an employee who is breastfeeding a child, and leave or work half-time for the care and nurturing of a child with severe disabilities, in accordance with the regulation on maternity and parental benefits, which are considered a full-time work. Also, for periods of absence from work that lasted longer than 6 months in the calendar year, the employee will be assessed as "successful."

In the above-mentioned provisions, we can notice the introduction of performance-related pay into the Croatian legal system. Marcetic & Majnolovic-Toman (2019, p. 130) outlined the main contested issues related to such remuneration approach being difficulties in determining what is considered a high-quality performance, how to measure it, how to prevent abuses at performance evaluation, whether performance related pay would indeed increase work efficiency and quality of a work of public employees, and the impact it has to the motivation of employees and ethics of the public service. All these questions are fully valid and currently inadequately addressed in the ongoing introduction of overall performance evaluation in civil and public services in Croatia.

4. CHALLENGES IN PERFORMANCE EVALUATION OF ADMINISTRATIVE AND TECHNICAL EMPLOYEES IN THE HIGHER EDUCATION AND SCIENCE IN CROATIA

The assessment of the work of administrative and technical employees in higher education and science is necessary for improving and ensuring the quality of the functioning of the entire higher education system. In order for the performance evaluation system for administrative officials and employees of public services to achieve its purpose, it is

essential to establish a fair, objective and motivating system for employees. For this reason, it is necessary to objectively determine all special evaluation criteria, their impact and the system for assessing special criteria and general criteria for performance assessment, i.e. assessment of work efficiency and attitude towards work. It is therefore to be expected that separate regulations will have to be adopted to establish high-quality, precise, clear and unambiguous specific performance criteria, adapted to the specificities of each individual public service as a prerequisite for ensuring an objective system of performance evaluation of public service employees, including administrative and technical employees in the high education and science system.

As the work of administrative and technical employees in higher education and science institutions is very complex, changing, and dependent on external circumstances such as working with students and teaching and research staff, there are numerous challenges in the performance evaluation.

First, administrative employees perform different and very diverse tasks, depending on the particular institution, so it might prove difficult to establish specific criteria for evaluating the effectiveness of their work. Their institutions are different in size and have different job divisions. In smaller institutions, administrative and technical employees have multiple functions and, as such, could have multiple supervisors under various managerial structures. For example, one secretary of a small faculty can be simultaneously tasked by the Dean, Vice-Deans, and Professors, depending on her roles. If this is the case, it will be difficult to establish clear supervisory lines and subsequently, to make a high-quality performance evaluation.

Further, each higher education and science institution has different organizational priorities and strategic goals, which might be challenging for the establishment of clear assessment criteria. The absence of criteria and the lack of general guidelines can lead to uneven performance evaluation and a subjective approach by the supervisors. Therefore, it is necessary to establish clear and measurable specific performance assessment criteria, considering the specificities of administrative positions within the higher education system.

In order for administrative officials and employees to achieve satisfactory results in performing their jobs, it is necessary to enable professional development and improve competence within the scope of the job they perform, which the employer should previously determine in an annual training plan. This is closely linked to the need to establish competency gaps of administrative employees, followed by a personalized development plan with competencies each employee should possess for better work performance and aligned with that, individual training plan should be elaborated (Vukojdzic Tomic & Lopizic, 2019, p.77). In certain administrative and technical professions within the education system, opportunities for professional development are often limited or unavailable. Therefore, it is necessary to enable administrative and technical employees to attend further education, lifelong learning programs, and specialist and postgraduate studies in order to gain additional expertise would improve the performance and skills of employees.

Another important point is a very high possibility of favoritism and power influence of the head of a public institution, so that the highest grades are given only to privileged employees, or this can be used against workers who are active in workers' organizations

and trade unions. In order to completely exclude the possibility of arbitrariness, legislators should have established a competent committee within the relevant Ministry for Education and Science to review the final evaluation of public service employees for each category of public service for which special performance evaluation criteria will be established.

5. CHALLENGES IN EVALUATING THE PERFORMANCE OF TEACHING AND RESEARCH EMPLOYEES IN THE HIGHER EDUCATION AND SCIENCE SYSTEM IN CROATIA

In the higher education system in Croatia, teaching and research employees' work is evaluated through the assessment of teaching, scientific, research, and institutional contribution within a time period of five years. This evaluation is legally required in order to fulfill criteria and get promoted to a higher position or reappointed to an existing position. Taking into consideration that work of public service employees at public Universities in Croatia - teaching and research employees – is being carefully and regularly assessed and evaluated by the national expert committee, we can reasonably expect that the introduction of a parallel system of performance evaluation will be highly contestable.

We outline the main obstacles to the proper implementation of performance evaluation for the academic public employees in Croatia:

5.1. Labour Law Challenges in Implementation of Performance Evaluation for Teachers and Research Employees in the Higher Education and Science System

5.1.1. Predictability and transparency of working conditions

One of the basic principles of labour law and fair labour relations is predictability and transparency of employment. In that regard, when performance evaluation is introduced, we need to develop a comprehensive, transparent and predictable scheme for assessing worker's performance to avoid discrimination and violation of fundamental labour rights. Therefore, it is of particular importance to set clear strategic goals of the institution, followed by clear job descriptions and individual, yearly, and easily measurable performance goals and personal achievements for each employee. Then it is of crucial importance to train supervisors very well on the proper monitoring of performance and skills required to provide meaningful performance feedback. Once supervisors are trained and employees are fully aware of the expected results they are supposed to achieve within a certain timeframe – usually annually – we can proceed with the delivery of established performance goals and periodic review of performance against agreed standards and results. If the employee failed to deliver the initially agreed results, and if the employer provides a negative performance rating, firstly, the venue for informal resolution must be established, followed by the establishment of a formal internal mechanism for challenging a negative performance evaluation if and when informal resolution is unsuccessful. Besides that, an organisation must have a transparent and legal performance improvement plan with clearly stipulated areas where improvements are required, which would be activated within a certain period, either

six months or one year. If all the mentioned steps prove unsuccessful, an employee with inadequate performance should be informed in writing about exhausted possibilities to resolve the matter with a performance improvement plan, informally and formally, and subsequently, that his/her employment contract is to be terminated within the legally stipulated notice period.

Unless above mentioned steps of performance evaluation are all implemented, we cannot speak about fair and transparent working conditions as they are stipulated in the EU Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions and all applicable ILO standards on fair and predictable working conditions.

In the current proposal for regulation of the performance evaluation impact on labour status of public employees, including academic staff, one gap is very evident, and that is lack of legal recourse and internal avenues of redress. Disciplinary actions in labour law should firstly have internal procedures and possibility to settle the matters informally and formally within the organisation or through alternative methods of dispute resolution, i.e. mediation or arbitration. Appeal to the negative performance evaluation must be introduced as otherwise, we can easily violate articles 8 and 9 of Convention 158, dealing with the right of appeal, which is an essential element of a worker's protection against unjustified dismissal. The reasoned decision of the head of the institution and the Evaluation Proposal Review Committee should be communicated to the employee. However, there is no external body to which the employee being assessed can submit a complaint or appeal regarding the grade.

5.1.2. Violation of international standards applicable to dismissal

Proposed changes to the employment of the public employees in Croatia, including an academic staff of four public Universities, contravene international labour standards as guaranteed by the ILO protection against dismissal recognised by the ILO Conventions, the EU Charter of Fundamental Rights, the EU Treaty, and EU Directives. The primary ILO applicable convention violated is Convention C158 on Termination of Employment from 1982 (No. 158) and Termination of Employment Recommendation, 1982 (No. 166). In Article 7 of Convention No 158 it is clearly stipulated that:

> *'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.'*

Croatian Labour Law follows the Convention and in Art. 119. p. 2. sets a procedure that needs to be undertaken prior to dismissal, outlining that the employer has a duty to allow the worker to defend himself. In the proposal for legal regulation of dismissal due to negative performance evaluation, we do not find sufficiently convincing provision related to the 'opportunity (of worker) to defend himself against the allegations' and this might pose a serious issue to both employers and labour tribunals which will have to interpret national legal provisions in light of the ILO Conventions.

Another labour issue might be a period of notice, which is set to three months in the proposed new legislation. This is not aligned with Croatian Labour Law provisions, which in Art. 122 stipulates several notice periods for dismissal for misconduct, depending on the length of service.

5.2 Harmonization between current performance evaluation and newly introduced performance evaluation for teaching staff

Taking into consideration that teaching, scientific, research and institutional contribution of teaching staff at Croatian Universities is already being assessed regularly, introduction of another layer of performance evaluation might be repetitive if all four criteria will be re-assessed or focused on administrative side of the job, leaving out substantial content of the performance. If public service employee level of performance evaluation will be conducted on a yearly basis, there is a question whether data collected through such an assessment could be used further in a five-years cycle of performance evaluation by the National Scientific Committee or vice versa, if positive evaluation of promotion by the Committee should be a basis for annual review in next years.

5.3. Heavily diverse tasks of teaching staff

Formal job descriptions of teaching staff at Croatian Universities are very generic and give freedom to choose certain tasks over others. For example, while the minimum and maximum number of teaching hours are legally set, there is no repercussion if someone refuses to take on any additional teaching classes beyond the minimum. Very often, the amount of teaching hours does not depend on the teacher, but rather on external circumstances, such as the number of enrolled students, topic, elective courses, etc. At the same time, teachers can choose to work on additional tasks, such as mentoring, project work, or working with guest students, and those additional tasks are not reflected in remuneration, bonuses, additional leave days, or any other applicable employment benefits. Their access to certain activities beyond compulsory work tasks depends on highly diverse scientific interests, skills, and areas of interest, so subsequently, it might be very difficult to establish assessment criteria for performance evaluation.

5.4. Highly independent work of academic staff with minimum supervision

The work of Professors at the Croatian Universities is highly independent, with minimum supervision, even in areas where supervision would be expected and assumed, such as supervision or at least feedback regarding the quality of lecturing. Current practice is that University Professors only have one initial lecture when they formally start teaching, attended by a more senior colleague who provides assessment of that class. Apart from that, professors are free to organise the content of all of their future lectures and deliver them fully unsupervised. This poses a problem when we try to assess the quality of teaching because the ongoing practice of independence is not compatible with the performance evaluation in this area. For research part of academic work, the situation is easier because it is relatively easy to quantify published research papers or book chapters, and it is regularly done, but even here we have an issue of unequal access to prestigious

international publishers which are more interested in certain scientific fields, but less so in other (this particularly applies for social sciences and more specifically for law). For teaching, the only quantifiable data is a yearly survey by students, which is not fully reliable, considering that students can give higher ratings to more entertaining teachers, as well as to those who have low expectations for them. In addition, it is difficult to quantify external activities of teaching staff, such as involvement in public events, media, or cooperation with business enterprises. Finally, formally, supervisors of Professors are Deans who have very limited interaction with Professors and do not and cannot supervise them on a daily basis. In the human resources area, one important point is to try to avoid so-called proximity bias, by which managerial staff place unfairly higher value and impact on work they actually see or are directly aware of. In addition, staff members and his/her supervisor can and usually are in different scientific fields, so even on that front, supervision is not feasible. Therefore, the objective knowledge of Deans on the performance of teaching staff is very limited, if any, so it would be extremely difficult to make a proper, merit-based performance evaluation.

5. INTRODUCTION OF PERFORMANCE EVALUATION AS A TEST OF SOLIDARITY

The principle of solidarity is one of the prominent principles of labour law, particularly collective labour law, but also individual labour law, where we can link solidarity with protection from the arbitrariness of employers, protection from discrimination, protection of fair and transparent working conditions, and protection against unfair dismissal. By applying solidarity in labour law, we actually protect the weaker part of the labour relation and that is workers, while by guaranteeing solidarity in labour law implementation, we ensure human rights are respected, protected, and promoted, as outlined in all international human rights instruments.

The EU considers protection against unfair dismissal as part of the solidarity principle, and leaves the regulation of enforceability and accountability to Member States because of the subsidiarity principle by which diversity in the content's definition exists (Lopez, 2022, p. 11). Lopez also notes that protections against unfair dismissal, as defined in the Charter of Fundamental Rights, are a matter of solidarity, as well as part of the EU-promoted "flex-security" (Lopez, 202, p.11).

If we look into protecting labour rights as a solidarity principle, then every inadequately substantiated and well-elaborated proposal for the introduction of performance evaluation and performance-related pay could possibly jeopardise fair labour conditions and protection against unfair dismissal and, subsequently, labour solidarity. Therefore, it is of utmost importance to regulate performance evaluation in a way that regulation contains procedural and rights safeguards and full implementation of the ILO standards.

6. CONCLUSION

In Croatia, the performance evaluation of civil servants, which has been ongoing for many years now, was purely formalistic and included unrealistic over-rating of the performance of civil servants. This was supposed to be changed by the latest proposal for reform of performance evaluation in public services through links between performance evaluation and bonus payments to the base salary, and the possibility of termination of the employment contract because of unsatisfactory performance.

The primary research question of this paper was whether solidarity can be put to the test by introducing performance evaluation for public employees. By providing an analysis of the applicable proposal for legal regulation of performance evaluation, we established that the current proposal is inadequate and contains gaps that might and definitely should be addressed in the bylaws. The main concern is that proposed performance evaluation procedure is currently not promoting predictable and transparent working conditions because it is insufficiently regulated in areas like organisational goals and strategic areas, clear job descriptions, proper training of supervisory and managerial staff in performance evaluations and human resources feedback, defining setting of individual goals and achievements, possibility of performance improvement, internal informal and formal redress mechanisms and external amicable resolution of possible disputes related to the negative performance evaluation. These are essential if performance evaluation is to be linked to the additional payment of bonuses, and could lead to the termination of the employment contract. Without detailed regulation of all the above, the introduction of performance evaluation can undermine solidarity in labour relations and can jeopardise fundamental labour rights.

In the performance evaluation of academic public employees – both administrative and academic staff – the paper outlined areas where potential obstacles to fair and objective assessment of performance could happen, which might also serve as proposals for how to better regulate that area.

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Review scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch20

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PRACTICAL SOLIDARITY: A BOND CONNECTING CONSUMERS, FUNDAMENTAL VALUES AND DIRECTIVE

The paper analyses the connection between the fundamental rights, i.e., fundamental values from the Charter, and the general objectives set by Directive (EU) 2019/1023 of the European Parliament and the Council in relation to consumer bankruptcy, with solidarity being validated in a wider sense. Consumer bankruptcy as a part of the fundamental right guaranteed by the Charter of Fundamental Rights of the European Union, or protected value, is analysed in relation to the general objectives of the Directive, with reference to the sociological meaning and definition of solidarity as a legal principle. These values are related to consumer protection in the range of social rights. The Directive stipulates that EU member states can also apply to natural persons the procedures that lead to the discharge of debt incurred by an insolvent entrepreneur. These objectives indirectly enable the protection of fundamental rights guaranteed by the Charter, and they also relate to consumer protection. If solidarity in its definition includes freewill, voluntarism, or social bond, with the adoption of the Directive, those components are absent because the obligation to achieve certain objectives is imposed on the member states. Regarding the Directive's objectives, free will, voluntarism, or social bond as an assumption of solidarity is missing. Because of that, solidarity can be considered as imposed, forced, due to the objectives that the member states must achieve in the process of implementation.

Keywords: consumer bankruptcy, law, solidarity, fundamental rights and values.

1. INTRODUCTION

Consumer bankruptcy is a procedure set to avoid the insolvency of a natural person when there is a likelihood of insolvency. It is a procedure in which the composition or structure of consumer assets is changed, based on a repayment plan, in an attempt to reimburse creditors within a certain period, and in order to partially or completely release the consumer from the remaining debts. In order to achieve that, the consumer has to

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be considered honest, and the insolvency has to last for a certain period, while financial obligations must reach a certain amount. The consumer bankruptcy procedure itself is not based on the Charter as a right or obligation, but it is closely linked to the fundamental values prescribed in its Preamble. One of these values is solidarity. Solidarity as a universal value implies consumer protection, as prescribed in Article 38 of the Charter. It is precisely this part of the Charter that connects rights, or fundamental values, on the one hand and solidarity on the other. It is not a fundamental right protected by the Charter as such, it rather represents the protection of fundamental values. The consequence of the effect of solidarity on fundamental rights and values protected by the Charter is that Union policies ensure a high level of consumer protection[1]. Because of such policy, by adopting procedural and other regulations, on 26th of June 2019, Directive (EU) 2019/1023[2] (Directive 1023) was published in the Official Journal of the EU, which entered into force on the twentieth day after its publication, i.e., 16th of July 2019. The Charter of Fundamental Rights of the European Union (the Charter) in Chapter IV, entitled Solidarity, prescribes fundamental rights related to work and social security, i.e., the right to social protection and healthcare (see Articles 27 to 36). In addition to fundamental rights, this chapter also prescribes certain obligations relating to the protection of goods and persons. Consumer protection is, in fact, the basis that connects the Charter and Directive 1023, when it comes to the application of Directive 1023 to natural persons, because its provisions primarily apply to viable enterprises, legal persons carrying out a registered activity, and entrepreneurs. In view of that, by reading the introductory provisions, it can be concluded that the primary objective of Directive 1023 is the proper functioning of the internal market and the removal of obstacles to the exercise of fundamental freedoms such as the free movement of capital and freedom of establishment, by applying the provisions of the Charter from Chapter IV, its application to natural persons is also enabled. Likewise, Directive 1023 was adopted as a legal regulation relating to entrepreneurs, or rather to corporate law.[3] Solidarity as a social phenomenon is a relatively undetermined concept which, first of all, cannot fully coincide with law, especially strict legal rules. It can be said that through its development and effect on social changes, it indirectly influences the development of law, which undoubtedly follows from the Charter, in which solidarity is one of the fundamental protected values. Solidarity itself in law, especially within the framework of the Charter, encompasses an entire sequence of guaranteed rights and protects fundamental rights in the field of labour law and social welfare.

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1 Article 38 of Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, No. C 202/389.

2 Directive (EU) 2019/1023 of the European Parliament and the Council, *Official Journal of the European Union*, No. L 172/18.

3 COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023 (12. 3. 2025).

2. OBJECTIVES SET BY THE DIRECTIVE

The legal framework for the adoption of Directive 1023 was Article 53 (formerly Article 47), Article 114 (formerly Article 95), and Article 294 (formerly Article 251) of the Treaty on the Functioning of the European Union. If only Article 53 of the Treaty should be considered, it can be concluded that one of the basic objectives for which Directive 1023 was adopted is the protection of freedom of movement and business activity for self-employed persons. Articles 114 and 294 represent a certain type of legislative and procedural framework within which the aims set by the Treaty are achieved. Article 114 of the Treaty, paragraphs 1 and 3, stipulate that, in order to achieve the objectives set out in Article 26 of the Treaty, the European Parliament and the Council shall adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States, which have as their object establishment and functioning of the internal market, while paragraph 3 stipulates the obligation to protect consumers, i.e. that the Commission will take as a base a high level of protection, considering in particular any new development based on scientific facts.[4] It can be immediately seen that paragraph 1 refers to Article 26 of the Treaty, focused exclusively on protecting the functioning of the internal market, which includes the internal borders of the EU, in order to enable the free movement of goods, persons, services, and capital.[5] As already mentioned, Article 294 contains rules on the adoption procedure of Directive 1023, i.e., it determines that it is an ordinary legislative procedure. The introductory provisions of Directive 1023 set the objectives to contribute to the proper functioning of the internal market and the removal of obstacles to the exercise of fundamental freedoms, such as the free movement of capital and the freedom of establishment. As already mentioned, consumer protection can also be added here because it arises from the legal framework that served as the basis for the adoption of Directive 1023. It can be noticed that one of the objectives, if not the most important one, besides the protection of fundamental freedoms and consumer protection, is also the adaptation or harmonisation of national legislation with the provisions of the Treaty. Harmonisation is necessary in order to achieve the proper functioning of EU law throughout the EU, i.e., the equal execution of the Treaty's obligations. Solidarity as a sociological component is absent in the achievement of those aims or obligations because there is no voluntariness or free will. It should be emphasised that the provisions of Directive 1023 may have a legal impact on national legislations regardless of the fact whether the member state has implemented Directive 1023 in national legislation or not. It is a supranational source of law whose provisions are unconditionally applied, especially if the provisions of national legislation are contrary to EU law. In fact, the main goal of all secondary legal sources, including directives, is the even and efficient execution of the rights and obligations assumed by the member states by signing the Founding Treaties. In conclusion, it can be stated that the main objective of all secondary sources of EU law is, in fact, to create a legal framework for achieving the aims of the Founding Treaties, as well as harmonising the legal sources of the member states for the proper functioning of the internal market.

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[4] Article 114 of Treaty on the Functioning of the European Union, *Official Journal of the European Union,* No. C 202/1.

[5] Article 26[t] of Treaty on the Functioning of the European Union, *Official Journal of the European Union,* No. C 202/1.

3. THE DIRECTIVE'S EFFECT

When speaking about the effects of directives in general, they can have a dual effect on national legislation, they can act as a primary or secondary source of law. With respect to the dual effect, a distinction should be made between directives as primary or secondary sources of law for the Member States and their characteristics as a legislative act, a part of secondary sources of EU law. In the first case, it is about the enforcing of the directives in the Member States legal system, depending on whether or not it has been implemented into national legislation, while in the second case it is about the source of law for all the Member States, the implementing acts adopted by the European Parliament, the Council and the Commission. If the member state does not achieve the objectives set by the directive, having in mind that it is a supranational source of law, the one whose rights are violated can refer directly to the directive, regardless of the fact that the national legislation is contrary to the provision of the directive. In that case, the directive is the primary source of law, because the provision of national legislation that is not in accordance with the provision of the directive may not be applied. On the contrary, if the member state has implemented the directive into national legislation, but has not done so to a sufficient extent, it can still be referred to the directive as a secondary source of law, because the primary source of law, national act, did not achieve the objectives set by the directive. Directive 1023 was adopted in order to create the same or a similar legislative framework for bankruptcy throughout the EU. It primarily applies to legal entities, viable enterprises, and entrepreneurs, but the problem of over-indebtedness of natural persons was also observed, which is why it was necessary to extend its application to natural persons as well. This is evident in the draft proposal for Directive 1023, as it is stated that the over-indebtedness of natural persons is a major economic and social problem. Over-indebtedness of natural persons is a major economic and social problem. 11.4% of European citizens are permanently in arrears with payments, often for utility bills 9. This is mostly because of unfavourable macroeconomic conditions in the context of the financial and economic crisis (e.g., unemployment) combined with personal circumstances (e.g., divorce, illness).[6] The accuracy of the above-mentioned percentage has not been tested in this paper, with respect to the date when the proposal was drafted, and because it is not closely related to the paper's topic. It also follows that a functional insolvency framework covering all measures of the insolvency laws of the Member States is a key part of a good business environment because it supports trade and investment, helps create and preserve jobs and helps economies to better withstand shocks to the economy caused by high levels of bad loans and unemployment. These are all key priorities of the European Commission.[7] Given that the subject of this paper is consumer bankruptcy, and consumers are natural persons,

[6] COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023 (12. 3. 2025).

[7] COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023 (12. 3. 2025).

the most important effect of Directive 1023 is its application to natural persons, although the primary aim was to create a unified bankruptcy framework to ensure the functioning of the internal market, in order to achieve the objectives arising from the Treaty. Starting from the fact that it can also apply to natural persons, the main advantage of such a source of law is that some EU member states have passed special laws that enabled the bankruptcy of natural persons, even though it is a legal institute primarily related to trading companies. Like wise some of them have implemented the provisions of Directive 1023 into existing laws in order to harmonise national rights with EU law, with no need to draft a special law, e.g. Belgium only passed the Act of implementing the Directive 1023 and took only three measures in the process of transposition, while Luxembourg and Ireland passed only one act and took only one measure.[8] Hungary is the EU member state that has taken the most measures and amended the largest number of acts overall, 59 measures.[9]

4. SOCIAL ASPECT OF SOLIDARITY

Originally a legal term, solidarity became prominent from the 19th century onwards as a political and sociological concept, only to find its way back into the legal arena as an overarching legal principle. Whether solidarity is understood in the communitarian sense, as built upon community interests, or conversely, as primarily rooted in the relation between individuals (Denninger, 1967), as a legal principle, it has to be enforced through binding norms. Unlike solidarity between friends, solidarity between strangers is artificial, because it can only be accomplished by means of law (Habermas, 1998, p. 119; Kingreen, 2003, p. 252; Martinović, 2015). The difference between solidarity and the principle of solidarity encompasses the differentiation inherent in the principle of social state, that between society and state in social security (Kingreen, 2003, p. 252). Kingreen's succinct explanation perfectly illustrates the transition from solidarity to the principle of solidarity. The term solidarity, based on a specific personal bond, is reserved for the micro-level and exists with no legal or normative pressure. The principle of solidarity exists on the macro level as activity mediated through the state, as organised solidarity. As a legal principle, it implies coercion to solidarity (Kingreen, 2003; Martinović, 2015). Undeniably, solidarity is originally a legal term, and it can exist as a legal principle, but it can also be considered a relatively new sociological concept, non-inherent in law. When we speak about a social definition of solidarity, apart from voluntarism, its constituent part has to be a personal bond between individuals, which is connected on a certain level, and does not have to be a bloodline. If it is understood in the communitarian sense (Britannica, 2025a), those individuals have to be a part of a community. As a sociological definition of a certain type of social ties, regarding the development of the division of labour,

[8] COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Available at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023 (12. 3. 2025).

[9] COM (2016) 723: Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, ref. 9. Available at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A32019L1023 (12. 3. 2025).

the term solidarity was first used by Emile Durkheim (2023). Social solidarity is a complex phenomenon that encompasses many different dimensions, making the testing of the relationship between the law and social solidarity problematic (Johnson *et al.*, 2017). Nevertheless, if we look at solidarity as a sociological concept, there has to be either a bond between individuals or the existence of a community as a base upon which it is established, because it cannot exist between individuals if they are not a part of a community or bonded in another way. Seeing solidarity as a legal principle, it has to be established upon a legal norm, and it has to be a binding legal norm. In that sense, the solidarity lacks voluntarism or freewill, and it is imposed by an act of state, for which reason the solidarity is forced in a certain way. This is precisely what is emphasised in regulations such as directives because they are implemented into the national legal system of member states. All the provisions of national legal rules that are opposed are not applicable or have to be adapted to the provisions.

5. SOLIDARITY AND LAW

When the EU Parliament and Council of the European Union impose specific measures or goals that have to be achieved through an act of legislation, e.g., a directive, they lack free will and voluntarism. That particular type of imposed measures or goals has to be in the form of a mandatory, legislative act. Solidarity consisting of freewill, volunteerism, and social bond can only exist between natural persons as a result of a certain personal bond, and when it has to be achieved among strangers, it's artificial (Johnson *et al.*, 2017). It can be argued whether the solidarity as a legal principle can even exist if, firstly, it lacks freewill or volunteerism and, secondly, if it is imposed by a state through a specific legal act. In the latter sense, when it is imposed, it lacks a personal bond as one component of solidarity on the micro level. It is inherent that there's no personal bond between a member state and a consumer bankruptcy, as it is defined for the micro level. However, the bond can be realised on a macro level, as organised solidarity through legal principle, if we think of citizenship, for example. Citizenship is defined as a relationship between an individual and a state to which the individual owes allegiance and, in turn, is entitled to its protection. Citizenship implies the status of freedom with accompanying responsibilities. Citizens have certain rights, duties, and responsibilities that are denied or only partially extended to aliens and other non-citizens residing in a country. In general, full political rights, including the right to vote and to hold public office, are predicated upon citizenship. The usual responsibilities of citizenship are allegiance, taxation, and military service (Britannica, 2025b). As it has already been mentioned earlier in the paper, if we consider solidarity on the macro level as activity mediated through the state, as organised solidarity (Britannica, 2025b), it has to be done in the form of a legislative act. When an act imposes an objective to be achieved and, on the other hand, consequences if they are not achieved or not fully achieved, it is without doubt coercion to solidarity. That type of solidarity lacks voluntarism and freewill, an important component of the social, communitarian concept of solidarity which exists with no legal or normative pressure (Britannica, 2025b). Durkheim saw legal regulation as a key to the maintenance of social solidarity, whilst being an expression and indicator of differences in underlying moral sentiments and forms of social solidarity (see also Prosser, 2006). However,

he held that the complexity of social relationships and solidarities is proportional to the number of promulgated legal rules (Johnson *et al.,* 2017). Nevertheless, legal regulation, e.g., a directive, can never be voluntary if they are drafted to achieve certain objectives, whose further goal is to ensure the functioning of the Founding Treaties. It can be argued, because solidarity in law can only be mediated through a binding legal norm, that all legal norms about any social right or value are practical solidarity. The presumption of such solidarity would be the existence of a connection between a legal norm and a social right, which the norm consists of, i.e., that solidarity in law cannot exist if there is no binding legal rule.

6. FUNDAMENTAL RIGHTS, THE DIRECTIVE, AND PRACTICAL SOLIDARITY

As already mentioned, consumer protection represents the basis connecting the Charter and Directive 1023 when it comes to the application of Directive 1023 to natural persons. Its provisions primarily apply to legal persons carrying out a registered activity, in order to secure the proper functioning of the internal market and the removal of obstacles to the exercise of fundamental freedoms such as the free movement of capital and freedom of establishment. Consumer protection as a fundamental right or, rather, fundamental value contained within the Charter has to be linked to a legal rule, as a directive, in order to achieve the protection more precisely. The Charter alone does not form part of the Treaty, it was adopted at the Nice Summit in December 2000 by the Parliament, the Council, and the Commission. It is a product not of the constituent authorities of the Treaties but of the three political institutions (Lane, 2007). The charter is legally binding for all EU member states. In accordance with Article 6 of the Treaty on European Union, it has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU countries when they are implementing EU law (Charter of Fundamental Rights, 2000). In order to make fundamental rights or values applicable in practice, they have to be a part of legal rule, because of the Charter's constitutionalised nature and the fact that the Charter is not a part of the Founding Treaties. Legal regulation of fundamental rights and values, especially of those concerning social rights and solidarity, is set to achieve a higher-level practical solidarity, with respect to what has been outlined earlier in the paper. The Charter, yet alone, if we include a second paragraph in Article 51, is only applied when member states are implementing Union law (Charter of Fundamental Rights, 2000), so it is inherent that a binding legal rule must be drafted in order to apply its provisions in all EU member states. Since the Charter isn't a part of the founding treaties and it is a product not of the constituent authorities of the Treaties but of the three political institutions (Charter of Fundamental Rights, 2000), it is mandatory for fundamental rights to be enforced via a binding legal rule. EU fundamental rights must be respected by: (1) the EU institutions and bodies when making, interpreting, and applying primary or secondary EU law in private law; and (2) the Member States when they are 'implementing EU law' in the broad sense outlined above. Considering the need to respect the division of competences of the EU in relation to a multilevel system of private law, the following legal constructs can be identified, which may serve as gateways to the constitutionalisation of European contract law (Cherednychenko, 2017).

7. CONCLUSION

Consumer bankruptcy is not a fundamental right set by the Charter, but rather a protected value in the scope of solidarity, i.e., consumer protection. As of the Charter's constitutional character, having in mind that it's not a part of the Founding Treaties and regarding the provision of Article 51 section 2, consumer protection as a value had to be achieved by adopting a legislative framework, a legally binding rule imposed on all EU member states. Directive 1023 represents a legislative act which was adopted in ordinary legislative procedure, and member states had to implement its provisions into national legal systems. With respect to its provisions, they are subordinately related to consumers, since it is an act essential to legal entities, viable enterprises, and entrepreneurs. The Directive 1023 itself is set to create a unified bankruptcy framework in the whole EU, in order to ensure the functioning of the internal market, and achieve the goals arising from the Treaty. The most important effect is that its provisions can also apply to natural persons, and not only to legal entities connected by their business activity. Directive 1023 is a legal act that primarily relates to legal entities, such as trading companies and entrepreneurs. Relating to solidarity in terms of fundamental value, it implies consumer protection, as prescribed in Article 38 of the Charter. It is precisely this part of the Charter that connects rights, or fundamental values, on the one hand and solidarity on the other. In order to materialise the effects of solidarity in practice, or to carry out the protection of fundamental values set by the Charter, Directive 1023 was implemented in all member states. This was done by adapting the existing legal acts to the provisions of Directive 1023, or by drafting a completely new regulation. The consequence is that some EU member states have adopted special laws on consumer bankruptcy, which formerly did not exist in their national legal system, and it can be considered as one of the positive effects. From the sociological point of view, there is no solidarity if it has to be done by a binding legal rule, and such solidarity is considered artificial and under coercion. It cannot exist on a micro level if it has no connection between individuals. The term solidarity can be defined as a legal principle at the macro level. As a legal principle on the macro level, it is articulated through a legal rule, a binding legal norm. It can be argued that there can be a connection between an individual and an EU member state based on one's citizenship. If so, the solidarity as a sociological term can be articulated as well, with no need for a legal rule as coercion to solidarity, or without the existence of solidarity on the macro level. Bringing solidarity into practice by adopting a binding legal rule, in order to protect the fundamental values set by the Charter, can be considered as practical solidarity.

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Original scientific paper DOI: 10.56461/iup_rlrc.2025.6.ch21

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SOLIDARITY AND THE CONSTUTIONALIZATION OF EU LAW: DISABILITY RIGHTS IN LABOUR LAW

The principle of solidarity is a foundational and contested norm in EU constitutionalism, explicitly recognized in Article 3(3) TEU and the Charter of Fundamental Rights (CFREU). While traditionally viewed as a political aspiration, recent CJEU jurisprudence has transformed solidarity into a legally enforceable principle, particularly in disability rights law. This paper argues that disability rights serve as a test for the constitutional effectiveness of solidarity, demonstrating the extent to which the CJEU enforces social inclusion as a fundamental rights obligations.

By analyzing landmark cases such as Chacón Navas (C-13/05), HK Danmark (C-335/11 and Ring and Werge (C-335/11 & C-337/11), and DW v. Nobel Plastiques Ibérica SA (Case C-397/18) among others, this study illustrates how the CJEU has progressively aligned EU disability law with international human rights standards, particularly the UN CRPD. The Court's interpretation of anti-discrimination law and reasonable accommodation obligations has solidified solidarity as a legally binding principle, imposing direct obligations on employers, institutions, and Member States.

Drawing on constitutionalization theories (De Búrca, 2000, 2011, 2017; Weiler, 1999; Jankov, 2007), this paper situates CJEU jurisprudence within EU constitutional transformation, arguing that disability rights provide a benchmark for evaluating the enforceability of solidarity. The study concludes that solidarity is progressively gaining legal force through judicial interpretation, and its broader application in EU law depends on further judicial and legislative developments, particularly in its application by Member States.

Keywords: EU Disability Law, European Accessibility Act, UN Convention on the Rights of Persons with Disabilities (CRPD), Reasonable Accommodation, Court of Justice of the European Union (CJEU)

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1. INTRODUCTION

The principle of solidarity is deeply embedded in the European Union's (EU) constitutional framework, explicitly enshrined in Article 3(3) TEU and further reinforced by the Charter of Fundamental Rights of the European Union (CFREU). As a foundational principle, solidarity has shaped multiple aspects of EU law, particularly in areas of economic governance, social policy, and labour rights. However, the precise legal enforceability of solidarity — especially in its application to fundamental rights protections — remains an developing issue. While the EU Treaties recognize solidarity, its transformation from a guiding value into a binding legal obligation depends largely on judicial interpretation, particularly through the case law of the Court of Justice of the European Union (CJEU). This paper argues that disability rights provide a critical testing ground for assessing the constitutional effectiveness of solidarity as an enforceable principle in EU law.

The CJEU's evolving jurisprudence on disability rights demonstrates how solidarity is moving beyond political rhetoric to become a concrete legal norm that requires specific obligations from employers, national authorities, and economic actors. Through a series of landmark rulings, the Court has expanded the scope of disability protections, progressively reinforcing the duty to accommodate persons with disabilities in the labour market. Cases such as *Chacón Navas* (C-13/05), *HK Danmark and Ring and Werge* (C-335/11 & C-337/11) and *DW v. Nobel Plastiques Ibérica SA* (Case C-397/18) illustrate the Court's role in translating solidarity into an operational legal standard. By requiring reasonable accommodations and rejecting disproportionate burden defenses, the CJEU has ensured that solidarity is not merely a principle of moral duty but a legally binding requirement under EU law.

This study situates the role of the CJEU within the broader theoretical debates on EU constitutionalism, drawing on the works of De Búrca (2000, 2005, 2017), Weiler (1999), and Jankov (2007). De Búrca has argued that the EU's fundamental rights framework has evolved significantly through judicial interpretation, with the CJEU acting as a key constitutional actor in translating abstract legal principles into enforceable norms (De Búrca, 2017). Similarly, Weiler's theory of EU constitutional transformation emphasizes the role of the judiciary in shaping the European legal order, particularly by establishing the supremacy and direct effect of fundamental rights protections. These perspectives reinforce the argument that solidarity, when examined through the lens of disability rights litigation, provides a critical measure of how deeply embedded and legally operational this principle is within EU constitutional law.

The first part of this paper (Section 2) examines the legal framework of disability rights and solidarity in EU law, focusing on how the CFREU (Articles 21 and 26) and the UN Convention on the Rights of Persons with Disabilities (CRPD) have influenced the CJEU's jurisprudence. This section highlights how these normative instruments shape the legal enforceability of solidarity, emphasizing the transition from an aspirational commitment to a legal obligation.

The analysis then turns to CJEU case law (Section 3), which illustrates how the Court has gradually aligned its rulings with international human rights law, expanding the

enforceability of solidarity-based obligations. The discussion begins with *Chacón Navas* (C-13/05), where the CJEU initially adopted a restrictive medical definition of disability, significantly limiting the scope of anti-discrimination protections under Directive 2000/78/EC (the Employment Equality Directive). However, subsequent rulings—most notably —demonstrated a clear shift toward a rights-based approach, reinforcing solidarity as a legally enforceable norm in the context of disability inclusion, having finally *DW v. Nobel Plastiques Ibérica SA* (Case C-397/18) setting a structured methodology for assessing the proportionality of accommodation duties.

By analyzing disability rights as a constitutional test for solidarity, this paper aims to demonstrate that the CJEU has played a decisive role in shaping the legal meaning and enforceability of this principle. The Court's rulings reveal a broader constitutional shift, where solidarity is being embedded into EU law not merely as a political aspiration but as a binding legal duty. The ability of the EU legal system to enforce solidarity in disability rights cases provides insight into its broader constitutional effectiveness, raising crucial questions about the future trajectory of EU constitutionalism and the role of fundamental rights protection within it.

2. THE LEGAL FRAMEWORK FOR DISABILITY RIGHTS AND SOLIDARITY IN EU LAW

This section aims to contextualize the constitutionalization of the principle of solidarity within the framework of EU disability rights. It outlines the normative foundations of solidarity in EU primary and secondary law, with a particular focus on the Charter of Fundamental Rights of the European Union (CFREU) and the transformative impact of the UN Convention on the Rights of Persons with Disabilities (CRPD). The analysis intends to demonstrate how the CRPD has shifted the legal paradigm from a medical to a biopsychosocial model of disability, thereby reinforcing solidarity as a binding legal norm. By examining the obligations of EU institutions and Member States under this developing framework, the section seeks to establish the legal groundwork for understanding how solidarity functions as an enforceable constitutional principle within EU labour and anti-discrimination law. This foundation will support the later analysis of the CJEU's jurisprudence in giving practical effect to these obligations.

2.1. The Role of the Principle of Solidarity in the Constitutionalization of EU Law

The principle of solidarity is a fundamental value of the European Union (EU), enshrined in its constitutional framework and underpinning its commitment to social justice, non-discrimination, and inclusivity. Initially recognized as a political and moral principle, solidarity has evolved into an operational legal standard, progressively reinforced by EU primary law, the Charter of Fundamental Rights of the European Union (CFREU), and the jurisprudence of the Court of Justice of the European Union (CJEU) (De Búrca, 2005). In the field of disability rights and employment law, solidarity has been constitutionalized through judicial interpretation, imposing obligations on both Member States and private actors to ensure equal access to the labour market and social protection (O'Leary, 2005).

The legal embedding of solidarity can be traced to Article 3(3) of the Treaty on the European Union, which explicitly defines the EU's objectives regarding economic and social progress, equality, and inclusion. This provision institutionalizes solidarity as a constitutional objective, mandating the EU to actively combat social exclusion, foster social justice, and ensure equality. However, as De Búrca (2021a) argues, while solidarity is embedded in the EU Treaties, its justiciability has historically been limited, requiring judicial interpretation to transform it into enforceable legal obligations (De Búrca, 2021a).

The Charter of Fundamental Rights of the European Union (CFREU) plays a central role in reinforcing the justiciability of solidarity, particularly in the areas of labour and disability rights. By enshrining key principles that safeguard equality, social justice, and inclusion, the CFREU establishes solidarity as a legally enforceable standard within EU law (De Búrca, 2021a).

A cornerstone of this framework is Article 21 CFREU, which prohibits discrimination on various grounds, including disability, ensuring that all individuals are protected from unfair treatment based on sex, race, ethnic or social origin, genetic features, language, religion, political or other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation. This provision underscores the EU's commitment to fostering an inclusive society, where access to employment and social participation is guaranteed on an equal basis.

Complementing this broad anti-discrimination safeguard, Article 26 CFREU specifically recognizes the rights of persons with disabilities, affirming the Union's duty to facilitate their independence, social and occupational integration, and full participation in the community's life. This principle aligns with the EU's broader commitment to social inclusion, reinforcing the obligation of both Member States and employers to remove barriers that hinder full participation in society.

Further embedding solidarity within EU labour law, Article 27 CFREU strengthens social rights in employment, mandating that workers or their representatives be guaranteed information and consultation in good time, as provided for by Union law and national legislation. This provision ensures that labour protections are not only theoretical commitments but legally binding obligations, reinforcing the active participation of workers in decision-making processes that affect their employment conditions.

The legal authority of the CFREU was significantly strengthened by the Treaty of Lisbon (2009), making the Charter legally binding and enforceable before the CJEU and national courts (Schiek, 2017). The CJEU has since expanded the role of solidarity in disability law, as evidenced in *HK Danmark* (C-335/11 & C-337/11), where the Court aligned EU disability law with the UN Convention on the Rights of Persons with Disabilities (CRPD), emphasizing employer obligations to provide reasonable accommodations.

The constitutionalisation of solidarity has also been analysed by De Búrca (2021a; O'Leary, 2005), who argues that solidarity has progressively evolved from a moral imperative into a legally enforceable principle. This transformation is clear in CJEU jurisprudence, which has reinforced the obligation of both public and private actors to remove barriers to inclusion, ensure accessibility, and implement reasonable accommodation measures to be later developed in this research.

2.2. The CJEU's Role in Transforming Solidarity into an Enforceable Legal Norm

The principle of solidarity has developed from a foundational EU value into an operational legal standard shaped by judicial interpretation and gradually embedded within EU jurisprudence (Jankov, 2007). The CJEU has played a central role in defining and reinforcing solidarity, particularly in cases concerning social security coordination, energy policy, asylum law, and fundamental rights (Schiek, 2017). The following chronological analysis illustrates how solidarity has been progressively constitutionalized and enforced through the CJEU's case law, transforming it from an aspirational principle into a legally binding norm.

The earliest judicial references to solidarity appeared in the late 1960s, marking the beginning of its legal recognition. In *Stauder v City of Ulm* (C-29/69), the CJEU, then known as the European Court of Justice (ECJ), laid the groundwork for integrating fundamental rights into EU law, a development that would later support the justiciability of solidarity in areas such as social justice and anti-discrimination. This was followed by a dozen cases between 1969 and the adoption of the Single European Act, where the Court referenced solidarity in the context of economic and social cohesion (De Búrca, 2005).

A significant expansion of solidarity occurred in the field of social security coordination (European Council, 2000). In *Martínez Sala v Freistaat Bayern* (C-85/96) the ECJ affirmed that the principle of solidarity required equal treatment in access to social security benefits, reinforcing that EU citizenship entails rights to non-discriminatory access to welfare across Member States. This approach was further developed in *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* (C-184/99), where the Court famously ruled that "*Union citizenship is destined to be the fundamental status of nationals of the Member States*", highlighting that solidarity includes guaranteeing basic social rights to EU citizens moving within the Union.

Beyond social security, the CJEU extended the principle of solidarity into energy law in *the Republic of Poland v European Commission* (Case T-883/16). The General Court ruled that solidarity must be respected in the EU's energy policies, particularly in balancing national interests in the internal energy market (Joined Cases C-715/17, C-718/17 and C-719/17). This case marked a turning point, confirming that solidarity was not limited to individual rights but also encompassed collective responsibilities between Member States.

The principle took on an even more compelling role in asylum and migration law with Joined Cases C-715/17, C-718/17, and C-719/17. Here, the Court ruled that Poland, Hungary, and the Czech Republic had violated EU law by refusing to comply with the provisional mechanism for the relocation of asylum seekers. The judgment reinforced that solidarity is a legally binding obligation, requiring Member States to share responsibilities in times of crisis. This decision was widely recognized as a landmark ruling, confirming that solidarity is enforceable and not merely a political aspiration (Schiek, 2017).

The COVID-19 pandemic further tested the application of solidarity in the EU legal order. The EU's coordinated response, including joint public health measures and financial recovery mechanisms, demonstrated the binding nature of solidarity in crisis management. The CJEU's rulings and EU institutions' actions during the pandemic underscored the principle's relevance in ensuring collective action among Member States (Joppe, 2021).

As these cases illustrate, the CJEU has progressively shaped solidarity into an enforceable legal standard, integrating it into various sectors of EU law. From social security and welfare rights to energy policy, asylum law, and public health crises, solidarity has evolved into a concrete legal obligation, binding Member States and reinforcing the EU's constitutional commitment to social justice and non-discrimination (De Búrca, 2021a). The constitutionalization of solidarity remains a defining feature of the EU's legal development, ensuring that fundamental rights and obligations extend beyond national borders to promote transnational cohesion and shared responsibility.

2.3. The CRPD's Role in Reshaping Disability Rights Regime in the EU

The following examination addresses the transformative impact of the CRPD on the EU's approach to disability rights, particularly in reshaping legal definitions and state obligations. It begins by tracing the shift from a traditional medical model to a biopsychosocial understanding of disability, emphasizing how this reconfiguration reframes disability as the product of interaction with societal barriers rather than a purely individual condition. Building on this conceptual foundation, the analysis then moves toward the practical implications of the CRPD's ratification, highlighting the legally binding responsibilities imposed on Member States to revise domestic legislation, ensure accessibility, and promote inclusive practices across employment and public life.

2.3.1. The Shift from a Medical Model to a Biopsychosocial Model

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) has profoundly reshaped the EU's legal framework on disability rights, fostering a decisive shift from the traditional medical model — which conceptualizes disability as an individual impairment requiring treatment — to the biopsychosocial model, which acknowledges that disability results from the interaction between impairments and societal barriers. The EU's ratification of the CRPD in 2010 marked a transformative moment in its disability rights regime, embedding a human rights-based approach into EU primary and secondary law, thereby reinforcing the principle of non-discrimination and social inclusion (De Búrca, 2021b).

The medical model of disability, historically dominant in legal and policy frameworks, positioned disability as a personal misfortune, justifying exclusionary policies and institutional practices that emphasized rehabilitation and treatment over structural change. In contrast, the biopsychosocial model, as articulated in the CRPD, reframes disability as a social construct shaped by legal, economic, and environmental barriers. Article 1 of the CRPD encapsulates this paradigm shift, defining persons with disabilities as: *'Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.*' (CRPD, 2006, Art. 1).

This definition embeds two foundational legal principles. First, disability is not an inherent or immutable characteristic, but rather a dynamic condition shaped by exclusionary societal structures. Second, the removal of structural and attitudinal barriers — rather than mere medical intervention — is essential to achieving full and effective participation in society.

As de Búrca (2010) observes, the adoption of the CRPD has been instrumental in redefining disability within the EU legal order, compelling institutions and courts to embrace an inclusive, rights-based perspective that shifts the burden of adaptation from individuals to legal and institutional structures (De Búrca, 2010). This shift has been reflected in EU secondary legislation, particularly in Directive 2000/78/EC (the Employment Equality Directive), which prohibits disability-based discrimination in employment and mandates reasonable accommodation to promote workplace accessibility (Council of the European Union, 2000).

The CJEU has progressively incorporated CRPD principles into its jurisprudence, further consolidating the biopsychosocial model as a binding legal standard. Landmark cases such as *HK Danmark* (C-335/11 & C-337/11) and *Ring and Werge* (C-335/11 & C-337/11) have confirmed that disability must be understood in relation to barriers that prevent participation in professional life, thereby expanding the scope of protection under EU disability law. The CJEU's role in interpreting and enforcing the biopsychosocial model will be addressed in detail in a subsequent section of this paper.

Furthermore, the CRPD's ratification imposes binding legal obligations on both the EU and its Member States, requiring them to ensure accessibility, provide reasonable accommodation, and guarantee equal participation in employment, education, and public life. These obligations have necessitated substantial legislative and policy adjustments across national legal frameworks, an issue that will be examined in the following section.

The incorporation of the biopsychosocial model into EU law represents a paradigm shift in disability rights, aligning EU legal standards with international human rights obligations and reinforcing the constitutional principle of solidarity. By rejecting the individualized, deficit-oriented approach of the medical model, the CRPD has established a new legal norm, wherein disability is understood not as an isolated impairment, but as a condition shaped by societal and environmental factors. As Schiek (2017) argues, this transformation has reinforced transnational solidarity, compelling Member States to harmonize their legal frameworks in pursuit of a more inclusive and non-discriminatory European society.

2.3.2. The Obligations of Member States under the CRPD

The ratification of the CRPD imposes legally binding obligations on EU Member States, requiring them to adopt measures that promote full inclusion, accessibility, and equality for persons with disabilities. These commitments demand legislative and policy reforms across key areas, including employment protections, accessibility, and legal capacity, ensuring that national legal frameworks align with the Convention's principles.

A central requirement of the CRPD is the harmonisation of domestic legislation with its provisions. Member States must introduce laws that safeguard the rights of persons with disabilities and eliminate structural barriers to their full participation in society. Within the EU legal framework, these obligations have been reflected in Directive 2000/78/EC (the Employment Equality Directive, which prohibits disability-based discrimination in employment and mandates reasonable accommodation in the workplace. The influence of the CRPD has led to CJEU case law reinforcing these duties, affirming that employers are

required to make necessary adjustments to ensure equal access to employment, a matter that will be further examined in the following section.

Beyond employment, accessibility remains a fundamental obligation under the CRPD, requiring states to remove physical, digital, and informational barriers that prevent equal participation in public life. This commitment has been integrated into EU law through the European Accessibility Act (Directive 2019/882), setting binding standards for products, services, and public spaces across Member States. Courts have recognized that failure to guarantee accessibility constitutes indirect discrimination, necessitating systemic legal and policy reforms at the national level.

A comparative perspective on CRPD implementation provides valuable insight into the challenges and successes of integrating its principles into domestic legal frameworks. As de Búrca (2021b) highlights, Argentina serves as a notable case study, having incorporated the CRPD into constitutional law in 2014. This move prompted extensive legal reforms, particularly in the areas of legal capacity and education rights, and led to landmark judicial rulings that reinforced the direct applicability of CRPD principles. Civil society organizations played a crucial role in pressuring legislators and courts to advance disability rights, demonstrating the impact of advocacy in enforcing international human rights commitments. A particularly significant case involved a student with Down syndrome who was denied an official school certificate despite completing secondary education. The Argentine courts ruled that such exclusion violated the CRPD's commitment to inclusive education, compelling national authorities to reform education policies accordingly.

The obligations imposed by the CRPD on EU Member States require continuous legal and policy adaptation to align domestic frameworks with evolving international human rights standards. While legislative progress has been made, effective enforcement and uniform implementation remain key challenges. The next section will further examine the CJEU's role in interpreting and enforcing these obligations, shedding light on the judicial mechanisms that have strengthened disability rights across the EU legal order.

3. THE CJEU's JURISPRUDENCE: TESTING THE CONSTITUTIONAL EFFECTIVENESS OF SOLIDARITY

The CJEU has played a central role in embedding solidarity as an enforceable legal principle, particularly in the area of disability rights and employment law. Early case law reflected a restrictive interpretation of social rights, limiting their direct applicability. However, over time, the CJEU has expanded the enforceability of solidarity, particularly through its engagement with the UN Convention on the Rights of Persons with Disabilities (CRPD) and its integration into EU labour law.

This section examines how the CJEU's jurisprudence operationalizes the constitutional principle of solidarity through the lens of disability rights in employment. It explores the Court's developing interpretation of 'disability', tracing its departure from a restrictive, medicalized model to a more inclusive, biopsychosocial approach in line with the CRPD. By analyzing key cases such as *Chacón Navas v. Eurest Colectividades SA* (Case C-13/05), *HK Danmark* (*Ring and Skouboe Werge*) (Joined Cases C-335/11 and C-337/11), *HR Rail*

SA v. XXXX (Case C-485/20) and *DW v. Nobel Plastiques Ibérica SA* (C-397/18) the section aims to illustrate how the Court has progressively strengthened the enforceability of reasonable accommodation duties and curtailed the misuse of the disproportionate burden defense. This jurisprudence not only affirms the material dimension of solidarity but also positions the CJEU as a constitutional adjudicator, ensuring that EU law aligns with both internal labour standards and international human rights commitments.

3.1. The evolution from the Medical Model to the Biopsychosocial Model

In *Chacón Navas v. Eurest Colectividades SA* (Case C-13/05), the CJEU addressed, for the first time, the definition of disability under Directive 2000/78/EC, which prohibits discrimination in employment. The case concerned Ms. Sonia Chacón Navas, who was dismissed by her employer while on prolonged sick leave. The Court made a clear distinction between sickness and disability, defining disability as a limitation resulting from physical, mental, or psychological impairments that hinders participation in professional life and is likely to be long term. Since the Directive does not cover sickness as such, the Court concluded that Ms. Chacón Navas's dismissal did not fall within its scope. This judgment has been widely criticized for adopting a narrow, medicalized definition of disability, which focuses exclusively on the individual's impairment rather than societal and structural barriers that contribute to exclusion. By framing disability in terms of long-term impairments, the Court reinforced a *restrictive approach* that failed to acknowledge the role of external factors in shaping the lived experiences of persons with disabilities, limiting the scope of legal protection available under EU anti-discrimination law.

In *HK Danmark* (*Ring and Skouboe Werge*) (Joined Cases C-335/11 and C-337/11), the Court of Justice of the European Union (CJEU) revisited the concept of disability, marking a significant shift toward a more inclusive and dynamic interpretation. The cases involved two employees with long-term health conditions that limited their ability to work, raising questions about the scope of protection under Directive 2000/78/EC. In its ruling, the Court explicitly referenced the CRPD and expanded the definition of disability to include conditions resulting from long-term impairments that, in interaction with various barriers, may hinder full and effective participation in professional life on an equal basis with others. By recognizing that disability is not solely an inherent limitation but is also shaped by external societal factors, the Court aligned its interpretation with the *biopsychosocial model*, shifting the focus from the individual's condition to the broader need for societal adjustments. This ruling departed from the restrictive medical model previously adopted in *Chacón Navas*, reinforcing the idea that legal protections must account for the role of structural and environmental barriers in shaping disability and promoting a more holistic approach to inclusion.

Moreover, from a constitutional perspective, *HK Danmark* proves that solidarity is not an abstract value but an operational principle that courts can actively enforce. It also highlights the CJEU's role as a constitutional actor, ensuring that EU law aligns with international human rights commitments. As the ruling established a direct legal link between solidarity and concrete workplace obligations, the idea that solidarity entails active structural adjustments rather than passive non-discrimination was reinforced. The Court also rejected

arguments that economic constraints alone could justify non-compliance, emphasizing that: *'Economic considerations must be balanced against fundamental rights and the principles of social inclusion and equal treatment.*' This case is constitutionally significant because it confirms that solidarity is not just a guiding value — it has material, enforceable consequences in EU labour law. The principle of reasonable accommodation ensures that solidarity is embedded in legal obligations, providing a litmus test for its effectiveness in EU constitutionalism.

3.2. How CJEU rulings reject disproportionate burden defenses

Under Article 5 of Directive 2000/78/EC, employers are obligated to provide reasonable accommodations to enable persons with disabilities to have equal access to employment unless such accommodations would impose a disproportionate burden on the employer. The CJEU has consistently interpreted this provision in a manner that reinforces the enforceability of disability rights by narrowing the scope of the disproportionate burden defense and ensuring that economic considerations do not override fundamental equality rights.

In the *HK Danmark* (*Ring and Skouboe Werge*) (Joined Cases C-335/11 and C-337/11) judgment, the CJEU reinforced the *obligation of employers to provide reasonable accommodation* for employees with disabilities, emphasizing the importance of ensuring equal access to employment. The Court ruled that employers must implement appropriate measures to enable individuals with disabilities to enter, participate in, and advance in the workplace, provided that such accommodations do not impose a disproportionate burden on the employee.[1] These measures may include adjustments to working hours, modifications to job tasks, or the provision of specialized equipment to ensure that employees with disabilities can perform their roles effectively. Most significantly, the Court held that failure to provide reasonable accommodation constitutes discrimination under Directive 2000/78/EC, highlighting the necessity of active and structural interventions to achieve genuine workplace inclusion.[2] This ruling underscores the principle of solidarity, imposing positive obligations on employers and recognizing that exclusion is not merely a result of individual impairments but is shaped by societal structures and workplace environments. By affirming that the legal duty to accommodate is essential to prevent discrimination and promote full participation, the CJEU strengthened the rights-based approach to disability, ensuring that legal protections go beyond mere formal equality and instead require concrete, proactive measures to foster workplace inclusion.

This ruling establishes a high threshold for invoking the disproportionate burden defense. Employers must demonstrate that all avenues for reasonable accommodation have been exhausted, including seeking public funding or support measures. This

[1] Court of Justice of the European Union (CJEU) (2013) *HK Danmark (Ring and Skouboe Werge) (Joined Cases C-335/11 & C-337/11), ECLI:EU:C:2013:222*, paragraph 42: 'It is for the national court to assess whether the burden resulting from such measures is disproportionate, taking into account, in particular, the financial and other costs entailed, the size and financial resources of the organization or undertaking, and the possibility of obtaining public funding or any other assistance.'

[2] Court of Justice of the European Union (CJEU) (2013) *HK Danmark (Ring and Skouboe Werge) (Joined Cases C-335/11 & C-337/11), ECLI:EU:C:2013:222*, paragraph 54:'It follows that a failure to provide reasonable accommodation to a person with a disability may constitute discrimination within the meaning of Article 2(2)(b)(ii) of Directive 2000/78.'

interpretation reinforces solidarity by ensuring that economic arguments cannot override the fundamental right to equal treatment.

Further reinforcing this approach, in *HR Rail SA v. XXXX* (Case C-485/20), the CJEU clarified that an employer's duty to provide reasonable accommodation may include reassignment to another position within the company. This decision confirms that reasonable accommodation is not limited to modifying a current role, but may also include offering alternative employment within the organization. It ensures that employers cannot dismiss disabled workers without first considering alternative employment arrangements, reinforcing a solidarity-based approach to disability rights enforcement (Case C-485/20).[3]

The CJEU's ruling in *DW v. Nobel Plastiques Ibérica SA* (C-397/18) strengthened the duty of reasonable accommodation by refining the disproportionate burden defense and reinforcing the interpretative approach established in *HK Danmark and HR Rail SA*. The Court reaffirmed that economic considerations alone cannot override fundamental equality rights and provided a structured framework for assessing claims of disproportionate burden, enhancing legal certainty. Additionally, the judgment confirmed that disability under EU law includes any long-term impairment, whether from illness or injury, that significantly limits workplace participation, preventing employers from narrowly interpreting the concept to exclude certain conditions. This ruling further consolidated solidarity-based accommodations in employment law and ensured a broad, inclusive approach to disability rights (Case C-397/18).[4]

More critically, the ruling clarified and codified a structured test for evaluating whether an employer can validly invoke the disproportionate burden defense under Article 5 of Directive 2000/78/EC. While *HK Danmark* had emphasized that failure to provide reasonable accommodation constitutes discrimination, and *HR Rail SA* had extended accommodation duties to include reassignment to another position, in *DW v. Nobel Plastiques Ibérica SA* (C-397/18), the CJEU refined the assessment framework for the disproportionate burden defense, requiring employers to meet a three-pronged test before claiming undue hardship in providing reasonable accommodation.

First, employers must substantiate the financial burden with objective and quantifiable evidence, proving that the costs of accommodation would impose a severe strain on the

[3] Court of Justice of the European Union (CJEU) (2022) *HR Rail SA v. XXXX (Case C-485/20), ECLI:EU:C:2022:85*, paragraph 34: 'The concept of 'reasonable accommodation' must be understood as referring to all measures that enable a person with a disability to have access to, participate in, or advance in employment unless such measures would impose a disproportionate burden on the employer'.

[4] Court of Justice of the European Union (CJEU) (2019) *DW v Nobel Plastiques Ibérica SA (Case C-397/18), ECLI:EU:C:2019:703.* Paragraph 41: 'The concept of 'disability' within the meaning of Directive 2000/78 presupposes a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.'Paragraph 58: 'The prohibition of any discrimination on grounds of disability and the obligation to provide reasonable accommodation for disabled persons are intended to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.'

Paragraph 60: 'A failure to provide reasonable accommodation in accordance with Article 5 of Directive 2000/78 in respect of a person with a disability may constitute indirect discrimination within the meaning of Article 2(2)(b)(ii) of that directive.'

business's economic sustainability rather than constituting a routine expense. Second, they must demonstrate that the accommodation is unfeasible given the company's economic and structural capacity, considering factors such as size, financial resources, and operational framework. Lastly, before invoking financial constraints, employers are obligated to exhaust all available public support mechanisms, including government subsidies and alternative assistance programs, ensuring that they have explored all potential avenues before refusing accommodation. This ruling reinforced accountability and legal certainty, preventing employers from relying on vague economic justifications to deny accommodations.

By formalizing this test, the CJEU not only reinforced the restrictive nature of the disproportionate burden defense but also heightened the evidentiary threshold for employers seeking to rely on it. This judgment further aligns with the CJEU's jurisprudence in ensuring that solidarity remains a binding legal principle, preventing economic arguments from undermining the fundamental right to equal treatment and workplace inclusion.

Thus, the *DW v. Nobel Plastiques Ibérica SA* case does not introduce a radically new principle but rather systematizes and strengthens the existing legal framework by providing a structured methodology for assessing the proportionality of accommodation duties. In doing so, it ensures that employers must exhaust all reasonable avenues before invoking financial constraints as a defense against the duty to accommodate workers with disabilities.

From a constitutional perspective, these rulings affirm that solidarity is not merely an aspirational or declaratory value but an actively enforced principle within the EU legal order. The CJEU's jurisprudence demonstrates how judicial interpretation can transform abstract constitutional ideals into concrete, enforceable obligations. By progressively embedding solidarity into disability rights law, the Court has established clear legal tests that not only guide national courts but also set binding standards for employers and public authorities across the EU.

Moreover, the evolution of CJEU case law underscores that solidarity, as applied in the context of disability rights, has implications beyond individual employment disputes. The structured tests developed by the Court serve as a blueprint for domestic courts, effectively addressing the challenges of implementation and compliance at the Member State level. By setting clear legal thresholds, the Court mitigates the risk of divergent national applications and strengthens uniformity in the protection of disability rights across the EU. This approach also aligns EU labour law with international human rights obligations, particularly the CRPD, demonstrating that the constitutional effectiveness of solidarity is not confined to EU legal instruments, but extends to the broader global human rights framework.

4. CONCLUSION

The principle of solidarity, long regarded as a fundamental yet aspirational value of the EU, has increasingly become an enforceable constitutional norm, particularly in the field of disability rights. Through the jurisprudence of the CJEU, solidarity has been transformed from a guiding ideal into a binding legal principle, shaping the obligations of employers, institutions, and national authorities. The case law examined in this paper

demonstrates that disability rights serve as a key testing ground for the effectiveness of solidarity as a pillar of EU constitutionalism.

The progressive judicial interpretation of disability rights protections — from *Chacón Navas*' restrictive medical definition to the rights-based approach of *HK Danmark and Ring and Werge* — illustrates the CJEU's role as a constitutional enforcer. The Court has not only aligned EU law with the CRPD, but has also clarified the direct legal obligations that flow from the principle of solidarity, particularly in the labour market. The principle of reasonable accommodation, now firmly embedded in EU disability law, reflects a tangible enforcement mechanism for solidarity, ensuring that structural barriers to inclusion are actively dismantled rather than merely acknowledged.

From a constitutional perspective, the CJEU's jurisprudence on disability rights confirms that solidarity is not merely a symbolic or political principle but a legally operational mechanism within the EU legal order. The Court's rulings illustrate how abstract constitutional values acquire legal significance through judicial enforcement, reinforcing the broader constitutionalization of EU fundamental rights law. This trajectory aligns with De Búrca's argument that the CJEU has functioned as a key actor in translating fundamental rights principles into enforceable norms, as well as Weiler's view that the constitutional evolution of the EU has been driven by judicial interpretation rather than legislative codification alone.

However, while the constitutionalization of solidarity is evident in disability rights law, its broader application to other areas of EU social policy remains an open question. The judicial enforcement of solidarity in employment discrimination cases provides a framework for assessing its effectiveness, but further legal developments will determine whether this principle extends beyond specific contexts to become a generalized standard across EU constitutional law.

Ultimately, the CJEU's jurisprudence confirms that solidarity is no longer an abstract political commitment but a legally enforceable norm shaping EU labour law. As national courts apply the proportionality test established in *DW v. Nobel Plastiques Ibérica SA* and related rulings, the effectiveness of solidarity will continue to be tested in practice. The structured legal tests developed by the Court serve as guidelines for domestic courts, ensuring uniformity in disability rights protection across Member States and enhancing compliance with the CRPD. By setting precise legal standards for reasonable accommodation and narrowing the scope of disproportionate burden defenses, the CJEU has mitigated the challenges of national implementation and reinforced solidarity as a binding constitutional obligation.

As the EU continues to grapple with social, economic, and political challenges, the future trajectory of solidarity as a constitutional norm will depend on the extent to which the CJEU and EU institutions continue to reinforce its legal enforceability. The evolution of EU disability rights law provides a clear precedent for how solidarity can be judicially enforced, offering a model for future constitutional developments in other areas of social rights protection. In this sense, the effectiveness of solidarity in EU constitutionalism will continue to be tested in legal disputes, policy implementation, and further jurisprudential developments.

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CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

34(082)
343(082)
349::007(082)

INTERNATIONAL Conference Regional Law Review (6 ; 2025 ; Beograd)

[Sixth International Conference] Regional Law Review, Belgrade, 2025 : annual edition / [editor in chief Mario Reljanović]. - Belgrade : Institute of Comparative Law ; Pécs : University, Faculty of Law ; Ljubljana : University, Faculty of Law, 2025 (Beograd : Birograf comp). - [X], 271 str. ; 24 cm. - (Collection Regional law review, ISSN 2812-698X)

"In front of you is the sixth volume of RLR collection of papers..." --> foreword. - Tiraž 100. - Str. VII: Foreword / editor. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad.

ISBN 978-86-82582-35-9

1. Reljanović, Mario, 1977- [urednik] [autor dodatnog teksta]

a) Право -- Зборници b) Кривично право -- Зборници v) Информациона технологија -- Право -- Зборници

COBISS.SR-ID 170595593