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EDITED BY

LILIANA TYMCHENKO | PAULINA GULI HOTI

Comparative and International Law in an Era of Global Transformation: Sovereignty, Justice, Cooperation, and Emerging Technologies

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**Comparative and International Law in an Era of
Global Transformation: Sovereignty, Justice,
Cooperation, and Emerging Technologies**

Editors:

Liliana TYMCHENKO



Activity

Liliana Tymchenko is an Associate Professor at the Academic Department of Social Sciences at the European Humanities University (EHU) in Vilnius, Lithuania, where she leads the MA Programme in International Law and Security Studies. She has more than 30 years of experience in teaching and researching international law. Her academic work combines international legal theory and the history of international legal thought with research on statehood and recognition, human rights, Ukraine, decolonization,

and academic freedom. Throughout her career, Tymchenko has combined teaching, programme development, research, and academic leadership. In 2001, she founded the Department of International Law at the State Tax University of Ukraine, which she headed for many years. She subsequently worked at Kyiv Law University and Borys Grinchenko Kyiv Metropolitan University, where she created and led the BA Programme in International Law. At EHU, she was among the founders of the MA Programme in International Law and Security Studies and currently leads the programme. She has also served as Academic Director of the Graduate School of Management in Barcelona. Tymchenko served as an expert of the Legal Reform Commission under the President of Ukraine (2019–2021) and of the Scientific Advisory Council of the Higher Administrative Court of Ukraine (2014–2017). Her international academic development includes programmes of the American Bar Association, IREX and Yale University, the Coimbra Group Hospitality Scheme at the University of Geneva, the Civic Education Project, the CLASP Fellows Program at Bard College, and Equitas, among others. She is actively engaged in the European Society of International Law (ESIL) as a member of its Diversity Advisory Board and Task Force on Underrepresentation and Membership.

Publications

Tymchenko's research on international legal order, statehood and recognition is reflected in *“Transformation or Legitimation? The Problem of the Emergence of a State in Modern International Law: The Case of the State of Palestine”*, published in the *Liber Amicorum* for Professor V. V. Mytsyk (Kyiv–Odesa, 2016, pp. 115–138), and *“The Concept of International Legal Order and Its Influence on the Formation of the Institution of Recognition of States”*, in the collective

monograph *International Law in a World of Dynamic Changes: Contours of the Future International Legal Order* (Lviv, 2021, pp. 60–74). A significant strand of her scholarship addresses international law, Ukraine and armed conflict, including “Referendum in the Autonomous Republic of Crimea in 2014: An International Legal Aspect”, in *The Ukrainian Revolution of Dignity, Russian Aggression and International Law* (Kyiv, 2014, pp. 515–530), and “State Terrorism: Legal Assessments of the Concept”, *Public Security and Public Order*, No. 32 (2023), pp. 94–104. Her research has also examined the international legal responsibility of the Russian Federation for terrorist and cyber-terrorist actions in Ukraine. Her more recent work develops a trajectory on decolonization and international legal thought, focusing particularly on the place of Central and Eastern European and Ukrainian scholarship in international legal discourse. This includes “Decolonization of International Legal Thought: Towards Understanding the Scholarly Heritage of Professor O. V. Zadorozhnyi”, *Ukrainian Journal of International Law*, No. 2 (2025), pp. 35–42, as well as research on the legal heritage of the Karaites, including “Legal Heritage as a Basis for the Protection of Freedom and Equality: Example of the Karaites”, *Review of Law and Social Studies*, 1(2) (2024), pp. 129–143. Another research trajectory concerns human rights, identity and academic freedom. Her publications include “Right to Identity in International Law”, *Ukrainian Journal of International Law*, No. 3 (2022), pp. 88–91, and, most recently, “Academic Freedom as a Complex Legal Phenomenon: International Standards, National Models, and Implementation Challenges”, co-authored with R. Shchokin and S. Baranov, *Journal of Liberty and International Affairs*, 12(1) (2026), pp. 99–121. Alongside her scholarly work, Tymchenko is committed to legal education and innovative pedagogy, particularly freewriting-based and reflective approaches that foster critical thinking and student agency. In summer 2026, she led a three-week freewriting programme for Ukrainian senior high school students at the Kyiv School of Economics, using her own pedagogical materials. She also conducts workshops for higher-education teachers on freewriting-based pedagogy, including through her engagement with Bard College, USA.

Paulina GULI HOTI



Activity

Paulina Guli (Hoti) is Associate Professor at the Department of Public Law, Faculty of Law, University of Shkodra “Luigj Gurakuqi”, Albania. She received her PhD from the University of Nantes, France, in 2008 and was awarded the academic title of Associate Professor by the University of Tirana in 2015. She currently serves as Dean of the Faculty of Law and as a member of the Academic Senate of the University of Shkodra. She is also Editor-in-Chief of the *Scientific Bulletin – Legal Sciences Series* of the University of Shkodra and lectures at the Catholic University “Our Lady of Good Counsel” in Tirana. Her academic and research interests encompass the judiciary, human rights, bioethics, international criminal law, and criminal law. She has served on scientific boards and participated in working groups devoted to the study of judicial practice. She has also been invited to deliver lectures at the Faculty of Law and the Faculty of Political and Social Sciences of the Université Libre de Bruxelles, as well as at the Faculty of Law of the University of Bergamo. Professor Guli (Hoti) has also held several significant public positions. She was elected as a Member of the Parliament of Albania during the 18th legislature, serving on the Committee on Legal Affairs, Public Administration and Human Rights and on the Committee on Foreign Policy. She has also served as Deputy Minister of Justice of the Republic of Albania.

Publications

Recent publications reflect Professor Guli (Hoti)’s research interests in constitutional justice, legal language, artificial intelligence, and criminal law. In 2026, she published the study “Normativa costituzionale del 1925 sulla Corte dei conti – istituzione di una magistratura speciale?” in *DPCE Online*, examining the constitutional framework governing the Italian Court of Auditors and its position as a special jurisdiction. She also contributed the chapter “The Use of Artificial Intelligence in Judicial Trial and the Independence of Judicial Power” to the proceedings of the international conference devoted to the harmonisation of Albanian legislation with EU law. In 2025, together with N. Hoti, she published “Law and Legal Language: A Comparative Analysis of Legal and Linguistic Rules” in *Juridical Tribune – Review of Comparative and International Law*, exploring the relationship between legal norms and the linguistic structures

through which they are expressed. Her publications also include the co-authored study “Proportionality: A Principle to Be Re-evaluated in Albanian Criminal Law,” published in the *Academic Journal of Interdisciplinary Studies* in 2022, which addresses the role and application of the principle of proportionality in Albanian criminal law.

Liliana Tymchenko (ed.)

Paulina Guli Hoti (ed.)

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Preface

Editors

*Associate Professor **Liliana Tymchenko**, Department of Social Sciences
at the European Humanities University in Vilnius, Lithuania*

*Associate Professor **Paulina Guli (Hoti)**, Dean of the Faculty of Law,
University of Shkodra “Luigj Gurakuqi”, Albania*

This volume brings together selected peer-reviewed full papers presented at the *6th Conference on Comparative and International Law*, held online via Zoom on June 26, 2026.

All papers included in this volume were presented at the Conference and were open to discussion with participants.

The Conference was jointly organized by the World Academy of Art and Science, United States of America, through its Existential Threats and Risks for All Working Group; Hertfordshire Law School, University of Hertfordshire, United Kingdom; the Faculty of Law and Political Sciences, Department of International and European Law, University of Szeged, Hungary; the International Observatory for Law and Transdisciplinarity (IOLT) of the Centre International de Recherches et Études Transdisciplinaires (CIRET), Paris, France; and the Society of Juridical and Administrative Sciences, Romania.

Further information about the Conference, including its scientific programme, committees, publication policies, and organizational framework, is available on the official conference website: <https://comparativelawconference.eu>.

The studies included in this volume are organized into four thematic parts that reflect some of the major contemporary challenges facing comparative and international law.

Part I – Legal Traditions, Sovereignty, and Constitutional Order examines the role of colonial law in the formation and consolidation of contemporary legal families; the principle of the separation of powers in relation to the judiciary and jurisdictional disputes; questions concerning the legality of the abduction of Nicolás Maduro; and the evolving architecture of sovereignty in connection with intelligence services and the governance of cloud diplomacy in international law.

Part II – Human Rights, Migration, and Procedural Justice addresses the impact of the ECtHR judgment in *M.S.S. v. Belgium and Greece* on asylum transfers and subsequent reforms, as well as procedural unilateralism in civil justice and the limits of the adversarial principle.

Part III – Comparative Criminal Law and Transnational Judicial

Cooperation focuses on the convergence of continental criminal law and common law systems in the context of legal globalization; the principle of mutual trust in criminal matters from European Union and United States perspectives; contemporary developments in European and international judicial cooperation in criminal matters; corruption offences from a comparative criminal law perspective; and the evolution of criminal law concerning match-fixing.

Part IV – Market Regulation, Data Governance, and Artificial Intelligence explores comparative case law on capital market manipulation; the relationship between dominant market positions, personal data protection, and competition law; regulatory models governing the use of artificial intelligence in education across European Union Member States; artificial intelligence and the principle of transparency in decision-making, including the transition from opaque algorithms to explainable justice in European and Romanian law; and the legal dimensions of the environmental and climate sustainability of artificial intelligence.

All full papers submitted for publication in these proceedings underwent double-blind peer review by at least two independent reviewers. Acceptance for presentation at the Conference did not automatically entail acceptance for publication. Only manuscripts that successfully completed the peer-review process, addressed the reviewers' recommendations, and complied with the scientific and editorial requirements of the proceedings were included in this volume. The peer-review procedure and publication ethics are described on the Conference website: https://comparativelawconference.eu/peerreview_en.html.

The volume is addressed to researchers, academics, legal practitioners, doctoral candidates, and students interested in contemporary developments in comparative law, international law, European law, and related fields. By bringing together studies examining legal developments across jurisdictions and legal traditions, the volume seeks to contribute to the broader scholarly dialogue on the transformation, convergence, and interaction of legal systems in an increasingly interconnected world.

We extend our sincere appreciation to the authors, reviewers, members of the scientific and organizing committees, partner institutions, and all those who contributed to the success of the Conference and to the preparation of this volume. We hope that the studies collected here will provide a valuable contribution to ongoing research and debate in comparative and international law.

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PART I
LEGAL TRADITIONS, SOVEREIGNTY, AND
CONSTITUTIONAL ORDER

Colonial Law's Role in the Formation and Consolidation of Contemporary Legal Families

Lecturer **Bogdan Cristian TRANDAFIRESCU**¹

Abstract

The paper examines the role of colonial law in shaping the contemporary map of legal families, tracing, through a comparative-historical method, how two European traditions came to structure legal orders across every continent. The starting point is the distinction between legal system, legal family, and legal tradition. The central thesis begins from one observation: colonial law did not create the Romano-Germanic family, nor did it create the common law, for both had already taken shape in Europe before the imperial expansion; colonization changed their scale, however, turning two continental traditions into global families. Diffusion followed distinct paths: the continental model exported the text, the code that could be applied by distant administrations, while the English model exported the method, formed around courts, procedure, and precedent. The colonial transplant left behind, in place of copies of metropolitan law, mixed and hybrid systems, in which European law was superimposed hierarchically upon customs and religious norms fixed by the administration. The persistence of codes, institutions, and legal language explains why today's map still preserves the contours of former empires. Belonging to a family concerns form, however, rather than the quality of the law: the legal family proves to be a historical dominant, and comparative law cannot read its own classifications outside their colonial genesis.

Keywords: comparative law; legal transplant; legal families; colonial law; mixed and hybrid legal systems.

JEL Classification: K10, K19, K33

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1. Introductory Considerations. Legal Families and the Legal Geography of Colonialism

The classification of national legal systems into major legal families belongs to the ordinary toolkit of comparative law. By reference to common criteria (the sources of law, normative technique, the role of the judge, legal language, the cultural foundations of the legal order), the comparatist orders a vast normative reality and captures affinities between orders sometimes separated by great geographical distances. The Romano-Germanic family and the common law family thus appear as the two major models of Western legality, each with its own genealogy, its own institutions, and its own technique for constructing the legal rule².

The usefulness of this classification is beyond dispute, but usefulness should not be mistaken for neutrality. Legal families are not natural realities, given once and for all; they remain doctrinal constructions, through which the comparatist seeks to give coherence to a complex legal history. They describe, but they also simplify; they explain, yet they leave the premises of their own formation in shadow. One of these premises, perhaps the least examined in the classical literature on the major legal systems, is colonialism. Classical approaches describe legal families through their internal features: sources, technique, the role of the judge; the present study traces them, by contrast, through their colonial genesis, convinced that the form of a legal family is clarified only through the history of its diffusion³.

The contemporary map of legal families cannot be explained solely by the prestige of Roman law, the force of modern codifications, or the capacity of the common law to adapt through case law. Such elements explain the formation of the major traditions within their European space of origin; they say much less, however, about how the same traditions came to structure legal orders in Africa, Asia, Latin America, Oceania, or the Caribbean. Between the European genealogy of legal families and their current worldwide geography stands the colonial experience⁴. The two families existed prior to modern colonial expansion and had

² René David and John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd ed. (London: Stevens, 1985), 17–22; Leontin-Jean Constantinesco, *Tratat de drept comparat. Vol. 1: Introducere în dreptul comparat* [Treatise on Comparative Law. Vol. 1: Introduction to Comparative Law] (Bucharest: ALL, 1997), 11–16; Victor Dan Zlătescu, *Geografie juridică contemporană: Introducere în teoria marilor sisteme de drept* [Contemporary Legal Geography: Introduction to the Theory of Major Legal Systems] (Bucharest: Editura Științifică și Enciclopedică, 1981), 15–22.

³ On the critical perspective regarding the colonial genesis of legal categories, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 37–45; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002), 5–9.

⁴ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996), 17–21; James Thuo Gathii, “Africa,” in

developed their essential features within European space: the Romano-Germanic family on the foundation of Roman law, university legal scholarship, and the great codifications; the common law family around the English royal courts, precedent, and a pragmatic, procedural understanding of the legal rule. Colonialism changed their historical scale. Through colonization, two European legal traditions became global families.

We consider that this transformation took place through two structurally distinct mechanisms. In the case of the Romano-Germanic family, the code functioned as the principal vehicle of diffusion: a written, systematic, portable text, capable of being imposed directly or received through legislative reform. The common law, by contrast, relied on the organization of the courts, on procedure, on precedent, and on the controlled integration of local customs. The distinction goes beyond technique, for it expresses two conceptions of what is exported when a colonial power transfers its law: the continental model exports the text, the English model exports the method⁵.

Alongside administrations, armies, language, and economic models, the European metropolises also exported legal forms: codes, statutes, courts, procedures, property registers, commercial rules, criminal norms, criteria for validating local custom. The result was not uniform. In some territories systems close to the metropolitan model took shape; in others, hybrid orders formed, in which European law coexisted with customary law, with religious law, or with local institutions reshaped by the colonial administration. These hybrid orders, far from being mere taxonomic anomalies, are the structural trace of colonial superimpositions. From this follows a consequence that we will trace throughout the study: the legal family must be regarded as a historical dominant rather than as a pure form⁶.

The approach is comparative-historical: it sets the continental model alongside the common law and relates them to the conditions under which they spread⁷.

The Oxford Handbook of the History of International Law, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 407–428.

⁵ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, GA: University of Georgia Press, 1993), 21–25; Bogdan Cristian Trandafirescu, “Perioada marilor codificări în familiile de drept romano-germanice” [The Period of the Great Codifications in the Romano-Germanic Law Families], *Ars Aequi* 10, no. 1 (2020): 16–26.

⁶ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), 1–40; Mamdani, *Citizen and Subject*, 16–18.

⁷ On comparative method and its application to the study of major legal systems, see Leontin-Jean Constantinesco, *Tratat de drept comparat. Vol. 2: Metoda comparativă* [Treatise on Comparative Law. Vol. 2: The Comparative Method] (Bucharest: ALL Educațional, 1998), 4–51; Mark Van Hoecke, ed., *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing, 2011), 17–19. Against the background of the classical literature on the major legal systems, see René David and Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, 10th ed. (Paris: Dalloz, 1992); Zlătescu, *Geografie juridică contemporană*; Anghie, *Imperialism, Sovereignty and the Making of International Law*; Benton, *Law and Colonial Cul-*

Within the present study we will confine ourselves to the structural effect of the colonial phenomenon: the way in which colonial experience shaped the contemporary map of legal families. The analysis first distinguishes the concepts of legal system, family, and tradition, and the mechanisms of reception; it then traces the two paths of colonial projection, codification and judicial precedent; and finally examines the mixed and hybrid systems and the post-colonial continuities through which the map of empires became today's map of legal families. How much of this map is, in reality, the map of yesterday's empires? This question will guide the entire analysis.

2. Legal Families, Legal Reception, and Normative Transplant

2.1. Legal System, Legal Family, and Legal Tradition

The notions of legal system, legal family, and legal tradition describe three levels of legal reality, and their delimitation conditions the understanding of how colonial law shaped the legality of the contemporary world.

The legal system represents the effective legal order of a community: the rules in force, the sources of law, the institutions that create and apply them, the jurisdictional and administrative mechanisms that ensure the functioning of the whole. It has a concrete existence, formed within a determinate social and political space. The legal family is situated on a different plane, being a category devised by comparative law in order to group systems sharing essential affinities, by reference to the structure of their sources, fundamental concepts, regulatory technique, the role of the judge, and the formation of legal reasoning. It is precisely its constructed character that limits its claims and, at the same time, explains its usefulness: it orders a diversity that would otherwise be difficult to grasp⁸.

Legal tradition, in turn, expresses the historical dimension of law: the transmission, between generations, of concepts, institutions, social values, and ways of thinking about the legal rule; it can transcend the borders of a state and can survive significant changes in positive law.

From this follows a consequence directly relevant to the present study: belonging to a legal family presupposes a common dominant, formed over time, rather than identity among the systems included. The point bears directly on colonial law. The systems of former colonies did not adopt the metropolitan law to the same degree. Their belonging to a family indicates the dominant structural

tures; Mamdani, *Citizen and Subject*; Gathii, "Africa," 407–428; and Deana Heath, *Colonial Terror: Torture and State Violence in Colonial India* (Oxford: Oxford University Press, 2021).

⁸ Andra Iftimiei, *Drept comparat și sisteme juridice contemporane* [Comparative Law and Contemporary Legal Systems] (Bucharest: Universul Juridic, 2018), 29–30; Bogdan Cristian Trandafirescu, *Teoria generală a dreptului. Curs universitar* [General Theory of Law: University Course] (Bucharest: Universul Juridic, 2025), 64–65, 100–101.

element, without exhausting the entire normative reality.

2.2. Legal Reception and Legal Transplant

The circulation of norms between legal communities long predates the modern state. Roman law was received in Europe after the fall of the Western Roman Empire; the French codes influenced continental and extra-European legislations; the common law followed British expansion. By legal reception we understand the process through which a system adopts and integrates rules, institutions, or techniques of another order without copying it wholesale: the adopted rule enters another system of sources and acquires meaning through the concepts of the receiving environment. The notion of legal transplant shifts the emphasis to the object transferred and its movement between systems. Borrowing has been one of the most fertile sources of legal development. Its thesis nonetheless reaches a point worth dwelling on: if fundamental rules of private law (matrimonial-regime solutions migrating from the Visigoths in the Iberian Peninsula, then from Spain to California) survive in societies entirely different in economic structure, then the relationship between a society and its law can be neither simple nor necessary. Law possesses a considerable autonomy from the social substratum that receives it. This autonomy has a consequence we shall encounter further on. If law does not directly express the “spirit of the people,” then the persistence of a European code in a former colony ceases to be a paradox: it becomes the particular instance of a general rule of legal circulation. Mass codification, undertaken as an effort at accelerated modernization of a legal system, in many situations almost entirely disregards the specificity of local values and traditions, as, for example, the Turkish Civil Code, adopted in 1926 from the Swiss model with minimal modifications, which functioned in a society with no historical connection to the one that had produced it⁹.

Nevertheless, a legal rule cannot circulate like an unchanged object during its journey; its function depends on its position within the system of sources, on the organization of the courts, and on the social context of its application. Identity of text does not guarantee identity of effects. Reception and transplant therefore remain complementary perspectives (one looking at the system that assimilates, the other at the circulation of the legal element), and research must establish, in both cases, who initiated the transfer, what was adopted, and with what results. These questions become decisive when circulation takes place within a colonial relationship.

2.3. The Specificity of Colonial Legal Transplant

Reception may have a voluntary character: a state adopts a foreign code

⁹ Watson, *Legal Transplants*, 95–102, 108, 115–118.

in order to modernize its law. The colonial transplant unfolded within a different framework, in which the power supplying the model controlled the territory, the administration, and normative production, and the choice of applicable law belonged to the metropole. Political asymmetry also determined the selective character of the transfer. Metropolitan law was introduced as a priority into administration, the protection of property, commercial activity, the organization of the courts, and criminal control; local norms survived chiefly in matters of family, succession, and personal status, on condition of compatibility with the metropole's public order. Through this mechanism, normative plurality was reorganized hierarchically: European law occupied the superior position, while custom and religious law were tolerated within a limited field, under the supervision of the colonial courts¹⁰.

The phrase "legal reception" must be used here with caution, for it may suggest a free adherence on the part of the receiving system, even though the transfer rested on the institutional force of the empire; the characterization of imposed transplant captures the origin of the process more accurately. Nor should this be understood mechanically: judges and elites trained in metropolitan law frequently reinterpreted the imported rules, and the resulting practices sometimes departed from the model. The concept of transplant allows, moreover, an observation that reveals the real stakes of the colonial process. Comparative legal literature has noted that societies borrow according to a much more prosaic criterion, the accessibility of the model, rather than according to social criteria: a foreign law is accessible above all when it is written, drafted in an easily understood language, and effectively available. This criterion, neutral in appearance, takes on an entirely different meaning in the colonial context. The metropolitan model was "accessible" because the metropole controlled the official language, legal education, and the courts.

Postcolonial critique shows what that transplant produced in the receiving society: a hierarchization of normativity, in which European law subordinates custom and religious law. The effect of the transplant manifested itself beyond the period of direct domination: the imported codes, judicial institutions, and methods became components of the functioning of the state, and political independence could not, by itself, bring about the immediate replacement of the entire normative order. The Romano-Germanic family spread chiefly through codification, the common law chiefly through courts, procedure, and precedent.

¹⁰ Benton, *Law and Colonial Cultures*, 1–15, 210; Mamdani, *Citizen and Subject*, 16–23, 109–137.

3. The Romano-Germanic Family and Colonial Expansion through Codification

3.1. Codification as a Defining Feature of the Romano-Germanic Family

The formation of the Romano-Germanic family preceded modern colonial expansion by several centuries. Its root lies in Roman law, preserved through the work of Justinian and brought back to the center of European legal life by the medieval universities; from the Roman texts, the glossators, post-glossators, and pandectists drew concepts and principles applicable to a reality different from that in which they had been conceived, building a common law founded on the rationalization of institutions. Modern codification gave this tradition a unified legislative form: the bourgeois revolutions, the assertion of the national state, and the transformation of economic relations called for an accessible and predictable law. The French Civil Code (1804), the Commercial Code (1807), and the great German codifications reorganized private law around general categories; statute law acquired the central position within the system of sources, and the code became the legal expression of the unity of the state¹¹. Codification fixed a distinctive manner of conceiving law: the general and abstract rule, institutions arranged systematically, the solution deduced through interpretation of the norm, the authority recognized to legal scholarship. It was precisely this structure that recommended codification, first as a means of consolidating the European states (unifying territories, suppressing particularisms), and then as an instrument for organizing colonial territories.

3.2. The Code as an Instrument of Imperial Legal Projection

The spread of the Romano-Germanic family beyond Europe did not occur through a single mechanism. The intellectual influence of Roman law, voluntary modernization, and colonial domination acted at times successively, at times concurrently. Colonization matters here because it gave the transfer a scale and an institutional force that the mere circulation of ideas could not have produced.

One of the fundamental features of Romano-Germanic law (the legislative act as the principal source of law, and, among legislative acts, the code as the ultimate expression of systematization) facilitated legal export to the colonies. The legislative act could be transferred, translated, and applied by distant administrations, by officials who did not need to know the tradition from which it had emerged. Unlike case law, which requires a judge long trained in precedent, the code functions in the absence of the one who created it. The most abstract form

¹¹ Trandafirescu, "Perioada marilor codificări," 16–26.

of continental law thus proved to be also the most portable.

The French model offers the clearest example, and its path can be traced step by step. A first diffusion occurred by force of arms: the codes were introduced into Belgium, Luxembourg, the Rhenish states, part of Switzerland, and Italy, as an effect of the Napoleonic conquests, and in Belgium and Luxembourg they remain in force to this day. The same pattern reappears, in a more pronounced form, in the export of continental European law to the colonies: this too was preceded by military conquest or the taking of possession of the territory, and its effective application remained the task of the local colonial authorities, who held the power required to impose it. A second, later diffusion occurred through voluntary reception, owing to the recognized qualities of the code and the ascendancy of French culture: Romania (1864–1865), Portugal (1867), Spain (1889), Egypt (1883). The Iberian and Italian states, themselves possessors of vast empires, transmitted the model further: the Italian code was received in Malta and Venezuela, the Spanish code, *tale quale*, in Cuba, Puerto Rico, and the Philippines. A third wave followed decolonization, the French codes remaining in force in the Maghreb, Indochina, Senegal, Togo, and Madagascar, because they represented relatively modern legislation, and the new states often lacked jurists qualified to draft a new one¹².

This filiation, with its dates, supports a fact that the mere assertion of French influence cannot prove: the Romano-Germanic family spread along traceable paths, through the transmission of determinate texts, rather than diffusely. The dualist conception of private law, enshrined by the French Commercial Code of 1807, offers the clearest illustration. It was adopted by the Dutch code (1811), the Belgian and Egyptian codes (1824), the Turkish code (1830), the German code (1861), and, through the latter, the Austrian code; through the Spanish (1829, 1885) and Portuguese (1833) commercial codes, it penetrated Latin America, where the codes of Uruguay (1869), Colombia (1869), Mexico (1889), Peru (1902), and Bolivia (1934) are of Spanish inspiration, while the Brazilian code is of Portuguese inspiration. A European conceptual distinction thus transmitted itself, through the chain of colonial and postcolonial codes, across an entire continent¹³.

The code performed in the colonies a function different from the one for which it had been created. In the metropole, codification had affirmed civil equality and the legal unity of the nation; in the colonies, the same normative forms coexisted with personal statutes, separate jurisdictions, and exceptional regimes. The declared universality of the code did not mean universality of legal status: settlers benefited from the common law, while indigenous populations remained subject to differentiated regimes.

Algeria illustrates this legal regime well. French technique and institutional structure penetrated the local legal order, while Muslim personal status

¹² Zlătescu, *Geografie juridică contemporană*, 54–56.

¹³ Trandafirescu, “Perioada marilor codificări,” 22–24.

continued to function within a limited field, under the supervision of the administration. It was precisely through this asymmetric arrangement that the Romano-Germanic family took durable root: the Algerian Civil Code of 1975 combined French technique with Islamic norms in matters of personal status, bearing in its very architecture the mark of colonial reception. The same pattern is found in Francophone Africa and in Indochina.

Spain and Portugal projected the Romano-Germanic tradition along an earlier route, extending Castilian and Portuguese law over their overseas territories before the great codifications of the nineteenth century.

3.3. Colonial and Postcolonial Receptions of the Continental Model

Colonization extended the Romano-Germanic family without reproducing metropolitan law, and the degree of penetration varied considerably. Comparative scholarship distinguishes two types of reception: a direct, almost complete one, where the legal elites were of European training (Latin America, Louisiana, Quebec); and a partial, stratified one, in which the European code remained an upper layer placed over a customary normative mass (Francophone Africa). In the first case, the continental model became the common law of the entire society; in the second, it governed administration and the economy, leaving family and communal relations to a tolerated but subordinate normativity, the content and scope of which were fixed by the administration or the courts, and whose application could be refused whenever the local norm conflicted with public order or with the colonial conception of civilization. The imperial legal space was, in Benton's formula, a fabric of overlapping jurisdictions and exceptions, in which each colony constituted a differentiated zone of legality, rather than a smooth space¹⁴.

Colonial codification reduced normative diversity in the fields to which it actually extended, without everywhere creating a single law; it placed local pluralism within a controlled hierarchy, in which metropolitan law became the general reference point, while indigenous norms acquired a conditional validity.

Former colonial states faced, after independence, a structural choice: the immediate abrogation of the codes would have created a normative vacuum; their wholesale retention would have perpetuated an order tied to imperial domination. The frequent solution was provisional continuity, followed by successive reforms. The codes were amended or replaced, yet the basic structure remained close to the continental model: the division of branches of law, the centrality of statute, normative technique, the university training of jurists, and the organization of the courts continued to indicate membership in the Romano-Germanic family, even where customary and religious law returned in certain fields or received broader constitutional recognition.

¹⁴ Benton, *Law and Colonial Cultures*, 31, 141, 210; Benton, *A Search for Sovereignty*, 1–40.

Voluntary reception of the same model clarifies, by contrast, the specificity of the colonial transfer. The Romanian Principalities received French law in 1864–1865 for reasons of modernization and under the ascendancy of French culture, and the new Civil Code of 2009 enshrined, on the Italian model, the unity of private law. Reception was, here, the choice of a sovereign state, organically integrated into an affine legal culture; in the colonies, the same model arrived by administrative means, superimposed upon a subordinate local normativity. The legal form is the same, but the path by which it arrived, and its relationship with pre-existing law, are entirely different.

After independence, the Latin American states adopted national codes of the continental type, combining French influence with the Iberian tradition, because the administration, the legal professions, and the categories of private law were, by their training, of colonial origin; the same accumulation explains, in many African and Asian states, their belonging to the Romano-Germanic family, rather than the simple adoption of a code.

In conclusion, we may state that the political rupture (the attainment of independence) proceeded faster than the change of legal culture. The model received nevertheless remained intact nowhere: reinterpreted, supplemented, and at times contested, it generated systems that belong to the continental European legal tradition without reproducing the law of any metropole.

4. The Common Law Family and Colonial Expansion through Judicial Precedent

4.1. The Common Law as Judicial and Procedural Law

The common law family took shape within a historical framework different from that of continental law. Its origin lies in the activity of the English royal courts and in the solutions elaborated for concrete disputes; the legal rule emerged gradually from judicial practice, retaining a closer connection with procedure and with the circumstances of the case than the general and abstract norm characteristic of the Romano-Germanic family. From this follow the importance of precedent, the particular structure of its concepts, and the central position of the administration of justice, of the rules of evidence, and of the enforcement of judgments¹⁵.

This genealogy also determined the mode of expansion. Whereas the continental model projected itself through a concentrated legislative body, the common law circulated together with the institutions that produced it: courts, forms of action, legal professions, the technique of precedent. Where the continental European metropolises sent a text, Great Britain sent an institution. The distinction

¹⁵ Trandafirescu, *Teoria generală a dreptului*, 77–81, 87–90, 105–109.

should not be absolutized (English law contained numerous statutes, and continental law presupposes its own judicial practice), but it captures the center of gravity of the two traditions: legislative ordering of the subject matter, in one case; the continuity of judicial solutions, in the other.

The British Empire was matched by a principle of projection formulated early on: the English subject “carries English law with him,” hence a legal extra-territoriality in favor of Europeans, coupled with separate jurisdictions for indigenous populations¹⁶.

The introduction of English law did not presuppose the immediate application of all the rules of the metropole; it was sufficient to establish courts modeled on British ones and to gradually integrate the principles of common law and equity. The apparent flexibility concealed an unequal relationship: the colonial judge was trained in the concepts of English law, operated within a hierarchy built by the empire, and evaluated local norms by metropolitan criteria. The common law thus spread through a professional culture capable of reproducing the British model even in the absence of a general codification.

4.2. The British Empire and the Globalization of the Common Law

The British Empire transformed the common law from an insular law into a family present on several continents, through the network of courts, administrations, and legal professions that survived the dissolution of the empire. The transfer was not identical everywhere: the difference lay in demographic proportion rather than in doctrine. In settler colonies, where the indigenous population was numerically marginalized, the common law rapidly took the position of general law; in India and in Africa, the scale and persistence of the local social order indirectly imposed indirect rule: administration through English law, colonial legislation, and conditional recognition of local law¹⁷.

India offers the most revealing case, because here the expansion of the common law reveals a paradox. English law penetrated through courts, procedure, and the training of jurists; at the same time, the administration resorted to codification on an unprecedented scale: the Indian Penal Code (1860), the Indian Evidence Act (1872), the Indian Contract Act (the same year). The principal drafter of the Penal Code, Thomas Babington Macaulay, was the very embodiment of the uncoded tradition; he endowed India with a penal code more systematic than anything England itself possessed¹⁸. The tradition that had rejected

¹⁶ William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), 104–6; Heather J. Sharkey, “African Colonial States,” in *The Oxford Handbook of Modern African History*, ed. John Parker and Richard Reid (Oxford: Oxford University Press, 2013), 151–170.

¹⁷ Zlătescu, *Geografie juridică contemporană*, 150–157.

¹⁸ Indian Penal Code, Act No. 45 of 1860; Indian Evidence Act, Act No. 1 of 1872; Indian Contract Act, Act No. 9 of 1872; Heath, *Colonial Terror*, 33–36.

codification at home produced it, in the colony, in its most ambitious form.

Codification did not make India a Romano-Germanic system: the codes were interpreted within a jurisdictional order modeled on English law, and judicial reasoning bore the imprint of the common law and of equity. The needs of governance could thus modify the form of the exported law.

Standardization concerned the matters essential to administration and public order (criminal law, procedure, evidence, commerce), while personal status remained tied to religious affiliation. Hindu Law and Mohammedan Law applied in matters of family and succession, but interpretation rested with British judges, who worked with translations, compendiums, and European categories. The administration did not preserve pre-existing traditions; it selected, delimited, and transformed them into rigid normative bodies, redefining religious practices as “personal law” applicable to administratively defined categories.

Expansion also produced autonomous variants: United States law adapted to the federal structure, Canada retained the common law alongside the civil law of Quebec, South Africa combined Roman-Dutch law with British influences in procedure and precedent. The common law family does not form a uniform bloc; it brings together systems linked by origin, method, and professional culture, each with its own solutions.

4.3. Administered Customary Law as a Structural Layer of Colonial Common Law

The British model did not systematically seek the elimination of customs: their retention reduced the costs of governance and allowed local authorities to be used as intermediaries. Recognition nonetheless remained conditional: the norm applied within a field established by the administration and under the supervision of the colonial courts, the repugnancy clauses permitting the exclusion of any custom incompatible with natural justice or with public order¹⁹.

What matters essentially is not so much the control itself (found, in different forms, in all empires) as its structural effect on African common law. The custom applied was not identical to the practice that preceded colonization: the administration selected interlocutors, fixed competences, and transformed flexible rules into apparently stable norms, while traditional authorities received powers they had not previously held. Customary law became, in part, the product of the colonial state. Mamdani described this construction through the bifurcated state: the citizen belonged to the civil order, while the colonial subject was administered through custom and local authority, the separation overlapping the distinction between urban and rural.

English law does not recognize a layer of “administered customary law”

¹⁹ Benton, *Law and Colonial Cultures*, 127–166; Mamdani, *Citizen and Subject*, 16–18, 109–137.

defined by criteria of communal belonging; this is a creation of colonization. African common law systems inherited a structure that the metropole did not have: a general law of English inspiration, superimposed upon a customary law codified and hierarchized by the colonial administration.

After independence, numerous states retained the courts, procedures, and principles they had inherited. This continuity is not explained by inertia alone: the colonial model had formed legal professions, law faculties, and a common administrative language, whose replacement would have called into question the functioning of the newly constituted state. Precedent and procedure remained the central elements of the family, but colonial experience had associated them with codifying legislation, with religious personal law, and with the hierarchical administration of custom. The resulting systems bear the imprint of English law without being copies of it. British colonial law extended the common law on a global scale and, at the same time, compelled it to transform itself.

5. Mixed and Hybrid Systems. The Limits of Pure Classifications

5.1. Bijuralism, Mixed System, and Legal Pluralism

Dividing the law of the world into families presupposes identifying the dominant element of each system. Few contemporary systems reproduce in full the model from which they derive, and the distance becomes greatest where successive colonial dominations have superimposed traditions formed in different historical environments.

Three concepts order these situations: bijuralism, the mixed system, and legal pluralism.

Bijuralism designates the coexistence, within the same state, of two legal systems applied to distinct territories. The classic example is Canada: in Quebec, private-law relations are governed by continental civil law; in the other provinces, by the common law.

The mixed system presupposes a closer connection: the traditions apply to the same territory and act upon the same relations, influencing each other, for example, a continental institution interpreted by common law methods, or a common law rule adapted to civil-law concepts. The result is a structure that can no longer be assigned to either of the originating traditions. South Africa is the clearest example: its law represents a combination with a logic of its own rather than a pure form, Roman-Dutch or English.

Legal pluralism has the broadest scope: the simultaneous existence, within the same social space, of several normative orders (state, customary, religious), each with its own sources of legitimacy and forms of dispute resolution²⁰.

Quebec and Louisiana preserved a nucleus of continental private law

²⁰ Andra Iftimici, *Drept comparat și sisteme juridice contemporane*, 2nd ed. (Bucharest: Universul Juridic, 2020), 294–97.

within a jurisdictional environment dominated by the common law, through the succession of colonial powers. South Africa offers the most instructive mixed structure: Roman-Dutch law, retained in private law after the establishment of British authority; the common law, introduced through legislation, the organization of the courts, procedure, and precedent; African customary law, retained in communal relations. Frequently presented as exceptions, these orders reveal the mechanism by which legal systems are formed: transfers of sovereignty, peace treaties, and territorial reorganizations have left their mark on the structure of the law, and the mixed system is the legal memory of these successions.

5.2. Customary Law and Religious Law under Colonial Administration

Colonial authorities recognized certain customs, but reserved to themselves the power to identify, formulate, and validate them. Traditional law (oral and flexible, transmitted through proverbs, without a class of jurists) was captured in written collections, its interpretation entrusted to state officials and judges. Fixation in writing distorted the norm: a supple custom acquired the form of a rigid rule, and religious law was extracted from its doctrinal environment and reduced to a body of norms applicable to an administratively defined group.

Pluralism was itself a colonial project. Empires formed overlapping jurisdictions, personal regimes, and enclaves of differing intensities of authority; the colonial state used this diversity to administer the territory and differentiate populations rather than eliminating it²¹. India illustrates the pattern through the coexistence of colonial legislation, common law institutions, and Hindu and Muslim personal laws; similar situations formed in Africa, where European law regulated administration, commerce, and criminal matters, while custom remained within the field of family and succession.

Colonial policies were nonetheless not identical. The Portuguese authorities in northern Mozambique treated Islamic practices as local customs rather than as a distinct legal system, and did not elaborate, unlike the British, Dutch, or French administrations, a coherent body of “Islamic law” for the courts. Muslim communities nevertheless continued to follow the Shafi‘i legal tradition, and the local order combined Portuguese law, African customs, and Islamic practices that the administration had failed to systematize²².

Hybridization, however, does not result solely from a deliberate legislative policy; it may also arise from the limits of administration, from the resistance of communities, and from the persistence of normative networks older than the colonial state.

²¹ Benton, *Law and Colonial Cultures*, 127–209.

²² Liazat J. K. Bonate, “Portuguese Colonialism and Islamic Law in Northern Mozambique,” *History in Action* 6, no. 1 (2018): 18–20.

5.3. Hybridization as Mechanism and Structural Effect

A hybrid system arises when the components of an order have been so reshaped through contact that they can no longer be related back to their traditions of origin, rather than constituting a juxtaposition of rules of different origins. Unlike the mixed system (in which institutions of heterogeneous origin stand together while retaining their features), a genuine hybrid is a synthesis from which the initial state can no longer be reconstructed.

The South African trust illustrates the mechanism. It retains the English name and conception, but reception was partial: the office of trustee, as a position subject to public control, derives from English law; the constitution and revocation of the trust remain governed by Roman-Dutch law; and the English rule whereby the beneficiary need not except for the trust to become irrevocable was consciously rejected²³. A hybrid represents a selective recombination rather than a mixture: each institution is split into elements adopted and elements refused.

The encounter of these layers does not take place between equals. In South Africa, Roman-Dutch law, uncoded, was gradually eroded by British common law, applied with the unconditional authority of precedent and sustained by the training of jurists in Britain. The dominant element of a hybrid system is determined by the institutional force of each layer rather than by seniority.

Classifying South Africa within the Romano-Germanic family, India within the common law, or Mozambique within the Portuguese tradition is justified by the identification of a structural dominant, but none of these classifications describes the system in its entirety: the sources, the organization of the courts, private law, and personal status may point to different affiliations. Legal families are tools of orientation: they indicate the principal genealogy, the predominant technique, and the professional culture of jurists; they do not express every normative layer of a society.

Mixed and hybrid systems call for fine and precise distinctions. The legal family designates the dominant outcome of a historical evolution, one that can coexist with institutions from other traditions and can change through case law or reform. Colonial experience multiplied these configurations: empires carried norms across borders, reorganized local rights, and created differentiated jurisdictions, and the layers thus formed survived independence as elements of post-colonial systems. The globalization of legal families extended certain models, but compelled them to function in environments that altered their content and meaning.

²³ Watson, *Legal Transplants*, 55–56.

6. Postcolonial Continuities and the Contemporary Map of Legal Families

6.1. The Persistence of Colonial Codes, Institutions, and Legal Language

Independence changed the holder of sovereignty, while leaving the legal infrastructure standing. The new states retained the codes, courts, procedures, and administrations formed during the period of domination, for their immediate replacement would have paralyzed public life and private relations. Continuity answered a practical necessity, even though the rules retained originated in an order that independence sought to remove.

In the former French territories, continental legislative technique continued to shape the legislator, and the French language remained the language of administration, education, and legal practice. In the Anglophone space, the courts, procedure, and precedent retained their central position. Independence brought new constitutions, without dislodging the professional culture in which judges, lawyers, and officials had been trained²⁴.

Jurists trained in the European categories (property, contract, liability, public authority) continued to read social reality through them. Continuity was uneven from one branch to another: administration, commerce, and procedure proved more resistant, whereas in matters of family, succession, and personal status independence sometimes allowed the return of customary or religious law. The colonial legacy is found in texts as well as in the institutions that produce law, in the training of jurists, and in a silent hierarchy: state law of European origin, tied to administration and the formal economy, and custom, relegated to community and tradition.

6.2. Continuity and Adaptation in the Postcolonial Period

Contracts, property, and the activity of the courts could not be suspended until a new order was elaborated: the postcolonial legislator started from existing law. To this was added path dependence (an installed legal infrastructure sustains itself, for its reform requires resources and qualified personnel that independent states often lacked) and a common language for relations with the former metropole and for international circulation. Stability nonetheless had a price: the postcolonial order risked reproducing institutions cut for purposes other than those of the society that inherited them²⁵.

The postcolonial state also inherited the divisions of the colonial administration. The distinction between citizen and subject, between the urban and rural

²⁴ Sharkey, "African Colonial States," 151–170.

²⁵ Mamdani, *Citizen and Subject*, 16–18, 109–137.

orders, did not disappear with independence. This persistence did not annul the capacity for action of the new states: the inherited law was amended, reinterpreted, and at times replaced, and communities continued to form their own rules. Continuity was a process of selection: some institutions retained for their usefulness, others through inertia; some norms preserved, but with new purposes.

6.3. Legal Families as Historical Dominants

The persistence of colonial structures explains today's configuration of legal families. The states of the former British Empire are placed within the common law because the courts, procedure, precedent, and professional culture bear the imprint of English law; the former French, Spanish, or Portuguese territories relate to the Romano-Germanic family through the centrality of statute, codification technique, and institutional organization. This classification designates a historical dominant, not the complete structure of the system: a state may belong to the common law and still make extensive use of codes, just as a continental system may harbor religious or customary law within personal status.

Belonging to a family concerns legal form, not the quality of the law. Colonialism exported the architecture of the rule-of-law state (codes, courts, procedures), without transferring its substance as well. Law often worked as an instrument of power rather than as a limit upon it: a system may bear the entire structure of the common law or of continental law and still harbor an arbitrary practice. The legal family designates a structural dominant, not a guarantee regarding the content of the order.

The world's legal geography preserves the contour of former empires without reproducing it. National reforms and the new globalization of law (European Union law, international conventions, commercial harmonization) have shifted the boundaries and are increasingly bringing the two families closer together. The colonial origin nevertheless explains why certain sources, institutions, and methods still occupy the dominant position within a system today.

What postcolonial states recover as authentic tradition (custom, religious law) is, to a large extent, the version fixed and rigidified by the colonial administration. The return to traditional law unknowingly reactivates a construction of the colonial state. Imperial experience shaped both the imported law and the form in which it is resisted.

Classifying a legal order requires more than identifying a code or a rule on precedent: one must examine the institutions that apply the law, the training of jurists, the language of legal scholarship, and the relationship between state law and the other normative orders. The legal family is the sediment of a historical evolution, not an invariable model. Colonialism extended the two great European families on a global scale and, at the same time, multiplied their local forms, for the imported model everywhere encountered societies with their own institutions, which reshaped it.

The two great families cover a significant part of the world, yet each comprises systems lying at great distances from their European model of origin; their unity rests on genealogy and dominant structure, not on normative identity. Classification retains its orienting function on a single condition: that it be read historically. Beneath the apparent unity of the legal family lie strata of norms, institutions, and practices sedimented in different periods, carrying the memory of power relations that have outlived empires.

7. Conclusions

The two great European legal families took shape within the historical matrix of the continent. The Romano-Germanic family was forged through the reception of Roman law, through university legal scholarship, and through the great modern codifications; the common law grew up around the English courts, procedure, and precedent. The great geographical discoveries, however, opened a different stage. Colonial expansion sought control of resources, the supply of metropolitan economies, the opening of markets, and the extension of fiscal power. Such an enterprise could not function by military force alone. Economic exploitation, the administration of territories, and the organization of exchange required norms, institutions, and jurisdictions. Together with language, administration, and cultural models, the European powers exported their law as well. The transfer was not requested by the receiving societies; it was imposed through political domination. The colonial period thus became the moment in which European legal traditions exceeded their original space and turned into families of worldwide reach.

The export of European law took place along several paths. The continental model circulated chiefly through the written code, systematic and easily transported from one territory to another. The English model spread through courts, procedure, precedent, and the formation of a professional culture capable of reproducing the metropole's law at great distance from it. The distinction between text and method expresses the center of gravity of the two traditions, without constituting an absolute separation. British codification in India shows that the needs of colonial governance could modify the form of the exported law: recourse was had to the code whenever uniformity and administrative control made it useful.

The resulting legal order was not a copy of metropolitan law. European institutions were superimposed upon customs, religious laws, and local forms of authority. These were retained selectively, fixed in writing, and subordinated to criteria set by the colonial administration. The imported law reshaped local normativities, and these in turn influenced the application and meaning of the European institutions. Mixed and hybrid systems appear, from this perspective, as normal effects of the colonial circulation of law.

Independence changed the holder of sovereignty without being able to

replace, within a short time, the entire legal infrastructure. The codes, the courts, legal language, and professional training had become components of the functioning of the state. Postcolonial states modified, selected, and redirected the inherited institutions, using them for their own purposes.

A system's belonging to the Romano-Germanic family or to the common law indicates its dominant genealogy, the structure of its sources, and its professional culture. It does not express the entire normative reality and offers, by itself, no guarantee as to the quality of the law. The legal systems of the new postcolonial states represent stratified historical formations, in which metropolitan law, local normativities, and postcolonial reforms overlap without ever fully merging.

The contemporary map of legal families preserves the contour of former empires. Without the integration of this history, classifications describe the form of the systems but leave their worldwide spread insufficiently explained.

The contemporary circulation of law unfolds within a framework different from that of colonialism. European Union law, international conventions, and commercial harmonization are making the boundaries of legal families increasingly permeable. What remains current is the question of the authority that selects the models intended for standardization, the mechanisms through which they acquire legitimacy, and the order they consolidate after reception.

Bibliography

1. Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press, 2005.
2. Benton, Lauren. *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*. Cambridge: Cambridge University Press, 2010.
3. Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*. Cambridge: Cambridge University Press, 2002.
4. Blackstone, William. *Commentaries on the Laws of England*. Vol. 1. Oxford: Clarendon Press, 1765.
5. Bonate, Liazzat J. K. "Portuguese Colonialism and Islamic Law in Northern Mozambique." *History in Action* 6, no. 1 (2018): 15–25.
6. Constantinesco, Leontin-Jean. *Tratat de drept comparat. Vol. 1: Introducere în dreptul comparat* [Treatise on Comparative Law. Vol. 1: Introduction to Comparative Law]. Bucharest: ALL, 1997.
7. Constantinesco, Leontin-Jean. *Tratat de drept comparat. Vol. 2: Metoda comparativă* [Treatise on Comparative Law. Vol. 2: The Comparative Method]. Bucharest: ALL Educational, 1998.
8. David, René, and Camille Jauffret-Spinozi. *Les grands systèmes de droit contemporains*. 10th ed. Paris: Dalloz, 1992.
9. David, René, and John E. C. Brierley. *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*. 3rd ed. London: Stevens, 1985.
10. Gathii, James Thuo. "Africa." In *The Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters, 407–428.

- Oxford: Oxford University Press, 2012.
11. Heath, Deana. *Colonial Terror: Torture and State Violence in Colonial India*. Oxford: Oxford University Press, 2021.
 12. Iftimiei, Andra. *Drept comparat și sisteme juridice contemporane*. 2nd ed. Bucharest: Universul Juridic, 2020.
 13. Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton University Press, 1996.
 14. Sharkey, Heather J. "African Colonial States." In *The Oxford Handbook of Modern African History*, edited by John Parker and Richard Reid, 151–170. Oxford: Oxford University Press, 2013.
 15. Trandafirescu, Bogdan Cristian. "Perioada marilor codificări în familiile de drept romano-germanice" [The Period of the Great Codifications in the Romano-Germanic Law Families]. *Ars Aequi* 10, no. 1 (2020): 16–26.
 16. Trandafirescu, Bogdan Cristian. *Teoria generală a dreptului. Curs universitar* [General Theory of Law: University Course]. Bucharest: Universul Juridic, 2025.
 17. Van Hoecke, Mark, ed. *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Oxford: Hart Publishing, 2011.
 18. Watson, Alan. *Legal Transplants: An Approach to Comparative Law*. 2nd ed. Athens, GA: University of Georgia Press, 1993.
 19. Zlătescu, Victor Dan. *Geografie juridică contemporană: Introducere în teoria marilor sisteme de drept* [Contemporary Legal Geography: Introduction to the Theory of Major Legal Systems]. Bucharest: Editura Științifică și Enciclopedică, 1981.

The Principle of the Separation of Powers in Relation to Judicial Power and Disputes of Competence in Albania

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Abstract

This paper examines the principle of the separation of powers in relation to the judicial power and the jurisdictional disputes that may arise between them. Issues related to the interference of the judicial authority in the functions of other branches of power, and vice versa, are of particular interest at a time when various states are increasingly displaying authoritarian-inspired tendencies. The study is based on an analysis of recent cases encountered in practice and explores various perspectives regarding judiciary's interference in the functions of other branches of power, as well as the interference of those branches in the exercise of judicial functions. Specific cases include the suspension of a minister, seen as a direct interference in the functioning of the highest executive authority, and the creation of legal situations that can be considered contrary to the powers granted by the Constitution to both the Government and the Parliament regarding the formation and functioning of the Council of Ministers. The analysis of the influence of the judicial power on the executive power through the imposition of preliminary measures, considered as individual decisions of a criminal nature, confirms that no conflict of powers arises between the branches of government within the meaning of Article 131 of the Constitution. Furthermore, the analysis of constitutional jurisprudence supported by a comparative analysis confirms that judicial decisions are reviewed only by the highest court. No other authority can assess their legality as long as they have not been amended or annulled by a higher court. Any intervention by other state authorities in this regard constitutes a violation of constitutional principles.

Keywords: separation of powers, judicial power, constitutional jurisprudence, dispute of competence, executive power.

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1. Introduction

The principle of the separation and balance of powers, as a constitutional principle, constitutes one of the fundamental pillars of the rule of law, is guaranteed by the Constitution² and must be respected by the holder of each power. The dispute of competence between the executive power and the judicial power, expressed in the conflict produced by an interim security measure imposed by the court against organised crime and corruption upon a minister³, has provoked significant debate regarding the principle of the separation and balancing of powers in ensuring the rule of law.

The Council of ministers has recently⁴ argued that a court of the judicial power has no jurisdiction over matters relating to the mandate of a minister, a member of parliament, or other high constitutional officials, since they are not ordinary administrative bodies but constitutional bodies. According to this view, the Constitution does not envisage the suspension of a minister as a preventive measure and, consequently, such a measure cannot be applied.

Claiming that the principle of the separation and balance of powers has been violated, the executive power has brought the matter before the Constitutional Court, emphasizing that the suspension from office of a member of the Council of Ministers by a court exercising judicial power constitutes an interference with the executive power as a constitutional body. This is because the suspension measure impedes the fulfilment of the minister's competences, as regards the part concerning decision-making for that field of state responsibility. Furthermore, the Council of Ministers is unable to consider or issue acts for any initiative in the field covered by the minister against whom the suspension measure is taken.

According to the application of the Council of Ministers, the constitutional competence to propose the composition of the Council of Ministers is attributed solely to the Prime Minister and may not be exercised by any other entity, regardless of the power to which it belongs. Indeed, the courts are not vested by

² Constitution of the Republic of Albania, art. 7: "The system of government in the Republic of Albania is based on the separation and balancing of legislative, executive and judicial powers"; Luan Omari and Aurela Anastasi, *E drejta kushtetuese* (Tiranë: Dajti 2000, rev. ed. 2017); Sokol Sadushi, *Drejhtësia kushtetuese në zhvillim: Trajttime teorike dhe të praktikës së gjykimit kushtetues* (Tiranë: Toena, 2012), 497 ff.

³ The interim security measure suspending the Deputy Prime Minister and Minister of Infrastructure and Energy was claimed to have impaired the activity of the Council of Ministers and the Prime Minister by interfering with their competences as constitutional bodies. The measure suspended the minister's activity in the field of infrastructure and energy and was argued to oblige the Prime Minister to propose the dismissal of the incumbent minister and the appointment of a new one.

⁴ Constitutional Court of the Republic of Albania, Decision No. 8, February 6, 2026, para. 11.1.

the Constitution with any authority regarding the appointment, removal, or suspension of them.⁵

The Albanian Constitution, in Article 103⁶, provides that a member of the Council of Ministers is granted the immunity afforded to a Member of Parliament, specifically the guarantees set forth in Article 73 of the Constitution and Article 242 of the Code of Criminal Procedure.

In light of the above, it is important first to examine the general elements of the principle of the separation and balancing of powers in relation to the judicial power, and subsequently to address in detail the elements recently interpreted by the Constitutional Court.

2. The Separation and Balancing of Powers in Relation to the Judicial Power

2.1. Montesquieu's Principle of the Distribution of Power and the Prevention of Its Abuse

Although in its narrow conception, power is one and belongs to the state, it is divided into three branches and must be exercised by different bodies that are independent of one another, so as to avoid the danger of its concentration in the hands of a single body and the abuse thereof. In this sense, the principle of the independence of the judiciary is an indispensable element for securing the principle of the rule of law and the principle of the separation of powers in the spirit of Montesquieu. The protection of fundamental human rights and freedoms can be achieved only through an independent and impartial judicial power⁷.

The constitutional enshrinement of the principle of the separation and balancing of power, together with the conferral upon the Constitutional Court of jurisdiction to adjudicate disputes of competence between the powers, constitute the first guarantees for securing the rule of law.

The Constitution obliges all bodies of public power to exercise their competences only within the framework of, and on the basis of, constitutional norms and the law. It regulates the relations between the executive, legislative and judicial powers through the instruments laid down in the constitutional norms and on

⁵ Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 11.3 (applicant's submissions): "the suspension of a member of the Council of Ministers is not recognised by the juridical-constitutional system of the Albanian state."

⁶ Constitution of the Republic of Albania, art. 103(3): "Members of the Council of Ministers enjoy the immunity of a deputy."

⁷ Constitution of the Republic of Albania, arts. 42(2), 145; Omari and Anastasi, *E drejta kushtetuese*; Sadushi, *Drejtesia kushtetuese në zhvillim*, 497 ff.; Xhezair Zaganjori, Arta Vorpsi, and Denar Biba, *Parime kushtetuese dhe të drejta themelore në jurisprudencën e Gjykatës Kushtetuese* (Tiranë: Adelprint, 2012), 37; Xhezair Zaganjori, Aurela Anastasi, and Eralda (Methasani) Çani, *Shteti i së drejtës në Kushtetutën e Republikës së Shqipërisë* (Tiranë: Adelprint, 2011), 28.

the basis of the principle of the separation and balancing of powers.

The general principles of the rule of law, the principle of the separation of powers, the principle of legality, the principle of equality before the law, and the principle of the independence and impartiality of the courts, constitute the elements of the security of a democratic state and rest upon the idea of a judicial power free from external pressures, and in particular free from the pressures of politics and of the executive. They also rest upon a sound organisation of the judicial system.

2.2. The Independence of the Judicial Power in Relation to the Two Other Powers

The independence of the judicial power translates into the right to an independent and impartial tribunal, which is guaranteed by a series of international and domestic instruments⁸ and is regarded as an essential element of the rule of law itself. Consequently, the consolidation of the rule of law through an independent and impartial justice system is an obligation and a function of the state itself.⁹ Only in this way can the state guarantee respect for fundamental human rights and freedoms¹⁰.

The independence of the judicial system is enshrined in Article 145/1 of the Constitution: “*Judges are independent and subject only to the Constitution and the laws.*” The rules that are to govern the activity of the judge in the exercise of his competences derive from the Constitution and are sanctioned in substantive laws. And since the function of the judge is to apply the law and to decide who is right in the event of a conflict, guaranteeing the independence of the judiciary is and remains an obligation of the state itself.

⁸ International instruments include the Universal Declaration of Human Rights, art. 10; International Covenant on Civil and Political Rights, art. 14; European Convention on Human Rights, art. 6; United Nations, *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 1985) and endorsed by UN General Assembly Resolutions 40/32 (November 29, 1985) and 40/146 (December 13, 1985); and Council of Europe, Committee of Ministers, Recommendation No. R (94) 12 on the Independence, Efficiency and Role of Judges (October 13, 1994). Domestic instruments include the Constitution of the Republic of Albania; Law No. 98/2016, “On the Organization of the Judicial Power in the Republic of Albania”; and Law No. 96/2016, “On the Status of Judges and Prosecutors in the Republic of Albania.”

⁹ United Nations, *Basic Principles on the Independence of the Judiciary*, principle 1: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.”

¹⁰ Constitution of the Republic of Albania, art. 42(2): “Everyone, for the protection of his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.”

With respect to the principle of the independence of the court, the Constitutional Court¹¹ has provided its interpretation, emphasising that this principle must be understood in two main aspects. First, as *substantive independence*, that is: a right of the court to take impartial decisions, uninfluenced by the two other powers. Second, as *structural independence*, that is: the appointment and dismissal of judges must be provided for in the Constitution. Structural independence also implies *organisational and financial independence*. In its interpretation it continues: “*Respect for this principle is a necessary condition for the protection of fundamental human rights and freedoms (...). In this sense, this independence is not a privilege but one of the fundamental duties of judges and of the court, deriving from the human right to have an impartial arbiter in a conflict, guaranteed by the Constitution (...). On the other hand, the independence of the judiciary cannot be understood without the independence of the judge within the very structure of the judiciary, through which it is ensured that no judge may interfere in the activity and conviction of another judge.*”

In interpreting the constitutional provision¹² on the immunity of a deputy, it is understood that the latter is a means serving as a guarantee for achieving the protection of his duties, that is the deputy's right to exercise his duty a purpose realised through the establishment of the procedural guarantee of prior authorisation by the Assembly for acts of the judicial power that restrict the deputy's personal liberty, making it impossible for him to exercise his constitutional function. The reasoning applied by analogy also to the suspension of a minister is that which holds that a deputy may not be suspended from duty by an act of the judicial power; indeed, even acts that indirectly bring about the consequence of de facto suspension from the exercise of duty may not be taken without the authorisation of the Assembly.¹³

¹¹ Zaganjori, Anastasi, and (Methasani) Çani, *Shteti i së drejtës në Kushtetutën e Republikës së Shqipërisë*, 28.

¹² Constitution of the Republic of Albania, art. 73: “1. The deputy is not held responsible for opinions expressed in the Assembly and votes cast by him in the exercise of the function. This provision is not applicable in the case of defamation. 2. A deputy cannot be arrested or deprived of liberty in any form, nor may a personal search or a search of the residence be exercised against him, without the authorisation of the Assembly. 3. A deputy can be arrested or detained without authorisation when he is captured during or immediately after the commission of a crime. The General Prosecutor or Chief Special Prosecutor immediately notifies the Assembly, which, when it finds that there is no room for proceedings, orders the lifting of the measure. 4. For the cases provided in paragraphs 2 and 3 of this article, the Assembly may hold discussions in closed sessions for reasons of data protection. The decision is taken by open voting.”

¹³ In its submissions before the Constitutional Court, the Assembly likewise maintained that the security measure imposed by a judicial body infringed the separation of powers: “Judicial interference in the composition of the Council of Ministers approved by the Assembly constitutes a direct infringement of constitutional competences. The suspension of a minister creates a situation in which the judicial power interferes directly in the functionality of the highest constitutional executive body, as well as in its ability to take decisions in the field of responsibility of the suspended minister, thereby creating a factual impossibility for the exercise of the constitutional competences of the Council of Ministers. The interference of the judicial power cannot be justified merely by the

In this legal debate over the claim of interference by the judicial power in the executive power, the legislative power has stated that the imposition of the security measure by the judicial power has created “*a legal situation that conflicts with the competences which the Constitution has recognised to the Assembly in the process of the formation and functioning of the Council of Ministers, since it creates a factual state of affairs that conflicts with the Assembly’s decision to grant a vote of confidence. The suspension creates an unforeseen constitutional situation that directly affects the functional relationship between the Assembly and the Council of Ministers. (...) Likewise, the suspension creates legal confusion regarding the status of the acts that the President has issued for the appointment of the minister, since it suspends constitutional acts without following the constitutional procedure for their revocation*”¹⁴.

According to the legislative power, the constitutional provision of Article 103, point 3, which equates the immunity of a member of the Council of Ministers with that of a deputy, serves to ensure the functioning as a whole of the Council of Ministers as the holder of the executive power. Indeed, the legislative power reasons that “*the suspension of a minister from duty would impair executive activity in an entire field of state responsibility, would lead to the obstruction of the implementation of the governing programme for which the people voted, and would create an institutional vacuum that would damage the public interest.*”¹⁵

Meanwhile, the President of the Republic, before the Constitutional Court, has maintained the position that criminal prosecution as a direct and exclusive function of the bodies of justice has no bearing on the relations between the powers.¹⁶ He has added that the suspension of activity connected with the exercise of a duty or a public service, provided for by Article 242 of the Code of Criminal Procedure, is not a measure specific to members of the Council of Ministers.¹⁷ Nevertheless, the President, although of the view that it is the Constitutional Court that must pronounce on whether or not the prohibitive measure constitutes interference in the prerogatives of another power, does not stop at this observation but also offers his own interpretation.¹⁸ In light of this interpretation, the following questions arise: do prohibitive measures constitute an instrument of

need for criminal investigation, since the Constitution has provided special procedural guarantees for high state officials.” Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 12.1.

¹⁴ Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 12.1.

¹⁵ Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 12.2.

¹⁶ Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 13.1.

¹⁷ Code of Criminal Procedure of the Republic of Albania, art. 242(2), which excludes persons elected under the electoral law from the prohibitive measure of suspension from the exercise of a public duty or service.

¹⁸ The President of the Republic submitted that, if suspension from office imposed on a member of the Council of Ministers affects the free functioning of the executive branch, the measure assumes the character of an instrument of checks and balances; if it does not affect that functioning, it remains within the sphere of criminal law. Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 13.1.

checks and balances in the hands of the judicial power, and does this instrument condition the functioning and composition of the executive power?

The case that gave rise to this inter-institutional debate over disputes between the executive power and the judicial power concerns the suspension of the Deputy Prime Minister and Minister of Infrastructure and Energy. This suspension has been considered by the Prime Minister to be an infringement of the Constitution under letter “ç” of point 1 of Article 131 thereof. Considering the proposal of ministers to be within his discretion, as recognised by the Constitution and the case-law of the Court the head of government takes the view that there has been interference by the judicial power in the executive power, and that the prohibitive measure of suspension would have had to be expressly provided for.

3. The Functional and Procedural Guarantees of the Executive Power in Relation to the Principle of the Separation of Powers

3.1. Functional Guarantees for Special Legal Protection

Under Article 103(3) of the Constitution, members of the Council of Ministers are granted the immunity of a Member of Parliament. Since this constitutional provision treats the minister’s immunity as identical to that of the deputy, it is Article 73 of the Constitution that defines the nature and scope of parliamentary immunity. Pursuant to Article 73, point 1 of the Constitution, a deputy bears no responsibility for opinions expressed in the Assembly and votes cast by him in the exercise of his function. This provision does not apply in the case of defamation. Meanwhile, under point 2 of the same article, a deputy may not be arrested or deprived of liberty in any form, nor may a personal search or a search of the residence be exercised against him, without the authorisation of the Assembly. The cases in which a deputy is caught during or immediately after the commission of a serious crime are provided for in point 3 of Article 73 of the Constitution, according to which a deputy may be detained or arrested without authorisation, while the General Prosecutor or the head of the Special Prosecution Office immediately notifies the Assembly, which, when it finds that there is no room for proceedings, orders the lifting of the measure. The rules provided for in Article 73 of the Constitution are applicable also to a minister and constitute the constitutional regime of his immunity.

After the 1990s, the transition from a centralised system to a model of governance founded on the principle of the rule of law and on the separation and balancing of powers marked the strengthening of the institutional independence of the powers and constitutional bodies.¹⁹ Immunity was conceived as a functional guarantee to protect the holders of high state offices from undue pressures

¹⁹ Law No. 7491 of April 29, 1991, “On the Main Constitutional Provisions,” art. 22, provided that a Member of Parliament enjoyed immunity and could not be obstructed in the performance of par-

or interference that could impair their autonomy in the exercise of their function. With the consolidation of the constitutional order and the strengthening of democratic institutions, a phase began of raising the standards of public accountability and of guaranteeing the principle of equality before the law.²⁰ As a result, the regime of immunities has progressively narrowed, not only for deputies and ministers, but for all public officials.

With reference to the case-law of the Constitutional Court, Article 103, point 3, of the Constitution grants members of the Council of Ministers, by virtue of their important state function, a special legal protection. By equating the legal protection of a member of the Council of Ministers with that of a Member of Parliament, the Constitution has given the same juridical meaning to the immunity of this category of officials. Furthermore, since the Constitution places the immunity of a member of the Council of Ministers on an equal substantive footing with that of a Member of Parliament, the procedure governing the lifting of parliamentary immunity, as prescribed by Article 73 of the Constitution, shall likewise apply to a member of the Council of Ministers who does not hold a parliamentary mandate.²¹

Following the constitutional reform of 2012, Article 73 limited the inviolability of a deputy from criminal prosecution. Article 73 guarantees a deputy immunity in two forms: “*substantive immunity — in the sense of non-liability for opinions expressed in the Assembly and votes cast by him in the exercise of his function (first paragraph), and procedural immunity — in the sense of inviolability, that is, that a deputy may not be arrested or deprived of liberty in any form, nor may a personal search or a search of the residence be exercised against him, without the authorisation of the Assembly (second paragraph).*”²² In its jurisprudence, the Constitutional Court has emphasized that the rules concerning the inviolability of Members of Parliament in criminal proceedings should not exceed what is necessary to achieve legitimate objectives and must be interpreted restrictively.²³

For the Constitutional Court,²⁴ the regime of immunities, in every case,

liamentary duties or in obtaining non-secret information; search, detention, arrest, or criminal prosecution required Parliament’s consent, except in cases of a serious offence caught in flagrante delicto. Members of the Council of Ministers were accountable for the activities of their ministries (art. 39), and criminal proceedings against them could be initiated only with Parliament’s approval (art. 41). See also Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 44.

²⁰ Constitution of the Republic of Albania (1998), art. 73 (original text), required Assembly authorisation for the criminal prosecution or arrest of a deputy; art. 103(3) expressly equated a minister’s immunity with that of a deputy. See also Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 45.

²¹ Constitutional Court of the Republic of Albania, Decision No. 38, June 23, 2000.

²² Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 47.

²³ Constitutional Court of the Republic of Albania, Decision No. 81, November 21, 2024.

²⁴ Constitutional Court of the Republic of Albania, Decision No. 81/2024; Decision No. 1, January 17, 2025.

aims to guarantee the calm and uninfluenced exercise of important public functions by high state officials, who should not fear that their state activity might become the cause of personal consequences such as, for example, a civil suit or a criminal charge. Nevertheless, it must be emphasised that a deputy's immunity is not a personal privilege and its main purpose is the protection of parliament itself and its proper functioning. The inviolability of a deputy must be applied only in cases where there are grounds to suspect that the decision to prosecute the deputy contains party-political elements.

As regards procedural immunity, Article 73, point 2, of the Constitution guarantees a deputy in this case a minister special protection from those procedural acts undertaken by law-enforcement bodies in the course of criminal proceedings which restrict his personal liberty. In such cases, the Constitution itself provides for a safeguarding mechanism, namely the authorization of Parliament, which is required whenever restrictive measures imposed on a Member of Parliament entail the restriction or deprivation of personal liberty. Such measures affect the Member's right to be elected and, consequently, the exercise of his or her rights and functions as a Member of Parliament, including parliamentary activity itself.²⁵

The system of governance rests on the fundamental principle of the rule of law, which means that every holder of public functions, without exception including ministers as members of the executive power, is subject to the legal order and bears responsibility in the event of a violation of the law. This principle requires that the exercise of state competences take place within the limits set by the Constitution and the law. Furthermore, the principle of the rule of law is intrinsically connected to the principle of equality before the law, pursuant to which no individual may enjoy privileges or exemptions from the application of the law on account of the office he or she holds, save where an objective and reasonable justification exists under Article 18 of the Constitution. In this context, the minister's immunity does not amount to a personal privilege or a form of absolute immunity from criminal jurisdiction; but, it constitutes a limited functional safeguard designed to secure the free and independent performance of official functions. Such a safeguard cannot be construed as an impediment to criminal prosecution or the exercise of judicial authority beyond the circumstances expressly prescribed by the Constitution.

All state bodies have the duty to act within the basis and limits of the law, and privileged treatment is considered incompatible with the principle of equality before the law in the absence of a reasonable and objective justification. The principle of the rule of law requires that responsibility and accountability be essential elements of the exercise of public functions. In this sense, a member of the Council of Ministers bears political responsibility before the Assembly for the exercise

²⁵ Constitutional Court of the Republic of Albania, Decision No. 8/2026, para. 51; Decision No. 81/2024.

of his governing functions. This responsibility runs through the mechanisms of parliamentary oversight provided for in the Constitution and may lead to his dismissal. At the same time, he also bears individual criminal responsibility if, during the exercise of his duty, he commits a criminal offence. The minister's immunity is intended solely to guarantee the free and independent exercise of public function, protecting him from undue interference or attacks of a political nature. This immunity constitutes neither a personal privilege nor a shield against the application of criminal law. A minister, like any individual, remains subject to criminal responsibility and is obliged to submit to criminal rules and sanctions before the competent bodies in the event of the commission of a criminal offence.

3.2. Procedural Guarantees in View of the Principle of the Separation and Balancing of Powers

The protection of the representative function and respect for the principle of sovereignty according to which sovereignty belongs to the people and is exercised by them through their elected representatives is guaranteed by Article 242, point 2, of the Code of Criminal Procedure. This point of Article 242 provides that the prohibitive measure of suspension from the exercise of a public duty or service does not apply to persons elected under the electoral law. In the jurisprudence of the Constitutional Court²⁶ such a provision has been considered a specific procedural guarantee afforded to persons elected in accordance with electoral legislation. Since the electorate delegates to the elected person the right to decide on matters relating to the governance of the country, immunity serves to guarantee the integrity of the representative mandate and of the will of the electorate.

The principle of the separation and balancing of powers, enshrined in Article 7 of the Constitution, according to the case-law of the Constitutional Court means that no body whether or not part of one of the three powers may interfere in the handling and resolution of matters that, as the case may be, would constitute the central object of the activity of other constitutional bodies or institutions.²⁷ We share the view that immunity does not exclude or protect from criminal prosecution. We also consider that the free and independent exercise of functions must be guaranteed, and that Article 242 (2), has as its purpose the guaranteeing of the exercise of functions by persons elected under the electoral law, and constitutes a procedural guarantee necessary to enable the exercise of the constitutional function. In the case of a member of the executive power, these guarantees apply only if two principles are simultaneously respected: the principle of the effectiveness of criminal prosecution and of the exercise of the judicial function, and the principle of the free exercise of the executive function.

²⁶ Constitutional Court of the Republic of Albania, Decision No. 4, February 23, 2011.

²⁷ Constitutional Court of the Republic of Albania, Decision No. 15, April 15, 2010.

It is evident that, where a restrictive measure is imposed upon a member of the Council of Ministers, a careful balancing exercise must be undertaken between the public interest in the formulation and implementation of governmental policies and the political administration of the State, on the one hand, and the public interest in ensuring effective investigation and criminal prosecution, on the other. We consider that the public interest requires that public officials not enjoy privileges capable of facilitating the avoidance of criminal accountability, and that the procedural safeguards deriving from immunity cannot impede the exercise of the constitutional powers entrusted to the judiciary.

In the case of a member of the legislative power, so long as the suspension measure is such as to have consequences for the exercise of the constitutional functions of the legislative power, an assessment by the Assembly of the measure requested by the prosecuting body is necessary. The assessment by the Assembly of the prohibitive measure is regarded as a mechanism of institutional check and balance and is expressly provided for in the constitutional provisions.

The prior authorisation of the Assembly for a member of the legislative power in respect of the following measures: arrest, deprivation of liberty in any form, personal search, and search of the residence. However, the measure of suspension from duty is not expressly provided. We are of the opinion that although a member of the Council of Ministers enjoys the immunity of a deputy, the absence of the suspension measure from the text of Article 73 does not open the way to obtaining prior authorisation from the Assembly.²⁸

4. Conclusions

Given that the principle of the separation and balance of powers implies a structured interaction in accordance with the mechanisms expressly provided in the Constitution, it is these structural mechanisms that enable the powers to limit one another. The constitutional bodies themselves must remain faithful to the system of governance so that the principle of the rule of law is respected. The exercise of judicial powers through restrictive measures or decisions adopted in the course of criminal proceedings, even when affecting a member of the Council of Ministers and, consequently, the executive power, must be carried out in compliance with constitutional limits.

The imposition of a restrictive measure against a member of the executive power in criminal proceedings does not constitute interference by the judicial power in the activity of the executive power. The presentation of constitutional immunity as legal protection for the exercise of public duty does not entail exemption from criminal jurisdiction, since constitutional immunity is regarded only as a *limited balancing mechanism* for cases that are expressly provided for. In this regard, there is no jurisdictional dispute as long as the restrictive measure

²⁸ Constitutional Court of the Republic of Albania, Decision No. 8/2026, paras. 72–73.

does not affect the institution itself and does not result in the compulsory reorganization of the Government.

Bibliography

1. Barber, N. W. "Prelude to the Separation of Powers." *The Cambridge Law Journal* 60, no. 1 (2001): 59–88. <https://doi.org/10.1017/S0008197301000629>.
2. Helmke, Gretchen, and Frances Rosenbluth. "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective." *Annual Review of Political Science* 12 (2009): 345–366. <https://doi.org/10.1146/annurev.polisci.12.040907.121521>.
3. Kavanagh, Aileen. "The Constitutional Separation of Powers." In *Philosophical Foundations of Constitutional Law*, edited by David Dyzenhaus and Malcolm Thorburn, 221–240. Oxford: Oxford University Press, 2016. <https://doi.org/10.1093/acprof:oso/9780198754527.003.0012>.
4. Kosař, David. "Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe." *German Law Journal* 19, no. 7 (2018): 1567–1612. <https://doi.org/10.1017/S2071832200023178>.
5. Landau, David, and David Bilchitz. "The Evolution of the Separation of Powers in the Global South and Global North." In *The Evolution of the Separation of Powers: Between the Global North and the Global South*, edited by David Bilchitz and David Landau, 1–27. Cheltenham, UK: Edward Elgar Publishing, 2018. <https://doi.org/10.4337/9781785369773.00006>.
6. Leloup, Mathieu. "Constraints on the Domestic Separation of Powers by Supranational Courts." *International Journal of Constitutional Law* 23, no. 3 (2025): 717–745. <https://doi.org/10.1093/icon/moaf044>.
7. Masterman, Roger, and Se-shauna Wheatle. "Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the UK Constitution." *Public Law* 2017, no. 3 (July): 469–487. <https://durham-repository.worktribe.com/output/1383356>.
8. Möllers, Christoph. *The Three Branches: A Comparative Model of Separation of Powers*. Oxford: Oxford University Press, 2013. <https://doi.org/10.1093/acprof:oso/9780199602117.001.0001>.
9. Olivesi, Stéphane. "La séparation des pouvoirs. Aux origines d'un lieu commun." *Essais*, no. 21 (2024). <https://doi.org/10.4000/essais.13679>.
10. Omari, Luan, and Aurela Anastasi. *E drejta kushtetuese*. Rev. ed. Tiranë: Dajti 2000, 2017.
11. Ríos-Figueroa, Julio, and Jeffrey K. Staton. "An Evaluation of Cross-National Measures of Judicial Independence." *The Journal of Law, Economics, and Organization* 30, no. 1 (2014): 104–137. <https://doi.org/10.1093/jleo/ews029>.
12. Sadushi, Sokol. *Drejtësia kushtetuese në zhvillim: Trajtime teorike dhe të praktikës së gjykimit kushtetues*. Tiranë: Toena, 2012.
13. Stone Sweet, Alec. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000. <https://doi.org/10.1093/0198297718.01.0001>.
14. Zaganjori, Xhezair, Aurela Anastasi, and Eralda (Methasani) Çani. *Shteti i së drejtës në Kushtetutën e Republikës së Shqipërisë*. Tiranë: Adelprint, 2011.

15. Zaganjori, Xhezair, Arta Vorpsi, and Denar Biba. *Parime kushtetuese dhe të drejta themelore në jurisprudencën e Gjykatës Kushtetuese*. Tiranë: Adelprint, 2012.

The Legality of Nicolás Maduro’s Capture: International Law, Jurisdiction, and Immunity

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Abstract

This article examines the international legal issues raised by the capture of Nicolás Maduro during Operation Absolute Resolve in January 2026 and his forcible transfer to the United States for criminal proceedings. Drawing on treaty provisions, customary international law, and international and domestic case law, the analysis addresses three interrelated questions. First, it assesses the compatibility of the operation with the prohibition on the use of force and the principle of non-intervention, focusing on Article 51 of the United Nations Charter and the contested “unwilling or unable” doctrine. Second, it considers the grounds and limits of U.S. jurisdiction over alleged crimes committed abroad, including the male captus, bene detentus principle and contested claims to universal jurisdiction. Third, it examines personal and functional immunity, with particular attention to executive recognition and the “one voice” doctrine. The article argues that the domestic possibility of prosecution does not, in itself, establish the international legality of the preceding military operation. It highlights the tensions between sovereign equality, transnational criminal accountability, and unilateral coercion, while emphasizing the continuing importance of independent judicial scrutiny and the rule of law.

Keywords: *unwilling or unable state doctrine, executive recognition power, one voice doctrine, customary international law.*

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1. Introduction: The Factual Framework of “Operation Absolute Resolve” and the International Legal Order

In early January 2026, under the codename “Operation Absolute Resolve,” the USA, through its Armed Forces, federal agencies and intelligence services convened for the purpose, carried out a unilateral military and police intervention in Venezuelan territory aimed at capturing the country’s incumbent President, Nicolás Maduro Moros, and his wife, the “first combatant” Cilia Adela Flores de Maduro, followed by their immediate forced transfer to US soil to face a criminal trial before the U.S. District Court for the Southern District of New York (SDNY). This revived the delicate question of the foundations of international law. As Luís Heleno Terrinha wrote, “[t]he operation (...) confronts international law with its greatest ghost: that of its (lack of) bindingness and capacity for enforceable application in the face of great powers. In this respect, the problem it raises is not only one of violation of international law (...), but rather of its true delegitimization.”²

Indeed, launched without the consent of the UN and without a mandate from the Security Council, “Operation Absolute Resolve” appears to have involved an unequivocal violation of Article 2, paragraph 4, of the Charter of the United Nations. Furthermore, it also appears to have violated the principle of non-intervention, enshrined in Article 19 of the Charter of the Organization of American States (OAS), of which the USA is a member, and whose terms are even more stringent than Article 2, paragraph 4, of the Charter of the United Nations, denying any State or group of States the right to intervene: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.”³

The USA justified the intervention, citing serious accusations based on the concept of narcoterrorism, conspiracy to import cocaine across borders, ille-

² Luís Heleno Terrinha, “‘Absolute Resolve’ e deslegitimação do direito internacional,” *Jornal Económico*, January 22, 2026, <https://jornaleconomico.sapo.pt/noticias/absolute-resolve-e-deslegitimacao-do-direito-internacional/> (accessed May 28, 2026).

³ On the principle of non-intervention and Article 19 of the OAS Charter, see Mohamed S. Helal, “Intervention, Force & Coercion: A Historical Inquiry on the Evolution of the Prohibition on Intervention,” *International Law Studies* 106 (2025): 206–300, <https://digital-commons.usnwc.edu/ils/vol106/iss1/9/>; and Edmundo Vargas Carreño, “El principio de no intervención,” in *XXX Curso de Derecho Internacional: El Derecho Internacional y el mantenimiento de la paz y seguridad internacionales* (Washington, DC: Organization of American States, 2004), 135–178, https://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXX_curso_derecho_internacional_2003_Edmundo_Vargas_Carreno.pdf.

gal trade in high-caliber firearms, and criminal association with the Revolutionary Armed Forces of Colombia (FARC) guerrilla organization and the so-called “Cartel de los Soles”. According to the US Department of Justice (DOJ), Maduro allegedly used the Venezuelan State apparatus and military forces not for purposes of sovereign governance, but rather as a logistical and institutional protection platform to flood the US market with narcotics, using the resulting revenue to consolidate his autocratic power.

This factual situation brings into opposition two major international law paradigms: on the one hand, the classic Westphalian model of public international law, based on the principles of sovereign equality of States, territorial integrity and non-intervention in internal affairs (enshrined in Article 2 of the Charter of the United Nations)⁴ and, on the other hand, the doctrine of unilateral extraterritorial enforceability traditionally developed by US case law, particularly in its self-proclaimed “war on drugs”.

It is a brief legal analysis of this confrontation that I propose in the following lines, focusing on three essential questions raised by “Operation Absolute Resolve”:

- The legality, under international law, of the military incursion into Venezuela to capture and forcibly transport Nicolás Maduro and Cilia Flores to the USA;
- The competence of US jurisdiction to judge and apply US criminal law to the alleged crimes of Maduro and Flores, committed in Venezuela;
- The legal possibility of judging Nicolás Maduro given the sovereign immunity he enjoyed as the then-sitting President of Venezuela.

2. The Legality of Maduro’s Abduction under International Law and the “Unwilling or Unable State” Doctrine

In the dogmatic realm of public international law, the armed incursion of the USA into Venezuelan territory appears to constitute a clear violation of Article 2, paragraph 4, of the Charter of the United Nations, which prohibits the threat or use of force against the territorial integrity or political independence of any State, except with the prior express authorization of the Security Council under Chapter VII of the Charter, or when the requirements of legitimate self-defense established in Article 51 of the latter and in Article 22 of the OAS Charter are met.

The USA, however, invoked the so-called doctrine of the Unwilling or Unable State, reducing it to a form of legitimate self-defense, claiming that the

⁴ On the Westphalian paradigm, see Luís Moita, “A Critical Review on the Consensus around the ‘Westphalian System,’” *JANUS.NET, e-journal of International Relations* 3, no. 2 (2012): 17–42, http://observare.ual.pt/janus.net/en_vol3_n2_art2; and Andreas Osiander, “Sovereignty, International Relations, and the Westphalian Myth,” *International Organization* 55, no. 2 (2001): 251–287, <https://doi.org/10.1162/00208180151140577>.

Venezuelan State apparatus had been placed at the service of organizations (especially the "Cartel de los Soles") that directly and immediately threatened U.S. national security through the massive trafficking of narcotics (in particular, fentanyl and cocaine).

Primarily theorized by Ashley S. Deeks⁵, the doctrine of the Unwilling or Unable State is based on the traditional idea that if a sovereign State does not want to or cannot prevent its territory from being used by non-state actors as a launching pad for armed attacks against another State, the latter cannot be legally obliged to tolerate such aggression, and has the legitimate right to self-defense.

Daniel Bethlehem⁶ systematized and listed the fundamental assumptions of this doctrine, in terms that would be globally adopted by the legal advisors of the Department of State.

Apparently starting from the general and consensual assumptions to justify legitimate self-defense and the idea that, as a rule (outside of cases of consent by the State itself for foreign intervention in its territory, or a mandate from the United Nations Security Council for this purpose), it is not lawful for a State to attack another, Bethlehem expands on the assumptions of legitimate self-defense and introduces a break with the classical conception of *jus ad bellum*, arguing that the non-state legal status of the aggressor (a terrorist organization or a transnational organized crime cartel, for example) does not preclude the inherent right of the victim State to guarantee its national security by resorting to armed force⁷.

It is precisely this premise that underlies the theoretical foundation of the Unwilling or Unable State doctrine, justifying the use of force in the territory of a State from which the non-state actor carries out its activities, whenever that State fails to fulfill its duty to neutralize the threat or proves powerless to do so. In principles 11 and 12 of his list⁸, Bethlehem specifies the requirements for this legitimate self-defense intervention, arguing that "[the] requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the nonstate actor or is otherwise *unwilling* to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no

⁵ Ashley S. Deeks, "Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense," *Virginia Journal of International Law* 52, no. 3 (2012): 483–550, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326.

⁶ Daniel Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors," *American Journal of International Law* 106, no. 4 (2012): 769–777, <https://doi.org/10.5305/amerjintlaw.106.4.0769>.

⁷ Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack," 775 (principles 1–3): "1—States have a right of self-defense against an imminent or actual armed attack by nonstate actors; 2—Armed action in self-defense should be used only as a last resort in circumstances in which no other effective means are reasonably available to address an imminent or actual armed attack; 3—Armed action in self-defense must be limited to what is necessary to address an imminent or actual armed attack and must be proportionate to the threat that is faced."

⁸ Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack," 776.

other reasonably available effective means to address an imminent or actual armed attack. (...)” and that “[the] requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is *unable* to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack (...)”.

As mentioned, the principles of the Unwilling or Unable State doctrine have become frequently invoked by the Department of State to justify U.S. interventions in foreign territory without a legitimizing mandate from the United Nations Security Council, as happened in the operation that culminated in the elimination of Osama bin Laden in Pakistan in 2011, or in the air raids against the *Daesh* in Syrian territory from 2014 onwards, and as happened again in the abduction of Nicolás Maduro and Cilia Flores in early 2026, which is the subject of this essay.

The truth, however, is that the International Court of Justice (ICJ) has systematically rejected the unilateral extensive interpretation of Article 51 of the UN Charter implied in the Unwilling or Unable State theory, consistently reaffirming the requirement of direct attribution of aggression to a State to establish an act of international self-defense. Thus, in the landmark ruling *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), the ICJ determined that an armed attack giving rise to the right of self-defense requires extreme gravity (scale and effects) and must be directly attributable to a sovereign State⁹.

Similarly, in the Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it expressly stated, in paragraph 139, that Article 51 of the UN Charter governs a strictly interstate relationship (attacks by one State against another State), considering the invocation of legitimate self-defense against non-state forces whose actions are not organically attributable to a sovereign territorial entity to be legally inoperative¹⁰.

And in 2005 the ICJ reaffirmed the same thesis in the case *Armed Activities on the Territory of the Congo* (*DRC v. Uganda*)¹¹, proclaiming that Uganda's incursions into Congolese soil to combat the rebel militia Allied Democratic Forces (ADF) violated Article 2, paragraph 4, of the UN Charter, reiterating that the institutional weakness or incapacity of a territorial State (unable State) does

⁹ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, 14, para. 195, <https://www.icj-cij.org/case/70>.

¹⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, 136, para. 139, <https://www.icj-cij.org/case/131>.

¹¹ International Court of Justice, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, I.C.J. Reports 2005, 168, paras. 146–147, <https://www.icj-cij.org/case/116>.

not, in itself, preclude the illegality of unilateral intervention by third powers.

This explains the fundamental opposition separating the Westphalian model of international law, recognized and affirmed by the ICJ, from the pragmatic realist paradigm of asserting power and interests that dominates U.S. foreign policy. It also highlights the specter we recalled at the outset with Luis Heleno Terrinha, one that perpetually haunts international law: the specter of the frequent lack of enforceability regarding its norms and decisions whenever they run counter to the interests of dominant powers and no means exists to enforce them. This specter can be acknowledged. International law is law, and despite the crises that have beset it, its legal nature is not in question. Enforceability (or the lack thereof) does not constitute the essential core of the concept of law. As João Baptista Machado wisely put it, “Law does not depend on Force in its validity, in its specific meaning or in its essence; it depends on it only in its existence. It is, therefore, a purely *de facto* dependence, not a *de iure* dependence, that is, situated at the level of validity or legitimacy.”¹²

As I mentioned in another essay, norms and court decisions from international bodies, particularly the United Nations and the ICJ, bind the member States themselves, even when they act in defiance of them¹³. That is why the abduction of Maduro and Flores, while a full assertion of the USA’s absolute military dominance in the Americas, was not framed by the Trump administration as a purely arbitrary and unconstrained exercise of force. The very international legal legitimization of “Operation Absolute Resolve” required the U.S. government to hand over the trial of the detainees to the country’s independent judiciary. The matter thus shifted to the U.S. domestic legal system. We will now attempt to summarize how the issue is structured within that framework and the questions it raises.

3. The *Male Captus, Bene Detentus* Principle in the North-American Legal Order

Captured and forcibly transferred to U.S. territory, Nicolás Maduro and Cilia Flores were presented for criminal trial in the U.S. District Court for the Southern District of New York (SDNY), on charges of conspiracy to commit narcoterrorism, a crime defined and punished by Statute 21 U.S.C. § 960a(b) (2018); importation of cocaine, a crime defined and punished by Statute 21 U.S.C. § 963; use, carrying and possession of a firearm related to the crime of drug trafficking, defined and punished by Statute 18 U.S.C. § 924(c); and money laundering, a

¹² João Baptista Machado, *Introdução ao Direito e ao Discurso Legitimador* (Coimbra: Almedina, 1983), 41.

¹³ Paulo de Brito, “Droit international: contre vents et marées,” in *Le droit international en transition: Contributions à la 4e Conférence sur le droit comparé et international*, ed. Cătălin-Silviu Săraru and Cristina Elena Popa Tache (Paris: L’Harmattan, 2024), <https://www.editions-harmattan.fr/catalogue/livre/le-droit-international-en-transition/77582>.

crime established in Statute 18 U.S.C. §§ 1956 and 1957.

Notwithstanding the possible illegality, in light of international law, of the act of military intervention in Venezuela, the internal criminal procedure system of the USA does not summarily reject receiving the indictment and ruling on it, under the terms of federal law. Following the Anglo-Saxon tradition, U.S. courts are governed by the classic principle *male captus, bene detentus* ("badly captured, well detained"), according to which the jurisdictional competence of a court to try a defendant is not affected or prejudiced by the illegality, irregularity or violation of international law committed in the act of his/her capture or transfer to the territory of the State of the forum.

In practical terms, the principle defends the autonomy of the jurisdiction in relation to the manner in which the defendant is subjected to the proceeding, prioritizing the effectiveness of the criminal proceeding and (if applicable) the punishment of particularly serious crimes over formal regularity and the strict legality of the act of physically apprehending the individual. The premise is that the power of a criminal court to subject an individual to trial is not invalidated by any irregularities or illegalities committed in the act of his/her detention and/or forced extradition from abroad.

Perhaps most notably exemplified by the celebrated Eichmann case, the U.S. case law for this orientation can be traced back to two landmark rulings:

The case of *Ker v. Illinois* (119 U.S. 436, 1886)¹⁴ in which the U.S. Supreme Court determined that a defendant kidnapped in Peru by a private detective and forcibly brought to the state of Illinois lacked a constitutional basis to challenge the jurisdiction of the state criminal court, since his mere physical presence in the court was sufficient to initiate proceedings.

The case of *Frisbie v. Collins* (342 U.S. 519, 1952)¹⁵ in which, even considering the Federal Kidnapping Act, the same understanding was extended to interstate kidnappings carried out by law enforcement officers, establishing that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction (...). No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him, and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."¹⁶

¹⁴ *Ker v. Illinois*, 119 U.S. 436 (1886), <https://supreme.justia.com/cases/federal/us/119/436/>.

¹⁵ *Frisbie v. Collins*, 342 U.S. 519 (1952), <https://supreme.justia.com/cases/federal/us/342/519/>.

¹⁶ On the Ker-Frisbie doctrine, see Andrew B. Campbell, "The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs," *Vanderbilt Journal of Transnational Law* 23, no. 2 (1990): 385, <https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss2/5/>; Kenneth E. Levitt, "International Extradition, the Principle of Speciality, and Effective Treaty Enforcement," *Minnesota Law Review*

More recent and fundamental, due to the immediate analogy with the Nicolás Maduro case, which also involves the violation of a foreign State's national sovereignty, is the ruling in *United States v. Alvarez-Machain* (504 U.S. 655, 1992)¹⁷. In that case, the Drug Enforcement Administration (DEA) planned and funded the abduction of a Mexican national, physician Humberto Alvarez-Machain, from Mexican territory, forcibly transporting him to the United States to stand trial for the murder of a federal agent. By a 6–3 vote, the Supreme Court concluded that, although the abduction violated general principles of international sovereignty, it did not bar the defendant's trial on U.S. soil, as the bilateral extradition treaty did not explicitly prohibit such forcible captures¹⁸.

Along these lines, at a hearing held on March 26, 2026, federal judge Alvin Hellerstein (presiding over the case) formally rejected the defense's motion seeking the dismissal of charges against Nicolás Maduro and challenging the U.S. court's jurisdiction¹⁹.

4. Universal Jurisdiction, Crimes Against *Jus Cogens* and the *Filartiga v. Peña-Irala* Case

Alongside the *male captus, bene detentus* principle, to legitimize the foreign capture and forced submission of Maduro and Flores to the U.S. jurisdiction, the Trump administration also faces the additional need to justify the right to try in the USA, according to its domestic law, foreign citizens who committed crimes in other sovereign States.

76, no. 4 (1992): 1017–1040, <https://journals.law.umn.edu/mlr/vol76/iss4/international-extradition-the-principle-of-specialty-and-effective-treaty-enforcement>; C. Jedson Nau, “Jurisdiction—The Short-Lived Death of the Ker-Frisbie Doctrine,” *Vanderbilt Journal of Transnational Law* 9, no. 1 (1976): 131–145, <https://scholarship.law.vanderbilt.edu/vjtl/vol9/iss1/3/>; and Carlos M. Vázquez, “Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position,” *Notre Dame Law Review* 86, no. 4 (2011): 1495–1634, <https://scholarship.law.nd.edu/ndlr/vol86/iss4/3/>.

¹⁷ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), <https://www.law.cornell.edu/supremecourt/text/504/655>.

¹⁸ On *United States v. Alvarez-Machain*, see Loubna W. Haddad, “Superpower Extraterritorial Abduction: The Alvarez-Machain Case,” *St. Thomas Law Review* 5, no. 2 (1993): 543–570, <https://scholarship.stu.edu/stlr/vol5/iss2/10/>; Michael Slattery, “Government Sanctioned Abductions: *United States v. Alvarez-Machain*,” *NYLS Journal of International and Comparative Law* 16, no. 1 (1996): 115–144, https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol16/iss1/7/; Candace R. Somers, “*United States v. Alvarez-Machain*: Extradition and the Right to Abduct,” *North Carolina Journal of International Law and Commercial Regulation* 18, no. 1 (1992): 213–234, <https://scholarship.law.unc.edu/ncilj/vol18/iss1/7/>; and Stephen M. Welsh, “*United States v. Alvarez-Machain*: The Implications of International Abductions by the United States,” *Mercer Law Review* 44, no. 3 (1993): 1023–1045, https://digitalcommons.law.mercer.edu/jour_mlr/vol44/iss3/16/.

¹⁹ Janon Fisher and Michael O’Keeffe, “Judge Won’t Drop Charges against Former Venezuelan President Nicolás Maduro,” *Newsday*, accessed May 31, 2026, <https://www.newsday.com/news/new-york/nicolas-maduro-cilia-flores-court-bih7i6uf>.

The material basis invoked to justify extending the domestic criminal framework to acts entirely committed abroad by non-national citizens is rooted in the historical evolution of the concept of universal jurisdiction and in the *erga omnes* obligations arising from peremptory norms of international law (*jus cogens*). Traditionally reserved for piracy on the high seas, slave trade, and genocide, the category of *hostis humani generis* (enemies of humanity) has been progressively broadened in international criminal practice to include in the list of agents subject to transnational jurisdiction the perpetrators of systematic torture and the leaders of large-scale cross-border narcoterrorism networks.

In this matter it is decisive the case *Filartiga v. Peña-Irala*²⁰, decided by the U.S. Court of Appeals for the Second Circuit, which established the modern dogmatic foundations for the extraterritorial liability of foreigners.

Dolly and Joel Filartiga filed a civil lawsuit against Américo Norberto Peña-Irala, a former police inspector from Paraguay, who was in New York, accusing him of the torture and death of Joelito Filartiga on Paraguayan soil. The lawsuit was based on the Alien Tort Statute (ATS), a 1789 Statute that grants jurisdiction to federal courts over civil wrongs committed by foreigners in violation of the law of nations. In the landmark ruling, Justice Irving Kaufman established the fundamental legal principle: “Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence.”²¹

Although the *Filartiga* case was a civil one, its conceptual basis migrated directly into U.S. federal criminal law. The U.S. Congress and courts used this argumentative framework to legislate and validate legal types of crimes with absolute extraterritorial effect (such as the provisions of Title 18, Chapter 113B, of the U.S. Code, on terrorism, and Title 21, 21 U.S.C. §960A, on narcoterrorism), arguing that certain criminal conduct by foreign citizens threatens global security and the stability of the institutions of all States, legitimizing the exercise of criminal proceedings by the court that apprehends the offender.

In the case of Nicolás Maduro, the DOJ has argued that his regime's strategic alignment with drug cartels and armed terrorist factions transcends mere Venezuelan domestic crime, constituting a violation of international conventions ratified by almost all nations, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention

²⁰ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), <https://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf>.

²¹ Jeffrey M. Blum and Ralph G. Steinhardt, “Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Peña-Irala*,” *Harvard International Law Journal* 22 (1981): 53–113.

of 1988) and the Convention against Transnational Organized Crime (Palermo Convention of 2000, effective since 2003), thus conferring, in the name of the universal jurisdiction derived from *jus cogens*, a basis of material legitimacy for his submission to the criminal jurisdiction of the USA. This is a controversial and non-consensual position, but it does not represent a break, but rather a continuity, with the traditional paradigm of interpretation and application of U.S. law.

The final question remains: Nicolás Maduro was the acting President of Venezuela, enjoying, under customary international law, sovereign immunity which, by submitting him to trial at the SDNY, the USA would be violating. I will conclude this essay by addressing it.

5. Head of State Immunity and Its Exceptions. Personal vs. Functional Immunity. The Cases *Arrest Warrant*, *Pinochet* and *Noriega*

Even if the multiple international legal difficulties to submit Nicolás Maduro to trial in U.S. courts, following the military incursion into Caracas, his detention and forced extradition to U.S. territory, were overcome, a core of fundamental legal questions raised by "Operation Absolute Resolve" remains: the obstacle that sovereign immunity may pose to that trial, a structural pillar of international relations and customary international law, codified in the work and projects of the UN International Law Commission (ILC)²².

5.1. *Ratione Personae* Immunity and the Executive Recognition Power

The first immunity is personal immunity or *ratione personae*, which protects a restricted circle of high-ranking State officials (traditionally, the so-called *troika*: Head of State, Head of Government, and Minister of Foreign Affairs) during the effective exercise of their official functions. This is an absolute status-based immunity, which covers any and all acts, whether public or private in nature, prior to or concurrent with the mandate, preventing any foreign criminal court from initiating or pursuing criminal proceedings against its holder.

In the 19th and 20th centuries, American law tended to admit sovereign immunity in a strongly restrictive manner. Examples of this are the cases *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)²³, in which judge John Marshall determined that a French warship in the port of Philadelphia enjoyed immunity from the jurisdiction of American courts, declaring, however, that this immunity stemmed from an implicit license granted by a friendly nation to an-

²² International Law Commission, "Immunity of State Officials from Foreign Criminal Jurisdiction," United Nations, https://legal.un.org/ilc/summaries/4_2.shtml (accessed June 1, 2026).

²³ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), <https://supreme.justia.com/cases/federal/us/11/116/>.

other, and could be revoked if that assumption changed; and the case *The Santissima Trinidad* (1822)²⁴, where it was decided that the immunity granted to ships or agents of foreign States is not absolute, ceasing if there are acts of aggression, piracy, or conspiracy against the host State.

Also in the 20th century, the USA supported efforts to prosecute former leaders who violated the laws of war, denying them any immunity. President Wilson supported the intention to try the Kaiser of Germany after the First World War and, subsequently, after the end of the Second World War, the USA established itself as the mentor of the doctrine established by the Nuremberg Tribunal which expressly declared that the authors of war crimes, crimes against peace and humanity could not benefit from immunity, taking refuge in their official status²⁵.

At the beginning of the 21st century, however, the traditional position of the USA would change substantially, following the ICJ ruling in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] (also commonly referred to as the *Arrest Warrant case* or the *Yerodia case*²⁶) which decided on the complete immunity from criminal jurisdiction, before the courts of third States, of Ministers of Foreign Affairs and Heads of State in office, solemnly and expressly proclaiming that this immunity subsists absolutely, even when the ruler is accused of committing war crimes or crimes against humanity²⁷.

Following the ICJ's reaffirmation of the absence of exceptions to immunity from foreign criminal jurisdiction for Heads of State, the U.S., following the majority of States and courts, also began to subscribe to the broader view of "total immunity."

In this context, the current indictment of Maduro and the will to prosecute him criminally in U.S. courts represent, at least apparently, a retreat from the official position recently adopted and a return to the doctrines of the 19th and 20th centuries.

The official justification, denying the reversal or retreat, is based on the non-recognition of Maduro as President of Venezuela, after the formal decision of the Department of State to that effect, considering his election fraudulent, combined with the constitutional doctrine of Executive Recognition Power and its reception by the federal court.

According to Article II, Section 3, of the U.S. Constitution, it is the exclusive prerogative of the President to diplomatically recognize foreign sover-

²⁴ *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), <https://supreme.justia.com/cases/federal/us/20/283/>.

²⁵ Miguel Manero de Lemos, "Head of State Immunity: United States v. Maduro," *Völkerrechtsblog*, February 27, 2026, <https://doi.org/10.17176/20260228-144926-0>.

²⁶ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, 3, <https://www.icj-cij.org/case/121>.

²⁷ *Arrest Warrant of 11 April 2000*, paras. 60–61 (distinguishing immunity from impunity and identifying circumstances in which prosecution may occur).

eigns and governments. In U.S. case law, categorically reaffirmed in the *Zivotofsky v. Kerry* (576 U.S. 1, 2015) case²⁸, this prerogative is exclusive, discretionary, not subject to judicial review, and absolutely binding on the courts (political question doctrine).

The basis is the idea that granting the President the power to receive ambassadors and public ministers implies, by its nature, the power to decide which entities are legitimate to send such representatives, thus equating that to the power of formal recognition. Furthermore, for functional reasons and international legal security, the conduct of foreign policy requires unity and speed, attributes that are prerogatives of the executive branch. "Recognition is a topic on which the Nation must 'speak ... with one voice' (...). That voice must be the President's", summarized Justice Anthony Kennedy in the case *Zivotofsky v. Kerry*²⁹.

The theory of recognition and the One Voice Doctrine directly contradict the dominant legal thinking, according to which it follows from customary international law that the status of Head of State, and the immunities associated with it, derive from the sovereignty of the State he/she represents, and not from the discretionary act of recognition by third States.

In this sense, Article 3 of the Convention on Rights and Duties of States (inter-American), signed at Montevideo on December 26, 1933, stipulated that "The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts."

Indeed, within international law, there is a justified fear of the risk of abuse of non-recognition (gaming the law): if unilateral non-recognition by a third State is a legally sufficient reason to extinguish the personal immunity of an effective ruler, the principle of sovereign equality (*par in parem non habet imperium*) will be devoid of content. It will suffice for a more powerful State to withdraw recognition of a foreign leader, in order to, for mere political or geopolitical convenience, capture and subject him/her to the criminal jurisdiction of its domestic courts, generating serious instability in international relations. Because of this fear, non-recognition is theoretically considered insufficient to remove the immunity *ratione personae* of a Head of State in the effective exercise of his/her office, since immunity protects the function of external representation of a sovereign community that, in fact, that individual leads.

The reality, however, is that the doctrine of recognition and One Voice

²⁸ *Zivotofsky v. Kerry*, 576 U.S. 1 (2015), <https://supreme.justia.com/cases/federal/us/576/1/>; see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

²⁹ On *Zivotofsky v. Kerry*, see Curtis A. Bradley, "Historical Gloss, the Recognition Power, and Judicial Review," *AJIL Unbound* 109 (2015): 2–9, <https://doi.org/10.1017/S2398772300001057>; and Ingrid Wuerth, "Zivotofsky ex rel. Zivotofsky v. Kerry," *American Journal of International Law* 109, no. 3 (2015): 636–642, <https://doi.org/10.5305/amerjintellaw.109.3.0636>.

has always been the prevailing discourse in American practice, which promptly formulated the official U.S. reservation to the Convention on Rights and Duties of States (inter-American), delivered by the U.S. Secretary of State, Cordell Hull, at the Plenary Session of December 22, 1933, and formally appended to the text of the treaty upon its signing on December 26, 1933, at the VII International American Conference in Montevideo, encompassing Article 3 of the Convention. In this context, although no definitive judicial decision has yet been issued on the merits of Nicolás Maduro's invocation of Head of State immunity, it is expected that at the hearing scheduled for June 30, 2026, the SDNY will declare that Nicolás Maduro does not possess the status of Head of State in office, consequently denying him the requested immunity.

5.2. *Ratione Materiae* Jurisdiction

With personal immunity set aside, the discussion remains regarding functional immunity or *ratione materiae* (conduct-based). This type of immunity protects all agents and officials of the State, perpetually, with respect to acts performed in an official capacity in the exercise of sovereign functions (*acta jure imperii*).

The dogmatic question becomes whether the commission of serious international crimes or acts of narcoterrorism can be legally qualified as an "official act of the State" protected by this immunity.

The paradigmatic case in this area is the ruling of the British House of Lords in the case *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147³⁰.

When analyzing the extradition request issued by Spanish judge Baltasar Garzón against the former Chilean dictator Augusto Pinochet (who was temporarily in British territory and no longer enjoyed personal immunity because he had ceased to be Head of State), the college of judges (law Lords) concluded that immunity *ratione materiae* does not and cannot cover international crimes against *jus cogens* that break with the foundations of the international legal order, since the systematic practice of crimes against humanity, specifically torture and the enforced disappearance of persons, is absolutely incompatible with the legitimate functions of a Head of State under contemporary international law; and, on the other hand, the 1984 Convention against Torture expressly criminalizes acts committed by public officials, and functional immunity cannot, without contradiction, be granted to an official for an act whose punishment is imposed by the Convention itself.

Although delivered by a British court and not an American one, the Pinochet precedent provides the doctrinal basis of Anglo-Saxon law to dismiss any

³⁰ *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (HL), March 24, 1999, <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf>.

claim by Maduro to invoke functional immunity for crimes committed while he led the Venezuelan regime. The continued violation of mandatory norms of international law negates the public nature of the act, stripping the former Venezuelan leader of his immunity *ratione materiae*. He will thus be left to deny the very accusation of committing acts that constitute criminal conduct.

Without prejudice to the transposability of the British doctrine established in the Pinochet case to the internal legal order of the USA, the American case law itself has set the boundaries of immunity *ratione materiae*, in the case *United States v. Noriega*³¹, specifically addressing the articulation between Head of State's immunities and drug trafficking.

General Manuel Antonio Noriega, *de facto* commander of the Panamanian Defense Forces and Head of State, was captured by the U.S. Armed Forces during the 1989 military invasion of Panama ("Operation Just Cause") and taken to the United States District Court for the Southern District of Florida (S.D. Fla.) on charges of conspiracy and drug trafficking. Noriega argued in his defense that he enjoyed absolute sovereign immunity as Head of State and that his capture violated treaties and international law. The United States Court of Appeals for the Eleventh Circuit (11th Cir.), however, summarily rejected these arguments, proclaiming that drug trafficking and money laundering did not constitute official acts of the Panamanian State (*acta jure imperii*), but rather private criminal activities of a commercial nature (*acta jure gestionis*), carried out for the illicit enrichment of the ruler himself and his accomplices; and concluding that customary international law does not extend functional immunity to crimes of a purely commercial nature and transnational organized crime.

The legal similarity between the Noriega and Nicolás Maduro cases, due to direct involvement in the "Cartel de los Soles", suggests it is expected that, here too, the SDNY will reject the functional immunity of the former President of Venezuela, since, in the face of the indictment, it will always be concluded that the management of cocaine export routes and association with armed terrorism are not covered by the definition of sovereign functions of a State.

6. Conclusion

The case of Nicolás Maduro's capture and trial in the United States of America starkly exposes the epistemological and practical chasm that divides contemporary international law. In the domain of political realism (*realpolitik*) and American common law, federal courts operate as effective instruments for punishing autocratic cross-border rulers, managing to overcome the obstacles of sovereign immunities through the political dissociation promoted by the Execu-

³¹ *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), <https://law.justia.com/cases/federal/district-courts/FSupp/746/1506/1757098/>; *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), <https://caselaw.findlaw.com/court/us-11th-circuit/1089768.html>.

tive Recognition Power and the pragmatic application of the principle *male cap-tus, bene detentus*. It is therefore expected that the SDNY forum, anchored in the case law of *Filartiga* and *Noriega*, will deny Maduro any sovereign immunity, personal or functional, accepting the indictment and submitting him to trial in the USA to answer for the crimes he is charged with.

Conversely, from the perspective of pure public international law and the binding customary rules that shape it, "Operation Absolute Resolve" remains flawed by an incurable original illegality. The unilateral extraction of a Head of State in the effective exercise of his functions, regardless of the nature of the respective regime, constitutes a dangerous precedent of fragmentation of the international legal order, where military force replaces the formal procedures of extradition and judicial cooperation.

In this context of division, the trial of Maduro may represent a turning point in the Westphalian paradigm that has dominated Western international legal philosophy, keeping alive and haunting the ghost of the very delegitimization of international law itself.

For now, it is necessary to conclude with a note of optimism: the abduction of Maduro and Flores did not exempt the U.S. executive from being obliged to present and submit the detainees to the independent jurisdiction of a judicial body. At the end of the day, the rule of law is still in place.

Bibliography

1. Bethlehem, Daniel. "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors." *American Journal of International Law* 106, no. 4 (2012): 769–777. <https://doi.org/10.5305/amerjintelaw.106.4.0769>.
2. Blum, Jeffrey M., and Ralph G. Steinhardt. "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filártiga v. Peña-Irala*." *Harvard International Law Journal* 22 (1981): 53–113.
3. Bradley, Curtis A. "Historical Gloss, the Recognition Power, and Judicial Review." *AJIL Unbound* 109 (2015): 2–9. <https://doi.org/10.1017/S2398772300001057>.
4. Brito, Paulo de. "Droit international: contre vents et marées." In *Le droit international en transition: Contributions à la 4e Conférence sur le droit comparé et international*, edited by Cătălin-Silviu Săraru and Cristina Elena Popa Tache. Paris: L'Harmattan, 2024. <https://www.editions-harmattan.fr/catalogue/livre/le-droit-international-en-transition/77582>.
5. Campbell, Andrew B. "The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs." *Vanderbilt Journal of Transnational Law* 23, no. 2 (1990): 385. <https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss2/5/>.
6. Deeks, Ashley S. "Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense." *Virginia Journal of International Law* 52, no. 3 (2012): 483–550. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326.

7. Fisher, Janon, and Michael O’Keeffe. “Judge Won’t Drop Charges against Former Venezuelan President Nicolás Maduro.” *Newsday* Accessed May 31, 2026. <https://www.newsday.com/news/new-york/nicolas-maduro-cilia-flores-court-bih7i6uf>.
8. Haddad, Loubna W. “Superpower Extraterritorial Abduction: The Alvarez-Machain Case.” *St. Thomas Law Review* 5, no. 2 (1993): 543–570. <https://scholarship.stu.edu/stlr/vol5/iss2/10/>.
9. Helal, Mohamed S. “Intervention, Force & Coercion: A Historical Inquiry on the Evolution of the Prohibition on Intervention.” *International Law Studies* 106 (2025): 206–300. <https://digital-commons.usnwc.edu/ils/vol106/iss1/9/>.
10. Levitt, Kenneth E. “International Extradition, the Principle of Speciality, and Effective Treaty Enforcement.” *Minnesota Law Review* 76, no. 4 (1992): 1017–1040. <https://journals.law.umn.edu/mlr/vol76/iss4/international-extradition-the-principle-of-speciality-and-effective-treaty-enforcement>.
11. Machado, João Baptista. *Introdução ao Direito e ao Discurso Legitimador*. Coimbra: Almedina, 1983.
12. Manero de Lemos, Miguel. “Head of State Immunity: United States v. Maduro.” *Völkerrechtsblog*, February 27, 2026. <https://doi.org/10.17176/20260228-144926-0>.
13. Moita, Luís. “A Critical Review on the Consensus around the ‘Westphalian System.’” *JANUS.NET, e-journal of International Relations* 3, no. 2 (2012): 17–42. http://observare.ual.pt/janus.net/en_vol3_n2_art2.
14. Nau, C. Jedson. “Jurisdiction—The Short-Lived Death of the Ker-Frisbie Doctrine.” *Vanderbilt Journal of Transnational Law* 9, no. 1 (1976): 131–145. <https://scholarship.law.vanderbilt.edu/vjtl/vol9/iss1/3/>.
15. Osiander, Andreas. “Sovereignty, International Relations, and the Westphalian Myth.” *International Organization* 55, no. 2 (2001): 251–287. <https://doi.org/10.1162/00208180151140577>.
16. Slattery, Michael. “Government Sanctioned Abductions: United States v. Alvarez-Machain.” *NYLS Journal of International and Comparative Law* 16, no. 1 (1996): 115–144. https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol16/iss1/7/.
17. Somers, Candace R. “United States v. Alvarez-Machain: Extradition and the Right to Abduct.” *North Carolina Journal of International Law and Commercial Regulation* 18, no. 1 (1992): 213–234. <https://scholarship.law.unc.edu/ncilj/vol18/iss1/7/>.
18. Terrinha, Luís Heleno. “‘Absolute Resolve’ e deslegitimação do direito internacional.” *Jornal Económico*, January 22, 2026. <https://jornaleconomico.sapo.pt/noticias/absolute-resolve-e-deslegitimacao-do-direito-internacional/>.
19. Vargas Carreño, Edmundo. “El principio de no intervención.” In *XXX Curso de Derecho Internacional: El Derecho Internacional y el mantenimiento de la paz y seguridad internacionales*, 135–178. Washington, DC: Organización de los Estados Americanos, 2004. https://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXX_curso_derecho_internacional_2003_Edmundo_Vargas_Carreno.pdf.
20. Vázquez, Carlos M. “Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position.” *Notre Dame Law Review* 86, no. 4 (2011): 1495–1634. <https://scholar>

- ship.law.nd.edu/ndlr/vol86/iss4/3/.
21. Welsh, Stephen M. "United States v. Alvarez-Machain: The Implications of International Abductions by the United States." *Mercer Law Review* 44, no. 3 (1993): 1023–1045. https://digitalcommons.law.mercer.edu/jour_mlr/vol44/iss3/16/.
 22. Wuerth, Ingrid. "Zivotofsky ex rel. Zivotofsky v. Kerry." *American Journal of International Law* 109, no. 3 (2015): 636–642. <https://doi.org/10.5305/amerjintelaw.109.3.0636>.

The Shadow Architecture of Sovereignty: Intelligence Services and the Governance of Cloud Diplomacy in International Law

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Abstract

The emergence of cloud computing as the structural substrate of contemporary statecraft has generated a new and insufficiently theorised domain of international relations: cloud diplomacy. This article argues that intelligence services occupy a peculiar yet constitutive role within this domain — functioning simultaneously as instruments of statecraft, threats to diplomatic confidence, and architects of the normative frameworks through which states negotiate digital sovereignty. Drawing on international law, intelligence studies, and theories of digital statecraft, the article develops an original tripartite analytical framework: intelligence services as (i) collectors of diplomatic advantage through cloud-based surveillance, (ii) disruptors of inter-state trust and the multilateral governance of data infrastructure, and (iii) normative entrepreneurs shaping the legal architecture that governs cross-border data flows. The article examines three critical junctures — the post-Snowden international order, the extraterritorial reach of the United States CLOUD Act (2018), and the Huawei 5G infrastructure contestation — as empirical anchors for the theoretical argument. It concludes that existing frameworks of international law are inadequate to address the structural power that intelligence services exercise in the cloud diplomacy arena, and proposes a set of de lege ferenda reforms oriented toward a principle of digital sovereign accountability.

Keywords: cloud diplomacy, intelligence services, digital sovereignty, CLOUD Act, cyber espionage, international law.

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1. Introduction: The Intelligence Dimension of Cloud Diplomacy

The cloud is not neutral. Beneath the reassuring metaphor of weightlessness and universal access lies a physical and political infrastructure of extraordinary consequence: submarine cables traversing ocean floors, server farms concentrated in a handful of jurisdictions, routing protocols that make no concession to national borders, and intelligence services that have recognised in all of this a terrain of both opportunity and vulnerability. Cloud diplomacy — the conduct of diplomatic relations through, about, and in response to cloud-based digital infrastructure — has become one of the defining features of twenty-first century international relations, yet it remains under-theorised in the legal and political science literature.

This article addresses that gap. It begins from the proposition that intelligence services are not peripheral actors in cloud diplomacy but rather constitutive ones. The architecture of the cloud — its technical protocols, governance arrangements, and legal frameworks — has been shaped to a significant degree by the interests, capabilities, and normative interventions of state intelligence agencies.² This is not a marginal observation. It is the central claim: that any adequate theory of cloud diplomacy must account for the intelligence dimension, and that any adequate theory of intelligence law must account for the cloud.

The argument proceeds in six parts. The first section establishes the conceptual framework, defining cloud diplomacy and situating it within the broader literature on digital statecraft and cyber diplomacy. The second section examines intelligence services as actors of digital statecraft. The third section surveys the legal architecture governing intelligence operations in cloud environments. The fourth section develops the tripartite analytical framework — intelligence as collector, disruptor, and normative entrepreneur. The fifth section applies this framework to three empirical junctures. The sixth and concluding section draws implications for international law reform.

This article operates at the intersection of international law and political science, deploying doctrinal, theoretical, and case-analytical methods. It does not aim to produce a comprehensive survey of intelligence law or of cloud governance; rather, it aims to demonstrate their structural interdependence—a relationship that has been addressed only in fragments in the existing scholarship.³

² Richard J. Aldrich and John Kasuku, “Escaping from American Intelligence: Culture, Ethnocentrism and the Anglosphere,” *International Affairs* 88, no. 5 (2012): 1009–1028, <https://doi.org/10.1111/j.1468-2346.2012.01116.x>.

³ Peter Gill and Mark Phythian, *Intelligence in an Insecure World*, 2nd ed. (Cambridge: Polity Press, 2012).

2. Conceptualising Cloud Diplomacy: Beyond the Digital Metaphor

The concept of cloud diplomacy is of recent coinage and its contours remain contested. In its narrowest usage, it refers to the diplomatic negotiations between states and between states and technology corporations concerning the governance, jurisdiction, and security of cloud computing infrastructure.⁴ In a broader and theoretically more productive sense, however, cloud diplomacy encompasses the full range of diplomatic activities that are mediated, enabled, or constrained by cloud-based digital infrastructure: communications between foreign ministries, the storage of sensitive diplomatic cables, the conduct of intelligence liaison, and the exercise of soft power through data-dependent platforms.

This broader conception has significant analytical advantages. It captures the extent to which digital infrastructure has become constitutive of, rather than merely instrumental to, contemporary diplomacy. Nye's foundational account of soft power anticipated some aspects of this transformation, but could not have foreseen the degree to which information architecture would itself become a site of power contestation.⁵ More recent scholarship on cyber diplomacy has begun to address this, emphasising the emergence of norms, institutions, and practices governing state behaviour in cyberspace.⁶

Cloud diplomacy, as conceptualised here, is irreducibly relational. It describes not merely what states do in the cloud, but how the cloud structures what states can do, know, and conceal from one another. This relational quality is what connects cloud diplomacy to intelligence services in a theoretically interesting way. Intelligence agencies are, in essence, institutional mechanisms for managing informational asymmetries between states.

The concept of digital sovereignty provides an important connecting thread. Digital sovereignty — broadly defined as the capacity of a state to exercise effective authority over data, digital infrastructure, and cyber activities within or associated with its territory — has emerged as a central preoccupation of international relations and international law.⁷ Intelligence services are simultaneously the primary beneficiaries of weaker forms of digital sovereignty

⁴ André Barrinha and Thomas Renard, "Cyber-diplomacy: The Making of an International Society in the Digital Age," *Global Affairs* 3, nos. 4–5 (2017): 353–364, <https://doi.org/10.1080/23340460.2017.1414924>.

⁵ Joseph S. Nye Jr., *Soft Power: The Means to Success in World Politics* (New York: PublicAffairs, 2004).

⁶ Barrinha and Renard, "Cyber-diplomacy," 354; Jovan Kurbalija, *An Introduction to Internet Governance*, 7th ed. (Geneva: DiploFoundation, 2016).

⁷ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press, 2020), <https://doi.org/10.1093/oso/9780190088583.001.0001>; Mauro Santaniello, "Attributes of Digital Sovereignty: A Conceptual Framework," *Geopolitics* 31, no. 2 (2026): 788–809, <https://doi.org/10.1080/14650045.2025.2521548>.

in other states and the primary drivers of stronger forms of digital sovereignty in their own. This paradox is central to any understanding of the role of intelligence in cloud diplomacy.

Theoretically, cloud diplomacy invites engagement with constructivist accounts of norm formation, realist accounts of structural power, and critical accounts of surveillance capitalism.⁸ The argument advanced here does not align exclusively with any single tradition; rather, it draws on each to illuminate different dimensions of a complex phenomenon. The realist insight that states pursue informational advantage is essential but insufficient. The constructivist insight that norms shape state behaviour even in the realm of intelligence is equally important. And the critical insight that commercial and state surveillance interests have converged in the cloud era is indispensable for understanding the structural context within which cloud diplomacy occurs.

3. Intelligence Services as Actors of Digital Statecraft

Intelligence services have always been instruments of statecraft. Their transformation into instruments of digital statecraft represents not a rupture but an acceleration — a quantitative shift in capability that has produced qualitative changes in the architecture of international relations.⁹ The cloud era has endowed signals intelligence (SIGINT) agencies in particular with capabilities of extraordinary scope: the ability to intercept and process communications at scale, to map social networks with granularity, to access the stored records of billions of individuals and institutions, and to influence the technical standards and legal frameworks that govern all of the above.

The signals intelligence agencies that emerged from the Second World War — most notably the National Security Agency (NSA) of the United States, the Government Communications Headquarters (GCHQ) of the United Kingdom, and their partners in the Five Eyes alliance — were designed to exploit analogue communications infrastructure. Their adaptation to the digital environment required sustained institutional investment, legal innovation, and the cultivation of relationships with the private technology sector.¹⁰

Three dimensions of this transformation are particularly relevant to cloud diplomacy. The first is the shift from targeted to bulk intelligence collection. Pre-

⁸ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4 (1998): 887–917, <https://doi.org/10.1162/002081898550789>; Kenneth N. Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979); Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: PublicAffairs, 2019).

⁹ Loch K. Johnson, *National Security Intelligence: Secret Operations in Defense of the Democracies* (Cambridge: Polity Press, 2012); David Omand, *Securing the State* (London: Hurst, 2010).

¹⁰ Gordon Corera, *Intercept: The Secret History of Computers and Spies* (London: Weidenfeld & Nicolson, 2015); Thomas Rid, *Active Measures: The Secret History of Disinformation and Political Warfare* (New York: Farrar, Straus and Giroux, 2020).

digital SIGINT operations were constrained by limited processing capacity. Digital infrastructure has enabled collection at a scale that effectively renders the distinction between targeted and bulk surveillance analytically unstable.¹¹ This has profound implications for diplomatic communications, which are now systematically exposed to interception by technologically advanced intelligence services.

The second is the internationalisation of intelligence collection through the exploitation of data flows that traverse multiple jurisdictions. Cloud service providers, by the nature of their business model, store and process data in jurisdictions other than those in which it was generated. This creates what Daskal terms 'data in transit' vulnerability: the possibility that data generated in State A, stored in State B, and transiting through State C may be subject to intelligence collection by the authorities of any of those states.¹²

The third is the emergence of intelligence services as participants in, and shapers of, the governance frameworks for digital infrastructure. Through their participation in standards bodies, their influence over domestic legislation with extraterritorial effect, and their engagement with technology corporations, intelligence agencies have become significant actors in the governance of the global digital environment.¹³

4. The Legal Architecture Governing Intelligence in Cloud Environments

The legal architecture governing intelligence operations in cloud environments is characterised by fragmentation, indeterminacy, and profound asymmetry between domestic authorisation and international constraint. At the domestic level, intelligence agencies in advanced democracies operate under increasingly elaborated statutory frameworks that authorise bulk data collection and the compelled disclosure of cloud-stored data. At the international level, the relevant normative framework remains embryonic and contested.

The Tallinn Manual process, culminating in the publication of Tallinn Manual 2.0 in 2017, represents the most systematic attempt to apply existing international law to cyber operations.¹⁴ The Manual's analysis proceeds from the foundational principle of sovereignty, applying it through the concept of territorial integrity. Rule 4 provides that a State must not conduct cyber operations that violate the sovereignty of another State. Rule 14 addresses internationally

¹¹ Ronald J. Deibert, *Black Code: Inside the Battle for Cyberspace* (Toronto: McClelland & Stewart, 2013), 112–130; Zuboff, *The Age of Surveillance Capitalism*, 88–95.

¹² Jennifer Daskal, "The Un-Territoriality of Data," *Yale Law Journal* 125, no. 2 (2015): 326–398, <https://yalelawjournal.org/article/the-un-territoriality-of-data>.

¹³ Omand, *Securing the State*, 220–235.

¹⁴ Michael N. Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed. (Cambridge: Cambridge University Press, 2017), <https://doi.org/10.1017/9781316822524>.

wrongful cyber acts, while Rules 15–18 address attribution and related questions of State responsibility.

These principles leave critical questions unresolved when applied to intelligence collection in the cloud. The first is attribution: given the technical difficulty of definitively attributing cyber operations to state actors, the law of state responsibility faces a serious implementation deficit. The International Law Commission's Articles on State Responsibility (2001) require attribution to a state organ (Art. 4) or to a person or entity exercising governmental authority (Art. 5); the opacity of intelligence operations, combined with the technical sophistication of false-flag operations, makes attribution inherently contestable.¹⁵ The Manual addresses attribution of cyber operations by non-State actors in Rule 17, including conduct carried out pursuant to a State's instructions or under its direction or control, as well as conduct subsequently acknowledged and adopted by the State.¹⁶

The second unresolved question is the legality of intelligence collection *per se*. The Tallinn Manual experts were divided on whether peacetime intelligence collection that does not rise to the level of a wrongful act constitutes a violation of international law. This doctrinal uncertainty is diplomatically corrosive: the absence of a clear prohibition on cloud-based intelligence collection undermines the foundations of inter-state trust on which diplomacy depends.

The CLOUD Act (Clarifying Lawful Overseas Use of Data Act, 2018) represents a particularly significant development at this intersection. The Act permits US law enforcement and intelligence agencies to compel US-based cloud providers to produce data stored abroad, while establishing a framework for bilateral executive agreements with foreign governments. It has been criticised by European data protection authorities as incompatible with the GDPR, and by legal scholars as asserting extraterritorial jurisdiction without a clear basis in customary international law.¹⁷

The GDPR, for its part, represents the European Union's assertion of regulatory sovereignty over data processed in connection with EU residents. Its extraterritorial reach creates a direct normative conflict with the CLOUD Act. This conflict was extensively litigated in the Schrems II decision of the Court of Justice of the European Union (Data Protection Commissioner v. Facebook

¹⁵ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries," *Yearbook of the International Law Commission* 2, pt. 2 (2001): 26–143, UN Doc. A/56/10.

¹⁶ Schmitt, *Tallinn Manual 2.0*, 94–97 (Rule 17 and commentary).

¹⁷ Clarifying Lawful Overseas Use of Data Act (CLOUD Act), Pub. L. No. 115-141, div. V, 132 Stat. 348 (2018), 18 U.S.C. § 2713; European Data Protection Board and European Data Protection Supervisor, "EDPB-EDPS Joint Response to the LIBE Committee on the Impact of the US CLOUD Act on the European Legal Framework for Personal Data Protection," July 10, 2019, https://www.edps.europa.eu/data-protection/our-work/publications/opinions/edpb-edps-joint-response-us-cloud-act_en.

Ireland Limited and Maximillian Schrems, Case C-311/18, 2020), which invalidated the EU-US Privacy Shield framework on the grounds that US intelligence surveillance laws failed to provide adequate protection for EU data subjects.¹⁸

The Budapest Convention on Cybercrime (2001) provides a further node in the legal architecture, establishing provisions for the expedited preservation and disclosure of electronic evidence across borders.¹⁹ While primarily oriented toward criminal rather than intelligence matters, its mechanisms have been invoked in intelligence-adjacent contexts, and the development of its Second Additional Protocol (finalised in 2021) has deepened the cross-border data access framework while leaving unresolved the fundamental tension between intelligence collection and data protection norms.

5. Intelligence as Collector, Disruptor, and Normative Entrepreneur: A Tripartite Analytical Framework

The article now develops its principal theoretical contribution: a tripartite analytical framework for understanding the role of intelligence services in cloud diplomacy. The three roles — intelligence as collector, as disruptor, and as normative entrepreneur — are analytically distinct but empirically interrelated. Together, they constitute what the article terms the 'shadow architecture of sovereignty': the set of intelligence-driven practices and frameworks that structure the cloud environment in ways that are largely invisible to the public but profoundly consequential for international relations.

The first role, intelligence as collector, is the most familiar. Intelligence services collect information about foreign states, non-state actors, and transnational threats through the exploitation of cloud-based communications and data infrastructure. The shift from targeted collection to ambient collection — the systematic harvesting of cloud-stored data for retrospective analysis — represents a fundamental change in the relationship between intelligence and diplomacy. Ambassadors, foreign ministers, and heads of state now conduct significant portions of their diplomatic activities through cloud-based platforms whose security cannot be guaranteed.

The implications for international law are significant. The principle of the inviolability of diplomatic communications, enshrined in Article 27 of the Vienna Convention on Diplomatic Relations (1961), was designed for an era in which the principal threat to diplomatic confidentiality was the physical interception of dispatches. Its application to cloud-based diplomatic communications is contested: while the principle of inviolability clearly extends

¹⁸ Court of Justice of the European Union, *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems (Schrems II)*, Case C-311/18, ECLI:EU:C:2020:559, July 16, 2020.

¹⁹ Council of Europe, *Convention on Cybercrime (Budapest Convention)*, ETS No. 185 (Budapest, November 23, 2001).

to the content of diplomatic communications, its extension to the metadata generated by cloud-based communications is doctrinally unsettled.²⁰

The second role, intelligence as disruptor, is less frequently theorised but equally consequential. Intelligence services disrupt cloud diplomacy not only through active operations—the insertion of malware into diplomatic systems, the manipulation of cloud-based communications, the conduct of influence operations — but through the mere awareness that such operations are possible. The chilling effect of intelligence surveillance on diplomatic communication is structurally analogous to the chilling effect of surveillance on free expression identified in the critical literature.²¹

The disruptive role of intelligence services in cloud diplomacy has been most starkly illustrated by the revelations of Edward Snowden in 2013. The exposure of the NSA's PRISM programme produced a diplomatic crisis that affected US relations with European allies, Latin American partners, and developing nations.²² The diplomatic damage was not principally a function of the specific intelligence collection revealed; it was a function of the demonstration that the foundational infrastructure of cloud diplomacy — the servers, protocols, and legal frameworks of US-based cloud providers — was systematically accessible to US intelligence.

The third role, intelligence as normative entrepreneur, is the most theoretically novel. Finnemore and Sikkink's account of norm entrepreneurship describes the process by which actors with strong organisational platforms promote new norms in international society.²³ Intelligence services have increasingly assumed this role in the governance of digital infrastructure. Through their influence over domestic legislation, their participation in technical standards bodies, and their conduct of intelligence liaison relationships, intelligence agencies have become significant architects of the normative frameworks that govern the cloud.

The intelligence community's role in shaping the CLOUD Act is illustrative. While the Act was formally drafted in response to a Supreme Court case concerning the production of data stored in Ireland, its substantive provisions reflect the longstanding interests and preferences of the intelligence community in establishing a legally coherent regime for cross-border data access that preserves US intelligence advantage while offering sufficient reciprocity to secure allied cooperation.

²⁰ Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Oslo: Publishing House of the Parliament of Norway, 2005), 77–85.

²¹ Zuboff, *The Age of Surveillance Capitalism*, 300–315; Deibert, *Black Code*, 145–160.

²² David P. Fidler, ed., *The Snowden Reader* (Bloomington: Indiana University Press, 2015), 52–69, 96–100, <https://doi.org/10.2307/j.ctt16gh840>; Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (Washington, DC, July 2, 2014), <https://www.pclob.gov/Oversight>.

²³ Finnemore and Sikkink, “International Norm Dynamics,” 897–905.

Similarly, the intelligence community's influence over technical standards represents a form of normative entrepreneurship that operates below the threshold of formal diplomacy but with consequences for the entire global digital environment. The revelation that the NSA had backdoored the Dual_EC_DRBG encryption standard illustrates the depth of intelligence community engagement with the technical foundations of cloud security.²⁴

6. Empirical Anchors: Three Junctures in Intelligence-Cloud Diplomacy

6.1. The PRISM Revelations and the Post-Snowden Diplomatic Order

The exposure of the NSA's PRISM programme in June 2013 constitutes a watershed moment in the history of cloud diplomacy. The programme, which compelled disclosure from nine major US cloud providers under the authority of Section 702 of the Foreign Intelligence Surveillance Act, enabled the NSA to access the emails, documents, photographs, and communications of foreign nationals stored on US servers.

Three aspects of the post-Snowden diplomatic landscape are particularly instructive. First, the revelations exposed the structural vulnerability of cloud-based diplomacy to intelligence collection. States that had relied on US cloud services for diplomatic communications were forced to recognise that those communications were, in principle, accessible to US intelligence.

Second, the Snowden revelations produced a significant normative response at the international level. The United Nations General Assembly adopted Resolution 68/167 in December 2013, affirming the applicability of international human rights law to digital communications.²⁵ While non-binding, the resolution represented a significant moment in the development of the *lex digitalis*.

Third, the post-Snowden period witnessed significant diplomatic investment in reducing dependence on US-centred digital infrastructure. Brazil pursued new data-sovereignty measures after the disclosures, while later European digital-sovereignty initiatives included Gaia-X. Germany's De-Mail initiative, however, predates the Snowden disclosures and cannot be treated as a post-Snowden response.²⁶

²⁴ Daniel J. Bernstein, Tanja Lange, and Ruben Niederhagen, "Dual EC: A Standardized Back Door," in *The New Codebreakers: Essays Dedicated to David Kahn on the Occasion of His 85th Birthday*, ed. Peter Y. A. Ryan, David Naccache, and Jean-Jacques Quisquater (Dordrecht: Springer, 2016), 256–281, https://doi.org/10.1007/978-3-662-49301-4_17.

²⁵ United Nations General Assembly, *The Right to Privacy in the Digital Age*, Resolution 68/167, A/RES/68/167, adopted December 18, 2013.

²⁶ Fidler, ed., *The Snowden Reader*, 52–69, 157–161; Germany, *De-Mail-Gesetz*, April 28, 2011, BGBl. I 666; Federal Ministry for Economic Affairs and Climate Action (Germany), "The Gaia-X

6.2. The CLOUD Act: Extraterritoriality as Diplomatic Architecture

The Clarifying Lawful Overseas Use of Data Act, signed into law in March 2018, represents the most significant US legislative intervention in the governance of cloud data since the Patriot Act. The Act resolves the question of whether US agencies can compel US-based providers to produce data stored abroad by answering it unequivocally in the affirmative, providing that a provider 'shall comply with an obligation to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States' (18 U.S.C. § 2713).

The Act's diplomatic architecture is sophisticated. By pairing this expansive assertion of jurisdiction with a framework for bilateral executive agreements, it creates a two-tier system of cloud governance: states that have concluded CLOUD Act agreements with the United States gain privileged access to US cloud infrastructure; states that have not remain subject to the full force of US extraterritorial jurisdiction without reciprocal access. This asymmetry is not merely a technical feature of the Act; it is a deliberate diplomatic architecture that uses cloud governance as leverage in bilateral relations.

The European Union's response to the CLOUD Act has been notably ambivalent. The Act conflicts with the GDPR's requirements for lawful data transfers to third countries; Article 48 of the GDPR provides that judgements of courts or tribunals of third countries requiring a transfer of personal data shall be recognised or enforceable only where based on an international agreement.²⁷ Yet EU member states have been reluctant to foreclose the possibility of CLOUD Act executive agreements, recognising their potential utility for mutual legal assistance. This ambivalence reflects the broader tension in EU cloud diplomacy between the assertion of digital sovereignty and the maintenance of privileged security relationships with the United States.²⁸

Ecosystem—A Sovereign Data Infrastructure for Europe,” accessed September 12, 2026, <https://www.bmwk.de/Redaktion/EN/Dossier/gaia-x.html>; Andreas Baur, “European Ambitions Captured by American Clouds: Digital Sovereignty through Gaia-X?,” *Information, Communication & Society* 29, no. 2 (2026): 417–434, <https://doi.org/10.1080/1369118X.2025.2516545>.

²⁷ European Data Protection Board and European Data Protection Supervisor, “EDPB-EDPS Joint Response on the US CLOUD Act,” July 10, 2019; Regulation (EU) 2016/679 (General Data Protection Regulation), art. 48.

²⁸ European Parliament and Council of the European Union, Regulation (EU) 2016/679 of April 27, 2016 (General Data Protection Regulation), *Official Journal of the European Union* L 119 (May 4, 2016): 1–88, art. 48.

6.3 Huawei and the 5G Intelligence Contestation

The contestation over Huawei's participation in 5G network infrastructure — which reached its diplomatic apex between 2019 and 2021 — represents perhaps the clearest illustration of the cloud diplomacy dynamic as a site of intelligence-driven statecraft. The US campaign to exclude Huawei from allied telecommunications networks was conducted primarily in the language of intelligence: the claim that Huawei equipment contained, or could contain, backdoors enabling Chinese intelligence collection from 5G-dependent cloud infrastructure.

The Huawei contestation illustrates all three dimensions of the tripartite framework. As a matter of intelligence collection, the concern was genuine and well-founded: 5G infrastructure would enable whoever controlled its architecture to collect intelligence at an unprecedented scale. As a matter of intelligence disruption, the US campaign — conducted through intelligence sharing with Five Eyes partners, through diplomatic *démarches* to allied governments, and through export control measures — systematically disrupted the commercial and diplomatic relationships that Huawei had developed over two decades. And as a matter of normative entrepreneurship, the campaign produced a set of emerging norms — the 'clean network' framework, the security evaluation requirements adopted by the EU's 5G toolbox — that structurally favour Western intelligence interests.

The Huawei contestation also illustrates the limits of existing international law in governing intelligence-driven cloud diplomacy. The invocation of national security as justification for trade restrictions under the GATT Article XXI security exception created a potentially unlimited carve-out from trade law obligations. The WTO Appellate Body's engagement with the national security exception in Russia — Measures Concerning Traffic in Transit (2019) has begun to subject these claims to scrutiny, but the application of that scrutiny to cloud-specific intelligence claims remains embryonic.²⁹

7. Toward a Framework of Digital Sovereign Accountability: *De Lege Ferenda* Reflections

The analysis presented above establishes that intelligence services occupy a constitutive role in cloud diplomacy that existing international law is inadequate to govern. Existing frameworks were designed for a world in which intelligence collection was episodic rather than ambient, in which the principal threat to diplomatic communications was physical interception rather than

²⁹ World Trade Organization, *Russia—Measures Concerning Traffic in Transit*, DS512, Panel Report WT/DS512/R, April 5, 2019, <https://doi.org/10.30875/9a582d67-en>.

systematic digital surveillance, and in which the governance of information infrastructure was a technical matter rather than a site of strategic contestation. The cloud era has rendered all of these assumptions obsolete.

The principle of digital sovereign accountability, advanced here as a framework for reform, builds on existing doctrines of state responsibility, sovereignty, and human rights while extending them in three directions. First, it requires states to accept accountability for the intelligence collection activities of their agencies in cloud environments, including activities conducted through the exploitation of domestic legal processes directed at cloud providers rather than through direct cyber intrusions. This extension of the traditional attribution framework acknowledges the structural reality that the CLOUD Act model constitutes a consequential form of intelligence diplomacy that falls outside the scope of the Tallinn Manual's attribution analysis.

Second, the principle requires states to extend the protection of the Vienna Convention on Diplomatic Relations to cloud-based diplomatic communications, including the metadata of those communications. This extension is not textually compelled by the Convention's existing provisions but is normatively required by its foundational purpose: the protection of the confidential character of diplomatic exchanges.³⁰ In the cloud era, the structural conditions for diplomatic communication include the security of cloud-based channels against intelligence exploitation.

Third, the principle requires the development of a multilateral treaty framework governing cross-border intelligence collection in cloud environments—an instrument that the article designates a Cloud Intelligence Convention. Such a Convention would draw on the Budapest Convention's architecture of mutual legal assistance while extending it to address intelligence collection specifically; it would establish minimum standards of proportionality and necessity for cloud-based surveillance; it would create a mechanism for interstate consultation and dispute resolution concerning intelligence activities with significant cloud diplomacy implications; and it would establish an international monitoring mechanism analogous to the UN Special Procedures system.

The proposal for a Cloud Intelligence Convention will strike some readers as utopian. Yet the history of arms control law, of international environmental law, and of international human rights law suggests that even structurally resistant domains of state behaviour can be progressively constrained by international legal frameworks, provided that the normative case is sufficiently compelling and the diplomatic coalition sufficiently broad.³¹ The post-Snowden

³⁰ Vienna Convention on Diplomatic Relations, April 18, 1961, 500 UNTS 95, arts. 27(1)–(2); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed. (Oxford: Oxford University Press, 2016), 178–190, <https://doi.org/10.1093/law/9780198703969.001.0001>.

³¹ Finnemore and Sikkink, “International Norm Dynamics,” 909; Stephen D. Krasner, *Sovereignty*:

diplomatic environment, and the growing recognition among mid-sized and smaller states of their vulnerability to intelligence-driven cloud diplomacy, provides a diplomatic basis for such a coalition that did not exist a decade ago.

In the shorter term, three more modest reforms deserve attention. First, the bilateral executive agreement framework established by the CLOUD Act should be multilateralised, brought within the ambit of a multilateral instrument that establishes baseline standards of data protection and reciprocity. Second, the mandate of the UN Group of Governmental Experts (GGE) on Cyber should be expanded to address intelligence collection in cloud environments explicitly, moving beyond its current focus on military cyber operations. Third, states should adopt domestic legislation requiring intelligence agencies to conduct formal diplomatic impact assessments before initiating cloud-based surveillance programmes affecting allied governments — a procedural safeguard that would ensure that diplomatic consequences were considered at the highest levels of government.

8. Conclusions

Intelligence services are not merely participants in cloud diplomacy; they are its shadow architects. Through their collection activities, their disruptive operations, and their normative entrepreneurship, they have shaped the cloud environment in ways that structure the possibilities available to states in their diplomatic interactions. The PRISM revelations demonstrated the scale of intelligence access to cloud-based diplomatic communications. The CLOUD Act institutionalised that access in domestic law with international diplomatic effect. The Huawei contestation transformed the governance of cloud infrastructure into a site of intelligence-driven geopolitical competition. In each case, the intelligence dimension was not peripheral to the diplomatic story; it was central to it.

The analytical framework developed in this article — intelligence as collector, disruptor, and normative entrepreneur — provides a theoretically integrated account of this centrality. It moves beyond the existing literature's tendency to treat intelligence and diplomacy as parallel but separate domains, revealing instead the deep structural interdependence that characterises their relationship in the cloud era.

The principle of digital sovereign accountability represents one possible normative response to this governance deficit. It is advanced not as a comprehensive solution but as a normative orientation: a set of principles that could guide the progressive development of international law in a domain where the existing framework is demonstrably inadequate. The development of that framework is one of the central tasks facing international lawyers and political

scientists in the decades ahead. It is a task whose urgency, in an era of accelerating digital transformation and intensifying geopolitical competition, is difficult to overstate.

The cloud may be ephemeral as metaphor, but it is enduringly material as infrastructure. It connects states, exposes their secrets, and mediates their conflicts. Intelligence services understood this before diplomats did. The task of international law is now to catch up.

Bibliography

I. Books and Article

1. Aldrich, Richard J., and John Kasuku. "Escaping from American Intelligence: Culture, Ethnocentrism and the Anglosphere." *International Affairs* 88, no. 5 (2012): 1009–1028. <https://doi.org/10.1111/j.1468-2346.2012.01116.x>.
2. Barrinha, André, and Thomas Renard. "Cyber-diplomacy: The Making of an International Society in the Digital Age." *Global Affairs* 3, nos. 4–5 (2017): 353–364. <https://doi.org/10.1080/23340460.2017.1414924>.
3. Baur, Andreas. "European Ambitions Captured by American Clouds: Digital Sovereignty through Gaia-X?" *Information, Communication & Society* 29, no. 2 (2026): 417–434. <https://doi.org/10.1080/1369118X.2025.2516545>.
4. Bernstein, Daniel J., Tanja Lange, and Ruben Niederhagen. "Dual EC: A Standardized Back Door." In *The New Codebreakers: Essays Dedicated to David Kahn on the Occasion of His 85th Birthday*, edited by Peter Y. A. Ryan, David Naccache, and Jean-Jacques Quisquater, 256–281. Dordrecht: Springer, 2016. https://doi.org/10.1007/978-3-662-49301-4_17.
5. Born, Hans, and Ian Leigh. *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*. Oslo: Publishing House of the Parliament of Norway, 2005.
6. Bradford, Anu. *The Brussels Effect: How the European Union Rules the World*. Oxford: Oxford University Press, 2020. <https://doi.org/10.1093/oso/9780190088583.001.0001>.
7. Corera, Gordon. *Intercept: The Secret History of Computers and Spies*. London: Weidenfeld & Nicolson, 2015.
8. Daskal, Jennifer. "The Un-Territoriality of Data." *Yale Law Journal* 125, no. 2 (2015): 326–398. <https://yalelawjournal.org/article/the-un-territoriality-of-data>.
9. Deibert, Ronald J. *Black Code: Inside the Battle for Cyberspace*. Toronto: McClelland & Stewart, 2013.
10. Denza, Eileen. *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*. 4th ed. Oxford: Oxford University Press, 2016. <https://doi.org/10.1093/law/9780198703969.001.0001>.
11. Fidler, David P., ed. *The Snowden Reader*. Bloomington: Indiana University Press, 2015. <https://doi.org/10.2307/j.ctt16gh840>.
12. Finnemore, Martha, and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, no. 4 (1998): 887–917. <https://doi.org/10.1162/002081898550789>.

13. Gill, Peter, and Mark Phythian. *Intelligence in an Insecure World*. 2nd ed. Cambridge: Polity Press, 2012.
14. Johnson, Loch K. *National Security Intelligence: Secret Operations in Defense of the Democracies*. Cambridge: Polity Press, 2012.
15. Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*. Princeton, NJ: Princeton University Press, 1999.
16. Kurbalija, Jovan. *An Introduction to Internet Governance*. 7th ed. Geneva: DiploFoundation, 2016.
17. Mueller, Milton L. *Networks and States: The Global Politics of Internet Governance*. Cambridge, MA: MIT Press, 2010. <https://doi.org/10.7551/mitpress/9780262014595.001.0001>.
18. Nye, Joseph S., Jr. *Soft Power: The Means to Success in World Politics*. New York: PublicAffairs, 2004.
19. Omand, David. *Securing the State*. London: Hurst, 2010.
20. Rid, Thomas. *Active Measures: The Secret History of Disinformation and Political Warfare*. New York: Farrar, Straus and Giroux, 2020.
21. Santaniello, Mauro. "Attributes of Digital Sovereignty: A Conceptual Framework." *Geopolitics* 31, no. 2 (2026): 788–809. <https://doi.org/10.1080/14650045.2025.2521548>.
22. Schmitt, Michael N., ed. *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. 2nd ed. Cambridge: Cambridge University Press, 2017. <https://doi.org/10.1017/9781316822524>.
23. Schmitt, Michael N., ed. *Tallinn Manual on the International Law Applicable to Cyber Warfare*. Cambridge: Cambridge University Press, 2013.
24. Waltz, Kenneth N. *Theory of International Politics*. Reading, MA: Addison-Wesley, 1979.
25. Zuboff, Shoshana. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: PublicAffairs, 2019.

II. Legislation and Official Sources

1. Clarifying Lawful Overseas Use of Data Act (CLOUD Act), Pub. L. No. 115-141, div. V, 132 Stat. 348 (2018), codified in relevant part at 18 U.S.C. § 2713.
2. Council of Europe. *Convention on Cybercrime (Budapest Convention)*, ETS No. 185. Budapest, November 23, 2001.
3. European Data Protection Board and European Data Protection Supervisor. "EDPB-EDPS Joint Response to the LIBE Committee on the Impact of the US CLOUD Act on the European Legal Framework for Personal Data Protection." July 10, 2019. https://www.edps.europa.eu/data-protection/our-work/publications/opinions/edpb-edps-joint-response-us-cloud-act_en.
4. European Parliament and Council of the European Union. Regulation (EU) 2016/679 of April 27, 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 (May 4, 2016): 1–88.
5. Federal Ministry for Economic Affairs and Climate Action (Germany). "The Gaia-X Ecosystem—A Sovereign Data Infrastructure for Europe." Accessed

- September 12, 2026. <https://www.bmwk.de/Redaktion/EN/Dossier/gaia-x.html>.
6. International Law Commission. “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.” *Yearbook of the International Law Commission* 2, pt. 2 (2001): 26–143. UN Doc. A/56/10.
 7. Privacy and Civil Liberties Oversight Board. *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*. Washington, DC, July 2, 2014. <https://www.pclob.gov/Oversight>.
 8. United Nations General Assembly. *The Right to Privacy in the Digital Age*. Resolution 68/167, A/RES/68/167. Adopted December 18, 2013.
 9. Vienna Convention on Diplomatic Relations. April 18, 1961. 500 UNTS 95.
 10. World Trade Organization. *Russia—Measures Concerning Traffic in Transit*, DS512, Panel Report WT/DS512/R, April 5, 2019. <https://doi.org/10.30875/9a582d67-en>.

III. Cases and Decisions

1. Court of Justice of the European Union. *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems (Schrems II)*, Case C-311/18, ECLI:EU:C:2020:559, July 16, 2020.

PART II
HUMAN RIGHTS, MIGRATION, AND
PROCEDURAL JUSTICE

The Impact of the ECtHR Judgment in *M.S.S. v. Belgium and Greece* on Asylum Transfers: A Comparative Analysis of Reforms

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Abstract

*This paper examines how the jurisprudence of the European Court of Human Rights influences the legislative systems of the member states. The central element is the observation that the comparative analysis serves as a "domino" effect triggered by the historic judgment in *M.S.S v Belgium and Greece*, which indirectly modified the Dublin II system and caused changes in perceptions and domestic legislation. The comparative study examines how judicial decisions have restructured protection systems in major transit states, such as Greece, and how host states have halted transfer to high-risk states, including Belgium and United Kingdom. The paper identifies a shift from the automatic, blind presumption of trust between states under Dublin II to trust based on evidence and guarantees. This harmonizes the protection procedure and redefines the boundary between state sovereignty and the protection of rights in matters of migration and asylum.*

Keywords: ECtHR Jurisprudence, migration, asylum, comparison, *M.S.S v Belgium and Greece*.

JEL Classification: K37, K38

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1. Introduction

The transfer of people from one state to another is different because of a common way set to an automatic practice: the identification of a person who needs to be transferred, the identification of a quality state for the well-being of the person and to make a favorable decision for the transfer.

The European system was built on the presumption of mutual trust. This

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thing was demonstrated by the Dublin II Regulation. When the Dublin II Regulation came into force, transfers between European states became automatic. In that time, the concept of mutual trust. In this case, the state authorities did not observe the real effect of a transfer and the way in which a transferred person is accepted by the responsible state.

In European practice, the reception and housing conditions were poles apart. The states that were confronted with a massive immigration, Italy, Greece, and Spain, made hard efforts to accord human rights in accordance with the European system of protection to everyone. As a result, the European Court of Human Rights (ECtHR) Jurisprudence was enriched in several areas, including asylum and migration. The judges of the ECtHR needed to develop a new interpretation of the European Convention on Human Rights (ECHR). In this case, the interpretation needed to be consistent with the circumstances of the cause.

The absolute character of Article 3 ECHR was created from the beginning of the ECHR, but the real interpretation in extension was influenced by the case of *Soering v UK*. The jurisprudence of *M.S.S v Belgium and Greece* was recognized in the domestic law of the countries. The domestic laws of Belgium, Greece, and the United Kingdom were changed.

2. Conceptual Framework and the *M.S.S.* Judgment

2.1. The Knock-on Effect and Research Methodology

The term "knock-on effect" is also known as a domino effect². It means the procession of some effects or situations because of a principal cause. This terminology is used in accordance with ECtHR Jurisprudence and is based on a reinterpretation of the positive, mandatory obligations of the states. These states recognize that their authorities must provide greater support for reception, accommodation conditions and vulnerability. Competent asylum authorities, when they seek to observe a litigation conflict, must closely monitor the individual's behavior, provisional measures, and the assessment of a real risk in an effective manner.

In a methodological way, this paper utilizes the comparative method, historical method, and the concept of Law in action for all the pages of the article. In this way, we can examine how jurisprudence was introduced in certain European legislative systems.

2.2. Facts and Findings in *M.S.S. v. Belgium and Greece*

On 21 January 2011, the Judges of the ECtHR condemned the violations

² Merriam-Webster.com Dictionary, s.v. "knock-on effect," accessed January 21, 2026, <https://www.merriam-webster.com/dictionary/knock-on%20effect>.

of Articles 3 and 13 of the ECHR by Belgium and Greece. In the first, an Afghan citizen's entry into Greece via a legal border crossing. Because of poor conditions, he considered going to Belgium. The Belgian authorities decided in accordance with the Dublin II Regulation³ to make an automatic transfer to Greece. The competent Belgian authorities did not conduct an effective, individual assessment of the actual risk. This risk stems from the reception conditions and the asylum procedure. However, these authorities relied on the presumption in the Dublin II Regulation⁴. The ECtHR judges held that mutual trust does not justify a transfer under the Dublin II Regulation when there are clear and substantial grounds for believing that the applicant faces a real risk of being treated contrary to Article 3 of the ECHR in the destination State⁵. They mentioned that the Belgian authorities are aware of the situation in Greece and, in accordance with the Dublin II Regulation, decided to affect the transfer⁶. Both states needed to make some improvements in their domestic law.

3. The Greek Asylum System

3.1. Migration Context and the Legal Framework

Greece, in southeastern Europe, is a country with a rich history and a diverse culture. In the context of the geopolitical landscape, thousands of new arrivals cross the border each year, seeking to start a new life. Every day, there are some new arrivals by sea or at the territory's borders. In general, the new arrivals are from the Asian zone (Afghanistan, Syria, Pakistan)⁷ and Africa (Somalia, Nigeria, Egypt, Morocco, Libya)⁸.

The principal routes are in the Aegean Sea: the coast of Turkey and the Greek islands (Lesbos, Samos) and the route of the Evros river. In the year 2019,

³ Council Regulation (EC) No. 343/2003 of February 18, 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, *Official Journal of the European Union* L 50 (February 25, 2003): 1–10, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R0343>.

⁴ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 339–60 (ECtHR, January 21, 2011), <https://www.bailii.org/eu/cases/ECHR/2011/108.html>.

⁵ Marco Gerbaudo, “Paving the Way to the New Pact on Migration and Asylum: Some Reflections on Ministero dell’Interno (Joined Cases C-228/21, C-254/21, C-297/21, C-315/21, C-328/21),” *Maastricht Journal of European and Comparative Law* 31, no. 5 (2024): 647–661, <https://doi.org/10.1177/1023263X241311677>.

⁶ *M.S.S. v. Belgium and Greece*, §§ 359–60, 365–68.

⁷ UNHCR, “Operational Data Portal: Europe Sea Arrivals, Greece,” accessed September 12, 2026, <https://data.unhcr.org/en/situations/europe-sea-arrivals/location/24489>.

⁸ Ioannis E. Kotoulas, “Greece and Mass Migration from North Africa,” China-CEE Institute, September 10, 2025, <https://china-cee.eu/2025/09/10/greece-monthly-briefing-greece-and-mass-migration-from-north-africa/>.

on the island routes the new arrivals contributed to superpopulation. In this context were 42.000 of new arrivals in a capacity of 6.178 places⁹. This situation created a difficult situation for human rights in accordance with European authorities.

Before 2011, the Greek protection system was grounded in a normative act governing migration and asylum. In the first, the main law of migration was 3386/2005¹⁰. This law defined a migrant from a distinct state as a person who has no Greek citizenship and no European Union (EU) citizenship. As a result, most legal migrants were protected by this law. At the beginning of the XXI century, most migrants were from Albania and after this, the crisis of migration was bigger¹¹. Consequently, Law 3386/2005 was insufficient.

The diminution of protective character was established by Law 3386/2005 and became evident after the migration pressures. In 2009, Greek Police recorded approximately 63,500 apprehensions of Albanian nationals¹². According to Eurostat data cited by RIEAS, Greece's population grew by 35,000 people in 2009, 27,000 of whom were immigrants¹³. In 2010, the international migrant stock was 1,269,749, a 6.64% increase from 2005¹⁴.

At the same time, the medical system was confronted with a new national pandemic, malaria. This illness was stopped by medical authorities in 1974 and reborn in 2009-2014. The primary objective was to increase the arrival of new migrants from low-income countries¹⁵. All these elements led to the enactment of a new law with the primary aim of protecting migrants and refugees.

The section of detention and transfer from 3386/2005 needed to be standardized in accordance with ECtHR Jurisprudence. Greece was found guilty of failing to provide a ECHR in the conditions of detention. At the same time, to have a favorable admission of asylum, a new arrival needed to go to the police

⁹ Miriam Orcutt et al., "EU Migration Policies Drive Health Crisis on Greek Islands," *The Lancet* 395, no. 10225 (2020): 668–670, [https://doi.org/10.1016/S0140-6736\(19\)33175-7](https://doi.org/10.1016/S0140-6736(19)33175-7).

¹⁰ Greece, *Law No. 3386/2005 on the Entry, Residence and Social Integration of Third-Country Nationals on Greek Territory*, Government Gazette A 212/23.08.2005, <https://www.refworld.org/legal/legislation/natlegbod/2005/en/98138>.

¹¹ Simeon Karafolas and Alexandros Alexandrakis, "The Annual Demand for Seasonal Immigrant Labor in Greece During the Crisis Period," in *EU Crisis and the Role of the Periphery*, ed. Anastasios Karasavvoglu, Serdar Ongan, and Persefoni Polychronidou (Cham: Springer, 2015), 76–79, https://doi.org/10.1007/978-3-319-10133-0_5.

¹² Thanos Maroukis, *The Number of Irregular Migrants in Greece at the End of 2010 and 2011*, ELIAMEP Briefing Notes 21/2012 (June 2012), 2, https://www.eliamap.gr/wp-content/uploads/2012/06/Briefing-Notes_21_June-2012_Thanos-Maroukis1.pdf.

¹³ Research Institute for European and American Studies (RIEAS), "Immigration to Greece," August 2010, 9, <https://www.rieas.gr/images/rieas145.pdf>.

¹⁴ Macrotrends, "Greece Immigration Statistics," accessed September 12, 2026, <https://www.macrotrends.net/global-metrics/countries/GRC/greece/immigration-statistics>.

¹⁵ Panagiota Kotsila and Giorgos Kallis, "Biopolitics of Public Health and Immigration in Times of Crisis: The Malaria Epidemic in Greece (2009–2014)," *Geoforum* 106 (2019): 223–233, <https://doi.org/10.1016/j.geoforum.2019.08.019>.

station. At the police office, the new arrival completed the required documentation. The police office is, in this context, an administrative authority within the crisis of migration and asylum procedures. Once all documents are complete, the primary observation procedure for a positive decision begins. The asylum seeker's entry in this manner is part of an international monitoring program; the fingerprinting was conducted in accordance with the EURODAC system. Human rights and their obligations are governed by law. The new arrivals had the opportunity to request integrity, legal assistance, medical assistance, and other rights, such as non-refoulement¹⁶.

3.2. Asylum and Reception Reforms

Law 3907/2011, published on 26 January 2011, established the Asylum Service and the First Reception Service and formed a central element of the reform of Greece's migration and asylum system. Its implementation developed in the immediate post-M.S.S. period.

The main objective of the Asylum Greek System is the examination of documents for approval or refusal of protection. It was the first independent structure of asylum procedure in Greece¹⁷. The First reception system in Greece has a person with authority to ensure respect for the law and European human rights standards for vulnerable people. However, the system is complex because it can assist individuals in vulnerable situations. In accordance with this system, all people can continue their education. The children can easily be integrated into Greek culture and society through the national program. Their parents can be assisted by the authorities in developing skills for a new job¹⁸. All these measures respect European practices and Directive 2013/33/EU.

We consider that a significant non-bureaucratic importance is the empathy of the staff and their flexibility in the primary areas: linguistic, medical and psychological. The latter being particularly important to create a stable link between the competent authority and the newcomers. Nevertheless, recent scholarship indicates that reception conditions in the Greek island centres continue to raise significant concerns regarding restrictions on freedom of movement, surveillance, and the effective protection of asylum seekers' fundamental rights¹⁹.

¹⁶ Joanna Lenart, "'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms," *Utrecht Journal of International and European Law* 28, no. 75 (2012): 4–19, <https://doi.org/10.5334/ujiel.v28i75.30>.

¹⁷ Hellenic Republic, Ministry of Citizen Protection, "The New Asylum Service and Appeals Authority: Frequently Asked Questions," May 30, 2012, <https://www.minocp.gov.gr/2012/05/30/sychnes-erotiseis-i-neaypiresia-asylou-kai-i-archi-prosfygon/>.

¹⁸ Hellenic Republic, Ministry of Migration and Asylum, "Educational Activities of the Reception and Identification Service," accessed September 12, 2026, <https://migration.gov.gr/en/ekpaideytikes-enimerotikes-draseis/>.

¹⁹ C.H. (Lieneke) Slingenberg, "Coerced into Subsistence: Deprivation of Liberty in the EU Reception and Identification Centres in Greece," *Social & Legal Studies* 34, no. 3 (2025): 381–401,

4. The Belgian Asylum System

4.1. The Legislative Framework and Procedural Safeguards

Belgium is one of 6 countries that founded the EU. Between 1970 and 2000, this country respected EU Law and the Dublin II Regulation. The asylum procedure in Belgium is governed by a federal law, which means that a new arrival must undergo additional procedures to be recognized as an asylum seeker. At the end of the XX century, a new supplementary law of protection was created. *Loi du étrangers*²⁰, need to be seen as an *étranger* Constitution. Under it, European and non-European strangers have the right to well-being and legal accommodation.

The access condition in Belgium is subject to the following requirement: all people must have an ID card. For EU people, the accommodation is automatic because of one of these reasons: education studies, a job, or reunification. They need to submit some documents to the Commune, also known as City Hall. Non-EU citizens require a visa. This visa could not be obtained from the Belgian border, as a rule and it needed to be obtained before entering the state²¹. Under the EU Visa Code, a short-stay visa covers intended stays not exceeding 90 days in any 180-day period, and applications may generally be lodged no more than six months before the intended visit²². Sometimes a person may need to have a unique premise of work²³, needs to demonstrate the reunification with his family²⁴. For short stays, the Visa Code sets the common EU conditions and procedures applicable to visa applications²⁵.

Due to a great number of migrants and refugees, the Belgian authorities needed to make a new reform. In 2004, there were some minors without families

<https://doi.org/10.1177/09646639251322979>

²⁰ Belgium, *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, consolidated text, accessed September 12, 2026, https://emnbelgium.be/sites/default/files/publications/loi_derniere_version.pdf.

²¹ Elisabeth Derriks, Karima Sbai, and Maïté Van Regemorter, *Droit des étrangers: Chronique de jurisprudence 2007–2010* (Brussels: Larcier, 2012), 75.

²² European Union, “Visa Code,” EUR-Lex, accessed September 12, 2026, <https://eur-lex.europa.eu/EN/legal-content/summary/visa-code.html>; Regulation (EC) No. 810/2009, as amended.

²³ European Parliament and Council of the European Union, Directive 2011/98/EU of December 13, 2011 on a Single Application Procedure for a Single Permit, *Official Journal of the European Union* L 343 (December 23, 2011): 1–9, <https://eur-lex.europa.eu/eli/dir/2011/98/oj/eng>.

²⁴ Council of the European Union, Council Directive 2003/86/EC of September 22, 2003 on the Right to Family Reunification, *Official Journal of the European Union* L 251 (October 3, 2003): 12–18, <https://eur-lex.europa.eu/eli/dir/2003/86/oj/eng>.

²⁵ European Parliament and Council of the European Union, Regulation (EC) No. 810/2009 of July 13, 2009 Establishing a Community Code on Visas (Visa Code), as amended, *Official Journal of the European Union* L 243 (September 15, 2009): 1–58, <https://eur-lex.europa.eu/eli/reg/2009/810/oj/eng>.

from 59 countries. These minors were divided into two. First category was the minors who asked for asylum: Congo, Guinea, Afghanistan. The second category was created by the minors who did not ask for asylum: Yugoslavia, Romania, Moldova²⁶.

The year 2006 is a new fresh start for Conseil du Contentieux des Étrangers, this is an administrative and independent authority²⁷. From this, two distinct criteria emerge. First, there is the possibility of an appeal in the annulment of the transfer decision. This appeal, although made by the person to be expelled, does not have a suspension effect. To produce the suspension, a separate request is made, which can take place even if the case is judged. The secondary measure was suspension in extreme urgency, which was limited to a maximum of 72 hours.

Practically, the fundamental difference between the two lies in the depth of the analysis. The right to appeal is a normal way to attack a court decision without suspending the effect of transmission to another state. While suspension in extreme urgency is an exceptional measure taken for more serious cases that produce a temporary stop.

4.2. Transfer Procedures and Legislative Reforms

It goes without saying that the measure of automatic transfer without prior verification and without guaranteeing European rights is in contradiction with the provisions of the ECHR and its case law. Thus, with the 2011 judgment in *M.S.S. v. Belgium and Greece*, the Belgian system produced legislative reforms with both direct and indirect effects. As for the direct effect, it was evident in the reconstruction of the transfer procedure and its guarantees. In practice, the Belgian system could no longer rely on the automatic transfer effect and the right to appeal without suspension of transfer, as provided by the 2006 reform, which remained ineffective.

The first measure taken by Belgium at the ECHR following this event was to halt transfers to Greece and to increase interaction between the authorities and the asylum and possible transfer files²⁸. The 1980 law is a fundamental core of the status of newcomers. Thus, this law was reformed in 2012 and 2014 to guarantee more rights and freedoms in accordance with the provisions of the ECHR.

In 2008, the Return Directive was adopted; in this context, the member states had to transpose it by the end of December 2010. Belgium implemented it

²⁶ Ilse Derluyn and Eric Broekaert, "Unaccompanied Refugee Children and Adolescents: The Glaring Contrast between a Legal and a Psychological Perspective," *International Journal of Law and Psychiatry* 31, no. 4 (2008): 319–330, <https://doi.org/10.1016/j.ijlp.2008.06.006>.

²⁷ Federal Public Service Interior (Belgium), "Conseil du Contentieux des Étrangers," accessed September 12, 2026, <https://www.ibz.be/fr/notre-culture-dentreprise/organismes-independants/conseil-du-contentieux-des-etrangers>.

²⁸ Philipp Lutz, Florian Trauner, and Philipp Stutz, "Towards More Fairness among States: How Dublin Transfers Redistribute Asylum Responsibility," *European Union Politics* 27, no. 3 (2026): 533–556, <https://doi.org/10.1177/14651165261446534>.

by national measures, with subsequent reforms adopted in 2012²⁹. At the same time, the principle of non-refoulement was put into practice in an exceptional manner. Like transfers, return measures as provided for in the Dublin Regulation require additional safeguards to help ensure a removal in which human rights are guaranteed throughout the transfer period and thereafter. At all times, the authorities must ensure respect for human rights in accordance with the European protection mechanism during the transfer and after it³⁰.

In 2014, a new reform was introduced to the *Loi du 1980 sur les étrangers*. A new model of codification and development practice for asylum procedures is being written. The competent authorities must review all documents on a case-by-case basis. This helps to eliminate any possibility of transfer that would contravene the provisions of the ECHR, particularly in Article 3. Any person seeking asylum may request a stay of the transfer process pending finalization of their status.

The number of non-Belgians living in Belgium exceeded 1.2 million at the end of 2013³¹. In 2023, Belgium recorded a positive international migration balance of 66,349³². As of 1 January 2025, 36% of Belgium's population had a foreign background³³.

4.3. The Application of M.S.S. in Belgian Case Law

It is needed to observe that *M.S.S v Belgium and Greece* was mentioned by the national instance³⁴. In case 56.201, the person's name is anonymized due to their vulnerability. This person of European-Chechen nationality was fingerprinted in accordance with EURODAC requirements in Poland. He was transferred to Belgium, where the Secretary of State for Migration and Asylum Policy issued a negative decision on his request to remain in the territory. Thus, the individual named X requested, in an urgent procedure, the suspension of the transfer decision's execution. In the decision given in this case, the judges mentioned

²⁹ Belgium, *Loi du 19 janvier 2012 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, Moniteur belge, February 17, 2012, <https://lisloi.be/laws/2012000081>.

³⁰ European Parliament and Council of the European Union, Directive 2008/115/EC of December 16, 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, arts. 1, 5, 8, and 12, *Official Journal of the European Union* L 348 (December 24, 2008): 98–107, <https://eur-lex.europa.eu/eli/dir/2008/115/oj/eng>.

³¹ The Brussels Times, “Population of Non-Belgians in Belgium in 2013 – 1.2 Million,” September 22, 2015, <https://www.brusselstimes.com/belgium-news/34878/population-of-non-belgians-in-belgium-in-2013-1-2-million/>.

³² Statbel, “International Migration Balance of 66,349 Persons in 2023,” June 4, 2024, <https://statbel.fgov.be/en/news/international-migration-balance-66349-persons-2023>.

³³ Statbel, “36% of the Belgian Population Has Foreign Background,” June 12, 2025, <https://statbel.fgov.be/en/news/36-belgian-population-has-foreign-background>.

³⁴ Conseil du Contentieux des Étrangers, *Arrêt no. 56.201*, February 17, 2011, <https://www.rvv-ccc.be/sites/default/files/arr/A56201.AN.pdf>.

the obligation to observe the independent and effective cause in accordance with the decision in *M.S.S v Belgium and Greece*³⁵.

It is important to note that to the detriment of the ECHR decision on *M.S.S v Belgium and Greece*, this person of Chechen origin would have been automatically transferred to Poland in accordance with the European provisions: the Dublin II Regulation and automatic mutual trust. It is important to note that the rights of vulnerable people are more extensive and better protected by the relevant authorities. We believe it is important to examine how ECHR decisions are effectively applied in national legislative jurisprudence to assess their impact and the mechanisms by which they are integrated.

We thus observe that in Greece, the main problem was around the reception conditions and material conditions, being a Greek system with deficient problems due to the large number of migrants and refugees. However, in Belgium, the immediate consequence was the suspension of transfers, the reconfiguration of procedural guarantees, and the challenge of the transfer.

5. The Asylum System in the United Kingdom

5.1. The Legislative Framework and Institutional Developments

The United Kingdom (UK) is a European country that has tried many times to be a part of the EU community. The acceptance was in 1973. At the time of the events, the UK was a party to the Dublin II Regulation and was therefore bound to comply with it as an EU Member State. This Regulation therefore raised the same risk assessment issue under the ECHR in the UK.

The British Nationality Act 1981 came into force on 1 January 1983 and restructured British nationality law. Under the pre-1983 rules, British mothers generally could not transmit nationality on the same terms as British fathers to children born abroad; subsequent registration provisions provide a route for certain persons affected by that historical discrimination to register as British citizens³⁶. The year 2002 started with a new law: the Nationality, Immigration and Asylum Act 2002³⁷. With its help, asylum, immigration, and appeal rights were established.

In 2008, The UK Border Agency (UKBA) was established by the British government and the Home Office. This agency has multiple roles: immigrants can be sent to detention or arrest in certain cases, search, detention, transfer of criminals after serving their detention. At the same time, a biometric recognition

³⁵ Conseil du Contentieux des Étrangers, *Arrêt no. 56.201*, February 17, 2011.

³⁶ UK Visas and Immigration, "Form UKM: Guidance," updated August 10, 2026, <https://www.gov.uk/government/publications/form-ukm-guidance>.

³⁷ United Kingdom, *Nationality, Immigration and Asylum Act 2002*, c. 41, <https://www.legislation.gov.uk/ukpga/2002/41/contents>.

by fingerprinting and the granting of ID cards were attempted³⁸. These were first used by people new to the British system who were in educational studies or who considered themselves in a civil partnership with a British person or were married to a British citizen³⁹.

However, the agency has not been without problems, which is why it was divided in 2013 into visa services (UK visas and Immigration) and enforcement and transfer (Immigration Enforcement).⁴⁰ Both UK visas and Immigration and Immigration Enforcement were created in 2013 1 month apart: March and April.

UK Visas and Immigration is responsible for: asylum, visa, and citizenship applications. The authorities authorized in this field have as their main responsibilities: processing visa applications, administering asylum applications and the international procedure, assessing applications, and the file of each person. All of these must comply with the provisions of the legislation on asylum and migration and respect the rights conferred.

While Immigration Enforcement is responsible for identifying and removing people who are residing illegally, managing detention operations, deportations, combating illegal migration, and ensuring the national security of the state.

5.2. Suspension of Transfers and Individual Risk Assessment

The impact of *M.S.S v Belgium and Greece* was so significant that it produced effects in other countries. The British authorities have a direct effect: suspension of transfer to Greece in accordance with *M.S.S v Belgium and Greece*. These measures of suspension were maintained for an extended period until the Greek authorities revised their conditions and introduced new human rights protections.

These suspension measures were maintained for an extended period until the Greek system issued new clarifications and a higher level of protection for European rights.

The case, *R (EM (Eritrea)) v Secretary of State for the Home Department*, was heard by the Supreme Court of the United Kingdom, where national judges discussed the application of Article 3 of the European Convention on Human Rights in a case involving four asylum seekers (three Eritrean nationals and one Iranian national)⁴¹.

These applicants came to the United Kingdom from Italy. They were

³⁸ "UKBA Switches Biometrics Spend to Immigration and Asylum," *Biometric Technology Today* 2010, no. 9 (October 2010): 12, [https://doi.org/10.1016/S0969-4765\(10\)70191-0](https://doi.org/10.1016/S0969-4765(10)70191-0).

³⁹ "UKBA to Issue ID Cards to Foreign Nationals," *Card Technology Today* 20, no. 9 (September 2008): 4, [https://doi.org/10.1016/S0965-2590\(08\)70181-6](https://doi.org/10.1016/S0965-2590(08)70181-6).

⁴⁰ BBC News, "UK Border Agency to Be Scrapped, Theresa May Announces," March 26, 2013, <https://www.bbc.com/news/uk-politics-21941395>.

⁴¹ United Kingdom Supreme Court, *R (EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, February 19, 2014, <https://www.supremecourt.uk/cases/uksc-2012-0272>.

therefore transferred to Italy under the Dublin II Regulation. Before the Supreme Court, the applicants sought a suspension of the transfer decisions on the grounds that this would protect the interests guaranteed by Article 3 of the ECHR, citing the impact on their physical and mental health. It was argued that, once in Italy, they would be exposed to a real risk of treatment contrary to Article 3, including the risk of abusive detention or, indirectly, of readmission to their country of origin, poor conditions of detention and reception. It is important to note that all of these can lead to degrading or inhuman treatment.

The Supreme Court, drawing on *Soering* and *M.S.S.*, held that an applicant resisting a Dublin II transfer need not establish a “systemic deficiency” in the receiving State. The decisive question is whether substantial grounds show a real risk of treatment contrary to Article 3, and the cases were remitted for assessment on that basis⁴².

6. Conclusion

The jurisprudence of the European Court of Human Rights has had a real impact on the domestic law of the Member States, the case of *M.S.S v Belgium and Greece* demonstrates this.

The evidence show that European legislative systems integrate the most impactful decisions issued by Strasbourg into national practice, interpret them in their own way, and apply them in domestic law. It is important to observe how the protection of people's rights and freedoms is intensified in the European system, with a major impact on vulnerable people: migrants and refugees. The protection of these categories of people is essential both theoretically and practically because the real state in which they find themselves is a vulnerable one.

This indicates that it is necessary for the competent authorities of the states to thoroughly and effectively verify each asylum application or international procedure. At the same time, vulnerable people observed on maritime territory or on land by the responsible authorities must be helped to gain their migrant and refugee rights. If there were a group of several people, some of whom exhibited signs of vulnerability and others did not, those who exhibited signs of vulnerability should be transferred to reception points within the European state to be granted the necessary legal status. And the people with signs of non-vulnerability should be given real guarantees throughout the transfer and afterwards.

⁴² *R (EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, ¶ 58.

Bibliography

I. Articles and Books

1. Derluyn, Ilse, and Eric Broekaert. "Unaccompanied Refugee Children and Adolescents: The Glaring Contrast between a Legal and a Psychological Perspective." *International Journal of Law and Psychiatry* 31, no. 4 (2008): 319–330. <https://doi.org/10.1016/j.ijlp.2008.06.006>.
2. Derriks, Elisabeth, Karima Sbai, and Maïté Van Regemorter. *Droit des étrangers: Chronique de jurisprudence 2007–2010*. Brussels: Larcier, 2012.
3. Gerbaudo, Marco. "Paving the Way to the New Pact on Migration and Asylum: Some Reflections on *Ministero dell'Interno* (Joined Cases C-228/21, C-254/21, C-297/21, C-315/21, C-328/21)." *Maastricht Journal of European and Comparative Law* 31, no. 5 (2024): 647–661. <https://doi.org/10.1177/1023263X241311677>.
4. Karafolas, Simeon, and Alexandros Alexandrakis. "The Annual Demand for Seasonal Immigrant Labor in Greece During the Crisis Period." In *EU Crisis and the Role of the Periphery*, edited by Anastasios Karasavoglou, Serdar Ongan, and Persefoni Polychronidou, 75–91. Cham: Springer, 2015. https://doi.org/10.1007/978-3-319-10133-0_5.
5. Kotsila, Panagiota, and Giorgos Kallis. "Biopolitics of Public Health and Immigration in Times of Crisis: The Malaria Epidemic in Greece (2009–2014)." *Geoforum* 106 (2019): 223–233. <https://doi.org/10.1016/j.geoforum.2019.08.019>.
6. Lenart, Joanna. "'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms." *Utrecht Journal of International and European Law* 28, no. 75 (2012): 4–19. <https://doi.org/10.5334/ujiel.v28i75.30>.
7. Lutz, Philipp, Florian Trauner, and Philipp Stutz. "Towards More Fairness among States: How Dublin Transfers Redistribute Asylum Responsibility." *European Union Politics* 27, no. 3 (2026): 533–556. <https://doi.org/10.1177/14651165261446534>.
8. Orcutt, Miriam, Reem Mussa, Lucinda Hiam, Apostolos Veizis, Sophie McCann, Elisavet Papadimitriou, Aurelie Ponthieu, and Michael Knipper. "EU Migration Policies Drive Health Crisis on Greek Islands." *The Lancet* 395, no. 10225 (2020): 668–670. [https://doi.org/10.1016/S0140-6736\(19\)33175-7](https://doi.org/10.1016/S0140-6736(19)33175-7).
9. Slingenberg, C. H. (Lieneke). "Coerced into Subsistence: Deprivation of Liberty in the EU Reception and Identification Centres in Greece." *Social & Legal Studies* 34, no. 3 (2025): 381–401. <https://doi.org/10.1177/09646639251322979>.
10. "UKBA Switches Biometrics Spend to Immigration and Asylum." *Biometric Technology Today* 2010, no. 9 (October 2010): 12. [https://doi.org/10.1016/S0969-4765\(10\)70191-0](https://doi.org/10.1016/S0969-4765(10)70191-0).
11. "UKBA to Issue ID Cards to Foreign Nationals." *Card Technology Today* 20, no. 9 (September 2008): 4. [https://doi.org/10.1016/S0965-2590\(08\)70181-6](https://doi.org/10.1016/S0965-2590(08)70181-6).

II. Reports and Online Resources

1. BBC News. "UK Border Agency to Be Scrapped, Theresa May Announces." March 26, 2013. <https://www.bbc.com/news/uk-politics-21941395>.
2. Hellenic Republic, Ministry of Migration and Asylum. "Educational Activities of the Reception and Identification Service." Accessed September 12, 2026. <https://migration.gov.gr/en/ekpaideytikes-enimerotikes-draseis/>.
3. Hellenic Republic, Ministry of Migration and Asylum. "The Asylum Application." Accessed September 12, 2026. <https://migration.gov.gr/en/gas/di-adikasias-asyloy/i-aitisi-gia-asylo/>.
4. Kotoulas, Ioannis E. "Greece and Mass Migration from North Africa." China-CEE Institute, September 10, 2025. <https://china-cee.eu/2025/09/10/greece-monthly-briefing-greece-and-mass-migration-from-north-africa/>.
5. Macrotrends. "Greece Immigration Statistics." Accessed September 12, 2026. <https://www.macrotrends.net/global-metrics/countries/GRC/greece/immigration-statistics>.
6. Maroukis, Thanos. *The Number of Irregular Migrants in Greece at the End of 2010 and 2011*. ELIAMEP Briefing Notes 21/2012, June 2012. https://www.eliamep.gr/wp-content/uploads/2012/06/Briefing-Notes_21_June-2012_Thanos-Maroukis1.pdf.
7. Merriam-Webster.com Dictionary. S.v. "knock-on effect." Accessed January 21, 2026. <https://www.merriam-webster.com/dictionary/knock-on%20effect>.
8. Research Institute for European and American Studies (RIEAS). "Immigration to Greece." August 2010. <https://www.rieas.gr/images/rieas145.pdf>.
9. Statbel. "36% of the Belgian Population Has Foreign Background." June 12, 2025. <https://statbel.fgov.be/en/news/36-belgian-population-has-foreign-background>.
10. Statbel. "International Migration Balance of 66,349 Persons in 2023." June 4, 2024. <https://statbel.fgov.be/en/news/international-migration-balance-66349-persons-2023>.
11. The Brussels Times. "Population of Non-Belgians in Belgium in 2013 – 1.2 Million." September 22, 2015. <https://www.brusselstimes.com/belgium-news/34878/population-of-non-belgians-in-belgium-in-2013-1-2-million/>.
12. UK Visas and Immigration. "Form UKM: Guidance." Updated August 10, 2026. <https://www.gov.uk/government/publications/form-ukm-guidance>.
13. UNHCR. "Operational Data Portal: Europe Sea Arrivals, Greece." Accessed September 12, 2026. <https://data.unhcr.org/en/situations/europe-sea-arrivals/location/24489>.

III. Legal Sources and Official Documents

1. Belgium. *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*. Consolidated text. https://emn.belgium.be/sites/default/files/publications/loi_derniere_version.pdf.
2. Belgium. *Loi du 19 janvier 2012 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*. Moniteur belge, February 17, 2012. <https://lislois.be/laws/2012000081>.

3. Conseil du Contentieux des Étrangers. *Arrêt no. 56.201*, February 17, 2011. <https://www.rvv-ccc.be/sites/default/files/arr/A56201.AN.pdf>.
4. Council of the European Union. Council Directive 2003/86/EC of September 22, 2003 on the Right to Family Reunification. *Official Journal of the European Union* L 251 (October 3, 2003): 12–18. <https://eur-lex.europa.eu/eli/dir/2003/86/oj/eng>.
5. Council of the European Union. Council Regulation (EC) No. 343/2003 of February 18, 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National. *Official Journal of the European Union* L 50 (February 25, 2003): 1–10. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R0343>.
6. European Court of Human Rights. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, January 21, 2011. ECLI:CE:ECHR:2011:0121JUD003069609. <https://www.bailii.org/eu/cases/ECHR/2011/108.html>.
7. European Court of Human Rights. *Soering v. United Kingdom*, no. 14038/88, July 7, 1989.
8. European Parliament and Council of the European Union. Directive 2008/115/EC of December 16, 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals. *Official Journal of the European Union* L 348 (December 24, 2008): 98–107. <https://eur-lex.europa.eu/eli/dir/2008/115/oj/eng>.
9. European Parliament and Council of the European Union. Directive 2011/98/EU of December 13, 2011 on a Single Application Procedure for a Single Permit. *Official Journal of the European Union* L 343 (December 23, 2011): 1–9. <https://eur-lex.europa.eu/eli/dir/2011/98/oj/eng>.
10. European Parliament and Council of the European Union. Regulation (EC) No. 810/2009 of July 13, 2009 Establishing a Community Code on Visas (Visa Code), as amended. *Official Journal of the European Union* L 243 (September 15, 2009): 1–58. <https://eur-lex.europa.eu/eli/reg/2009/810/oj/eng>.
11. Greece. *Law No. 3386/2005 on the Entry, Residence and Social Integration of Third-Country Nationals on Greek Territory*. Government Gazette A 212/23. 08.2005. <https://www.refworld.org/legal/legislation/natlegbod/2005/en/98138>.
12. Greece. *Law No. 3907/2011 on the Establishment of an Asylum Service and a First Reception Service*. Government Gazette A 7/26.01.2011. <https://www.refworld.org/legal/legislation/natlegbod/2011/78894>.
13. United Kingdom. *Nationality, Immigration and Asylum Act 2002*, c. 41. <https://www.legislation.gov.uk/ukpga/2002/41/contents>.
14. United Kingdom Supreme Court. *R (EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, February 19, 2014. <https://www.supremecourt.uk/cases/uksc-2012-0272>.

Procedural Unilateralism in Civil Justice: The One-Sided Courtroom and the Limits of Adversarial Principle

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Abstract

This study examines the departures from the natural and traditional multilateral structure of the adversarial principle in civil proceedings, with a particular focus on determining the conditions under which an initially unilateral procedure remains compatible with fair trial guarantees and those under which it amounts to a genuine exclusion of the opposing party. The research combines doctrinal, logical and comparative methods, using Romanian civil procedure as the primary reference point and testing it against French, Portuguese, German, common-law and transnational procedural models. The analysis distinguishes apparent unilateralism from true unilateralism. The study finds that unilateral procedures are justified only by strict reasons such as urgency, preservation of evidence, surprise, efficient judicial administration or the structurally non-contentious nature of the application. It identifies the derogatory legal regime governing such procedures. Their legitimacy depends on enhanced procedural compensatory safeguards designed to preserve the essence of adversarial participation, characterized by narrowly construed grounds of application, heightened judicial scrutiny, temporal limitations, a reinforced judicial role, strict proportionality, prompt disclosure, effective review. The study's implication is normative and methodological: unilateralism should be treated not as a procedural shortcut, but as a narrowly confined derogation requiring rigorous justification and effective subsequent adversarial control.

Keywords: procedural unilateralism; adversarial principle; civil justice; ex parte proceedings; compensatory safeguards.

JEL Classification: K15, K41

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1. Prolegomena

1.1. The Adversarial Principle

The adversarial principle has, first of all, an epistemic function: it prevents a single perspective from being transformed into the official version of reality². Without hearing the other party, the procedural configuration risks being constructed from a single angle, incomplete or strategically oriented³. In the case law of the European Court, this requirement is not reduced to a merely decorative formality: what matters is that the party knows the elements capable of influencing the decision and can decide for itself whether they call for a response⁴.

In its classical meaning, the adversarial principle expresses, in its typical form, the dialogic structure of contentious proceedings⁵: two antagonistic procedural positions, advanced by holders of divergent interests, are subjected to reciprocal scrutiny before the court. From this perspective, procedural truth is neither delivered by one of the parties nor intuited by the judge in isolation; rather, it is constructed critically, through the confrontation of opposing submissions, evidence and arguments⁶.

In the British model described by Lord Reed, the hearing lies **at the heart** of adversarial procedure: the judge decides by assessing the competing evidence and arguments of the parties, and the system is built on the premise that "**nothing**

² In an extra-legal register, but useful for understanding the risk of the single perspective, see Marija Gjorgjieva Dimova, "Audiatur et altera pars! (Ex-centrism in Macedonian Novel)," *Fluminensia* 33, no. 1 (2021): 241, 253, <https://doi.org/10.31820/f.33.1.4>. The source is used here only as a methodological analogy: an ignored perspective may destabilize the claim of a dominant version to exhaust the reality of the facts.

³ See, on the connection between *audiatur et altera pars*, multiperspectivity, and the formation of judgment, Dennis Pausch, "Audiatur et altera pars? Multiperspektivität als narratives Prinzip bei Sueton," in *Suétone narrateur: Biographie und Erzählung in De vita Caesarum*, ed. Edoardo Galfré and Christoph Schubert (Berlin/Boston: De Gruyter, 2024), 21–24, <https://doi.org/10.1515/978311333939-002>; for a historical illustration of the risks inherent in a unilateral perspective, see Teresa Bałuk-Ulewiczowa, "Audiatur et Altera Pars: The Polish Record of the Działyński Embassy of 1597," *British Catholic History* 33, no. 4 (2017): 501, 503, 515, <https://doi.org/10.1017/bch.2017.23>. The English sources present the audience granted to Paweł Działyński by Elizabeth I as an embarrassing episode for Poland-Lithuania, whereas the Polish perspective preserved in *Mercurius Sarmaticus* reveals a less humiliating and more diplomatically functional episode.

⁴ See *Nideröst-Huber v. Switzerland*, no. 18990/91, §§ 24, 29–31 (ECtHR, February 18, 1997), ECLI:CE:ECHR:1997:0218JUD001899091; and *Beer v. Austria*, no. 30428/96, §§ 17–20 (ECtHR, February 6, 2001), ECLI:CE:ECHR:2001:0206JUD003042896.

⁵ Elena Belei, in Elena Belei, coord., *Drept procesual civil. Partea generală* [Civil procedural law. General part], 3rd ed. (Chișinău: Lexon-Prim, 2024), 105.

⁶ *Ex parte Lloyd* (1822) Mont. 70, 72 n., cited in Andrew Langdon, "The Adversarial System," in *Practical Advocacy in the Crown Court*, ed. Mary Cowe and Susan Cavender (Bloomsbury Professional, 2020), 57, recording the formula that "truth is best discovered by powerful statements on both sides of the question."

is decided" until oral argument has been heard⁷. This perspective must, however, be regarded *cum grano salis* in our system of law, where written procedure, the role of the judge and the regime of remedies - including the limits of appellate review - give the adversarial principle a physiognomy less dependent on orality. Lord Reed does not refer to unilateral procedures, but his observation sets a useful comparative benchmark: if the classical form of adversarial procedure presupposes the confrontation of the parties' arguments before the judge, procedures in which the court initially examines only the submissions or material of one party must be treated as functional and strictly justified departures from adversarial debate, not as ordinary means of capitalizing adversarial debate. This paper analyses the legal regime of civil procedures in which the court determines, temporarily or structurally, an application in the absence of the procedural opponent's participation or, in non-contentious matters, in the absence of a determinate procedural opponent. The research problem is not the mere lack of simultaneity in the debate, but the identification of the limit beyond which an initially unilateral procedure ceases to be a derogation compatible with a fair trial and becomes a true procedural exclusion.

The novelty of the study lies in proposing a **taxonomy** of procedural unilateralism accompanied by appropriate procedural safeguards: apparent unilateralism, in which adversariality is merely sequenced; **structural** unilateralism, in which the absence of initial or simultaneous adversariality flows from the law or from the very nature of the procedure; and **conjunctural** unilateralism, in which the procedure remains adversarial as a model but, *in concreto*, is conducted in the absence of the party who was lawfully summoned. Within structural unilateralism, the study distinguishes between the *ex parte* form, in which the opponent exists but is temporarily excluded, and the structurally **non-contentious** form, in which there is no determinate procedural opponent. The research uses the doctrinal, logical and comparative methods, taking Romanian civil procedure as its principal point of reference and testing its solutions by reference to French, Portuguese and German law, common-law procedures and transnational procedural standards.

1.2. Unilateralism vs. Multilateralism

Romanian civil procedural law enshrines a dialogic conception, which this study expresses through the rule of multilateralism. **Multilateralism** means the dialogic structure of the procedure, in which the material capable of influencing the court's decision is accessible to both parties before it is jurisdictionally capitalized, through knowledge, observations, challenge and supplementation.

⁷ Robert Reed, Lord Reed of Allermuir, "Oral Hearings in the United Kingdom Courts: Past, Present and Future," speech delivered at the Legal Training and Research Institute of Japan, November 29, 2023, 1, 10, Supreme Court of the United Kingdom, accessed June 13, 2026, https://supremecourt.uk/uploads/speech_231129_reed_c6c3c2d800.pdf.

From this rule there has been established the **exception** of procedural **unilateralism**, in which the emphasis falls - at least in its first phase, and sometimes even entirely before the first-instance court - on its monological nature: there is a single "voice"; even if it is not "heard" in the proper sense, it emerges from the content of the claim or, as the case may be, of the request submitted.

1.3. Apparent Unilateralism: the Sequencing of Adversariality

The adversarial principle does **not** require every procedural step to take the form of immediate *inter partes* **confrontation**. Such an understanding would be not only excessive, but also unsupported: many procedural acts are prepared, filtered, produced or processed by the court or by its auxiliaries, without this automatically giving rise to a problem of unilateralism. Doctrine shows - in its analysis of German civil procedure - that the procedure remains adversarial even if the judge plays the principal role in gathering and filtering evidence, while the lawyers supervise, guide and complete that activity⁸. This observation may be generalized: the non-adversarial part of a procedural sequence does not, in itself, exclude adversariality, provided it is followed or accompanied by the parties' effective possibility to guide, control and challenge the outcome of the operation⁹.

Expert evidence is an eloquent example, but not an isolated exception. The expert is selected and instructed by the court, yet this operation is carried out with particular care for the protection of the parties' interests¹⁰. The parties are **not absent** from the taking of expert evidence: they have the right to participate in setting the objectives, to file documents, to be summoned in order to participate directly in on-site findings, to observe the operations performed in their presence, subsequently to submit objections to the expert report, to request clarifications or supplementation of the report, or even to ask for a new expert examination. The **only** sequence that does **not take place** in the parties' **presence** is the internal operation of technical **analysis** and **drafting** of the report. That, however, is not a judicial debate conducted in secret with one of the parties, but the court auxiliary's own intellectual activity.

The same distinction also operates in the field of digital evidence: **cyber-navigation**, by which the judge obtains information directly by accessing online content, is not problematic because of the court's initiative, but because of any solitary use of the information obtained online¹¹. It does **not** slide into **unilater-**

⁸ John H. Langbein, "The German Advantage in Civil Procedure," *University of Chicago Law Review* 52, no. 4 (1985): 824, 826, 829, <https://doi.org/10.2307/1599518>.

⁹ Langbein, "German Advantage in Civil Procedure," 829.

¹⁰ Langbein, "German Advantage in Civil Procedure," 835.

¹¹ Lurdes Varregoso Mesquita, "Justiça Digital para Todos? Prova Eletrônica, Eficiência e Vulnerabilidade" [Digital justice for all? Electronic evidence, efficiency and vulnerability], *Revista*

alism insofar as it is conducted within a framework accessible to the parties, enabling them to observe, **discuss** and **challenge** the verification¹².

More generally, the unilateral character of a procedure should **not** be **equated** with the **absence** of simultaneous participation by both parties at **every procedural step**. The decisive **criterion** is different: if the relevant procedural element enters - before being relied on by the court - a **circuit accessible to both parties** - knowledge, observations, supplementation, challenge - we are not dealing with unilateralism properly so called. Unilateralism properly so called arises only when **one** party is **excluded** from the information, operation or argument capable of influencing the decision, without a real and useful possibility of reaction. The adversarial principle therefore does not require absolute simultaneity, but effective bilateral control over the relevant procedural material.

What is essential is that the element on which the judge relies in the decision should previously have been opened to adversarial debate. This conclusion is also confirmed in the analysis of transnational rules of civil procedure, where the fairness of adjudication is linked not only to the impartiality of the court, but also to the existence of a genuine opportunity "to be heard" and to the procedure's capacity to allow the establishment of the relevant facts¹³. In this respect, the effect of the French principle of contradiction is precisely to prevent the judge from taking into consideration, for the purposes of the decision, anything that has not been submitted to the parties' adversarial debate¹⁴.

1.4. Particular Features of Procedural Unilateralism

The incidence of the adversarial principle must be assessed by reference to the **stage** and **specific** nature of the procedure. Thus, in urgent or conservatory procedures, the guarantee of adversariality is not identical with an obligation to submit the application to prior adversarial debate between the parties in all cases; it may also be realized through effective subsequent review, if that review enables the affected party to challenge the measure and reopen discussion of its grounds. As will be seen, what is specific to *ex parte* **structural unilateralism** is that the affected party exists, but is kept outside the initial phase of the procedure: it **does not know** of the judicial step taken, has no access to the material filed by the

Eletrônica de Direito Processual 27, no. 1 (January–April 2026): 542, <https://doi.org/10.12957/redp.2026.95756>.

¹² Mesquita, "Justiça Digital para Todos?," 542.

¹³ Russell J. Weintraub, "Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure," *Texas International Law Journal* 33 (1998): 416, where the author identifies among procedural-fairness factors the "opportunity to be heard" and "factfinding capacity."

¹⁴ John Anthony Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure," *International and Comparative Law Quarterly* 52, no. 2 (April 2003): 282–83, <https://doi.org/10.1093/iclq/52.2.281>.

applicant and cannot, before the measure is ordered, respond¹⁵, challenge or supplement that material. The court thus rules on the basis of a single factual and legal version¹⁶, which requires stricter scrutiny of the legal basis, concrete necessity, risk of abuse and proportionality of the measure.

The difference does not lie in the application of the adversarial principle in favour of the **applicant**, but in the fact that **only** the applicant has, in the initial phase, the possibility to present its **version** through the **application** seising the court.

Because it departs from the deep reasons of debate - reasons specific to the rule of law - this exception must have multiple, serious and well-articulated justifications. Accordingly, unilateralism must remain an **exception**¹⁷, subject to **strict interpretation** and **application**.

Structural unilateralism has, in all cases, its **source** in the **law**. This statement also holds true where the law gives the court discretion to decide the case without summoning the parties. The reason is that the circumstances in which proceedings may be determined without summoning the parties are laid down by law; where the law allows such an option, only the discretionary determination of whether the parties should be summoned or not lies with the judge.

In these procedures, the active role of the judge does not replace adversariality; it operates as a **compensatory safeguard** for the temporary absence of adversarial debate. Precisely because the court rules, in the initial phase, only on the basis of the application and the material supplied by the applicant, it must check with heightened rigor the legal basis of the measure, its concrete necessity, the risk of abuse and the proportionality of the interference.

1.5. The Source of the Absence of Adversariality: Structural Unilateralism and Conjunctural Unilateralism

In the case of unilateral applications, the absence of adversariality is **structural** (1.5.1), whereas in the case of contentious proceedings that become "non-adversarial" because they are conducted in the absence of the defendant who was lawfully summoned, that absence is merely **conjunctural**¹⁸ (1.5.2).

¹⁵ Marie-Anne Frison-Roche, *Généralités sur le principe du contradictoire: Étude de droit processuel* [General considerations on the adversarial principle: A study in procedural law] (Paris: LGDJ, 2014), 129.

¹⁶ Frison-Roche, *Généralités sur le principe du contradictoire*, 129–30.

¹⁷ Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

¹⁸ Loïc Cadet and Emmanuel Jeuland, *Droit judiciaire privé* [Private judicial law], 5th ed. (Paris: Litec, 2006), § 643, 416, cited in Lionel Miniato, *Le principe du contradictoire en droit processuel* [The adversarial principle in procedural law] (Paris: LGDJ, 2008), § 219, 199.

1.5.1. Structural unilateralism

Structural unilateralism should be understood as the absence of initial or simultaneous adversariality where that absence results from the **legal configuration** of the procedure or from the legal **nature** of the **application**, and not from the passivity of a party who has been lawfully summoned. It may concern either the **temporary exclusion** of an affected person in *ex parte* procedures, or the very **absence** of a determinate procedural **opponent** in structurally non-contentious procedures or incidents. In both hypotheses, unilateralism is not an accident in the conduct of the case, but a feature of the procedural model established or accepted by law.

This type of unilateralism has two distinct forms. (a) The first is *ex parte* structural unilateralism and presupposes that an affected party exists, but is temporarily excluded from the initial phase of the procedure so that the measure is not deprived of useful effect; (b) The second is structurally **non-contentious** unilateralism, which does not presuppose a temporarily excluded opposing party, but rather the absence of a determinate procedural opponent; here, adversariality between opponents is not deferred, but an application is determined which, by its nature, is not built on the opposition between adverse claims.

1.5.2. Conjunctural unilateralism

Conjunctural unilateralism arises within **contentious**, adversarial proceedings which, *in concreto*, come to be conducted **without the participation of the defendant** who was **lawfully summoned**; it results from the **conduct** of the **absent party** or from the circumstances that led to the non-appearance of the lawfully summoned party¹⁹. In this latter case, the opposing party exists, has been duly summoned to the proceedings and has had a genuine opportunity to put forward its defence, but fails to avail itself of that opportunity. Therefore, the absence of a lawfully summoned defendant does not transform the procedure into a unilateral procedure in the proper sense. It produces, at most, a **factual** unilateralism, not a structural one. The decisive criterion remains the regularity of notification and the existence of an effective possibility of defence: if the defendant was lawfully summoned and had a real chance to participate, adversariality is not suppressed, but unused by the party who is absent.

¹⁹ See Vitalie Moscalciuc, “Garanțiile procesual-civile ale reclamantului la examinarea cauzei în lipsa pârâtului” [The claimant’s civil procedural guarantees in the examination of the case in the defendant’s absence], *Legea și Viața* (November 2019): 37–41. The author emphasizes that default adjudication presupposes proper notification and a genuine opportunity to defend, while Article 6 ECHR guarantees a real possibility to present one’s case rather than physical presence as such.

1.6. Statement of Reasons

The law may enshrine unilateralism having regard to the **specific nature** of the case or to an **interest** which, under the conditions strictly provided by law, temporarily **prevails** over adversariality²⁰.

These justifications derive from: 1) the **urgent** nature of the procedure; 2) preservation of the **surprise** effect, including through the initial confidentiality of the procedure as a requirement of effectiveness; and 3) the need to ensure the effective functioning of the public service of justice²¹ in **non-contentious** matters.

Some applications may be supported by not merely one, but even **two** such justifications. This is the case with applications for attachment and garnishment as conservatory measures, whose primary rationale is to preserve the surprise effect vis-à-vis the debtor, procedural expedition being only a secondary consideration²².

2. Analysis of Exceptions to the Rule of Procedural Multilateralism

2.1. Urgency of the Procedure

French law contains provisions according to which the rules relating to adversariality are not applicable in certain matters in cases of urgency or exceptional circumstances. In situations of exceptional urgency, the judge must be able to intervene before it is too late, before it is no longer truly useful to do justice²³ and, therefore, to decide very quickly²⁴. The need for urgent determination of the procedure would not provide the time necessary for the procedure to be conducted - realistically - in an adversarial manner²⁵. Having regard (i) to the short time available and (ii) to the absolute necessity of taking a decision, urgency imposes an "inversion of legal values"²⁶. It has been considered that the effects are twofold because, while certain provisions tend to exclude application of the adversarial principle, others make an adapted application of the

²⁰ Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

²¹ Lionel Ascensi, *Du principe de la contradiction* [On the adversarial principle] (Paris: LGDJ/EJA, 2006), § 444, 248; Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

²² Constitutional Court of Romania, Decision no. 166 of March 22, 2005, *Official Gazette of Romania*, Part I, no. 372 (May 3, 2005).

²³ Olivier Lecucq, "Réflexions générales sur le respect du contradictoire dans les procédures d'urgence" [General reflections on respect for the adversarial principle in urgent proceedings], in *Le principe du contradictoire dans le procès administratif* [The adversarial principle in administrative proceedings], coord. J. Gourdou, O. Lecucq, and J.-Y. Madec (Paris: L'Harmattan, 2010), 63.

²⁴ Frison-Roche, *Généralités sur le principe du contradictoire*, 131.

²⁵ Frison-Roche, *Généralités sur le principe du contradictoire*, 132; Ascensi, *Du principe de la contradiction*, § 99, 62.

²⁶ Frison-Roche, *Généralités sur le principe du contradictoire*, 131.

principle²⁷.

The urgency of the situation requires procedures **adjusted** to situations of this nature²⁸. It is natural that, in urgent circumstances, the applicable law should not be the same as that applicable in ordinary times and, on the contrary, that in such circumstances it should be highly **specific**²⁹, in which respect adversariality may suffer because of the **compression** of time.

To illustrate the foregoing, the urgency generated by the "danger in delay" underlies the granting of an application for *preservation of evidence* without summoning the parties, where the court considers - in light of the circumstances of the case - that summoning them would compromise the effectiveness of the measure³⁰. Here the logic of procedural expedition of procedure is beyond doubt and follows from the requirements of Article 359 of the Romanian Code of Civil Procedure: the existence of a danger that the evidence may disappear or become difficult to take in the future. In French law, measures of instruction *in futurum* are examined in the same evidentiary and preventive key: they allow the preservation or prior producing of evidence before the commencement of proceedings, when litigation is still merely possible³¹. Where - under that legal system - the applicant resorts to the non-adversarial form, that route is subsidiary and may be used only in cases of "strict necessity to derogate from adversariality"³². On this basis, it may be argued that the problem is not the anticipatory character of the measure, but the separate justification of the departure from adversariality. Therefore, the anticipatory character of the measure is not, in itself, problematic; what becomes problematic is the non-adversarial mode of obtaining evidence where the derogation from adversariality is not justified by a **strict, duly reasoned necessity**, or where the measure exceeds the limits of loyal, legally admissible and circumscribed inquiry³³.

The determination of an application for a *presidential ordinance*, exceptionally without summoning the parties, is also grounded in the urgency of taking the measure requested³⁴, and not in the surprise effect vis-a-vis the

²⁷ Ascensi, *Du principe de la contradiction*, § 99, 62.

²⁸ Lecucq, "Réflexions générales," 63.

²⁹ Lecucq, "Réflexions générales," 64. The author gives a suggestive French example—when a house is on fire, one does not ask a judge for authorization to send the firefighters—referring to Government Commissioner Romieu.

³⁰ Romanian Code of Civil Procedure, art. 360(5).

³¹ François-Xavier Gosselin, Yves Le Marrec, and Pol De Kervenoael, "Les mesures d'instruction in futurum. Analyse de la jurisprudence des Cours d'Angers et de Rennes," *Revue Juridique de l'Ouest*, no. 2 (1987): 155–56, <https://doi.org/10.3406/juro.1987.1484>.

³² Nathalie Bruché and Cédric Porin, "Instruire le dossier pour établir les faits: le rôle actif du juge," *Le Droit Ouvrier*, no. 789 (April 2014): 248, <https://doi.org/10.3917/drou.789.0247>. The authors discuss Article 145 of the French Code of Civil Procedure, which permits, before trial, legally admissible investigative measures where there is a legitimate reason to preserve or establish proof of facts on which the resolution of a dispute may depend.

³³ Bruché and Porin, "Instruire le dossier," 251–53.

³⁴ Liviu-Alexandru Viorel and Alin Stamatoiu, "Ordonanța președințială în Noul Cod de procedură

defendant; this conclusion follows from Article 999(2) of the Code of Civil Procedure, which links determination without summons to particular urgency³⁵. In this case, urgency is a constitutive condition of admissibility, the judge having the difficult task of identifying the fair balance between the claimant's interest in obtaining the provisional measure with speed and preventing damage to the defendant through determination without summoning him³⁶.

Also, for reasons of urgency, *suspension* of the proceedings whose transfer is requested may be ordered, for well-grounded reasons, without summoning the parties before the first hearing³⁷: summoning them could delay the measure until the main proceedings had already been determined.

2.2. The Surprise Effect and the Risk of Procedural Pressure

A second justification for not summoning the parties must be found in the objective **effectiveness**³⁸ of the measure. In this hypothesis, the surprise effect is the requirement of the measure's useful effect; the pressure exerted on the targeted party is an inherent risk which justifies stricter judicial scrutiny: prior notification would allow the person concerned to neutralize precisely the result that the measure seeks to preserve.

French doctrine identifies, in the same logic, the hypothesis in which the effectiveness of the judicial measure depends on the initial confidentiality of the procedure, examples being seizures and inspections³⁹.

The notions of "secrecy" or "confidentiality" are only partly adequate. In these procedures, the purpose is not secrecy as an autonomous value, but preservation of the surprise effect: prior summoning of the opponent could allow the removal of assets, emptying of accounts, destruction of evidence or depriving the measure of content⁴⁰. Precisely for this reason, **attachment**⁴¹ and garnishment as

civilă. Elemente de continuitate și de noutate. Propuneri de lege ferenda," *Revista Română de Drept Privat*, no. 2 (2013): 172.

³⁵ Dan-Mihail Gavriș, commentary on Article 999, in Gabriel Boroș et al., *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II: art. 456–1134*, 2nd rev. and supplemented ed. (Bucharest: Hamangiu, 2016), 867. On particular urgency under Article 999(2), see Gabriel Boroș and Mirela Stancu, *Drept procesual civil. Vol. 2: Judecata în căile de atac; proceduri speciale; executarea silită*, 6th rev. and supplemented ed. (Bucharest: Hamangiu, 2023), 366.

³⁶ Paul Piperea and R. Dan, in Gheorghe Piperea et al., *Noul Cod de procedură civilă. Note, corelații, explicații* [The New Code of Civil Procedure. Notes, correlations, explanations] (Bucharest: C.H. Beck, 2019), 1815–16.

³⁷ Romanian Code of Civil Procedure, art. 143(1), second sentence.

³⁸ Viorel Mihai Ciobanu, *Tratat teoretic și practic de procedură civilă. Vol. I. Teoria generală* [Theoretical and practical treatise on civil procedure. Vol. I. General theory] (Bucharest: Național, 1996), 127.

³⁹ Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

⁴⁰ Helder Martins Leitão, *Dos princípios básicos em processo civil* [On the basic principles in civil procedure], 3rd ed. (Porto: Almeida & Leitão, 1999), 68.

⁴¹ Portuguese Code of Civil Procedure, art. 393(1) ("Examinadas as provas produzidas, o arresto é

conservatory measures – the typical examples – are determined in first instance court without summoning the parties, not as a mere technique of acceleration, but as a means of preventing the risk of conduct consisting in removing, concealing or diminishing the debtor's assets⁴². British doctrine also emphasizes, however, their nature as **powerful tactical pressure** instruments capable of forcing the defendant to provide security or accept an unfavourable settlement⁴³. It is readily apparent that the initial unilateralism of conservatory measures is not entirely "neutral"⁴⁴ or "innocent", since the measure may produce a **dissuasive** effect and procedural pressure. Therefore, the procedure without initially summoning the defendant must be deemed as an exception with potential for procedural pressure, not as a simple technical instrument for preserving enforcement.

In the common-law tradition, the same logic appears paradigmatically in the Anton Piller order: the defendant is not notified so that the evidence will not be **destroyed, concealed or moved** before it is preserved⁴⁵. Initial unilateralism does not suppress adversariality, but saves its object, because without evidence the subsequent debate would become purely formal⁴⁶.

2.3. The Structurally Non-Contentious Nature of the Application and the Sound Administration of Justice

Non-contentious applications are a **common** feature of many continental judicial systems⁴⁷; they are viewed sometimes through the lens of public authorities' assistance in the creation of individual rights⁴⁸. In non-contentious procedure, **unilateralism** has a **different structure** from that found in urgent or

decretado, sem audiência da parte contrária, desde que se mostrem preenchidos os requisitos legais").

⁴² Mihaela Tăbărcă, *Drept procesual civil. Vol. 3: Căile de atac; procedurile speciale* [Civil procedural law. Vol. 3: Remedies; special procedures], 2nd ed. (Bucharest: Solomon, 2017), 453; Constitutional Court of Romania, Decision no. 166 of March 22, 2005, *Official Gazette of Romania*, Part I, no. 372 (May 3, 2005).

⁴³ Filip Saranovic, "Jurisdiction and Freezing Injunctions: A Reassessment," *International and Comparative Law Quarterly* 68, no. 3 (July 2019): 643, <https://doi.org/10.1017/S0020589319000265>.

⁴⁴ A. Spătaru, "Asigurarea acțiunii civile" [Securing the civil action], in *Analele științifice ale USM. Lucrări studențești* [Scientific Annals of Moldova State University. Student papers] (2020), 139, describing measures securing the civil claim as imposing "limitations, prohibitions or obligations" on the defendant.

⁴⁵ Jeffrey Berryman, *The Anton Piller Order—A Civil Search Warrant* (paper presented at the American Bar Association International Law Section Conference, Washington, DC, April 5–8, 2011), 22, <https://doi.org/10.2139/ssrn.3309879>.

⁴⁶ Berryman, *Anton Piller Order*, 22.

⁴⁷ James E. Pfander and Daniel D. Birk, "Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction," *Yale Law Journal* 124, no. 5 (2015): 1407, <https://yalelawjournal.org/article/non-contentious-jurisdiction>.

⁴⁸ Walter Neitzel, "Non-Contentious Jurisdiction in Germany," *Harvard Law Review* 21, no. 7 (May 1908): 477.

conservatory procedures. There is **no temporarily excluded opposing party**; rather, by the very nature of the application, there is no determinate procedural opponent. The court does **not** settle a **conflict** between **opposing claims**⁴⁹, but verifies the fulfilment of the legal requirements for configuring, authorizing or declaring a legal situation. Accordingly, the absence of adversariality in this field is **consubstantial** with non-contentious procedure⁵⁰, and the principal guarantee does not consist in subsequently restoring a bilateral debate, but in the active **role of the judge**, in the verification of the relevant facts and in the protection of persons whose rights or interests may be affected.

Certain *ex parte*/non-contentious procedures in the United States federal system, in which the petitioner seeks the court's intervention without identifying a determinate procedural opponent, confirm that the absence of an opponent is not, in itself, incompatible with the adversarial system⁵¹. Separately, where an *ex parte* procedure affects the interests of a determinate person, it must observe a strict balance of fairness and proportionality, remain - in the field of provisional measures affecting a determinate person - an **exception** reserved for **urgent** necessity⁵², and the affected party must be able to **respond as soon** as possible thereafter⁵³.

Thus, the distinctive feature of proceedings concerning non-contentious applications at first instance is that the court may dispense summoning the parties only within the limits laid down by law, including where the law itself leaves it to the court to decide whether the application should be examined with or without summoning the parties⁵⁴.

For example, the following are determined within non-contentious procedure: (i) the **application for approving the enforcement** by the enforcement court⁵⁵, which falls within the category concerning the granting of judicial authorizations⁵⁶; (ii) the application for **setting an earlier date** for the

⁴⁹ Romanian Code of Civil Procedure, art. 527; French Code of Civil Procedure, arts. 26–27.

⁵⁰ Lionel Miniato, *Le principe du contradictoire en droit processuel* [The adversarial principle in procedural law] (Paris: LGDJ, 2008), § 219, 198.

⁵¹ Pfander and Birk, “Article III Judicial Power,” 1346.

⁵² ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (2004), principles 5.8 and 8.2, <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/>.

⁵³ Kangnikoé Bado, Aluisio Gonçalves de Castro Mendes, and Stefan Huber, “Procedural Rights, Principles, and Approaches Influencing the Structure of Civil Litigation,” in *Comparative Procedural Law and Justice*, ed. Burkhard Hess et al., Part VI, chap. 1 (2024), para. 7, <https://www.cplj.org/publications/6-1-procedural-rights-principles-and-approaches-influencing-the-structure-of-civil-litigation>.

⁵⁴ Delia Narcisa Theohari, in Gabriel Boroi, Octavia Spineanu-Matei, and Alexandru Constanda, *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II: art. 527–1134*, 2nd rev. and supplemented ed. (Bucharest: Hamangiu, 2016), 265.

⁵⁵ Nicolae-Horia Țiț, *Executarea silită. Partea generală* [Enforcement proceedings. General part] (Bucharest: Hamangiu, 2016), 198; Boroi and Stancu, *Drept procesual civil*, vol. 2, 569.

⁵⁶ Romanian Code of Civil Procedure, art. 527.

hearings⁵⁷; (iii) **conflicts of jurisdiction**⁵⁸; and (iv) the **preliminary screening and regularisation** of the statement of claim under Article 200 of the New Code of Civil Procedure, which - where applicable - has a non-contentious physiognomy in the phase prior to communication of the application to the defendant, being therefore exempted from application of the adversarial principle⁵⁹, a procedure in which the objection of specialized jurisdictional incompetence may also be raised (material procedural or functional⁶⁰).

3. Compensatory Safeguards

In a modern conception, adversariality cannot be understood as an isolated mechanism, but as part of a fragile procedural balance between the rights of the parties, the effectiveness of the measure and the authority of the court. Therefore, initial unilateralism is admissible only if the imbalance it produces remains **temporary**, proportionate and susceptible to effective **subsequent review**; where the measure creates consummated effects or a procedural advantage impossible to neutralize, subsequent adversariality no longer restores the balance, but merely confirms its rupture.

In structural *ex parte* procedures, the affected party must subsequently receive access to the material relied upon and a real possibility to challenge the grounds of the measure within an adversarial framework. In structurally non-contentious procedures, the safeguard is not expressed by reintroducing an absent opponent, but by the **active role** of the judge, by full verification of the legal requirements and by protection of interested persons or of those whose rights may be affected.

In *ex parte* procedures, adversarial debate is **not**, in principle, **suppressed, but deferred**⁶¹. In structurally non-contentious procedures, the issue arises differently: a contentious debate between opponents is **not postponed**; rather, the **absence** of a determinate procedural opponent is compensated by the **active role** of the judge and by protection of interested persons.

Consequently, the law has devised **palliatives**⁶², such as the correlative

⁵⁷ Romanian Code of Civil Procedure, art. 230, second sentence.

⁵⁸ Gheorghe-Liviu Zidaru, commentary on Article 135, in Viorel Mihai Ciobanu and Marian Nicolae, coords., *Noul Cod de procedură civilă: comentat și adnotat. Vol. 1: art. 1–526*, 2nd rev. ed. (Bucharest: Universul Juridic, 2016), § 5, 554.

⁵⁹ Belei, *Drept procesual civil. Partea generală*, 105.

⁶⁰ For the rationale of the solution, see Liviu-Alexandru Viorel and G. Viorel, “Noi realități procesuale în procedura de judecată. Unele modificări ale NCPC aduse prin intermediul Legii nr. 138/2014,” *Juridice.ro*, October 20, 2014, accessed November 30, 2024, <https://www.juridice.ro/342383/noi-realitati-procesuale-in-procedura-de-judecata-unele-modificari-ale-ncpc-aduse-prin-intermediul-legii-nr-1382014.html>.

⁶¹ Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

⁶² Henri Motulsky, *Droit processuel* [Procedural law] (Paris: Les Cours de droit, 1973), 148, cited in Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

expansion of the judge's powers (3.1) and the availability of a remedy (3.2).

It may readily be observed that, where the law admits the unilateral character of the procedure for well-grounded reasons, it surrounds it with **numerous rules** designed either to **compensate** for the **absence of debate** or to allow **subsequent adversarial review**⁶³.

3.1. The Correlative Expansion of the Judge's Powers. Particularities in Non-Contentious Matters

In French law, it is held that, in non-contentious procedure, the law grants the court powers of initiative that are binding on the party and on third parties, in such a way that, in this field, one may speak of an **exclusion of the principle of party disposition**⁶⁴. The adversarial principle - always necessary, but sometimes inapplicable - is **replaced by the inquisitorial** character of the procedure, which means that the two rules are not antinomical, but tend toward the same result, namely the establishment of the truth⁶⁵. Thus, where the persons concerned are not summoned, the judge's role is reinforced⁶⁶. The same occurs as in the hypothesis in which a party is present, but is so powerless before a strong and uncooperative opponent that the judges are obliged to ensure the adversarial process themselves⁶⁷. The reinforcement of the active role must not, however, be understood as being oversized to the point of transforming the parties into auxiliaries in the search for truth⁶⁸.

In our system of law, the issue is not the exclusion of the principle of **party disposition**, but rather its limitation; indeed, the court's active role **compensates** for the **lack of adversariality** and for the lack of publicity of the hearing⁶⁹.

In non-contentious procedure, the structural absence of an opponent requires a **modification** of the **judge's role**⁷⁰. Thus - within such procedures - the court cannot rely on an "opposing party" (for the good reason that it does not exist, author's note L.-Al. Viorel) in developing the factual register⁷¹. Precisely for that reason, it is natural that the structural unilateralism of the procedure should be compensated by an active role of the judge in screening the facts and

⁶³ Frison-Roche, *Généralités sur le principe du contradictoire*, 134. For comparison, French Code of Civil Procedure, art. 17.

⁶⁴ Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

⁶⁵ Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

⁶⁶ Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

⁶⁷ Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

⁶⁸ Volodymyr Kroitor and Valeriy Mamnitskyi, "Adversarial Principle under the New Civil Procedure in Ukraine," *Access to Justice in Eastern Europe*, no. 4(5) (2019): 32, <https://doi.org/10.33327/AJEE-18-2.4-a000021>.

⁶⁹ Theohari, commentary in *Noul Cod de procedură civilă*, vol. II, 265.

⁷⁰ Pfander and Birk, "Article III Judicial Power," 1407.

⁷¹ Pfander and Birk, "Article III Judicial Power," 1407.

the legal requirements of the application. A **link** may thus be established between the **unilateral** character of non-contentious procedure and the **correlative expansion of the judge's active role**⁷². For example:

a) The rules concerning **summons** are **specific**: (i) if the law requires it, the petitioner and the persons indicated by law shall be summoned; (ii) if the law does not require it, the court shall assess whether the application is to be determined with summons or without summons [Article 532(1)];

b) The court is entitled to order, even of its **own motion**, measures that may prove useful for the case⁷³. Legal literature states that measures ordered by the court of its own motion should not previously be submitted to the petitioner's discussion; however, if the petitioner is present, he or she may express a point of view concerning them⁷⁴. In my view, if the petitioner is present, it is not sufficient that he or she be able to express a point of view; the court **must** effectively submit to the petitioner's **debate** the measures it intends to order of its own motion.

c) The court may **hear any person who could provide clarifications** in the case, as well as those whose interests would be affected by the decision⁷⁵. It is readily apparent that third-party interests are thus protected in a specific manner⁷⁶.

It may therefore readily be observed that the **strengthening** of the **active role** represents the fundamental **safeguard** at the first-instance stage against **arbitrariness** within the unilateralism specific to non-contentious procedure.

3.2. The Availability of a Remedy Governed by Adversariality

3.2.1. The Power of Adversariality in the Remedy

In *ex parte* procedures, the remedy has a direct compensatory function. Precisely because the judge's active role **reinforces** and does **not replace** the **debate** between the parties, the law attaches to a unilateral procedure the possibility of a **remedy**, opening a second channel in which the parties may **express their positions**⁷⁷.

By contrast, in structurally non-contentious procedures, the function of the remedy is different: it does not restore deferred adversariality, but reviews the legality and effects of the decision, especially where interested persons are involved.

⁷² Frison-Roche, *Généralités sur le principe du contradictoire*, 132; Ascensi, *Du principe de la contradiction*, 198.

⁷³ Romanian Code of Civil Procedure, art. 532(2), first sentence.

⁷⁴ Theohari, commentary in *Noul Cod de procedură civilă*, vol. II, 266.

⁷⁵ Romanian Code of Civil Procedure, art. 532(2), second sentence; French Code of Civil Procedure, art. 27.

⁷⁶ Ascensi, *Du principe de la contradiction*, 198.

⁷⁷ Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

In *ex parte* procedures based on the surprise effect, the affected person can benefit from adversariality only after the measure has achieved its useful effect⁷⁸.

From this perspective, the French Code of Civil Procedure enshrines, in a more **general** and more **explicit** wording than Romanian law, the guarantee of an appropriate remedy against a measure ordered without the knowledge of the affected party. In this respect, Article 17 of that Code provides that "where the law permits or necessity requires that a measure be ordered without the knowledge of a party, that party has an appropriate remedy against the decision that adversely affects it".

The heuristic deficiency of the unilateralism specific to first-instance proceedings must be compensated by rules enabling the reintegration of the dispute into a debate⁷⁹. If the judge who determined the case at first instance had before him or her a **single version** (i.e. that of the claimant), then, depending also on the first-instance solution, at least **two** versions appear in the remedy. Thus, the exercise of that remedy does indeed **allow** the judge to **assess** the situation **better**⁸⁰.

3.2.2. The Correlation Between the Absence of Adversariality in the Unilateral Phase and the Adversarial Nature of the Subsequent Phase

Scope of application is:

i) Contentious procedures: temporal deferral. Insofar as a decision taken within an initially non-adversarial procedure is called into question, the remedy has a legal nature different from that ordinarily made available to the parties⁸¹.

Doctrine states that adversariality is "**restored**"⁸² in the remedy. Although the statement is suggestive, it is **fragile**, because adversariality did **not exist** in the **first place** (during first instance) in order to be able of being "restored".

Nor is it rigorous to describe all unilateral procedures as forms of "**temporary suspension**" of adversariality because, as will be seen, the unilateral phase may produce **reputational**, economic or procedural effects that are difficult to reverse. In fact, what occurs is a **return** to the **ordinary situation**, involving - in the terms of one foreign author - the "**resurrection**" of **adversariality**⁸³. In urgent or conservatory procedures, what occurs is, more precisely, a **temporal deferral** in the hearing of the opponent: the opposing party exists, but is not heard

⁷⁸ Frison-Roche, *Généralités sur le principe du contradictoire*, 129.

⁷⁹ Frison-Roche, *Généralités sur le principe du contradictoire*, 132.

⁸⁰ Ascensi, *Du principe de la contradiction*, § 352, 199.

⁸¹ Frison-Roche, *Généralités sur le principe du contradictoire*, 133.

⁸² Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. I, 127.

⁸³ Frison-Roche, *Généralités sur le principe du contradictoire*, 134.

before the measure is adopted, precisely in order not to compromise its useful effect. This deferral is not, however, innocent. It may become a genuine **amputation** of adversariality where the *ex parte* measure produces **substantial economic, reputational**⁸⁴, financial⁸⁵ or procedural effects that are **difficult to reverse** before the affected party can be heard, or where the subsequent remedy is late, formal or incapable of reopening discussion of the grounds and proportionality of the measure. In the Romanian legal system, insofar as **security** exists and is deposited, it may **mitigate** - at most *ex post* and within the patrimonial limits of the deposit - the consequences of a measure ordered unjustifiably; it does not, however, transform the subsequent hearing into a sufficient guarantee and does not, by itself, repair the deficit of adversariality produced during the interval in which the measure was enforceable without the affected party having been able to be heard.

ii) Non-contentious procedures. In non-contentious matters, the appeal has special features that differentiates it from the legal regime of the other cases of unilateralism of the first-instance procedure. Thus: (i) in the appeal, the appellant and the persons summoned before the first-instance court will be summoned, the argument being that Article 534 of the Code of Civil Procedure contains no provisions derogating from the obligation to summon, of the kind provided in Article 532(1), second sentence, of the Code of Civil Procedure⁸⁶ (which refers to the right of the judge hearing the application at first instance to assess whether or not to summon the parties); insofar as parties with opposing interests exist in the appeal, the adversarial principle will apply⁸⁷. As has been observed, the remedy in non-contentious matters gives effect rather to the protective function of adversariality than to its supposed heuristic function, there being no guarantee that this remedy was regulated for the purpose of discovering the truth⁸⁸.

Having regard to the foregoing, the situation of the appeal in non-contentious procedures differs from that encountered in *ex parte* procedures. In this

⁸⁴ For reputational risk associated with *ex parte* conservatory measures, see Saranovic, "Jurisdiction and Freezing Injunctions," 643. Discussing *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), Saranovic notes that publicity concerning the order appeared before the *inter partes* hearing and could have damaged the defendant's reputation.

⁸⁵ See Magdalena Söllner, "Die prozessuale Waffengleichheit im einstweiligen Verfügungsverfahren" [Procedural equality of arms in preliminary injunction proceedings], *StudZR Wissenschaft Online*, no. 1 (2022): 4, 11–12, <https://doi.org/10.11588/srzwo.2022.1.89853>. Söllner explains that the affected party may already suffer considerable economic harm before opposition is determined and that a later opportunity to be heard is not, by itself, a sufficient cure where the interim effects continue to operate.

⁸⁶ Dan-Mihail Gavriș, commentary on Article 534, in Boroi et al., *Noul Cod de procedură civilă*, vol. II, 269; V. Belegante, commentary on Article 534, in Viorel Mihai Ciobanu and Marian Nicolae, coords., *Noul Cod de procedură civilă: comentat și adnotat. Vol. 2: art. 527–1134*, 2nd rev. ed. (Bucharest: Universul Juridic, 2016), § 8, 36.

⁸⁷ Gavriș, commentary on Article 534, 269; Belegante, commentary on Article 534, § 8, 36.

⁸⁸ Ascensi, *Du principe de la contradiction*, § 352, 199.

field, it is **not** rigorous to speak of a temporal **deferral** of **adversariality**, because the procedure is not built on the opposition between adverse claims. There is **no** temporarily **excluded opposing party**, but rather the structural absence of a determinate procedural opponent. The court is not called upon to settle a conflict between subjects with opposing procedural interests, but to check fulfilment of the legal conditions for authorizing, declaring or configuring a legal situation.

In this hypothesis, the central safeguard does **not** consist in the possibility of a **subsequent bilateral debate**, but in the **intensification of the judge's active role**: verification of the requirements of the application, requesting any necessary clarifications and protecting the persons whose rights or interests may actually be affected by the decision. The remedy may subsequently introduce elements of adversariality, especially where interested persons are involved, but such adversariality is contingent and derivative, not constitutive of the procedure. It does not transform the non-contentious procedure into contentious proceedings properly so called, but operates as a mechanism for reviewing the legality and effects of the decision.

3.2.3. The Characteristics of the Remedy Governed by Adversariality

The remedy represents a **specific manifestation** not so much of the right of action as of the right to **adversariality**⁸⁹.

In the remedy, the voice of the affected person or of the party absent from the initial sequence appears for the first time, thereby enabling the **inaugural monologue** to be **transformed into an adversarial debate**, written and, as the case may be, oral.

Having regard to the **specific** features of the hypothesis analysed and to the procedural **stage** at which the measure intervenes, the guarantee of adversariality cannot be reduced to the mere formal existence of a remedy.

In the logic of international procedural guarantees, the effectiveness of the remedy⁹⁰ presupposes at least three **requirements**: **informing** the party, **understanding** the grounds of the measure and the real possibility of being **heard**⁹¹.

⁸⁹ Frison-Roche, *Généralités sur le principe du contradictoire*, 134.

⁹⁰ See Belgian Court of Cassation, C.20.0045.N, September 4, 2020, ECLI:BE:CASS:2020:ARR.20200904.1N.3. The court held that Article 6(1) ECHR does not preclude proceedings initiated by unilateral application where absolute necessity requires it, provided that the procedure is authorized by law and the interested person has the possibility of lodging an opposition in order to safeguard his or her rights.

⁹¹ Felipe de Andrade and Geert Van Calster, "Due Process—Protecting the Right to Fair Trial of Foreign Defendants in Cross-Border Proceedings: Comparing Practices, Investigating Conflicting Principles, and Searching for Common Standards," in *Comparative Procedural Law and Justice*, ed. Burkhard Hess et al., Part XIV, chap. 5 (2024), para. 16, <https://www.cplj.org/publications/14-5-due-process-protecting-the-right-to-fair-trial-of-foreign-defendants-in-cross-border-proceeding-s-comparing-practices-investigating-conflicting-principles-and-searching-for-common-standards>.

Without this triad, initial unilateralism no longer operates as a mere temporal deferral of adversariality, but turns into a true amputation of it.

The affected party must receive sufficient information concerning the measure, its grounds and the manner of challenging it, and must subsequently be able to discuss all relevant elements that underpinned the initial solution.

At this stage, adversariality has a **concentrated** function of review. It does not merely allow the late expression of the absent party, but introduces into the procedure the first factual and legal counter-narrative concerning the measure ordered unilaterally. The targeted party may show what was missing from the applicant's initial version, what elements were presented incompletely, what evidence or circumstances were ignored and why the measure was unnecessary, disproportionate or abusive.

Consequently, a remedy governed by adversarial safeguards is not a mere formal review of the initial decision, but an assessment of whether the procedural imbalance created by the unilateral phase can still be **effectively cured**. If the remedy allows genuine reconsideration of the grounds of the measure and neutralization of the effects produced, the initial unilateralism remains a temporal deferral of adversariality. If, conversely, review intervenes too late or can no longer remove the procedural advantage created, subsequent adversariality no longer restores the balance, but merely confirms belatedly its rupture. In certain hypotheses, this remedy is the first and only effective chance for the targeted party to transform a decision taken with a single voice into a judgment with two perspectives.

3.2.4. Adversariality Does Not Always Produce Reparatory Effects

Even where the remedy is governed by adversariality, the unilateral phase may produce effects that are **difficult to reverse**. In this respect, in one case, although the *ex parte* order was subsequently set aside, the publicity occurring before the adversarial procedure could have affected the defendant's **reputation**⁹². Consequently, the guarantee of subsequent hearing must **not** be **overestimated**: it is necessary, but it does not always neutralize the harm caused by the measure initially ordered in a non-adversarial context.

3.2.5. The Mechanical, Formal Perspective

It is clear that the parties may rely on what is already in the case file.

Thus, they may, as the case may be, maintain or re-invoke the **grounds** and **arguments** put forward in the statement of claim or, respectively, **retained in the decision**, so that they may be analysed again by a new court (i.e. the court

⁹² Saranovic, "Jurisdiction and Freezing Injunctions," 643, discussing *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm).

determining the remedy).

This is a mechanical, formal perspective. As will be seen below, the essence of the added value brought by adversariality in the remedy does not lie in this, but in the new elements.

3.2.6. The Creative Perspective

The legal consequences of adversariality become visible in the remedy through the introduction, for the **first time**, of an adverse **perspective** on the measure ordered unilaterally. This is not an unlimited novelty of the procedural framework, but the entry into the adversarial circuit of **defences, arguments, counter-arguments** and, as the case may be, evidence or relevant circumstances which the first-instance court did not have before it because of the unilateral character of the procedure. Even if it is not in itself a new element, **orality** is an additional means of **persuasive use** of these elements.

From the perspective of the *initial applicant*, the remedy may allow the **development** and **refinement** of the arguments supporting the favourable solution delivered at first instance or, conversely, the **rebuttal** of the reasons for which the application was dismissed. From the perspective of the *party targeted by the measure*, the remedy has a more markedly **compensatory function**: that party may **challenge** the **conditions** of the **derogation** from adversariality, the existence of **urgency** (insofar as the unilateral nature of the procedure was grafted onto it), the **necessity** of the **surprise** effect, the **proportionality** of the measure, the **fairness** of the applicant's presentation, the **evidentiary** material considered by the court and the concrete consequences of the measure ordered.

Consequently, the elements introduced in the remedy may concern not only the merits of the initial solution, but also the very legitimacy of the unilateral procedure. The affected party or the absent party may offer **alternative factual explanations**, invoke valuable **legal defences** not examined, propose **rebuttal evidence**, subsequent relevant circumstances or the existence of less intrusive measures. In this sense, the remedy does not simply repeat the first-instance trial, but opens the **first real moment of confrontation** between the applicant's version and the affected party's version.

The issue concerns **not** so much the **double degree of jurisdiction** as the scope of **devolutive** review and the effectiveness of the subsequent remedy. The fact that certain defences or arguments are raised for the **first time** in the remedy is not, in itself, problematic: that is precisely the **compensatory** function of the remedy in initially unilateral procedures. The limit appears when those elements exceed the procedural framework allowed or when the remedy intervenes too late to influence effectively the legal situation produced by the measure.

4. Conclusions

Procedural unilateralism designates the situation in which the procedure is conducted, at the initial stage or at the moment when the relevant procedural material is used, **without the participation** of the procedural **opponent** or, in non-contentious matters, in the **absence of a determinate** procedural **opponent**. It constitutes a **derogation** from the **multilateral** structure of **adversariality**, but not every absence of debate has the same legal significance. **Structural** unilateralism, generated by the legal regulation or by the nature of the procedure, must be distinguished from the **conjunctural** situation in which the procedure remains adversarial as a model, but the lawfully summoned party does not participate although it had an effective possibility of defence.

The main object of the study is **structural** unilateralism. It does **not**, however, have a **unitary** configuration: in the *ex parte* form, the procedural opponent exists but is temporarily **excluded**, so that the derogation requires strict justifications and effective subsequent review; in the structurally non-contentious form, the absence of adversariality flows from the absence of a determinate procedural opponent and from the **non-contentious** nature of the application or procedural incident.

The justifications for structural unilateralism group around **three** main **reasons**. The first is **urgency**, including the need to preserve evidence where there is a danger of its disappearance or of its later difficult administration. The second is the objective **effectiveness** of the measure, where prior information of the person targeted could deprive the measure of useful effect; in this hypothesis, the surprise effect justifies the derogation, while the pressure exerted on the affected party remains a risk requiring heightened scrutiny, not an autonomous purpose. The third is the structurally **non-contentious** nature of the application or procedural incident, connected to the sound administration of the public service of justice. These reasons do **not** have the **same intensity**: urgency compresses the time of debate; preservation of evidence protects the evidentiary material; the surprise effect prevents neutralization of the measure; and the non-contentious character explains the absence of a determinate procedural opponent.

The practical result of the research is a five-step evaluation grid: express legal basis, concrete necessity, strict proportionality, **reinforced active role** and an effective **subsequent adversarial compensatory remedy**. In the absence of these conditions, unilateralism is no longer a legitimate procedural technique, but a form of procedural imbalance.

The study's contribution lies in proposing a more demanding standard of judicial review for procedures conducted without summoning the parties and in identifying the minimum safeguards that should accompany measures ordered *ex parte*, should the legislature choose to clarify the matter in general terms. The practical result of the research consists in a **five-element** control **grid**: a clear

legal **basis** for the derogation, concrete **necessity**, strict **proportionality**, a **reinforced active role** of the judge and, in certain cases, an effective subsequent **adversarial compensatory remedy**. In the absence of these requirements, unilateralism no longer functions as a legitimate procedural technique, but as a form of procedural imbalance.

Bibliography

1. Ascensi, Lionel. *Du principe de la contradiction* [On the adversarial principle]. Paris: LGDJ/EJA, 2006.
2. Bado, Kangnikoé, Aluisio Gonçalves de Castro Mendes, and Stefan Huber. "Procedural Rights, Principles, and Approaches Influencing the Structure of Civil Litigation." In *Comparative Procedural Law and Justice*, edited by Burkhard Hess, Margaret Woo, Loïc Cadiet, Séverine Menétrey, and Enrique Vallines García, Part VI, chap. 1. 2024. <https://www.cplj.org/publications/6-1-procedural-rights-principles-and-approaches-influencing-the-structure-of-civil-litigation>.
3. Bałuk-Ulewiczowa, Teresa. "Audiatur et Altera Pars: The Polish Record of the Działyński Embassy of 1597." *British Catholic History* 33, no. 4 (2017): 501–533. <https://doi.org/10.1017/bch.2017.23>.
4. Belei, Elena. "Drept procesual civil. Partea generală" [Civil procedural law. General part]. In *Drept procesual civil. Partea generală*, coordinated by Elena Belei. 3rd ed. Chișinău: Lexon-Prim, 2024.
5. Belegante, V. Commentary on Article 534. In *Noul Cod de procedură civilă: comentat și adnotat. Vol. 2: art. 527–1134* [The New Code of Civil Procedure: Commentary and annotations. Vol. 2: arts. 527–1134], coordinated by Viorel Mihai Ciobanu and Marian Nicolae. 2nd rev. ed. Bucharest: Universul Juridic, 2016.
6. Berryman, Jeffrey. *The Anton Piller Order—A Civil Search Warrant*. Paper presented at the American Bar Association International Law Section Conference, Washington, DC, April 5–8, 2011. <https://doi.org/10.2139/ssrn.3309879>.
7. Boroi, Gabriel, and Mirela Stancu. *Drept procesual civil. Vol. 2: Judecata în căile de atac; proceduri speciale; executarea silită* [Civil procedural law. Vol. 2: Proceedings in remedies; special procedures; enforcement proceedings]. 6th rev. and supplemented ed. Bucharest: Hamangiu, 2023.
8. Bruché, Nathalie, and Cédric Porin. "Instruire le dossier pour établir les faits: le rôle actif du juge" [Preparing the case file to establish the facts: The active role of the judge]. *Le Droit Ouvrier*, no. 789 (April 2014): 247–262. <https://doi.org/10.3917/drou.789.0247>.
9. Cadiet, Loïc, and Emmanuel Jeuland. *Droit judiciaire privé* [Private judicial law]. 5th ed. Paris: Litec, 2006.
10. Ciobanu, Viorel Mihai. *Tratat teoretic și practic de procedură civilă. Vol. I. Teoria generală* [Theoretical and practical treatise on civil procedure. Vol. I. General theory]. Bucharest: Național, 1996.
11. de Andrade, Felipe, and Geert Van Calster. "Due Process—Protecting the Right to Fair Trial of Foreign Defendants in Cross-Border Proceedings: Comparing Practices, Investigating Conflicting Principles, and Searching for Common

- Standards.” In *Comparative Procedural Law and Justice*, edited by Burkhard Hess, Margaret Woo, Loïc Cadet, Séverine Menétrey, and Enrique Vallines García, Part XIV, chap. 5. 2024. <https://www.cplj.org/publications/14-5-due-process-protecting-the-right-to-fair-trial-of-foreign-defendants-in-cross-border-proceedings-comparing-practices-investigating-conflicting-principles-and-searching-for-common-standards>.
12. Dimova, Marija Gjorgjieva. “Audiatur et altera pars! (Ex-centrism in Macedonian Novel).” *Fluminensia* 33, no. 1 (2021): 239–253. <https://doi.org/10.31820/f.33.1.4>.
 13. Frison-Roche, Marie-Anne. *Généralités sur le principe du contradictoire: Étude de droit processuel* [General considerations on the adversarial principle: A study in procedural law]. Paris: LGDJ, 2014.
 14. Gavriș, Dan-Mihail. Commentary on Articles 534 and 999. In *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II: art. 456–1134* [The New Code of Civil Procedure. Article-by-article commentary. Vol. II: arts. 456–1134], by Gabriel Boroș et al. 2nd rev. and supplemented ed. Bucharest: Hamangiu, 2016.
 15. Gosselin, François-Xavier, Yves Le Marrec, and Pol De Kervénoaël. “Les mesures d’instruction in futurum. Analyse de la jurisprudence des Cours d’Angers et de Rennes” [Measures of inquiry in futurum: Analysis of the case law of the Courts of Angers and Rennes]. *Revue Juridique de l’Ouest*, no. 2 (1987): 155–172. <https://doi.org/10.3406/juro.1987.1484>.
 16. Jolowicz, John Anthony. “Adversarial and Inquisitorial Models of Civil Procedure.” *International and Comparative Law Quarterly* 52, no. 2 (April 2003): 281–295. <https://doi.org/10.1093/iclq/52.2.281>.
 17. Kroitor, Volodymyr, and Valeriy Mamnitskyi. “Adversarial Principle under the New Civil Procedure in Ukraine.” *Access to Justice in Eastern Europe*, no. 4(5) (2019): 30–41. <https://doi.org/10.33327/AJEE-18-2.4-a000021>.
 18. Langbein, John H. “The German Advantage in Civil Procedure.” *University of Chicago Law Review* 52, no. 4 (1985): 823–866. <https://doi.org/10.2307/1599518>.
 19. Langdon, Andrew. “The Adversarial System.” In *Practical Advocacy in the Crown Court*, edited by Mary Cowe and Susan Cavender. Bloomsbury Professional, 2020.
 20. Lecucq, Olivier. “Réflexions générales sur le respect du contradictoire dans les procédures d’urgence” [General reflections on respect for the adversarial principle in urgent proceedings]. In *Le principe du contradictoire dans le procès administratif* [The adversarial principle in administrative proceedings], coordinated by J. Gourdou, O. Lecucq, and J.-Y. Madec. Paris: L’Harmattan, 2010.
 21. Leitão, Helder Martins. *Dos princípios básicos em processo civil* [On the basic principles in civil procedure]. 3rd ed. Porto: Almeida & Leitão, 1999.
 22. Mesquita, Lurdes Varregoso. “Justiça Digital para Todos? Prova Eletrônica, Eficiência e Vulnerabilidade” [Digital justice for all? Electronic evidence, efficiency and vulnerability]. *Revista Eletrônica de Direito Processual* 27, no. 1 (January–April 2026): 529–546. <https://doi.org/10.12957/redp.2026.95756>.
 23. Miniato, Lionel. *Le principe du contradictoire en droit processuel* [The adversarial principle in procedural law]. Bibliothèque de droit privé 483. Paris: LGDJ, 2008.

24. Moscalciuc, Vitalie. “Garanțiile procesual-civile ale reclamantului la examinarea cauzei în lipsa pârâtului” [The claimant’s civil procedural guarantees in the examination of the case in the defendant’s absence]. *Legea și Viața* (November 2019): 37–41.
25. Motulsky, Henri. *Droit processuel* [Procedural law]. Paris: Les Cours de droit, 1973.
26. Neitzel, Walter. “Non-Contentious Jurisdiction in Germany.” *Harvard Law Review* 21, no. 7 (May 1908): 477–484.
27. Pausch, Dennis. “Audiatur et altera pars? Multiperspektivität als narratives Prinzip bei Sueton.” In *Suétone narrateur: Biographie und Erzählung in De vita Caesarum*, edited by Edoardo Galfre and Christoph Schubert, 21–40. Berlin/Boston: De Gruyter, 2024. <https://doi.org/10.1515/9783111333939-002>.
28. Pfander, James E., and Daniel D. Birk. “Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction.” *Yale Law Journal* 124, no. 5 (2015): 1346–1474. <https://yalelawjournal.org/article/non-contentious-jurisdiction>.
29. Piperea, Paul, and R. Dan. Commentary in *Noul Cod de procedură civilă. Note, corelații, explicații* [The New Code of Civil Procedure. Notes, correlations, explanations], by Gheorghe Piperea et al. Bucharest: C.H. Beck, 2019.
30. Reed of Allermuir, Robert. “Oral Hearings in the United Kingdom Courts: Past, Present and Future.” Speech delivered at the Legal Training and Research Institute of Japan, November 29, 2023. Supreme Court of the United Kingdom. Accessed June 13, 2026. https://supremecourt.uk/uploads/speech_231129_reed_c6c3c2d800.pdf.
31. Šaranovic, Filip. “Jurisdiction and Freezing Injunctions: A Reassessment.” *International and Comparative Law Quarterly* 68, no. 3 (July 2019): 639–664. <https://doi.org/10.1017/S0020589319000265>.
32. Söllner, Magdalena. “Die prozessuale Waffengleichheit im einstweiligen Verfügungsverfahren” [Procedural equality of arms in preliminary injunction proceedings]. *StudZR Wissenschaft Online*, no. 1 (2022): 1–18. <https://doi.org/10.11588/srzw.2022.1.89853>.
33. Spătaru, A. “Asigurarea acțiunii civile” [Securing the civil action]. In *Analele științifice ale USM. Lucrări studențești* [Scientific Annals of Moldova State University. Student papers], 2020.
34. Tăbârcă, Mihaela. *Drept procesual civil. Vol. 3: Căile de atac; procedurile speciale* [Civil procedural law. Vol. 3: Remedies; special procedures]. 2nd ed. Bucharest: Solomon, 2017.
35. Theohari, Delia Narcisa. Commentary in *Noul Cod de procedură civilă. Comentariu pe articole. Vol. I: art. 1–526* [The New Code of Civil Procedure. Article-by-article commentary. Vol. I: arts. 1–526], by Gabriel Boroî, Octavia Spineanu-Matei, and Alexandru Constanda. 2nd rev. and supplemented ed. Bucharest: Hamangiu, 2013.
36. Theohari, Delia Narcisa. Commentary in *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II: art. 527–1134* [The New Code of Civil Procedure. Article-by-article commentary. Vol. II: arts. 527–1134], by Gabriel Boroî et al. 2nd rev. and supplemented ed. Bucharest: Hamangiu, 2016.
37. Țiț, Nicolae-Horia. *Executarea silită. Partea generală* [Enforcement proceedings. General part]. Bucharest: Hamangiu, 2016.

38. Viorel, Liviu-Alexandru, and Alin Stamatoiu. “Ordonanța președințială în Noul Cod de procedură civilă. Elemente de continuitate și de noutate. Propuneri de lege ferenda” [The presidential ordinance in the New Code of Civil Procedure: Elements of continuity and novelty; proposals de lege ferenda]. *Revista Română de Drept Privat*, no. 2 (2013).
39. Viorel, Liviu-Alexandru, and G. Viorel. “Noi realități procesuale în procedura de judecată. Unele modificări ale NCPC aduse prin intermediul Legii nr. 138/2014” [New procedural realities in trial proceedings: Some amendments to the New Code of Civil Procedure introduced by Law no. 138/2014]. *Juridice.ro*, October 20, 2014. Accessed November 30, 2024. <https://www.juridice.ro/342383/noi-realitati-procesuale-in-procedura-de-judecata-unele-modificari-ale-ncpc-aduse-prin-intermediul-legii-nr-1382014.html>.
40. Weintraub, Russell J. “Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure.” *Texas International Law Journal* 33 (1998): 413–424.
41. Zidaru, Gheorghe-Liviu. Commentary on Article 135. In *Noul Cod de procedură civilă: comentat și adnotat. Vol. 1: art. 1–526* [The New Code of Civil Procedure: Commentary and annotations. Vol. 1: arts. 1–526], coordinated by Viorel Mihai Ciobanu and Marian Nicolae. 2nd rev. ed. Bucharest: Universul Juridic, 2016.

PART III
COMPARATIVE CRIMINAL LAW AND
TRANSNATIONAL JUDICIAL COOPERATION

The Convergence of Continental Criminal Law and Common Law Systems in the Context of Legal Globalization

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Abstract

This study examines the interaction between continental law (civil law) and Anglo-Saxon (common law) focusing on their historical foundations and the main structural differences regarding the sources of law, the role of the judge and criminal procedure. It argues that legal globalization and the internationalization of criminal law have led to increasing functional convergence, reflected in the growing role of case law in civil law systems and codification trends in common law jurisdictions. A comparative analysis of Romania, the United States, France, and the United Kingdom shows both procedural convergence and persistent institutional and cultural differences. The study concludes that convergence is progressive but partial, as each legal system retains its distinct identity shaped by its historical and cultural background.

Keywords: common law; legal convergence; case law; codification; legal globalization; judicial precedent; continental system.

JEL Classification: K15, K33, K40, K42

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1. Introduction

Contemporary criminal law is the product of a complex historical and institutional evolution, fundamentally marked by two major legal traditions: the civil law system and the common law system. These traditions do not simply represent different regulatory techniques, but rather distinct legal paradigms, reflecting different conceptions of legal norms, the role of the state and the function of the judge in the administration of criminal justice.

The continental law system is characterized by the centrality of codified

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law and a legal structure oriented towards systemic coherence and predictability. In this model, the role of the judge traditionally consists of applying the law within a pre-existing normative framework. In contrast, the common law system develops mainly through case law, based on the principle of binding precedent (*stare decisis*), where the judge plays an active role in the formation and evolution of the law through interpretation and gradual development.

However, the literature emphasizes that these systems cannot be understood only through a binary opposition, as they represent legal phenomena deeply rooted in culture and institutions. In the context of legal globalization, regional integration and the consolidation of supranational jurisdictions, the traditional differences between the two legal systems tend to diminish, giving way to processes of functional convergence.

This convergence is manifested through the progressive judicialization of continental legal systems, the development of codification and standardization mechanisms in common law, and the harmonization of criminal law at international and European level, especially within the European Union and the European human rights system.

In this context, the central hypothesis of this study argues that continental criminal and common law systems are evolving towards a gradual functional convergence under the influence of global and supranational pressures, without however achieving complete uniformity. The persistence of institutional and cultural differences determines the maintenance of distinct legal identities, despite functional proximity.

Therefore, the analytical objective of this research is to analyze this convergence dynamic, as well as its structural limits, within a criminal law system characterized by normative pluralism and transnational interaction.

2. A Comparative Functional Framework of Criminal Law Convergence

This study develops a structured comparative framework for analyzing the evolving relationship between civil law (continental law) and common law traditions in criminal justice. Rather than viewing these legal families as strictly opposed systems, defined by binary distinctions such as codification versus precedent or inquisitorial versus adversarial procedure, the analysis conceives of their interaction as a process of functional convergence within a multi-level legal order.

Functional convergence is defined here, in a strictly analytical sense, as the progressive alignment of legal outcomes, institutional practices, and procedural rules across jurisdictions, without implying doctrinal uniformity or structural assimilation. It is analytically distinct from (i) legal harmonization, understood as deliberate normative convergence through formal instruments, and (ii) systemic unification, understood as the replacement of different legal systems by

a single normative framework.

From this perspective, convergence is driven by three interdependent processes: supranational judicialization, the establishment of transnational legal standards, and the diffusion of regulations. These processes generate selective institutional adaptation while preserving underlying doctrinal diversity. As a result, formal legal categories remain differentiated, while functional outcomes increasingly converge across legal systems.

To understand this dynamic, the study proposes a multi-layered model of criminal law transformation, encompassing national legal systems, supranational jurisdictional regimes, and international legal frameworks. In this model, convergence is nonlinear, asymmetric, and path-dependent. Its evolution is driven by inherited institutional structures, variations in judicial authority, and different levels of codification density across jurisdictions.

The analysis identifies four main mechanisms of functional convergence in contemporary criminal justice:

- (i) Judicial expansion in civil law systems, characterized by the growing normative authority of constitutional and supranational courts;
- (ii) Selective codification in common law systems, reflected in the growing role of legislative consolidation and model criminal laws;
- (iii) Procedural diffusion, in particular the spread of negotiated and consensual mechanisms within both legal families; and
- (iv) Rights-based transnationalization, defined by the consolidation of common norms derived from human rights jurisprudence and international criminal law.

These mechanisms function as interdependent factors of institutional change, rather than as isolated reforms.

Methodologically, the study integrates classical comparative legal analysis with socio-legal and empirical approaches, including the origins of legal theory and research on judicial behavior in multi-level governance contexts. This combined approach allows us to analyze how legal categories evolve through institutional practice, in addition to legislative design.

Supranational criminal law is conceptualized as a constitutive normative layer within this structure. Instruments such as the European Convention on Human Rights, the case law of the European Court of Human Rights, the harmonization of European Union criminal law, and international criminal jurisdiction serve as sources of legal norms². In this framework, supranational jurisprudence directly contributes to the redefinition of legality, procedural fairness, and criminal liability within national legal systems.

² Kai Ambos, *Treatise on International Criminal Law. Volume III: International Criminal Procedure*, 2nd ed. (Oxford: Oxford University Press, 2024), 1–98, <https://doi.org/10.1093/law/9780192868664.001.0001>.

3. Historical and Conceptual Foundations

3.1. The Continental System

The continental legal system has its origins in Roman law, one of the most sophisticated legal constructs of antiquity. Its foundation is the *Corpus Iuris Civilis*, codified under Emperor Justinian in the 6th century, which ensured the preservation and systematization of Roman legal principles that later shaped continental European law.

The rediscovery of Roman law in the Middle Ages, especially through the School of Bologna, generated an academic tradition based on rational interpretation and systematization.

The work of the Roman jurist Q. Mucius Scaevola, “Treatise on *Jus Civile*”, is said to have “laid the foundations not merely of Roman, but of European, jurisprudence”³, allowing for the unification of European legal thought.

This tradition produced a legal culture in which the law is understood as a coherent system of hierarchically organized general norms, rather than as isolated judicial solutions, emphasizing structured legal reasoning at the expense of case-based development.

A defining moment in modern continental law is codification, especially the French Civil Code of 1804, which established the supremacy of written law and normative clarity. The Napoleonic Code became a model for many legal systems. Napoleon said: “I have won 40 battles, but that means nothing, Waterloo will erase the memory of all my victories; my eternal glory will be the Civil Code”⁴.

From a doctrinal perspective, codification rationalizes law and limits judicial arbitrariness. Jan Peter Schmidt explains that “Today the term codification is generally used in the modern technical sense of the word that was coined by Jeremy Bentham. It denominates the legislative technique of stating an entire field of law in a clear, systematic and comprehensive manner”⁵.

3.2. Common Law

The common law system originated in medieval England and was consolidated after 1066, with the centralization of justice under the Norman crown.

³ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 135.

⁴ Ion Predescu, “Elogiu Codului Civil,” *Revista de Științe Juridice*, no. 1 (2006): 7–9, <https://drept.ucv.ro/RSJ/images/articole/2006/RSJ1/0101PredescuIon.pdf>.

⁵ Jan Peter Schmidt, “Codification,” in *The Max Planck Encyclopedia of European Private Law*, ed. Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann, vol. 1 (Oxford: Oxford University Press, 2012), 221–225, <https://max-eup2012.mpipriv.de/index.php/Codification>.

The creation of itinerant royal courts and, later, the courts at Westminster led to the unification of English law, replacing local customary rules with a coherent judicial system.

In legal doctrine, common law is understood as law developed to a significant extent through judicial decisions. Baker's historical account shows that English law developed through case law, equity, and legislation, while systematic reform and codification played a comparatively limited role until the modern period⁶

An essential feature of common law is precedent (*stare decisis*), which obliges courts to respect previous decisions in similar cases. This ensures coherence, predictability and gradual legal development.

Holmes states⁷: „The life of the law has not been logic: it has been experience.” This highlights the empirical evolution of legal norms through judicial practice.

Gennaioli and Shleifer argue that:

- „the law evolves when judges distinguish cases from precedents rather than just overrule precedents”;

- „... distinguishing brings new data into dispute resolution, thereby increasing the precision of legal rules...”

- „... policy-motivated judges distort the law away from efficiency...”

They conclude: „even when judges are motivated by personal agendas, legal evolution is, on average, beneficial because it washes out judicial biases and renders the law more precise.”⁸

Common law judges do not simply apply the law; they are also indirect legislators. By interpreting, distinguishing, and overruling precedents, they actively shape legal development. Eisenberg states: „The common law, in contrast, is that part of the law that is established by the courts. The rules established in every common law case ... are a product of the interplay between the rules announced in past precedents ... and moral norms, policies, and experience. Courts consciously take on the function of developing certain bodies of law, albeit on a case-by-case basis. The rules established in every common law case are a product of the interplay between prior precedents and background norms, policies, and experience”.⁹

⁶ John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), <https://doi.org/10.1093/oso/9780198812609.001.0001>.

⁷ Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown, 1881), 1.

⁸ Nicola Gennaioli and Andrei Shleifer, “The Evolution of Common Law,” *Journal of Political Economy* 115, no. 1 (2007): 43–68, <https://doi.org/10.1086/511996>.

⁹ Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1988).

3.3. Classical Structural Differences

The distinction between continental law and common law is essential in comparative law. The differences lie in the sources of law, the judicial function and the procedure. However, modern scholarship emphasizes an increasing convergence due to globalization and institutional interaction.

Continental law systems traditionally assign a central role to legislation and codification. Common-law systems traditionally assign a major law-making role to judicial decisions, although statutes also constitute an important source of law¹⁰

Continental law judges apply pre-existing norms under the prerogative of legislative supremacy (“la bouche de la loi”), “the judges of the nation are... only the mouth that pronounces the words of the law, inanimate beings who cannot moderate its force or rigor”¹¹.

Civil law systems are traditionally associated with the inquisitorial model and common-law systems with the adversarial model, although contemporary systems frequently combine elements of both. Langbein’s historical analysis shows how the English criminal trial evolved toward lawyer-dominated adversarial contest and away from earlier forms of judicially directed inquiry¹².

Continental law is based on codification and a systematic legal structure. Common law evolves gradually, through judicial decisions. Eisenberg describes this as „a product of the interplay between the rules announced in past precedents, on the one hand, and moral norms, policies, and experience, on the other”¹³.

Modern comparative law highlights increasing interaction between continental and common-law systems under the influence of globalization and supranational courts. Civil-law systems increasingly give jurisprudence a practical law-shaping role, while common-law jurisdictions make extensive use of legislation and codification. Zweigert and Kötz’s comparative method cautions against treating legal families as self-contained and impermeable categories¹⁴

In general, modern legal systems display hybrid characteristics, shaped by institutional convergence and mutual influence.

¹⁰ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, trans. Tony Weir, 3rd rev. ed. (Oxford: Clarendon Press, 1998).

¹¹ Charles-Louis de Secondat, Baron de Montesquieu, *De l’esprit des lois* (Geneva: Barrillot & Fils, 1748), bk. 11, chap. 6.

¹² John H. Langbein, “The Criminal Trial before the Lawyers,” *University of Chicago Law Review* 45, no. 2 (1978): 263–316, <https://doi.org/10.2307/1599166>.

¹³ Eisenberg, *Nature of the Common Law*.

¹⁴ Zweigert and Kötz, *Introduction to Comparative Law*.

4. Convergences in Contemporary Criminal Law

4.1. Europeanization of Criminal Law and Judicial Integration

In contemporary criminal law, the influence of the jurisprudence of the European Court of Human Rights and the integration of the standards of the European Convention on Human Rights into domestic law can be observed in continental legal systems. Thus, procedural guarantees have a higher authority than national legislation.

In support of this statement, we recall the *Salduz v. Turkey Case*¹⁵, the Court ruled that in order for the right to a fair trial to remain sufficiently ‘practical and effective’, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police...”.

Thus, the role of the judge, as an active interpreter of the law, was strengthened, creating a bridge between the civil law and common law systems.

Piet Hein van Kempen and Joeri Bemelmans¹⁶ examine the growing influence of EU fundamental-rights law on substantive criminal-law principles, including guilt and ne bis in idem, within a still incomplete European criminal justice framework.

This development:

- confirms that national criminal law is losing ground to European law;
- European case law is playing an increasingly important role.

The principle of ne bis in idem is another significant example. Through case law, this principle is developing from a national rule into an autonomous European standard.

Ger Coffey¹⁷ notes: „The ne bis in idem principle (procedural defence) proscribes multiple criminal proceedings and punishments for the same criminal offence/conduct...CJEU and ECtHR jurisprudence have delineated the scope and limitations of the procedural defence and the two European courts have reciprocally influenced their respective case law.”

This shows that criminal law is:

- uniformly interpreted at European level;
- depends also on case law, not only on legislation.

¹⁵ *Salduz v. Turkey* [GC], no. 36391/02, § 55 (ECtHR, November 27, 2008), ECLI:CE:ECHR:2008:1127JUD003639102.

¹⁶ Piet Hein van Kempen and Joeri Bemelmans, “EU Protection of the Substantive Criminal Law Principles of Guilt and ne bis in idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework,” *New Journal of European Criminal Law* 9, no. 2 (2018): 247–264, <https://doi.org/10.1177/2032284418778146>.

¹⁷ Ger Coffey, “An Interpretative Analysis of the European ne bis in idem Principle through the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?,” *New Journal of European Criminal Law* 14, no. 3 (2023): 345–373, <https://doi.org/10.1177/20322844231160246>.

The scope of application of criminal law, through evolutionary interpretation, has been extended by the ECHR, „Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty.”¹⁸

This demonstrates that:

- criminal law is no longer based solely on legislation;
- the shaping of legal standards is achieved through the normative role of the judge.

The literature in the field supports the idea that the continental criminal law system accelerates the process of jurisprudentialization, an aspect that results from the following considerations:

- the ECHR has an important role in its quasi-constitutional capacity;
- national judges have transformed themselves into interpreters of European standards;
- the supremacy of legislation over criminal norms has eroded;
- the continental law system has entered a process of convergence with the common law system.

4.2. Codification in Common Law

The modern evolution of the common law system, even if traditionally associated with judicial development, highlights an evolutionary process of legislative systematization. Thus, the coherence of criminal norms increases and normative fragmentation decreases.

The trend that reflects this aspect very well is found in the Model Penal Code¹⁹, adopted by the American Law Institute in 1962. The Model Penal Code is a model code, not federal law, and therefore has no binding force; nevertheless, it has been highly influential in the revision and codification of substantive criminal law in the American states.

Through this Model Penal Code, the aim was to standardize American criminal law, because each state had its own normative system, an aspect that generated differences in the definition of crimes, sanctions and guilt.

Sanford Kadish, a distinguished criminal-law scholar, described the project as animated by “the spirit of root-and-branch rethinking and reformulation toward a more just and more effective criminal law”²⁰.

The Model Penal Code significantly influenced criminal-code revision and codification in many American states, without creating a uniform or binding national criminal code.

¹⁸ *Kokkinakis v. Greece*, no. 14307/88, § 52 (ECtHR, May 25, 1993), ECLI:CE:ECHR:1993:0525 JUD001430788.

¹⁹ American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Philadelphia: American Law Institute, 1962), <https://www.ali.org/publications/model-penal-code>.

²⁰ American Law Institute, “Codes and Majority Rules,” December 18, 2017, <https://www.ali.org/news/articles/codes-and-majority-rules>.

In fact, Markus D. Dubber refers to the Model Penal Code as a key to American criminal law: „Reflecting the Code’s attempt to present an accessible, comprehensive, and systematic account of American criminal law, this book unlocks the Code’s potential as a key to American criminal law.”²¹

4.3. Codification as Convergence Between Common Law and Continental Law

„In all common law jurisdictions, an abundance of statute law exists... judges develop, supplement and sometimes even alter the written law”²².

This process does not eliminate case law, but complements it, through a more stable regulatory framework.

The internationalization of criminal law reflects the harmonization of norms at regional and global levels:

- The European Convention on Human Rights influences criminal law through the case law of the Court;

- The International Criminal Court. The Rome Statute defines crimes such as genocide and war crimes and establishes the principles of criminal liability;

- The criminal law of the European Union harmonizes criminal offenses through directives, in areas such as terrorism and cybercrime. Ester Herlin-Karnell frames the constitutional difficulty through the question: „Is it possible to simply translate the harmonisation of trade standards into the harmonisation of criminal provisions?”²³

- Common core of principles. A transnational core of principles includes legality, fair trial, proportionality and the presumption of innocence.

5. Comparative Analysis

5.1. Romania vs. United States

Romania belongs to the continental legal tradition (civil law), characterized by the existence of a unified Criminal Code and a Code of Criminal Procedure that regulates the criminal process in a systematic way. Romanian criminal procedure retains significant elements of the European inquisitorial model: “the judicial body cannot remain a simple arbitrator who administers and evaluates the evidence proposed by the parties, having the obligation to establish the truth ex

²¹ Markus D. Dubber, *An Introduction to the Model Penal Code*, 2nd ed. (Oxford: Oxford University Press, 2015), viii, <https://doi.org/10.1093/acprof:oso/9780190243043.001.0001>.

²² J. G. Sauveplanne, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems* (Amsterdam: North-Holland, 1982).

²³ Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford: Hart Publishing, 2012), 2.

officio, ordering the administration of new evidence necessary to achieve this objective.... the conduct of the criminal trial must be oriented towards finding the truth and not towards accusing a person at any cost”²⁴. „In Romanian criminal proceedings, the court may order, ex officio or at the request of the parties, a new or supplementary expertise when the expert report is incomplete, unclear or contradictory. The judge is not bound by the expert’s opinion and freely assesses the evidence when forming his judgment”²⁵.

In contrast, the American legal system belongs to the common law tradition and operates predominantly according to the adversarial model. „Procedural systems are configured as a confrontation between prosecution and defense, while the judge acts primarily as a neutral arbitrator...”²⁶ Thus, the emphasis is placed less on the formal search for objective truth and more on respecting procedural fairness and equality of arms.

A defining feature of the criminal justice system in the United States is plea bargaining. Comparative scholarship treats negotiated guilty pleas as a central mechanism of contemporary criminal adjudication²⁷. This mechanism transforms criminal proceedings into a process of procedural negotiation and is commonly justified by considerations of efficiency and the avoidance of lengthy trials. Jenny Roberts observes that ninety-five percent of convictions follow guilty pleas rather than trials²⁸. At the same time, American scholarship has emphasized the coercive risks of plea bargaining, including the pressure created by the prospect of a substantially harsher sentence after trial²⁹.

The fundamental distinction between the two systems therefore lies in the underlying logic of criminal procedure. In the continental model represented here by Romania, the official fact-finding function and the institutional search for truth traditionally occupy a more prominent place³⁰. The adversarial American model assigns a greater role to procedural competition between prosecution and defence in the production and testing of evidence.

²⁴ Ovidiu Predescu and Gheorghe Ivan, “Marile sisteme procesuale penale și sistemul procesual penal român,” *Revista Pro Lege*, no. 1 (2017): 15–25, <https://portal.penalmamente.ro/index.php/10098/>.

²⁵ Adrian Șandru, “The Use of Experts in Criminal Proceedings in Romania: Inquisitorial Background and Future Trends,” *RAIS Conference Proceedings* (2021), paper 0112, <https://ideas.repec.org/p/smo/lpaper/0112.html>.

²⁶ Mar Jimeno Bulnes, “El proceso penal en los sistemas del Common Law y Civil Law: los modelos acusatorio e inquisitivo en pleno siglo XXI,” *Justicia* 2013, no. 2 (2013): 201–304.

²⁷ Jacqueline S. Hodgson, “Plea Bargaining: A Comparative Analysis,” Warwick School of Law Research Paper no. 2013/29 (December 12, 2013), <https://ssrn.com/abstract=2366847>.

²⁸ Jenny Roberts, “Effective Plea Bargaining Counsel,” *Yale Law Journal* 122 (2013): 2650, <https://yalelawjournal.org/essay/effective-plea-bargaining-counsel>.

²⁹ H. Mitchell Caldwell, “Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System,” *Catholic University Law Review* 61 (2012): 63–96, <https://scholarship.law.edu/law-review/vol61/iss1/2/>.

³⁰ Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CT: Yale University Press, 1986), 3–4.

Contemporary comparative studies nevertheless identify processes of convergence and hybridization between adversarial and inquisitorial traditions³¹. The structural differences between the traditions remain important, however, for understanding the institutional logic of criminal justice.

5.2. France vs. United Kingdom

France represents the classic continental-law tradition and retains important inquisitorial features in criminal procedure. A distinctive institution is the judicial investigation. Article 81 of the French Code of Criminal Procedure provides that the investigating judge carries out, in accordance with the law, all investigative acts considered useful for establishing the truth and investigates both incriminating and exculpatory matters³². The search for material truth is therefore institutionally integrated into the pre-trial phase.

The United Kingdom operates under the adversarial common law model. Criminal proceedings are structured around the procedural confrontation between the prosecution and the defence. „There is no impartial third party present, just the prosecution and defence, and the defence has the chance to question the witnesses³³“. The judge does not actively investigate the facts. He ensures procedural fairness, and the jury determines guilt, based on the evidence presented by the parties.

However, the European Convention on Human Rights, in particular through the requirements of Article 6, concerning the right to a fair trial, has influenced the convergence between the two systems: “The Court has developed a body of case-law reflecting the common principles underlying the notion of a fair trial in both common law and civil law systems.”³⁴

In France, reforms have progressively reduced the dominance of the investigating judge and strengthened adversarial safeguards in the pre-trial phase. Article 7(2) of Directive 2012/13/EU provides that “Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, ... in

³¹ Riccardo Montana, “Procedural Tradition in the Italian Criminal Justice System: The Semi-adversarial Reform in 1989 and the Inquisitorial Cultural Resistance to Adversarial Principles,” *The International Journal of Evidence & Proof* 20, no. 4 (2016): 289–304, <https://doi.org/10.1177/1365712716655164>.

³² France, *Code de procédure pénale*, art. 81, Légifrance, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038369344.

³³ John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012), <https://doi.org/10.1017/CBO9781139093606>.

³⁴ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)*, updated August 31, 2025 (Strasbourg: Council of Europe/European Court of Human Rights), https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng.

order to safeguard the fairness of the proceedings and to prepare the defence³⁵”.

In the United Kingdom, ECHR case law has strengthened procedural safeguards, particularly with regard to disclosure obligations, equality of arms and protection against self-incrimination. „The right not to incriminate oneself is primarily concerned ... with respecting the will of an accused person to remain silent”³⁶.

France and the United Kingdom, therefore, remain rooted in distinct legal traditions. Contemporary criminal procedure, in both systems, reflects a process of hybridization. This convergence is particularly visible in the strengthening of fair trial guarantees. „Each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent³⁷”.

6. Conclusions

This study refers to the fact that contemporary criminal law can no longer be understood through the traditional distinction between continental law and common law. Currently, it develops on three levels, old rules, systems are approaching each other, and European law influences national systems.

The traditions of continental law and common law continue to reflect distinct historical and institutional logics. These differences remain visible in the sources of law, judicial reasoning and procedural organization. However, these structural distinctions no longer function as absolute oppositions. Rather, they function as enduring institutional systems that condition, without entirely determining, contemporary legal developments.

At the functional level, the analysis reveals a clear trend towards procedural convergence between legal systems. This convergence is expressed in the progressive harmonisation of procedural guarantees, standards of evidence and guarantees of a fair trial. It is mainly determined by judicial interpretation. It is important to note that this process does not lead to doctrinal uniformity, but rather to a selective and asymmetrical harmonisation of legal practices. At the supranational level, institutions such as the European Court of Human Rights, the Court of Justice of the European Union and international criminal tribunals have become key actors in the development of contemporary criminal law. Through their case law, these bodies contribute to the formulation and dissemination of common legal standards relating to legality, proportionality, procedural fairness and

³⁵ European Parliament and Council of the European Union, Directive 2012/13/EU of May 22, 2012 on the Right to Information in Criminal Proceedings, art. 7(2), *Official Journal of the European Union* L 142 (June 1, 2012): 1–10, <https://eur-lex.europa.eu/eli/dir/2012/13/oj/eng>.

³⁶ *Saunders v. the United Kingdom* [GC], no. 19187/91, § 69 (ECtHR, December 17, 1996), ECLI:CE:ECHR:1996:1217JUD001918791.

³⁷ *Dombo Beheer B.V. v. the Netherlands*, no. 14448/88, § 33 (ECtHR, October 27, 1993), ECLI:CE:ECHR:1993:1027JUD001444888.

criminal liability. In this sense, supranational decisions constitute a fundamental element of the architecture of contemporary criminal justice and not just an external influence.

Taken together, these dynamics generate a differentiated form of integration within criminal law. The system is characterized by the coexistence of persistent structural diversity and increasing functional alignment, mediated by supranational normative frameworks. Consequently, contemporary criminal law evolves as a multi-layered legal order, in which convergence occurs without eliminating institutional pluralism. In conclusion, the results confirm the thesis that contemporary criminal law undergoes a process of functional convergence, in a context of structural differentiation and supranational influence. This configuration does not lead to a complete doctrinal unification, but rather to a stable and dynamic form of legal pluralism in which diversity and convergence coexist within a common normative framework.

Bibliography

I. Books and Articles

1. Ambos, Kai. *Treatise on International Criminal Law. Volume III: International Criminal Procedure*. 2nd ed. Oxford: Oxford University Press, 2024. <https://doi.org/10.1093/law/9780192868664.001.0001>.
2. Baker, John. *An Introduction to English Legal History*. 5th ed. Oxford: Oxford University Press, 2019. <https://doi.org/10.1093/oso/9780198812609.001.0001>.
3. Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, MA: Harvard University Press, 1983.
4. Caldwell, H. Mitchell. "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System." *Catholic University Law Review* 61 (2012): 63–96. <https://scholarship.law.edu/lawreview/vol61/iss1/2/>.
5. Coffey, Ger. "An Interpretative Analysis of the European *ne bis in idem* Principle through the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?" *New Journal of European Criminal Law* 14, no. 3 (2023): 345–373. <https://doi.org/10.1177/20322844231160246>.
6. Damaška, Mirjan R. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven, CT: Yale University Press, 1986.
7. Dubber, Markus D. *An Introduction to the Model Penal Code*. 2nd ed. Oxford: Oxford University Press, 2015. <https://doi.org/10.1093/acprof:oso/9780190243043.001.0001>.
8. Eisenberg, Melvin Aron. *The Nature of the Common Law*. Cambridge, MA: Harvard University Press, 1988.
9. Gennaioli, Nicola, and Andrei Shleifer. "The Evolution of Common Law." *Journal of Political Economy* 115, no. 1 (2007): 43–68. <https://doi.org/10.1086/511996>.
10. Herlin-Karnell, Ester. *The Constitutional Dimension of European Criminal Law*. Oxford: Hart Publishing, 2012.
11. Hodgson, Jacqueline S. "Plea Bargaining: A Comparative Analysis." Warwick

- School of Law Research Paper no. 2013/29, December 12, 2013. <https://ssrn.com/abstract=2366847>.
12. Holmes, Oliver Wendell, Jr. *The Common Law*. Boston: Little, Brown, 1881.
 13. Jackson, John D., and Sarah J. Summers. *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*. Cambridge: Cambridge University Press, 2012. <https://doi.org/10.1017/CBO9781139093606>.
 14. Jimeno Bulnes, Mar. "El proceso penal en los sistemas del Common Law y Civil Law: los modelos acusatorio e inquisitivo en pleno siglo XXI." *Justicia* 2013, no. 2 (2013): 201–304.
 15. Langbein, John H. "The Criminal Trial before the Lawyers." *University of Chicago Law Review* 45, no. 2 (1978): 263–316. <https://doi.org/10.2307/1599166>.
 16. Montana, Riccardo. "Procedural Tradition in the Italian Criminal Justice System: The Semi-adversarial Reform in 1989 and the Inquisitorial Cultural Resistance to Adversarial Principles." *The International Journal of Evidence & Proof* 20, no. 4 (2016): 289–304. <https://doi.org/10.1177/1365712716655164>.
 17. Montesquieu, Charles-Louis de Secondat, Baron de. *De l'esprit des lois*. Geneva: Barrillot & Fils, 1748.
 18. Predescu, Ion. "Elogiu Codului Civil." *Revista de Științe Juridice*, no. 1 (2006): 7–9.
 19. Predescu, Ovidiu, and Gheorghe Ivan. "Marile sisteme procesuale penale și sistemul procesual penal român." *Revista Pro Lege*, no. 1 (2017): 15–25. <https://portal.penalmente.ro/index.php/10098/>.
 20. Roberts, Jenny. "Effective Plea Bargaining Counsel." *Yale Law Journal* 122 (2013): 2650–2669. <https://yalelawjournal.org/essay/effective-plea-bargaining-counsel>.
 21. Șandru, Adrian. "The Use of Experts in Criminal Proceedings in Romania: Inquisitorial Background and Future Trends." *RAIS Conference Proceedings* (2021), paper 0112. <https://ideas.repec.org/p/smo/lpaper/0112.html>.
 22. Sauveplanne, J. G. *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems*. Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe Reeks 45, no. 4. Amsterdam: North-Holland, 1982.
 23. Schmidt, Jan Peter. "Codification." In *The Max Planck Encyclopedia of European Private Law*, edited by Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann, vol. 1, 221–225. Oxford: Oxford University Press, 2012. <https://max-eup2012.mpipriv.de/index.php/Codification>.
 24. van Kempen, Piet Hein, and Joeri Bemelmans. "EU Protection of the Substantive Criminal Law Principles of Guilt and ne bis in idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework." *New Journal of European Criminal Law* 9, no. 2 (2018): 247–264. <https://doi.org/10.1177/2032284418778146>.
 25. Zweigert, Konrad, and Hein Kötz. *An Introduction to Comparative Law*. Translated by Tony Weir. 3rd rev. ed. Oxford: Clarendon Press, 1998.

II. Legislation and Official Sources

1. American Law Institute. *Model Penal Code: Official Draft and Explanatory Notes*. Philadelphia: American Law Institute, 1962. <https://www.ali.org/publications/model-penal-code>.
2. American Law Institute. “Codes and Majority Rules.” December 18, 2017. <https://www.ali.org/news/articles/codes-and-majority-rules>.
3. European Parliament and Council of the European Union. Directive 2012/13/EU of May 22, 2012 on the Right to Information in Criminal Proceedings. *Official Journal of the European Union* L 142 (June 1, 2012): 1–10. <https://eur-lex.europa.eu/eli/dir/2012/13/oj/eng>.

III. Cases and Decisions

1. European Court of Human Rights. *Dombo Beheer B.V. v. the Netherlands*. App. no. 14448/88. Judgment of October 27, 1993. ECLI:CE:ECHR:1993:1027JUD001444888.
2. European Court of Human Rights. *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)*. Updated August 31, 2025. Strasbourg: Council of Europe/European Court of Human Rights. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng.
3. European Court of Human Rights. *Kokkinakis v. Greece*. App. no. 14307/88. Judgment of May 25, 1993. ECLI:CE:ECHR:1993:0525JUD001430788.
4. European Court of Human Rights. *Salduz v. Turkey* [GC]. App. no. 36391/02. Judgment of November 27, 2008. ECLI:CE:ECHR:2008:1127JUD003639102.
5. European Court of Human Rights. *Saunders v. the United Kingdom* [GC]. App. no. 19187/91. Judgment of December 17, 1996. ECLI:CE:ECHR:1996:1217JUD001918791.

The European Union and the United States of America's Perspectives on the Principle of Mutual Trust in Criminal Matters

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Abstract

Judicial cooperation in criminal matters among the Member States of the European Union currently operates based on the trust they mutually extend to one another regarding the judgments they deliver and the criminal procedures they conduct. Building on this interstate trust, numerous legal instruments have been developed to combat organized crime and to transform the administration of justice into an efficient process in which the cross-border formalities undertaken by states are simplified. Whether we refer to the European Arrest Warrant, the European Investigation Order, or the most recent mechanism of enhanced cooperation, the European Public Prosecutor's Office, the principle of mutual trust proves both its usefulness and its necessity in the effort to eradicate cross border crime. The study aims at examining the evolutionary stage of the principle of mutual trust on the European continent in comparison with the situation in the American context, as well as the legal instruments derived from this principle within each co-operation system. Furthermore, the analysis of the case law and doctrine of the United States of America on this topic leads to the conclusion that the way the principle of mutual trust is applied may serve as a reference model for European states, offering potential avenues for improvement.

Keywords: mutual trust, judicial cooperation in criminal matters, EU area of freedom, security and justice, United States of America.

JEL Classification: K14, K33

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1. Introduction

The principle of mutual trust currently constitutes the foundation of international judicial cooperation in criminal matters. To confirm its indispensable feature in combating crime at the international level, as well as to identify the aspects that may be optimized in the context of its application, the present study has been constructed along two phases of research.

In the first phase, the study examines the principle of mutual trust diachronically, with the aim of highlighting its evolution on the European continent. In the next stage of the analysis, the examination of legal texts - both the primary and secondary legislation of the European Union - reveals the vision of the European legislator, the critical points that have been strengthened thus far, and the direction set by the European Union (EU) regarding the cooperation mechanisms driven by the principle of mutual trust. Furthermore, the analysis of academic doctrine and the judicial practice of European courts clarify the framework within which the principle may be applied and establishes the limits within which it can operate, so that it does not interfere either with other principles of international judicial cooperation in criminal matters or with other fundamental rights.

The second part of the study is dedicated to presenting the principle of mutual trust in comparative terms, by highlighting the way it is used by the United States of America (USA) in interstate relations. The research aims to highlight the cooperation mechanisms existing among the American states, the way in which the applicable legal provisions in this field are simplified, and the way the operational component is maximized to achieve the intended results. At the same time, the assessment of American case law concerning issues arising from interstate judicial cooperation in criminal matters reveals an efficient, flexible, and streamlined system of cooperation, oriented toward finality - the eradication of criminal conduct - and less toward the applicable procedure. Given the architecture of the European Union and that of the United States of America, one might argue that, at least on the surface, the two entities could not be meaningfully compared (the former being an international entity, and the latter a federal state), and that the terms of such a comparison could not exist. However, their structures allow for comparative research regarding the principle of mutual trust, particularly through the lens of the connections created among EU Member States and, respectively, among the federal states.

The purpose of the research is to demonstrate that the American example may be regarded as a model for EU Member States - a model validated not only by its longevity, but also by the efficiency and speed with which judicial cooperation takes place and offenders are punished. On the other hand, one cannot overlook the more sustained concern of EU structures and Member States regarding the protection of fundamental rights, matters that are sometimes treated more superficially in the USA.

2. The Principle of Mutual Trust on the European Continent

The issue of mutual trust has been addressed on the European continent since ancient times, and in the modern era the philosopher Voltaire, in his commentary on Cesare Beccaria's *Dei delitti e delle pene*, wondered whether a convention between states for the reciprocal surrender of offenders², based on trust, would be useful. In light of Beccaria's observations, the conclusion was that such an action would indeed be useful; however, the obstacles to its implementation stemmed from the differences between the judicial systems of each state, the systems of penalties they regulated (including the existence of the death penalty in some states), and the risk of impunity (the same offence might be punishable in one state but not regulated at all in another). Thus, until a certain degree of harmonisation of legal systems - and implicitly of penalties - could be achieved, the surrender of offenders based on reciprocity would not have constituted a fair measure for them.

Years later, European states intensified their cooperative relations, concluding not only bilateral treaties but also European-level conventions³ founded on the principle of mutual trust and aimed at combating criminal activity. The 20th century is therefore marked by the activity of the Council of Europe, which made significant efforts to develop cooperation between states through the adoption of a broad normative framework applicable to them. The end of the 20th century and the beginning of the 21st century brought to the forefront another organisation on the European continent within whose activity the principle of mutual trust would acquire constitutional value: the European Union.

In 1999, at the Tampere European Council, the principle of mutual recognition was designated as the “cornerstone” of judicial cooperation in criminal matters⁴. Mutual recognition is grounded in the mutual trust that states place in the legal systems of other Member States — systems which, however different they may be, provide a minimum level of guarantees regarding fairness and an equivalent standard of procedural quality⁵.

² Cesare Beccaria, *An Essay on Crimes and Punishments*, by the Marquis Beccaria of Milan; with a Commentary by M. de Voltaire, new ed., corrected (Edinburgh: Alexander Donaldson, 1778), 141–42, <https://doi.org/10.5479/sil.36417.39088001520584>.

³ See Council of Europe, *European Convention on Extradition*, ETS No. 024 (Paris, December 13, 1957); Council of Europe, *European Convention on Mutual Assistance in Criminal Matters*, ETS No. 030 (Strasbourg, April 20, 1959); Council of Europe, *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*, ETS No. 051 (Strasbourg, November 30, 1964); and Council of Europe, *European Convention on the Transfer of Proceedings in Criminal Matters*, ETS No. 073 (Strasbourg, May 15, 1972).

⁴ European Council, *Presidency Conclusions, Tampere European Council, 15–16 October 1999*, para. 33, https://www.europarl.europa.eu/summits/tam_en.htm.

⁵ Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Oxford: Hart Publishing, 2021), 2, <https://doi.org/10.5040/9781509924578>.

Starting with Tampere, judicial cooperation acquired new dimensions through the adoption of several instruments facilitating the accountability of offenders, including the European Arrest Warrant⁶, the European Investigation Order⁷, and more recently, European Production Orders and European Preservation Orders for electronic evidence⁸. Nevertheless, amid the dynamism of these cooperation mechanisms, it became apparent that the principles of mutual trust and mutual recognition of judicial decisions issued by other Member States were increasingly confronted with the problem of non-compliance with the fundamental rights of the individuals targeted by these procedures. Thus, in the application of one of these cooperation instruments, there was a risk of violating, for example, the right to a fair trial or of exposing individuals to inhuman or degrading treatment⁹. In practice, the principle reached a stage in which trust became “blind”¹⁰, prevailing over other fundamental rights¹¹. Although Article 6 of the European Convention on Human Rights sets out a series of rights that must be respected in judicial proceedings, these guarantees often proved insufficient, with cooperation instruments and their intended objectives taking precedence. Consequently, the Council adopted a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings¹², precisely to provide additional safeguards ensuring that their rights are respected.

The Lisbon Treaty of 2009 marked another reference point for judicial cooperation in criminal matters by embedding mutual recognition in the Treaty

⁶ Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, *Official Journal of the European Communities* L 190 (July 18, 2002): 1–20, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0584>.

⁷ Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 regarding the European Investigation Order in Criminal Matters, *Official Journal of the European Union* L 130 (May 1, 2014): 1–36, <https://eur-lex.europa.eu/eli/dir/2014/41/oj/eng>.

⁸ Regulation (EU) 2023/1543 of the European Parliament and of the Council of July 12, 2023, *Official Journal of the European Union* L 191 (July 28, 2023): 118–180, <https://eur-lex.europa.eu/eli/reg/2023/1543/oj/eng>; Directive (EU) 2023/1544 of the European Parliament and of the Council of July 12, 2023, *Official Journal of the European Union* L 191 (July 28, 2023): 181–190, <https://eur-lex.europa.eu/eli/dir/2023/1544/oj/eng>.

⁹ *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198 (Court of Justice of the European Union, April 5, 2016).

¹⁰ *Radu*, Case C-396/11, EU:C:2013:39 (Court of Justice of the European Union, January 29, 2013); *Melloni*, Case C-399/11, EU:C:2013:107 (Court of Justice of the European Union, February 26, 2013).

¹¹ Rosaria Sicurella, “Fostering a European Criminal Law Culture: In Trust We Trust,” *New Journal of European Criminal Law* 9, no. 3 (2018): 308, <https://doi.org/10.1177/2032284418801561>; Ermioni Xanthopoulou, “The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?,” *European Law Journal* 28, nos. 4–6 (2022): 219, <https://doi.org/10.1111/eulj.12467>.

¹² Council of the European Union, Resolution of November 30, 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, *Official Journal of the European Union* C 295 (December 4, 2009): 1–3, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204(01)).

framework¹³ within “an area of freedom, security and justice”¹⁴. Mutual trust itself is not expressly named in the Treaties; it subsequently emerged in the case law of the Court of Justice as a structural principle of EU law. The two principles are closely connected and are frequently treated as complementary components of judicial cooperation¹⁵ in legal matters concerning judicial , although they remain conceptually distinct.

However, no clear definition of the principle of mutual trust, nor any standards for measuring the degree of trust between states, has ever been officially established. Each entity retains the freedom to assess the importance of the principle, the limits within which it may be applied, and the consequences of its absence. What can nevertheless be stated with certainty is that legal scholarship and case law in recent years have demonstrated that the principle of mutual trust is autonomous - not merely “the principle behind the principle”¹⁶ - and that it follows its own trajectory within the architecture of European law. Moreover, the Court of Justice of the European Union (CJEU)¹⁷ has also acknowledged the structural value of the principle of mutual trust.

As a result of the effects of previous CJEU judgments, as well as national case law, it became clear that the regulation of certain limits¹⁸ on the application of the principle of mutual trust was necessary. Likewise, the range of European normative instruments designed¹⁹ either to contextualize the way the principle is applied or to establish specific rights for individuals targeted by cooperation procedures has expanded.

Evidently, a new vision of the principle of mutual trust has taken shape on the European continent. National courts in countries such as Poland, Romania,

¹³ Treaty on the Functioning of the European Union, consolidated version, *Official Journal of the European Union* C 202 (June 7, 2016): 47–200, arts. 67, 70, 80, and 82.

¹⁴ Treaty on the Functioning of the European Union, Title V, “Area of Freedom, Security and Justice.”

¹⁵ Romania, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, republished in *Monitorul Oficial al României*, Part I, No. 411 (May 27, 2019), art. 84(2), <https://legislatie.just.ro/Public/DetaliuDocument/153661>.

¹⁶ Willems, *Principle of Mutual Trust*, 51, 173–78.

¹⁷ *Opinion 2/13*, EU:C:2014:2454, para. 191 (Court of Justice of the European Union, December 18, 2014).

¹⁸ Sacha Prechal, “Mutual Trust before the Court of Justice of the European Union,” *European Papers* 2, no. 1 (2017): 75–92, <https://doi.org/10.15166/2499-8249/139>; Valsamis Mitsilegas, “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual,” *Yearbook of European Law* 31, no. 1 (2012): 319–372, <https://doi.org/10.1093/yel/yes023>.

¹⁹ See Directive 2010/64/EU of October 20, 2010, *Official Journal of the European Union* L 280 (October 26, 2010): 1–7, <https://eur-lex.europa.eu/eli/dir/2010/64/oj/eng>; Directive 2013/48/EU of October 22, 2013, *Official Journal of the European Union* L 294 (November 6, 2013): 1–12, <https://eur-lex.europa.eu/eli/dir/2013/48/oj/eng>; and Directive (EU) 2016/1919 of October 26, 2016, *Official Journal of the European Union* L 297 (November 4, 2016): 1–8, <https://eur-lex.europa.eu/eli/dir/2016/1919/oj/eng>.

Hungary, Slovenia, and even Greece or Spain²⁰ have become increasingly concerned with safeguarding the fundamental rights of individuals involved in judicial cooperation procedures in criminal matters. Consequently, the CJEU has been called upon with growing frequency to clarify the interpretation of European legal norms arising in the practice of these courts.

Thus, the principle has evolved from the stage of unconditional trust, to limited trust, and at present, both doctrine and case law suggest that the prevailing trend is toward contextualized trust - one that is assessed individually, rather than by reference to systemic deficiencies of a judicial system.

3. The Principle of Mutual Trust in the Relations between the United States of America

At first glance, one might state that the manner in which EU Member States cooperate in combating crime is similar to the model existing in the United States of America. All U.S. states have different criminal law systems and distinct procedures applicable to the investigation of offences or to judicial cooperation processes. Likewise, at the regional level or at the level of the federal state as a whole, there are normative acts that have been implemented into the domestic legislation of U.S. States, just as European states have incorporated the primary and secondary legislation adopted at EU level. Nevertheless, despite the legislative diversity among U.S. States, the homogeneity of provisions concerning judicial cooperation is evident, and divergences in their application are far fewer than those encountered on the European continent, as the U.S. manages to solve them through less rigid and more spontaneous mechanisms.

As for the instruments of judicial cooperation, the United States adopts a more relaxed approach than the European model, in the sense that, in many cases, such cooperation does not require a rigid normative framework to be followed. Cooperation may also arise in an “informal” way, which is considered just as essential by U.S. authorities as formal cooperation. Informal cooperation means that, in addition to the official measures used by states for cooperation, they may also resort to other legal actions that are flexible and adaptable to the circumstances, without becoming blocked by legislative barriers.

As for the principles of mutual trust and mutual recognition, the U.S. Constitution contains a provision in Article IV, Section I, requiring states to respect the “public acts, records, and judicial proceedings of every other state,” the so-called *Full Faith and Credit Clause*. Article IV, Section II, Clause II regulates the *Extradition Clause*.

Although the *Full Faith and Credit Clause* could be seen as an analogue of mutual recognition in Europe, it does not require sister States to enforce one

²⁰ Urszula Jaremba and Jasper Krommendijk, “How Much Trust in Times of Distrust: National Courts, the ECJ and Criminal Cooperation in an Era of Rule-of-Law Backsliding,” *Erasmus Law Review* 17, no. 1 (2024): 51, <https://doi.org/10.5553/ELR.000274>.

another's penal judgments; the U.S. Supreme Court has expressly recognized this penal-law limitation²¹. Consequently, the clause is primarily relevant to civil judgments and other non-penal matters.

The *Extradition Clause*, on the other hand, incorporates the same features of reciprocity and trust, but applies exclusively to criminal law²², without interfering with the jurisdiction of each U.S. state. Regarding extradition, the United States adopted the *Extradition Act* in 1793 and later, in 1926, the *Uniform Criminal Extradition Act*, with the aim of standardizing extradition procedures among the states²³. The framework established by the *Uniform Criminal Extradition Act* has been adopted by the majority of U.S. states²⁴. What makes extradition a particularly notable form of cooperation is its constitutional regulation, and in practice its application generally does not raise difficulties.

Other forms of cooperation are established concretely through agreements or arrangements concluded between states, without being formalized at the constitutional level. In practice, U.S. states are free to conclude bilateral or multilateral agreements and may create the normative framework applicable to a particular form of cooperation. Moreover, U.S. states have the possibility - but not the obligation - to give effect to the agreements they have signed, depending on the specific circumstances they face.

One of the forms of cooperation used among U.S. states is the detainer order. This represents "a request made by a law enforcement agency to the institution where an inmate is incarcerated, asking either that the inmate be kept in custody for that agency or that the agency be notified when the inmate's release is imminent"²⁵. Over time, this order was applied between states on the basis of the principle of interstate comity, without having a binding feature, which created difficulties in its implementation.

The Interstate Agreement on Detainers was drafted by the Council of State Governments in 1956 and subsequently adopted by the participating jurisdictions; Congress enacted it in 1970 on behalf of the United States and the District of Columbia. Article III provides that a prisoner against whom a detainer has

²¹ *Nelson v. George*, 399 U.S. 224, 229 (1970); see also Mark W. Janis, "The Recognition and Enforcement of Foreign Law: The Antelope's Penal Law Exception," *The International Lawyer* 20, no. 1 (1986): 303–308, <https://scholar.smu.edu/til/vol20/iss1/16/>.

²² U.S. Const. art. IV, § 2, cl. 2: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

²³ Willems, *Principle of Mutual Trust*, 193–94; see also 18 U.S.C. § 3182.

²⁴ The Uniform Criminal Extradition Act has been adopted in 48 states. See *Cuyler v. Adams*, 449 U.S. 433, 435 n.1 (1981).

²⁵ *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (defining a detainer as a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release is imminent).

been lodged may request final disposition of pending charges in another jurisdiction and must be brought to trial within 180 days after the request is delivered to the prosecuting officer and the appropriate court²⁶. The mechanism is therefore designed to secure the expeditious disposition of outstanding charges.

Another instrument used in the United States to prevent offenders from evading investigation or trial, and to prevent witnesses from avoiding testimony in criminal cases, is the Fugitive Felon Act. Enacted in 1934, it formed part of a package of federal crime legislation responding to organized interstate crime and to the difficulties state authorities faced in pursuing fugitives across state lines²⁷. The statute allows federal authorities to assist in locating and apprehending persons who cross state lines to avoid prosecution, confinement, or testimony in qualifying criminal proceedings. It is principally an assistance mechanism rather than a substitute federal prosecution for the underlying state offence.

Regarding the way in which judicial authorities obtain evidence located in other states, this usually occurs through spontaneous agreements that, in principle, respect the rules on the admissibility of evidence²⁸. Federal agencies may likewise provide support or even take over investigations in the most complex cases. The difficulty, however, arises from determining which law applies to the admissibility of evidence: the law of the state where the evidence is collected, the law of the state where the investigation takes place, or the law of the state with the greatest interest in solving the case²⁹. Nevertheless, the doctrine³⁰ notes that situations giving rise to divergences regarding the applicable law for the collection and admissibility of evidence have been very rare in the United States over time, and legislative differences between states are minimal, meaning that uniformization of cooperation mechanisms in this field has not been necessary.

4. Conclusions

It may be concluded that the cooperation system among U.S. states functions without significant difficulties, since their legal systems, although different, are homogeneous with respect to the means of cooperation or are open to finding

²⁶ Interstate Agreement on Detainers, 18 U.S.C. app. 2, § 2, art. III(a); William A. Meadows, "Interstate Agreement on Detainers and the Rights It Created," *Akron Law Review* 18, no. 4 (1985): 691, 695, <https://ideaexchange.uakron.edu/akronlawreview/vol18/iss4/7/>.

²⁷ "Fugitive Felon Act: Its Function and Purpose," *Washington University Law Quarterly* 1964, no. 3 (1964): 355–367, https://openscholarship.wustl.edu/law_lawreview/vol1964/iss3/5/; 18 U.S.C. § 1073 historical and revision notes (tracing the statute to the Act of May 18, 1934, ch. 302, 48 Stat. 782).

²⁸ Willems, *Principle of Mutual Trust*, 202.

²⁹ John Bernard Corr, "Criminal Procedure and the Conflict of Laws," *Georgetown Law Journal* 73 (1985): 1217–19, <https://scholarship.law.wm.edu/facpubs/839/>.

³⁰ Jenia Iontcheva Turner, "Interstate Conflict and Cooperation in Criminal Cases: An American Perspective," *European Criminal Law Review* 4, no. 2 (2014): 114–146, <https://doi.org/10.5235/219174414813522060>.

ad hoc solutions that allow such collaboration to be effective. Additionally, the minimum standards set in the Constitution provide states with an additional guarantee regarding the reliability of the cooperation procedures they engage in. At the same time, the constant support offered by the federal government constitutes yet another mechanism ensuring that the cooperation process will be efficient and will achieve the outcome sought by the states involved.

Drawing an analogy with the situation in the European Union, we may note that both the EU's leadership structures and its various bodies and agencies support Member States in facilitating international judicial cooperation in criminal matters. However, the aspect in which Member States should follow the American model is the uniformization of the legislative framework in this field, and the implementation of EU norms should be carried out in a way as closely aligned as possible, without fundamental divergences. Moreover, there remains a certain rigidity of procedures that could be nuanced, precisely in light of the trust that EU Member States ought to place in the legal systems of their fellow Union members.

Likewise, U.S. legislation in the field of cooperation does not provide such numerous grounds for refusal of cooperation procedures as those found in European legislation. Furthermore, the rule of specialty is not applied in relations between U.S. states, but only at the international level, which reflects the high degree of trust states have in the proper conduct of criminal proceedings in other states. Nevertheless, the extent to which fundamental rights are respected remains debatable - an element on which the EU places significant emphasis in the conduct of cooperation relations.

Bibliography

I. Books and Articles

1. Beccaria, Cesare, marchese di. *An Essay on Crimes and Punishments, by the Marquis Beccaria of Milan; with a Commentary by M. de Voltaire*. New ed., corrected. Edinburgh: Alexander Donaldson, 1778. <https://doi.org/10.5479/sil.36417.39088001520584>.
2. Corr, John Bernard. "Criminal Procedure and the Conflict of Laws." *Georgetown Law Journal* 73 (1985): 1217–1240. <https://scholarship.law.wm.edu/facpubs/839/>.
3. "Fugitive Felon Act: Its Function and Purpose." *Washington University Law Quarterly* 1964, no. 3 (1964): 355–367. https://openscholarship.wustl.edu/law_lawreview/vol1964/iss3/5/.
4. Janis, Mark W. "The Recognition and Enforcement of Foreign Law: The Antelope's Penal Law Exception." *The International Lawyer* 20, no. 1 (1986): 303–308. <https://scholar.smu.edu/til/vol20/iss1/16/>.
5. Jaremba, Urszula, and Jasper Krommendijk. "How Much Trust in Times of Distrust: National Courts, the ECJ and Criminal Cooperation in an Era of Rule-of-Law Backsliding." *Erasmus Law Review* 17, no. 1 (2024): 50–62. <https://doi.org/10.1007/s10672-024-10000-0>.

- org/10.5553/ELR.000274.
6. Meadows, William A. "Interstate Agreement on Detainers and the Rights It Created." *Akron Law Review* 18, no. 4 (1985): 691 ff. <https://ideaexchange.uakron.edu/akronlawreview/vol18/iss4/7/>.
 7. Mitsilegas, Valsamis. "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual." *Yearbook of European Law* 31, no. 1 (2012): 319–372. <https://doi.org/10.1093/yel/yes023>.
 8. Prechal, Sacha. "Mutual Trust before the Court of Justice of the European Union." *European Papers* 2, no. 1 (2017): 75–92. <https://doi.org/10.15166/2499-8249/139>.
 9. Sicurella, Rosaria. "Fostering a European Criminal Law Culture: In Trust We Trust." *New Journal of European Criminal Law* 9, no. 3 (2018): 308–325. <https://doi.org/10.1177/2032284418801561>.
 10. Turner, Jenia Iontcheva. "Interstate Conflict and Cooperation in Criminal Cases: An American Perspective." *European Criminal Law Review* 4, no. 2 (2014): 114–146. <https://doi.org/10.5235/219174414813522060>.
 11. Willems, Auke. *The Principle of Mutual Trust in EU Criminal Law*. Oxford: Hart Publishing, 2021. <https://doi.org/10.5040/9781509924578>.
 12. Xanthopoulou, Ermioni. "The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?" *European Law Journal* 28, nos. 4–6 (2022): 218–233. <https://doi.org/10.1111/eulj.12467>.

II. Cases and Legal Instruments

1. Council of Europe. *European Convention on Extradition*. ETS No. 024. Paris, December 13, 1957. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=024>.
2. Council of Europe. *European Convention on Mutual Assistance in Criminal Matters*. ETS No. 030. Strasbourg, April 20, 1959. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=030>.
3. Council of Europe. *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. ETS No. 051. Strasbourg, November 30, 1964. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=051>.
4. Council of Europe. *European Convention on the Transfer of Proceedings in Criminal Matters*. ETS No. 073. Strasbourg, May 15, 1972. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=073>.
5. Council of the European Union. Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States. *Official Journal of the European Communities* L 190 (July 18, 2002): 1–20. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0584>.
6. Council of the European Union. Resolution of November 30, 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings. *Official Journal of the European Union* C 295 (December 4, 2009): 1–3. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009R0001>.

- LEX:32009G1204(01).
7. Court of Justice of the European Union. *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198, judgment of April 5, 2016.
 8. Court of Justice of the European Union. *Melloni*, Case C-399/11, EU:C:2013:107, judgment of February 26, 2013.
 9. Court of Justice of the European Union. *Opinion 2/13*, EU:C:2014:2454, December 18, 2014.
 10. Court of Justice of the European Union. *Radu*, Case C-396/11, EU:C:2013:39, judgment of January 29, 2013.
 11. European Council. *Presidency Conclusions, Tampere European Council, 15–16 October 1999*. https://www.europarl.europa.eu/summits/tam_en.htm.
 12. European Parliament and Council of the European Union. Directive 2013/48/EU of October 22, 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings. *Official Journal of the European Union* L 294 (November 6, 2013): 1–12. <https://eur-lex.europa.eu/eli/dir/2013/48/oj/eng>.
 13. European Parliament and Council of the European Union. Directive 2014/41/EU of April 3, 2014 regarding the European Investigation Order in Criminal Matters. *Official Journal of the European Union* L 130 (May 1, 2014): 1–36. <https://eur-lex.europa.eu/eli/dir/2014/41/oj/eng>.
 14. European Parliament and Council of the European Union. Directive (EU) 2016/1919 of October 26, 2016 on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings. *Official Journal of the European Union* L 297 (November 4, 2016): 1–8. <https://eur-lex.europa.eu/eli/dir/2016/1919/oj/eng>.
 15. European Parliament and Council of the European Union. Directive (EU) 2023/1544 of July 12, 2023 laying down Harmonised Rules on the Designation of Designated Establishments and the Appointment of Legal Representatives for the Purpose of Gathering Electronic Evidence in Criminal Proceedings. *Official Journal of the European Union* L 191 (July 28, 2023): 181–190. <https://eur-lex.europa.eu/eli/dir/2023/1544/oj/eng>.
 16. European Parliament and Council of the European Union. Regulation (EU) 2023/1543 of July 12, 2023 on European Production Orders and European Preservation Orders for Electronic Evidence in Criminal Proceedings and for the Execution of Custodial Sentences following Criminal Proceedings. *Official Journal of the European Union* L 191 (July 28, 2023): 118–180. <https://eur-lex.europa.eu/eli/reg/2023/1543/oj/eng>.
 17. Romania. Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, republished in *Monitorul Oficial al României*, Part I, No. 411 (May 27, 2019), art. 84. <https://legislatie.just.ro/Public/DetaliiDocument/153661>.
 18. Treaty on the Functioning of the European Union. Consolidated version, *Official Journal of the European Union* C 202 (June 7, 2016): 47–200, arts. 67, 70, 80, and 82 and Title V.

Some Considerations Regarding the Current State of Judicial Cooperation in Criminal Matters Between Different Countries at European and International Level

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Abstract

Starting from the consecrated meaning of the concepts of international law, international criminal law, judicial cooperation, respectively international judicial assistance in criminal matters, this study aims to highlight several current aspects regarding the judicial cooperation of states both at European and international level, in their fight against the criminal phenomenon. Applying, as main research methods, observation, documentation, scientific analysis and interpretation, this work addresses the issue of international legal assistance in the broader context of international judicial cooperation in criminal matters. The study brings to attention the possibility of using the so-called modern forms of judicial assistance in criminal matters between states, such as the spontaneous transmission of information, as well as the need to respect both the general principles of international judicial cooperation in criminal matters and the fundamental principles of international law. The work concludes by emphasizing that preventing and combating cross-border crime cannot legitimize a violation of international law.

Keywords: cross-border crime; international judicial cooperation; judicial assistance in criminal matters; international law.

JEL Classification: K33, K14

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1. Introduction

In its current official meaning², international law is that set of binding

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² European e-Justice Portal, "International Law," accessed May 5, 2026, https://e-justice.europa.eu/topics/legislation-and-case-law/international-law_ro.

norms recognized by states or nations in terms of regulating their mutual relations, as well as their relations with international organizations.

Currently, it is generally accepted to divide international law into two subdivisions: public international law and private international law. While private international law refers to relationships that contain an element of foreignness between individuals (natural persons and legal entities) and aims to resolve conflicts of laws (when two or more national legal systems are involved in a dispute), public international law regulates relationships established mainly between states and international intergovernmental organizations³.

Moreover, the phrase “international law” is used to refer to public international law⁴.

In turn, public international law has several branches, in relation to the diversity of the areas it regulates, one of the most recent branches established in the development of international law⁵ being international criminal law. Broadly speaking, international criminal law represents the set of international norms that criminalize acts classified as international crimes (war crimes, crimes against humanity, genocide) and that seek to hold those who commit such acts criminally accountable⁶.

If we recognize the existence of a distinction between the notions of “international criminal law”, as a branch of international law, and “criminal international law” (in the sense of international judicial cooperation in criminal matters), we note a tendency to expand the understanding of the concept of international criminal law, by including some aspects of criminal international law⁷. Thus, in a broader sense, international criminal law is defined as that set of norms or customs of public international law “which govern cooperation between states in criminal matters or establish in the charge of state parties the obligation to criminalize certain criminal conduct contrary to universally accepted fundamental values or to hand over persons accused of crimes against humanity, war crimes or genocide to international criminal tribunals”⁸.

In this context, this study, structured in 5 sections, addresses several cur-

³ Carmen Moldovan, *Drept internațional public* [Public international law] (Bucharest: Hamangiu, 2015), 3.

⁴ Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2 (Amsterdam: Elsevier Science, 1995), 1161.

⁵ Florian Coman et al., *Dicționar de drept internațional public* [Dictionary of public international law] (Timișoara: MediaTM, 2002), 100.

⁶ Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 3.

⁷ Anca-Lelia Lorincz and Adriana Iuliana Stancu, “Legal Nature of the Deprivation Measure Ordered During the Procedure for the Execution of the European Arrest Warrant,” *Perspectives of Law and Public Administration* 11, no. 3 (2022): 405, <https://adjuris.ro/revista/articole/An11nr3/6.%20Lorincz%20Stancu%20EN.pdf>.

⁸ Florin-Răzvan Radu, *Drept european și internațional penal* [European and international criminal law] (Bucharest: C.H. Beck, 2013), 169–70.

rent issues regarding judicial cooperation in criminal matters both between European states and at international level.

In the preparation of this work, observation, documentation, scientific analysis and legal interpretation of the provisions on judicial cooperation between states for the prevention and combating of the criminal phenomenon are used as research methods.

Thus, in the section that follows these introductory considerations, a conceptual delimitation is first made between the notions of international legal assistance in criminal matters, international judicial assistance in criminal matters, international judicial cooperation in criminal matters and judicial cooperation in criminal matters. This section also addresses several aspects regarding the application of the general principles of international judicial cooperation in criminal matters in the broader context of the fundamental principles of international law. The research then focuses on the mechanisms of judicial cooperation in criminal matters within the European Union.

The 3rd section is devoted to the notion of international judicial assistance in criminal matters, as a distinct form of cooperation. The main forms of judicial assistance in criminal matters are analyzed, as they are provided for in the Romanian special law (Law no. 302/2004 republished⁹). Also, this section highlights the existence of mechanisms for judicial cooperation in criminal matters between the European Union and the United States of America (under the Mutual Assistance Agreement¹⁰ between the EU and the USA concluded in 2003), as well as provisions on mutual assistance between Romania and the USA (according to the Treaty on Mutual Assistance in Criminal Matters¹¹ between Romania and the USA concluded in 1999 and the 2007 Protocol¹² accompanying this treaty).

Section 4 analyses, among other forms of international judicial assistance in criminal matters, the so-called modern investigative means, with particular reference to the spontaneous transmission of information.

The conclusions section emphasizes the need to apply legal and conventional mechanisms of judicial cooperation at the international level, without the imperative of combating cross-border crime being able to justify the violation of principles and norms of international law.

⁹ Romania, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, republished in *Monitorul Oficial al României*, Part I, No. 411 (May 27, 2019), as subsequently amended.

¹⁰ European Union and United States of America, *Agreement on Mutual Legal Assistance between the European Union and the United States of America*, signed June 25, 2003, *Official Journal of the European Union* L 181 (July 19, 2003): 34–42, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0719\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0719(02)).

¹¹ Romania and United States of America, *Treaty on Mutual Assistance in Criminal Matters*, May 26, 1999, *Monitorul Oficial al României*, No. 425 (August 31, 1999).

¹² Romania and United States of America, *Protocol to the Treaty on Mutual Assistance in Criminal Matters*, September 10, 2007, *Monitorul Oficial al României*, No. 389 (May 22, 2008).

2. Judicial Cooperation within the European Union

Regarding the concept of **international judicial cooperation in criminal matters**, it was introduced into Romanian legislation by Law no. 302/2004. In the absence of a legal definition of this concept, to clarify it, one can start from another notion established in legal literature – that of **international legal assistance in criminal matters**.

The notion of international legal assistance in criminal matters has received, in doctrine, two meanings. Thus, in a broad sense, international legal assistance in criminal matters means the support (the aid) that states generally offer each other in the fight against crime¹³, through activities such as cooperation between judicial police bodies, international rogatory commissions in criminal matters, recognition of criminal judgments, extradition, etc.

International legal assistance in criminal matters, in its narrow sense, refers to legal assistance of a judicial (or procedural) nature, which means the assistance that the judicial bodies of a state grant, during the criminal process, to the judicial bodies of the state in which the judicial activity takes place and which consists in the execution, delivery or communication of procedural documents necessary for the resolution of that case¹⁴. In other words, the notion of international judicial assistance actually represents the narrow meaning of the notion of international legal assistance in criminal matters, which means that the notion of international legal assistance includes that of international judicial assistance.

Moreover, the concept of **international judicial assistance in criminal matters** was also used in Romanian legislation prior to 2004, and a special law was also adopted in this field¹⁵.

Until the entry into force of the special law on international judicial assistance in criminal matters, the Romanian criminal procedure codes contained provisions regarding some forms of collaboration between states in the fight against the criminal phenomenon.

Thus, if in the Criminal Procedure Code of 1864 (the first Romanian Criminal Procedure Code)¹⁶ there were no provisions regarding any form of international judicial assistance or cooperation, in the first Criminal Procedure Code of Romania (the 1936 Code), applicable throughout the unified territory of the Romanian state¹⁷, there were provisions regarding the procedure of rogatory

¹³ Rodica Mihaela Stănoiu, *Asistența juridică internațională în materie penală* [International legal assistance in criminal matters] (Bucharest: Editura Academiei, 1975), 16.

¹⁴ Vintilă Dongoroz et al., *Explicațiile teoretice ale Codului de procedură penală român. Partea specială* [Theoretical explanations of the Romanian Criminal Procedure Code. Special part], vol. 2 (Bucharest: Editura Academiei, 1976), 405.

¹⁵ Romania, Law No. 704/2001 on International Judicial Assistance in Criminal Matters, *Monitorul Oficial al României*, No. 807 (December 17, 2001).

¹⁶ Romania, Code of Criminal Procedure of 1864, *Monitorul Oficial*, December 2, 1864.

¹⁷ Romania, Code of Criminal Procedure of 1936 (Carol II Code of Criminal Procedure), *Monitorul*

commissions abroad¹⁸, the recognition of foreign criminal judgments and the extradition procedure, but the notion of “international judicial assistance” was not used.

Later, in the 1968 Code of Criminal Procedure¹⁹ two special procedures were regulated²⁰ that referred to the granting of international judicial assistance: the rogatory commission and the recognition of criminal judgments or other foreign judicial acts.

Following the repeal²¹ of the provisions of the Code of Criminal Procedure that regulated the rogatory commission²², the modalities for carrying out international judicial assistance remained those provided for in the special law, the procedure for recognizing criminal judgments or other foreign judicial acts being further regulated by the provisions of the code²³.

Subsequently, both the provisions of the special law on international legal assistance in criminal matters and most of the provisions of the Code of Criminal Procedure regulating the recognition of criminal judgments and other foreign judicial acts²⁴ were repealed by Law no. 302/2004 on international judicial cooperation in criminal matters²⁵.

The special law of 2004 introduced a new concept - that of “international judicial cooperation in criminal matters”, while still using the notion of international judicial assistance in criminal matters, which means that it was not intended to replace the notion of “judicial assistance” with that of “judicial cooperation”. Moreover, according to the initial text of Law no. 302/2004 (before its amendment and completion)²⁶, the forms of international judicial cooperation in criminal matters were: a) extradition; b) surrender based on a European arrest warrant; c) transfer of proceedings in criminal matters; d) recognition and enforcement of decisions in criminal matters; e) transfer of convicted persons; f) rogatory commissions; g) appearance of witnesses, experts and persons prosecuted; h) notification of procedural documents drawn up or filed in a criminal trial; i) criminal record.

Moreover, from the initial content of the special law²⁷ it emerged that the request for international judicial assistance in criminal matters was the request

Official, No. 66 (March 19, 1936).

¹⁸ Romania, Code of Criminal Procedure of 1936, art. 128.

¹⁹ Romania, Code of Criminal Procedure of 1968, *Buletinul Oficial*, No. 145 (November 12, 1968).

²⁰ Romania, Code of Criminal Procedure of 1968, arts. 513–522.

²¹ Romania, Law No. 704/2001 on International Judicial Assistance in Criminal Matters.

²² Romania, Code of Criminal Procedure of 1968, arts. 514–518.

²³ Romania, Code of Criminal Procedure of 1968, arts. 519–522.

²⁴ Romania, Code of Criminal Procedure of 1968, arts. 519–521.

²⁵ Romania, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, final provisions concerning repeal and entry into force; Title III entered into force on Romania’s accession to the European Union on January 1, 2007.

²⁶ Romania, Law No. 302/2004, original art. 1, *Monitorul Oficial al României*, No. 594 (July 1, 2004).

²⁷ Romania, Law No. 302/2004, original art. 2(a).

soliciting cooperation in a criminal case, in one of the forms expressly provided for.

Therefore, in the legislative conception since the adoption of Law no. 302/2004, the notion of international judicial assistance was given a broader meaning, including other forms of cooperation that do not exclusively aim at the support that the judicial bodies of a state grant, during the conduct of a criminal trial, to the judicial bodies of the state in which the judicial activity takes place (such as the transfer of convicted persons abroad or extradition for the purpose of executing a sentence).

Law no. 302/2004 was, however, substantially amended and supplemented in 2006²⁸, among the amendments made at that time being the regulation of judicial assistance in criminal matters, as a distinct form of international judicial cooperation.

And in the current Romanian Code of Criminal Procedure²⁹, the institution of international judicial cooperation in criminal matters has a general regulation (framework regulation) in the title dedicated to special procedures (Title IV of the Special Part – “Procedure on international judicial cooperation and the implementation of international treaties in criminal matters”): Section I – general provisions on international judicial assistance and Section II – provisions on the recognition of foreign judicial acts. It is thus observed that, in the current Code of Criminal Procedure, unlike previous codes, express reference is made to the concept of “international judicial cooperation in criminal matters”, without however providing a legal definition of this notion.

According to the current legislative framework in Romania³⁰, the forms of international judicial cooperation in criminal matters are: a) extradition; b) surrender based on a European arrest warrant; c) transfer of proceedings in criminal matters; d) recognition and enforcement of judgments in criminal matters; e) transfer of convicted persons; f) judicial assistance in criminal matters; g) other forms of cooperation.

Therefore, the current concept of international judicial cooperation in criminal matters “is approximated to the broad sense of the notion of international legal assistance in criminal matters, and the international judicial assistance is considered to be just one of the forms of international judicial cooperation”³¹.

On the other hand, the concept of **judicial cooperation in criminal matters** is currently also used, which means cooperation in criminal matters between

²⁸ Romania, Law No. 224/2006 amending and supplementing Law No. 302/2004, *Monitorul Oficial al României*, No. 534 (June 21, 2006).

²⁹ Romania, Law No. 135/2010 on the Code of Criminal Procedure, *Monitorul Oficial al României*, No. 486 (July 15, 2010), effective February 1, 2014, as subsequently amended.

³⁰ Romania, Law No. 302/2004, republished, art. 1.

³¹ Anca-Lelia Lorincz, “The European Arrest Warrant as a Form of International Judicial Cooperation in Criminal Matters in Terms of Amendments to the Romanian Legislation,” *European Police Science and Research Bulletin*, no. 8 (Summer 2013): 34, https://www.cepol.europa.eu/sites/default/files/08_EPSR_BULLETIN.pdf.

EU member states.

In order to outline the general framework of international judicial cooperation in criminal matters, the Romanian legislator has expressly established³² certain rules with the value of **general principles of cooperation**, namely:

- limiting international cooperation to the need to protect national interests defined by the Constitution (such as interests of sovereignty, security and internal public order);

- recognition of the preeminence of international law;
- respecting international courtesy and reciprocity, including by ensuring reciprocity;

- *non bis in idem*;

- maintaining confidentiality.

Among these general principles, it is necessary to highlight **reciprocity**, the principles of recognition and mutual trust being the basis for the collaboration of the EU member states in response to the challenge represented by the increase in the phenomenon of cross-border crime favored by the progressive elimination of border controls within the Union³³. In arguing this statement (regarding the substantiation of **judicial cooperation at the EU level** based on mutual recognition), some clarifications are required in relation to some temporal landmarks.

Thus, since 1999, the Conclusions of the European Council Meeting in Tampere (Finland)³⁴ recorded that the principle of mutual recognition “should become the cornerstone of judicial cooperation, both in civil and criminal matters, within the Union” and that this principle “should apply both to judgments and to other decisions of judicial authorities”.

Mutual recognition was conceived as the mechanism by which a decision of a judicial authority in a Member State is recognized and, where appropriate, implemented by the other EU Member States, thus avoiding the difficulties that could arise as a result of the diversity of the judicial systems of these states³⁵.

Later, in 2004, during the Dutch Presidency of the Council of the EU, the Hague Programme³⁶ was adopted, which had as its objective to accelerate measures aimed at ensuring a *common judicial area*. It was considered then that, within the common judicial area of the European Union, “the further realisation

³² Romania, Law No. 302/2004, republished, arts. 3–9.

³³ Cristinel Ghigheci, Vlad Neagoe, Roxana Matefi, and Diana Geanina Ionaș, “Fundamental Rights Within the European Arrest Warrant,” *Juridical Tribune – Review of Comparative and International Law* 14, no. 4 (December 2024): 600, <https://doi.org/10.62768/TBJ/2024/14/4/04>.

³⁴ European Council, *Tampere European Council, 15–16 October 1999: Presidency Conclusions*, para. 33, https://www.europarl.europa.eu/summits/tam_en.htm.

³⁵ Judith Hester, Michael Klackl, and Mariana Zainea, *Recunoașterea reciprocă în domeniul cooperării judiciare în materie penală: Instrumente juridice și implementarea lor – Manual* [Mutual recognition in the field of judicial cooperation in criminal matters: Legal instruments and their implementation – Handbook] (Bucharest: Euro Standard, 2010), 13.

³⁶ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, *Official Journal of the European Union* C 53 (March 3, 2005): 1–14.

of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions”.

In 2007, through the Treaty of Lisbon³⁷, which aimed to make the functioning of the EU more efficient, the need to extend the scope of application of the principle of mutual recognition in the field of judicial cooperation with a cross-border dimension in criminal matters was also outlined, in order to strengthen this cooperation. It was then established that, in order to facilitate the mutual recognition of judgments and judicial decisions, the European Parliament and the Council may establish, by means of directives, minimum rules relating, inter alia, to the mutual admissibility of evidence between Member States.

This was followed by the adoption, in 2009, of the Stockholm Programme³⁸ through which the European Council established the priorities for the development of the European area of freedom, security and justice in the period 2010-2014. One of the instruments for implementing the Stockholm Programme, with consequences also in terms of judicial cooperation in criminal matters, was the further strengthening of mutual recognition, through concrete measures, for example by extending mutual recognition to all types of judicial decisions (which could be, depending on the national legal system, criminal or administrative). These measures to extend the scope of the principle of mutual recognition continued with the adoption of the European Investigation Order Directive³⁹. In order to transpose this directive, provisions regarding the European Investigation Order were also introduced into Romanian legislation⁴⁰, as a form of judicial assistance in criminal matters in the relationship between EU member states.

Starting with 2017, the concept of “mutual recognition” was doubled by that of “*enhanced cooperation*”, a concept under which the European Public Prosecutor's Office was established⁴¹, which became operational on 1 June 2021. Therefore, it can be said that we have moved from the level of mutual recognition to the level of materialized consolidation of cooperation between EU member states. Moreover, the European Public Prosecutor's Office was conceived as a

³⁷ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed December 13, 2007, *Official Journal of the European Union* C 306 (December 17, 2007): 1–271.

³⁸ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, *Official Journal of the European Union* C 115 (May 4, 2010): 1–38.

³⁹ Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 regarding the European Investigation Order in Criminal Matters, *Official Journal of the European Union* L 130 (May 1, 2014): 1–36.

⁴⁰ Romania, Law No. 236/2017 amending and supplementing Law No. 302/2004, *Monitorul Oficial al României*, No. 993 (December 14, 2017).

⁴¹ Council Regulation (EU) 2017/1939 of October 12, 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office (EPPO), *Official Journal of the European Union* L 283 (October 31, 2017): 1–71, arts. 3–4.

consolidated instrument of cooperation, an indivisible body of the Union with legal personality that investigates, prosecutes and brings to judgment offences affecting the financial interests of the Union before the competent courts of the participating Member States⁴². Romania also implemented⁴³, in 2021, the EPPO (European Public Prosecutor's Office) Regulation, by adopting internal provisions that ensure the exercise by European prosecutors of the powers vested in them in accordance with this regulation⁴⁴.

A reflection of the application of the concept of “enhanced cooperation” at European level can also be seen in the continued operation of a cooperation mechanism between the EU and the United Kingdom of Great Britain and Northern Ireland. After the end of the transition period, this mechanism is no longer the European Arrest Warrant as such; it is a surrender mechanism based on arrest warrants under Part Three, Title VII of the EU-UK Trade and Cooperation Agreement, although it is structurally similar to the EAW system.

Thus, after Brexit, according to the Trade and Cooperation Agreement concluded between the EU and the United Kingdom⁴⁵, judicial cooperation in criminal matters includes a surrender regime pursuant to an arrest warrant that is comparable in several respects to the Framework Decision on the European Arrest Warrant⁴⁶. Therefore, although it is no longer a member state of the EU, a request from the United Kingdom authorities addressed to one of the 27 member states, with a view to handing over a person located on the territory of that state, is admissible even after January 1, 2021, with continuity of procedures in the matter of judicial cooperation.

Returning to the subject of the general principles of international judicial cooperation in criminal matters, it is necessary to approach them also from the perspective of their framing in the broader context of **the fundamental principles of international law**. Thus, the principle of international cooperation (or cooperation between states) is just one of the fundamental principles of contemporary international law, defined as “legal rules of maximum generality, universal and imperative of relations between states”⁴⁷.

Enshrined and developed through a series of international documents

⁴² Directive (EU) 2017/1371 of the European Parliament and of the Council of July 5, 2017 on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law, *Official Journal of the European Union* L 198 (July 28, 2017): 29–41.

⁴³ Romania, Law No. 6/2021 Establishing Measures for the Implementation of Council Regulation (EU) 2017/1939, *Monitorul Oficial al României*, No. 167 (February 18, 2021).

⁴⁴ Romania, Law No. 6/2021, art. 14.

⁴⁵ European Union and United Kingdom, *Trade and Cooperation Agreement*, Part Three, Title VII (“Surrender”), *Official Journal of the European Union* L 149 (April 30, 2021): 10–2539.

⁴⁶ Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, *Official Journal of the European Communities* L 190 (July 18, 2002): 1–20.

⁴⁷ Coman et al., *Dicționar de drept internațional public*, 195.

(beginning with the Charter of the United Nations⁴⁸ and continuing with the 1970 Declaration of the UN General Assembly⁴⁹, the 1974 Charter of Economic Rights and Duties of States⁵⁰ and the 1975 Final Act of the Helsinki Conference⁵¹), the framework of these fundamental principles includes⁵²:

- the principle of non-recourse to force or the threat of force in international relations (the principle of non-aggression);
- the principle of peaceful settlement of international disputes;
- the principle of non-interference in the internal affairs of another state (the principle of non-interference or non-intervention);
- the principle of cooperation between states;
- the principle of equal rights and self-determination of peoples;
- the principle of sovereign equality of states;
- the principle of fulfilling obligations in good faith (*pacta sunt servanda*);
- the principle of territorial integrity of states;
- the principle of the inviolability of borders;
- the principle of respect for fundamental rights and freedoms.

3. International Judicial Assistance in Criminal Matters. Cooperation Between the European Union and the United States of America. Cooperation Between Romania and the United States of America

As previously shown, the notion of international legal assistance in criminal matters, as a distinct form of cooperation, refers to procedural assistance, i.e. the support that the judicial authorities of a state grant during a criminal trial to the judicial authorities of the state in which the procedural activity takes place; this support consists, essentially, in the execution and communication of procedural documents necessary to resolve the respective case.

The normative framework of international legal assistance in criminal matters is represented, in order of their priority, by: multilateral conventions with international (global) applicability, bilateral treaties between different states and the domestic legislation of each state.

⁴⁸ United Nations, *Charter of the United Nations*, signed June 26, 1945, entered into force October 24, 1945, 1 UNTS XVI.

⁴⁹ United Nations General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Resolution 2625 (XXV), October 24, 1970, UN Doc. A/RES/2625(XXV).

⁵⁰ United Nations General Assembly, *Charter of Economic Rights and Duties of States*, Resolution 3281 (XXIX), December 12, 1974, UN Doc. A/RES/3281(XXIX), [https://docs.un.org/en/A/RES/3281\(XXIX\)](https://docs.un.org/en/A/RES/3281(XXIX)).

⁵¹ Conference on Security and Co-operation in Europe, *Helsinki Final Act*, August 1, 1975.

⁵² Moldovan, *Drept internațional public*, xvii–xviii; Cristina-Elena Popa Tache, *Drept internațional public* [Public international law] (Bucharest: C.H. Beck, 2022), 68–71.

The best-known multilateral convention in this field is the European Convention on Mutual Assistance in Criminal Matters, adopted in Strasbourg in 1959⁵³ and then supplemented by three additional protocols (in 1978, 2001 and 2025); this multilateral convention was also supplemented by the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union⁵⁴.

In the relationship between EU Member States, under the 2000 Convention on Mutual Legal Assistance in Criminal Matters, the communication of judicial documents can be made directly by mail to the recipient, and other categories of requests for judicial assistance can be sent directly to the requested judicial authorities, for the identification of which the European Judicial Atlas can be used, published on the website of the European Judicial Network created in 1998 with a view to facilitating judicial cooperation between Member States.

Romanian domestic legislation transposes and details international and European provisions in the field, regulating⁵⁵ as the main forms of international judicial assistance in criminal matters: “international rogatory commissions; hearings by videoconference; appearance in the requesting state of witnesses, experts and persons prosecuted; notification of procedural documents drawn up or filed in a criminal case; criminal record”.

The international rogatory commission in criminal matters represents the form of judicial assistance which consists of the empowerment that a judicial body in one state grants to an authority in another state, to carry out, in its place and on its behalf, certain judicial activities relating to a specific criminal trial.

The activities that may be the subject of a rogatory commission request are in particular: locating and identifying persons and objects; questioning the suspect, the injured party, the parties, witnesses and experts, as well as confrontation; search, taking over objects and documents, seizure and special or extended confiscation; on-site investigation and reconstruction; expert opinions; transmission of information necessary in a given process, interceptions of conversations, examination of archive documents and specialized files; transmission of material evidence; communication of files or documents.

Videoconference hearings represent that form of assistance that allows, in the situation where the hearing as a witness or expert of a person located on

⁵³ Council of Europe, *European Convention on Mutual Assistance in Criminal Matters*, ETS No. 030 (Strasbourg, April 20, 1959), entered into force June 12, 1962. Romania deposited its instrument of ratification on March 17, 1999, and the Convention entered into force for Romania on June 15, 1999, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty_num=030.

⁵⁴ Council of the European Union, *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, May 29, 2000, *Official Journal of the European Communities* C 197 (July 12, 2000): 3–23, entered into force August 23, 2005. For Romania, the Convention entered into force on December 1, 2007 pursuant to Council Decision 2007/763/EC of November 8, 2007.

⁵⁵ Romania, Law No. 302/2004, republished, art. 228.

the territory of Romania is required by the judicial authorities of a foreign state and it is inconvenient or impossible for that person to appear in person on the territory of that state, the respective state can request that the hearing take place through audio-video technical means.

The judicial authorities competent to resolve requests for hearings made by the authorities of other states are the prosecutor's offices during the criminal investigation, or the courts during the trial, competent materially and according to the capacity of the person, according to Romanian law; as regards territorial jurisdiction, this is determined by the place where the person to be heard by videoconference domiciles or resides.

Among the rules according to which the hearing is conducted via videoconference, the following are noteworthy:

- the hearing takes place in the presence of the competent Romanian judge or prosecutor, assisted by an interpreter; the judge or prosecutor is obliged to ensure compliance with the fundamental principles of domestic law regarding the evidentiary procedure of the hearing;
- if applicable, the competent Romanian judicial authorities and those of the requesting state agree on the measures to protect the witness or expert;
- the hearing shall be carried out directly by the competent judicial body of the requesting state or under its coordination, according to its internal legislation; if necessary, the witness or expert shall be assisted by an interpreter, according to Romanian law.

The appearance of witnesses or experts in the requesting state is that form of assistance which involves the possibility of the requesting state bearing the legal expenses incurred by the travel of persons summoned as witnesses or experts, when the respective persons are on the territory of another state and their physical presence is necessary for the purpose of resolving a criminal case.

In the event that the Romanian judicial authorities consider it necessary for a witness or expert to appear in person, the request for the service of the summons must include a mention to this effect and indicate the approximate amount of the reimbursable expenses incurred by summoning the person in question (transportation, maintenance, accommodation expenses). Also, the Romanian judicial body that ordered the in-person appearance will be able to request the foreign state to grant an advance to the witness or expert, with reimbursement to be made from the specially allocated judicial expenses fund.

The same provisions apply if the personal appearance of a witness or expert is requested from the Romanian authorities by a foreign state.

The communication of procedural documents, as a form of international judicial assistance, consists of ensuring, by the judicial authorities of the requested state, the transmission to persons on its territory of documents such as: summonses for parties or witnesses, the indictment or other criminal prosecution documents, court decisions, requests for the exercise of appeals or documents regarding the execution of a sentence, the payment of a fine or the payment of

procedural legal costs.

Requests for judicial assistance that have as their object the communication of procedural documents and are addressed to Romanian judicial bodies are resolved in the trial phase by the court in whose jurisdiction the person to whom the documents are to be transmitted resides or is detained, and in the criminal prosecution phase, by the prosecutor's office attached to it.

The communication of procedural documents can be carried out by simply sending them to the recipient, the proof of notification being made by a document dated and signed by the recipient or by a declaration of the Romanian judicial body recording the form and date of the communication.

The exchange of information regarding the data existing in *the criminal record* of certain persons represents that form of international judicial assistance through which the judicial authorities of the requested state make available to another state certain data relating to the criminal records of the persons concerned; through this form of assistance, the Romanian state can communicate, at the request of a foreign state, extracts from the criminal record and any data relating to it, in order to resolve a criminal case by the judicial authorities of the requesting state.

It is also worth noting that, following the line of strengthening judicial cooperation, not only at European level, but also at international level⁵⁶, the Romanian legislator has made some recent amendments⁵⁷ to the special national legislation in the field. Thus, with regard to international legal assistance, as a separate form of cooperation, distinct provisions have been introduced⁵⁸ regarding the granting of this assistance in special cases in which the provisions of the Convention on Combating Bribery of Foreign Public Officials in International Economic Transactions⁵⁹ apply. For example, it is expressly provided that evidence obtained by another State Party to this Convention is admissible, in principle, also in criminal proceedings conducted in Romania; the exception is situations in which it is considered that the use of the respective evidence violates fundamental human rights established by the domestic legislation of Romania.

In the broader context of judicial cooperation in criminal matters at a

⁵⁶ Anca-Lelia Lorincz, "Recent Case Law at Union Level on the Execution of the European Arrest Warrant," in *New Perspectives on Multiculturalism: Intersecting Discourses and Dialogues*, ed. Iulian Boldea and Cornel Sigmirean (Tîrgu-Mureş: Arhipelag XXI Press, 2025), 35, <https://asociatia-alpha.ro/gidni/12-2025/GIDNI-12-Socs-f.pdf>.

⁵⁷ Romania, Law No. 156/2025 amending and supplementing Law No. 319/2024 and supplementing Law No. 302/2004, *Monitorul Oficial al României*, No. 959 (October 16, 2025).

⁵⁸ Romania, Law No. 302/2004, republished, art. 243¹, introduced by Law No. 156/2025.

⁵⁹ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted November 21, 1997, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293>.

global level⁶⁰, it is worth highlighting the existence of intercontinental cooperation mechanisms, in the form of judicial assistance, between the EU and the USA, under the Agreement⁶¹ concluded in 2003 (and entered into force on 1 February 2010). The purpose of concluding this agreement was to intensify and facilitate cooperation between the EU member states, on the one hand, and the USA, on the other hand, in complementing the bilateral treaties between them. Among the new aspects⁶² brought by the aforementioned agreement are:

- facilitating the identification and communication of banking information necessary to resolve criminal cases;
- transmission of requests for mutual judicial assistance by means of rapid communication (fax, e-mail);
- the creation and operation of joint investigation teams to conduct complex investigations involving judicial bodies from one or more EU countries and the USA;
- allowing the hearing of witnesses or experts by videoconference;
- extending the scope of mutual judicial assistance also to national administrative authorities, in situations where investigations could lead to referral to criminal prosecution bodies (i.e. when it is anticipated that a criminal prosecution will be carried out).

For the implementation of the Agreement between the EU and the USA, a protocol⁶³ was signed in 2007 in Bucharest between Romania (as a member state of the EU) and the USA for the amendment and completion of the bilateral Treaty on Mutual Assistance in Criminal Matters existing between them⁶⁴. This protocol, which was ratified by Romania in 2008⁶⁵ and entered into force on 1 February 2010, “regulates modern forms of legal assistance in criminal matters”⁶⁶, such as: identification of banking information regarding money laundering and terrorism activities punishable by the laws of both states, joint investigation teams, use of video transmission technology for videoconference hearings, etc. The amendment of the Treaty on Mutual Assistance in Criminal Matters between Romania and the USA was necessary at that time (in 2007) “and in order

⁶⁰ Alberto Oddenino and Diego Bonetto, “The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law,” *Global Jurist* 20, no. 3 (2020): 2, <https://doi.org/10.1515/gj-2019-0064>.

⁶¹ European Union and United States of America, *Agreement on Mutual Legal Assistance*.

⁶² EUR-Lex, “Agreement with the United States on Mutual Legal Assistance,” accessed May 21, 2026, [https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:22003A0719\(02\)](https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:22003A0719(02)).

⁶³ Romania and United States of America, *Protocol to the Treaty on Mutual Assistance in Criminal Matters*, September 10, 2007.

⁶⁴ Romania and United States of America, *Treaty on Mutual Assistance in Criminal Matters*, May 26, 1999.

⁶⁵ Romania, Law No. 112/2008 ratifying the 2007 Protocol to the Romania–United States Mutual Legal Assistance Treaty, *Monitorul Oficial al României*, No. 389 (May 22, 2008).

⁶⁶ Romanian Ministry of Justice, press release on Romania–United States mutual legal assistance, reproduced by Juridice.ro, accessed May 22, 2026, <https://www.juridice.ro/97501/noutati-ref-asis-tenta-judiciara-in-materie-penala-sua-romania.html>.

to better respond to the new challenges of transnational crime, especially its most serious forms, such as terrorism, human trafficking, drug trafficking, arms trafficking”, being “necessary to supplement the treaty in force by introducing modern forms of judicial assistance, regulated by both Romanian and American legislation”⁶⁷.

4. Spontaneous Transmission of Information, as a Form of International Judicial Assistance in Criminal Matters

The enumeration in the Romanian special law⁶⁸, of activities that may be subject to international judicial assistance is not exhaustive, the legislator leaving the possibility of using other forms of assistance, in addition to the main ones expressly provided for. Thus, as is evident from the interpretation of the domestic provisions regulating judicial assistance in criminal matters as a distinct form of cooperation⁶⁹, the category of other forms of assistance may include: spontaneous transmission of information; controlled deliveries; use of undercover investigators; joint investigation teams; cross-border surveillance.

Moreover, these domestic provisions⁷⁰ represent a full transposition of the 2001 Additional Protocol⁷¹ to the European Convention on Mutual Assistance in Criminal Matters, adopted in Strasbourg in 1959 (this is the second additional protocol to this convention, a protocol that regulated the forms of assistance considered modern).

In a brief presentation, *controlled deliveries*, as activities that may be the subject of a request for international judicial assistance, imply, according to domestic regulation, the possibility of authorization by the competent Romanian judicial authorities, under the conditions provided for by Romanian law, of operations such as the entry, exit or transit of goods about which there are suspicions regarding the illicit nature of the possession, within the framework of criminal proceedings regarding crimes that may give rise to extradition.

The use of undercover investigators may be agreed upon by the Romanian state together with a foreign state in order to provide mutual assistance for conducting investigations, the legal status of the agents and the concrete modalities for conducting the investigation being established under the conditions provided for by domestic law (Romanian).

Joint investigation teams represent that form of assistance that involves

⁶⁷ Romanian Chamber of Deputies, Explanatory Memorandum to the Draft Law Ratifying the 2007 Protocol to the 1999 Romania–United States Treaty on Mutual Assistance in Criminal Matters, <https://www.cdep.ro/proiecte/2008/000/50/5/em55.pdf>.

⁶⁸ Romania, Law No. 302/2004, republished, art. 228.

⁶⁹ Romania, Law No. 302/2004, republished, arts. 236–240.

⁷⁰ Romania, Law No. 302/2004, republished, Title VIII.

⁷¹ Council of Europe, *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, ETS No. 182 (Strasbourg, November 8, 2001). Romania ratified the Protocol by Law No. 368/2004, *Monitorul Oficial al României*, No. 913 (October 7, 2004).

the establishment of mixed commissions on the territories of Romania and other states in order to facilitate the conduct of criminal investigations with a clearly determined objective, especially in situations where:

- within the framework of an ongoing procedure in the requesting state, it is necessary to conduct complex investigations, considered difficult and involving significant human and material resources, which concern both states;
- several states carry out investigations that require coordinated and concerted action.

At the European level, the institution of Joint Investigation Teams (JIT) represents one of the most advanced instruments of judicial cooperation in criminal matters, which allows collaboration and direct communication between the authorities of different states, being considered the most efficient method of investigating organized crime activities with a transnational dimension⁷².

Joint teams are made up of law enforcement authorities, prosecutors and judges, the period for which they are set up being determined, usually between 12 and 24 months; their effectiveness lies in the fact that they offer national judicial authorities a flexible, relatively quick and easy-to-establish framework, which allows them to participate in the investigation in a mutually beneficial way. Thus, members of joint investigation teams have the opportunity to directly exchange information and evidence, as well as to carry out operations together. Moreover, as partners, participants from one state can be present during investigative activities on the territories of other states, sharing their experience and building personal relationships of trust that can lead to more effective cooperation⁷³.

For example, the efficiency of cooperation within the joint investigation team consisting of judicial authorities of the Kingdom of the Netherlands (Low Countries) and judicial authorities from Romania⁷⁴ was proven by the recovery of heritage objects from the Dacian treasure that were stolen in January 2025 from the exhibition organized by the Drents Museum⁷⁵.

It is worth highlighting the role of Eurojust (the European Union Agency for Criminal Justice Cooperation), in the implementation of this form of cooperation, as an agency that also ensures financial support for the cross-border activities of joint investigation teams⁷⁶.

⁷² Eurojust, "Joint Investigation Teams," accessed June 2, 2026, <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams>.

⁷³ Eurojust, "Joint Investigation Teams."

⁷⁴ Eurojust, "Romania and Netherlands Set Up Joint Investigation Team for Theft of Precious Historic Art from Dutch Museum," accessed June 3, 2026, <https://www.eurojust.europa.eu/news/romania-and-netherlands-set-joint-investigation-team-theft-precious-historic-art-dutch-museum>.

⁷⁵ Eurojust, "Precious Historic Art Recovered by Dutch and Romanian Authorities," April 2, 2026, <https://www.eurojust.europa.eu/news/precious-historic-art-recovered-dutch-and-romanian-authorities>.

⁷⁶ Eurojust, "JITs Funding," accessed June 4, 2026, <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams/jits-funding>.

Another recent example of the successful application of the institution of joint investigation teams is the legal assistance activity between Romania and the United Kingdom⁷⁷, through which, also with the support and funding of Eurojust, in June 2025 several people suspected of organizing a criminal group, involvement in continuous human trafficking, pimping and money laundering were identified.

Last but not least, it is necessary to highlight the role of Eurojust in the establishment and operation of the joint investigation team for the investigation of alleged serious international crimes committed as a result of the Russian Federation's aggression against Ukraine⁷⁸. We note that the formation of such a joint investigation team took place in consideration of the broader understanding of the concept of international criminal law, which also includes cooperation between states in order to hold accountable those guilty of crimes against humanity, war crimes or genocide. It is worth mentioning the results of the investigations of this joint team⁷⁹, which currently includes authorities from 7 countries (Estonia, Latvia, Lithuania, Poland, Romania⁸⁰, Slovakia, Ukraine) and which continues its activity, its period of operation being extended, in March 2026, by another two years.

Cross-border surveillance, as a form of judicial assistance, consists of the possibility of authorizing agents of a foreign state who, within the framework of a judicial investigation, are supervising on the territory of that state a person who is presumed to have participated in the commission of a crime that may lead to extradition, to continue this surveillance on the territory of the Romanian state, based on a request for assistance submitted in advance.

For operational reasons, when, for reasons of urgency, prior authorization from the Romanian state cannot be requested, foreign agents acting within the framework of a judicial investigation in the criminal prosecution phase may continue on Romanian territory the surveillance of a person suspected of having committed one of the acts listed in the law (highly serious crimes⁸¹), under the following conditions:

⁷⁷ Eurojust, "Action to Tackle Human Traffickers Forcing Female Victims into Prostitution in Romania and the UK," accessed June 4, 2026, <https://www.eurojust.europa.eu/news/action-tack-le-human-traffickers-forcing-female-victims-prostitution-romania-and-uk>.

⁷⁸ Eurojust, "ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes," accessed June 4, 2026, <https://www.eurojust.europa.eu/news/icc-participa-tes-joint-investigation-team-supported-eurojust-alleged-core-international-crimes>.

⁷⁹ Eurojust, "Joint Investigation Team Continues Work with Added Focus on Illegal Transfer of Ukrainian Children," March 20, 2026, <https://www.eurojust.europa.eu/news/joint-investigation-team-continues-work-added-focus-illegal-transfer-ukrainian-children>.

⁸⁰ Eurojust, "Romania Becomes Seventh Member of Joint Investigation Team on Alleged Core International Crimes," October 13, 2022, <https://www.eurojust.europa.eu/news/romania-becomes-seventh-member-joint-investigation-team-alleged-core-international-crimes>.

⁸¹ Romania, Law No. 302/2004, republished, art. 240.

- the border crossing must be immediately communicated to the Prosecutor's Office attached to the High Court of Cassation and Justice, as well as to the Border Police;

- a request for legal assistance, having as its object cross-border surveillance, and setting out the reasons justifying the border crossing without prior authorization, must be transmitted without delay.

Surveillance without prior authorization must, however, cease if authorization has not been obtained within 5 hours of crossing the state border.

A special place in the category of other forms of international judicial assistance in criminal matters is occupied by *the spontaneous transmission of information*; this form of assistance consists in the possibility for Romanian judicial authorities to transmit, without a prior request, to the competent authorities of a foreign state the information obtained in the course of an investigation, when they consider that this information could help the recipient state to initiate criminal proceedings or when the information in question could lead to the formulation of a request for judicial assistance.

The manner of using the transmitted information may be conditioned by the Romanian state (based on the principle of specialty), the recipient state being obliged to comply with the conditions imposed.

As we have shown previously, these internal provisions on the spontaneous transmission of information are a transposition of the Second Additional Protocol (from 2001) to the European Convention on Mutual Assistance in Criminal Matters, a protocol which, in turn, was an almost identical takeover of the text of the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU⁸². The new element brought by this additional protocol, regarding the spontaneous transmission of information, was the expansion⁸³ of this form of assistance which, until that moment, was only provided for in the field of money laundering⁸⁴. In other words, the Second Additional Protocol of 2001 introduced the possibility (without giving rise to any obligation on the part of the States Parties to the European Convention) for States, on their own initiative, without a prior request in this regard, to transmit to each other information in relation to the investigation and resolution of criminal cases, in order to prevent and combat the criminal phenomenon, regardless of the nature and seriousness of the crime.

More recently, in 2025, the Third Additional Protocol⁸⁵ to the European

⁸² Council of the European Union, *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (2000).

⁸³ Council of Europe, *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, ETS No. 182, art. 11.

⁸⁴ Radu, *Drept european și internațional penal*, 110.

⁸⁵ Council of Europe, *Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, CETS No. 227, opened for signature at Valletta on September 19, 2025. Romania signed the Protocol on September 19, 2025; as of September 12, 2026, the Protocol had not yet entered into force. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&>

Convention on Mutual Assistance in Criminal Matters was adopted, a protocol justified by “the need to update a number of provisions of the Convention [...], as well as the Second Additional Protocol thereto, to take into account the rapid evolution of practices and support systems relating to mutual assistance in recent years, including an increased use of videoconferencing and other technological tools, in particular in the context of the Covid-19 pandemic”⁸⁶. Also, the addition of the Convention, through this protocol, was justified by the need to eliminate certain deficiencies identified by practitioners.

Thus, with regard to the spontaneous transmission of information, the additions made by this protocol consist of “identifying as the preferred method secure means of electronic communication”⁸⁷, in the context of reference to the communication channels that must be used both for requests for mutual assistance and for the concrete application of some of the forms of assistance (spontaneous exchange of information, provision of information related to procedures or data from criminal records or transmission of copies of convictions or dispositions of procedural measures)⁸⁸.

The applicability of this form of assistance is not limited to the relationship between European states. Bilateral treaties on judicial assistance in criminal matters regulate the possibility of spontaneous transmission of information between other states, as is the case, for example, of the Treaty between Romania and Kazakhstan⁸⁹.

The efficiency of cross-border information sharing was illustrated in February 2026 by the Mexican operation that located and fatally wounded Nemesio Oseguera Cervantes ("El Mencho"), leader of the Jalisco New Generation Cartel (CJNG), an operation supported by intelligence provided by the United States⁹⁰. If that form of intelligence cooperation was aimed at dismantling a powerful transnational drug-trafficking organization, the legal situation was markedly different in the case of the operation in Venezuela.

In January 2026, United States forces conducted a military operation on Venezuelan territory in which Nicolás Maduro and his wife, Cilia Flores, were

treatynum=227.

⁸⁶ Council of Europe, *Explanatory Report to the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, Valletta, September 19, 2025, para. 2, <https://rm.coe.int/1680b62883>.

⁸⁷ European Commission, *Proposal for a Council Decision Authorising the Member States to Sign, in the Interest of the Union, the Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, COM(2025) 510 final.

⁸⁸ Council of Europe, *Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, CETS No. 227, art. 1, <https://rm.coe.int/48801f9d31>.

⁸⁹ Romania and Republic of Kazakhstan, *Treaty on Judicial Assistance in Criminal Matters*, signed in Bucharest November 14, 2014, ratified by Romanian Law No. 350/2015, *Monitorul Oficial al României*, No. 987 (December 31, 2015).

⁹⁰ Reuters, “Romantic Tryst Led to Mexican Cartel Leader’s Capture, Death,” February 23, 2026, <https://www.reuters.com/world/americas/least-25-soldiers-died-after-raid-mexicos-most-wanted-cartel-leader-2026-02-23/>.

captured and brought to the United States. The prosecution against Maduro built on charges first unsealed in 2020, while the superseding indictment unsealed in January 2026 also named Cilia Flores among the defendants. The United States intervention was carried out through military action⁹¹ on Venezuelan territory to bring the defendants before the United States justice system; the UN Secretary-General stated that the developments constituted a “dangerous precedent”⁹².

It is true that we can ask ourselves the question: as long as judicial cooperation between the authorities of two states cannot be resorted to (as was the case here), can an action of force contrary to the norms of international law be legitimized? It would be extremely worrying if an affirmative answer were given to such a question.

5. Conclusions

For more than 15 years, the “permanent phenomenon of contesting the international legal system”⁹³ has been discussed, a phenomenon that is still being confirmed⁹⁴ at the present moment.

We believe that preventing and combating cross-border crime cannot justify a violation of the fundamental principles of international law, such as: the principle of non-use of force or threat of force in international relations (the principle of non-aggression), the principle of non-interference or non-intervention, and the principle of the inviolability of borders.

Cooperation between states, including through the component of judicial cooperation at a global level, must be achieved through the application of legal forms of assistance (i.e. those regulated in treaties, conventions and domestic laws), without the imperative of combating the criminal phenomenon being able to legitimize the failure to comply with principles and norms of international law.

⁹¹ U.S. Department of Justice, *United States v. Nicolás Maduro Moros et al.*, sealed superseding indictment, S4 11 Cr. 205 (AKH), unsealed January 3, 2026, <https://www.justice.gov/opa/media/1422326/dl?embed=true>; Reuters, “Mock House, CIA Source and Special Forces: The US Operation to Capture Maduro,” January 3, 2026, <https://www.reuters.com/business/aerospace-defense/mock-house-cia-source-special-forces-us-operation-capture-maduro-2026-01-03/>.

⁹² United Nations, Secretary-General, “Statement Attributable to the Spokesperson for the Secretary-General – on Venezuela,” January 3, 2026, <https://www.un.org/sg/en/content/sg/state-ments/2026-01-03/statement-attributable-the-spokesperson-for-the-secretary-general-venezuela>.

⁹³ Valentin Constantin, *Drept internațional* [International law] (Bucharest: Universul Juridic, 2010), 46.

⁹⁴ Paulo De Brito, “International Law: The Lost Metaphor? Reflections on the Current Wars,” in *Adapting to Change: Business Law Insights from Today’s International Legal Landscape*, ed. Cristina Elena Popa Tache, Renata Treneska Deskoska, and Nathaniel Boyd (Bucharest, Paris, and Calgarry: ADJURIS – International Academic Publisher, 2024), 296–97, <https://www.adjuris.ro/books/acbl/Adapting%20to%20Change%20Business%20Law%20Insights.pdf>.

Bibliography

I. Books and Articles

1. Bernhardt, Rudolf, ed. *Encyclopedia of Public International Law*. Vol. 2. Amsterdam: Elsevier Science, 1995.
2. Cassese, Antonio. *International Criminal Law*. 2nd ed. Oxford: Oxford University Press, 2008.
3. Coman, Florian, Florin Sandu, Nicolae Purdă, Eliza Florea, and Ioana Dărbângă. *Dicționar de drept internațional public* [Dictionary of public international law]. Timișoara: MediaTM, 2002.
4. Constantin, Valentin. *Drept internațional* [International law]. Bucharest: Universul Juridic, 2010.
5. De Brito, Paulo. "International Law: The Lost Metaphor? Reflections on the Current Wars." In *Adapting to Change: Business Law Insights from Today's International Legal Landscape*, edited by Cristina Elena Popa Tache, Renata Treneska Deskoska, and Nathaniel Boyd, 296–297. Bucharest, Paris, and Calgary: ADJURIS – International Academic Publisher, 2024. <https://www.adjuris.ro/books/acbl/Adapting%20to%20Change%20Business%20Law%20Insights.pdf>.
6. Dongoroz, Vintilă, Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu, and Rodica Stănoiu. *Explicațiile teoretice ale Codului de procedură penală român. Partea specială* [Theoretical explanations of the Romanian Criminal Procedure Code. Special part]. Vol. 2. Bucharest: Editura Academiei, 1976.
7. Ghigheci, Cristinel, Vlad Neagoe, Roxana Matefi, and Diana Geanina Ionaș. "Fundamental Rights Within the European Arrest Warrant." *Juridical Tribune – Review of Comparative and International Law* 14, no. 4 (December 2024): 584–603. <https://doi.org/10.62768/TBJ/2024/14/4/04>.
8. Hester, Judith, Michael Klackl, and Mariana Zainea. *Recunoașterea reciprocă în domeniul cooperării judiciare în materie penală: Instrumente juridice și implementarea lor – Manual* [Mutual recognition in the field of judicial cooperation in criminal matters: Legal instruments and their implementation – Handbook]. Bucharest: Euro Standard, 2010.
9. Lorincz, Anca-Lelia. "Recent Case Law at Union Level on the Execution of the European Arrest Warrant." In *New Perspectives on Multiculturality: Intersecting Discourses and Dialogues*, edited by Iulian Boldea and Cornel Sigmirean. Tirgu-Mureș: Arhipelag XXI Press, 2025. <https://asociatia-alpha.ro/gidni/12-2025/GIDNI-12-Socs-f.pdf>.
10. Lorincz, Anca-Lelia. "The European Arrest Warrant as a Form of International Judicial Cooperation in Criminal Matters in Terms of Amendments to the Romanian Legislation." *European Police Science and Research Bulletin*, no. 8 (Summer 2013): 33–36. https://www.cepol.europa.eu/sites/default/files/08_EP_SR_BULLETIN.pdf.
11. Lorincz, Anca-Lelia, and Adriana Iuliana Stancu. "Legal Nature of the Deprivation Measure Ordered During the Procedure for the Execution of the European

- Arrest Warrant.” *Perspectives of Law and Public Administration* 11, no. 3 (2022): 405–415. <https://adjuris.ro/revista/articole/An11nr3/6.%20Lorincz%20Stancu%20EN.pdf>.
12. Moldovan, Carmen. *Drept internațional public* [Public international law]. Bucharest: Hamangiu, 2015.
 13. Oddenino, Alberto, and Diego Bonetto. “The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law.” *Global Jurist* 20, no. 3 (2020): 1–14. <https://doi.org/10.1515/gj-2019-0064>.
 14. Popa Tache, Cristina-Elena. *Drept internațional public* [Public international law]. Bucharest: C.H. Beck, 2022.
 15. Radu, Florin-Răzvan. *Drept european și internațional penal* [European and international criminal law]. Bucharest: C.H. Beck, 2013.
 16. Stănoiu, Rodica Mihaela. *Asistența juridică internațională în materie penală* [International legal assistance in criminal matters]. Bucharest: Editura Academiei, 1975.

II. Legal and Official Sources

1. Council of Europe. *European Convention on Mutual Assistance in Criminal Matters*. ETS No. 030. Strasbourg, April 20, 1959. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=030>.
2. Council of Europe. *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*. ETS No. 182. Strasbourg, November 8, 2001. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=182>.
3. Council of Europe. *Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*. CETS No. 227. Valletta, September 19, 2025. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=227>.
4. Council of the European Union. *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*. May 29, 2000. *Official Journal of the European Communities* C 197 (July 12, 2000): 3–23. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:42000A0712\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:42000A0712(01)).
5. Council of the European Union. Council Framework Decision 2002/584/JHA of June 13, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States. *Official Journal of the European Communities* L 190 (July 18, 2002): 1–20.
6. Council of the European Union. Council Regulation (EU) 2017/1939 of October 12, 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor’s Office (EPPO). *Official Journal of the European Union* L 283 (October 31, 2017): 1–71. <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>.
7. European Council. *Tampere European Council, 15–16 October 1999: Presidency Conclusions*. https://www.europarl.europa.eu/summits/tam_en.htm
8. European Union. *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*. *Official Journal of the European Union* C 53

- (March 3, 2005): 1–14.
9. European Union. *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*. *Official Journal of the European Union* C 115 (May 4, 2010): 1–38.
 10. European Union and United States of America. *Agreement on Mutual Legal Assistance between the European Union and the United States of America*. Washington, DC, June 25, 2003. *Official Journal of the European Union* L 181 (July 19, 2003): 34–42. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0719\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0719(02)).
 11. European Union and United Kingdom. *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part*. *Official Journal of the European Union* L 149 (April 30, 2021): 10–2539.
 12. European Parliament and Council of the European Union. Directive 2014/41/EU of April 3, 2014 regarding the European Investigation Order in Criminal Matters. *Official Journal of the European Union* L 130 (May 1, 2014): 1–36.
 13. European Parliament and Council of the European Union. Directive (EU) 2017/1371 of July 5, 2017 on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law. *Official Journal of the European Union* L 198 (July 28, 2017): 29–41.
 14. OECD. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. Paris, November 21, 1997. <https://legal.instruments.oecd.org/en/instruments/OECD-LEGAL-0293>.
 15. Romania. Law No. 302/2004 on International Judicial Cooperation in Criminal Matters, republished in *Monitorul Oficial al României*, Part I, No. 411 (May 27, 2019), as subsequently amended.
 16. Romania. Law No. 236/2017 Amending and Supplementing Law No. 302/2004 on International Judicial Cooperation in Criminal Matters. *Monitorul Oficial al României*, Part I, No. 993 (December 14, 2017).
 17. Romania. Law No. 6/2021 Establishing Measures for the Implementation of Council Regulation (EU) 2017/1939. *Monitorul Oficial al României*, Part I, No. 167 (February 18, 2021).
 18. Romania. Law No. 156/2025 Amending and Supplementing Law No. 319/2024 and Supplementing Law No. 302/2004. *Monitorul Oficial al României*, Part I, No. 959 (October 16, 2025).
 19. Romania and Kazakhstan. *Treaty on Judicial Assistance in Criminal Matters*. Bucharest, November 14, 2014. Ratified by Romanian Law No. 350/2015.
 20. Romania and United States of America. *Treaty on Mutual Assistance in Criminal Matters*. May 26, 1999. *Monitorul Oficial al României*, No. 425 (August 31, 1999).
 21. Romania and United States of America. *Protocol to the Treaty on Mutual Assistance in Criminal Matters*. Bucharest, September 10, 2007. Ratified by Romanian Law No. 112/2008, *Monitorul Oficial al României*, No. 389 (May 22, 2008).
 22. United Nations. *Charter of the United Nations*. San Francisco, June 26, 1945. 1 UNTS XVI.
 23. United Nations General Assembly. *Declaration on Principles of International*

- Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.* Resolution 2625 (XXV), October 24, 1970.
24. United Nations General Assembly. *Charter of Economic Rights and Duties of States.* Resolution 3281 (XXIX), December 12, 1974. [https://docs.un.org/en/A/RES/3281\(XXIX\)](https://docs.un.org/en/A/RES/3281(XXIX)).

III. Institutional and Current Sources

1. Eurojust. "Joint Investigation Teams." Accessed September 12, 2026. <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams>.
2. Eurojust. "Joint Investigation Team Continues Work with Added Focus on Illegal Transfer of Ukrainian Children." March 20, 2026. <https://www.eurojust.europa.eu/news/joint-investigation-team-continues-work-added-focus-illegal-transfer-ukrainian-children>.
3. Eurojust. "Precious Historic Art Recovered by Dutch and Romanian Authorities." April 2, 2026. <https://www.eurojust.europa.eu/news/precious-historic-art-recovered-dutch-and-romanian-authorities>.
4. United Nations, Secretary-General. "Statement Attributable to the Spokesperson for the Secretary-General – on Venezuela." January 3, 2026. <https://www.un.org/sg/en/content/sg/statements/2026-01-03/statement-attributable-the-spokesperson-for-the-secretary-general-venezuela>.
5. Reuters. "Romantic Tryst Led to Mexican Cartel Leader's Capture, Death." February 23, 2026. <https://www.reuters.com/world/americas/least-25-soldiers-died-after-raid-mexicos-most-wanted-cartel-leader-2026-02-23/>.

Corruption Crimes in Comparative Criminal Law

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Abstract

Corruption represents one of the most significant threats to the rule of law, good governance, and economic and social development. This paper examines corruption offenses from the perspective of comparative criminal law, highlighting the main similarities and differences among various legal systems. The study focuses on offenses such as active and passive bribery, trading in influence, and abuse of office, with particular reference to the legal frameworks of Romania, France, and the United States. It also analyzes the institutional mechanisms and legal instruments used to prevent and combat corruption, as well as the role of international cooperation in this field. The comparative analysis demonstrates that, although the regulation and punishment of corruption offenses vary across jurisdictions, all legal systems pursue the common objective of protecting the integrity of public administration and strengthening public trust in state institutions. Furthermore, the paper emphasizes the importance of international conventions and legislative harmonization in enhancing the effectiveness of anti-corruption efforts. The findings suggest that the success of anti-corruption policies depends not only on the existence of an adequate legal framework but also on the consistent, impartial, and effective enforcement of criminal law.

Keywords: corruption, comparative criminal law, bribery, trading in influence, criminal legislation, anti-corruption.

JEL Classification: K14, K42, D73

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1. Introduction

Corruption represents one of the oldest and most complex social, economic, and legal phenomena, manifesting itself in various forms across all known political and legal systems. Throughout history, it has posed a major challenge to

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the effective functioning of public institutions, directly undermining citizens' trust in state authority and democratic governance mechanisms.

In its broadest sense, corruption involves the abuse of a public or private position for the purpose of obtaining undue material or non-material benefits at the expense of the public interest. Such practices weaken the rule of law, distort economic development, reduce institutional efficiency, and negatively affect social cohesion. As a result, combating corruption has become a priority for national governments, international organizations, and civil society, particularly in the context of strengthening democratic institutions and promoting transparency, accountability, and good governance.²

The impact of corruption extends far beyond the strictly legal sphere, affecting economic, social, and political dimensions of society. Studies conducted by international organizations indicate that high levels of corruption lead to reduced investment, decreased efficiency of public administration, increased costs of public services, and the widening of social inequalities. Corruption undermines economic growth by distorting market competition, discouraging foreign direct investment, and misallocating public resources. Furthermore, it weakens public trust in governmental institutions, diminishes the quality of governance, and hinders sustainable development. As a result, corruption is widely recognized as a major obstacle to social progress, economic stability, and democratic consolidation.³ Moreover, corruption facilitates the growth of organized crime, undermines fair competition, and weakens the stability of democratic institutions. In this context, the fight against corruption has become an essential component of public policies promoted at both national and international levels.

In recent decades, the processes of globalization and the expansion of transnational economic relations have led to a paradigm shift in the understanding of corruption. Whereas corruption was previously viewed primarily as an internal issue to be addressed by individual states, it is now widely recognized as a global threat with consequences that transcend national borders. Corrupt practices often involve cross-border financial transactions, multinational corporations, international networks, and offshore jurisdictions, making effective prevention and prosecution increasingly dependent on international cooperation. Consequently, combating corruption requires coordinated efforts among states, international organizations, law enforcement agencies, and civil society actors to strengthen transparency, accountability, and the rule of law on a global scale.⁴ International financial transfers, cross-border commercial contracts, and the increasing mobility

² Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd ed. (Cambridge: Cambridge University Press, 2016), 8–10, <https://doi.org/10.1017/CBO9781139962933>.

³ Transparency International, *Corruption Perceptions Index 2024* (Berlin: Transparency International, 2025), 4–7, <https://www.transparency.org/en/publications/corruption-perceptions-index-2024>.

⁴ Mark Pieth, ed., *Recovering Stolen Assets* (Bern: Peter Lang, 2008), 21.

of capital have created new opportunities for the commission of corrupt acts, making the development of international cooperation mechanisms and legislative harmonization essential. The transnational nature of modern corruption schemes often allows illicit funds to be transferred rapidly across jurisdictions, complicating efforts to detect, investigate, and prosecute offenders. As a result, effective anti-corruption strategies require coordinated action among states and the establishment of common legal standards.

In response to these challenges, the international community has adopted numerous legal instruments aimed at preventing and combating corruption. Among the most significant are the United Nations Convention against Corruption (UNCAC), the Council of Europe Criminal Law Convention on Corruption, and the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. These instruments establish common principles and obligations for states, including the criminalization of corruption-related offenses, the promotion of transparency and integrity in public administration, international cooperation in criminal matters, and mechanisms for asset recovery. Together, they provide a comprehensive legal framework designed to strengthen global efforts against corruption and enhance accountability at both national and international levels.⁵ These international instruments have contributed significantly to the development of common standards regarding the criminalization of corruption offenses, the liability of individuals involved, and international judicial cooperation. By promoting harmonized legal approaches, they facilitate more effective cross-border investigations, extradition procedures, mutual legal assistance, and the recovery of assets obtained through corrupt activities.

From the perspective of criminal law, corruption is manifested through a range of offenses that undermine social relations based on the honest, impartial, and lawful exercise of official duties. In most contemporary legal systems, the principal forms of corruption include bribery, active bribery, trading in influence, and the purchase of influence. In addition to these core offenses, certain national legislations also criminalize related conduct such as abuse of office, conflicts of interest, embezzlement of public funds, illicit enrichment, and other acts involving the misuse of public authority for private gain. These offenses are considered particularly harmful because they erode public trust in institutions, compromise the integrity of public administration, and weaken the rule of law.⁶ Although the objective of criminalizing these acts is common across legal systems — namely, the protection of the integrity of public office and the preservation of citizens' trust in state institutions — the specific regulatory approaches vary according to

⁵ United Nations Office on Drugs and Crime, *United Nations Convention against Corruption* (New York: United Nations, 2004), 1–12, https://static.un.org/en/ethics/assets/pdfs/UN_Convention_Against_Corruption.pdf.

⁶ Ilie Pascu et al., *Codul penal comentat. Partea generală* (Bucharest: Universul Juridic, 2025), 23–31.

the legal traditions and particular characteristics of each national legal system. Differences may be observed in the legal definitions of corruption offenses, the scope of criminal liability, the severity of sanctions, and the procedural mechanisms employed for investigation and prosecution.

In this context, the comparative method provides a valuable tool for understanding and evaluating the various legislative models that have emerged worldwide. Comparative law enables the identification of effective legal solutions, highlights legislative convergences and divergences, and supports the formulation of recommendations for improving national legal frameworks. By examining how different jurisdictions regulate and combat corruption, researchers and policymakers can better assess the strengths and weaknesses of existing approaches and develop more effective strategies for preventing and sanctioning corrupt behavior.⁷ Furthermore, comparative analysis facilitates a deeper understanding of the influence exerted by international standards on domestic legal systems and highlights current trends toward the harmonization of anti-corruption regulations. By examining the interaction between international legal instruments and national legislation, comparative research reveals the extent to which states have adapted their legal frameworks to meet global anti-corruption requirements and best practices.

Romania, France, and the United States of America provide particularly relevant examples for such a comparative analysis. The selection of these jurisdictions is justified not only by their belonging to different legal traditions but also by their extensive experience in the development and implementation of anti-corruption policies. Romania and France are representative of the continental European civil law tradition, characterized by codification and the predominant role of written legislation. In contrast, the United States represents the common law system, distinguished by the significant role of judicial precedent and the existence of specific federal regulations addressing corruption-related offenses. The comparison of these legal systems offers valuable insights into the diversity of legislative approaches, enforcement mechanisms, and institutional responses adopted in the fight against corruption.⁸

The comparative analysis of the legislation of these countries is particularly important in light of recent developments in the phenomenon of corruption. In Romania, the legislative and institutional reform process carried out in the context of accession to the European Union has led to the strengthening of mechanisms for the prevention and combating of corruption. These reforms have focused on improving the legal framework, enhancing institutional capacity, and aligning national legislation with European and international anti-corruption standards.

France has likewise implemented significant reforms aimed at increasing

⁷ Vasile Dobrinoiu, *Corupția în dreptul penal român* (Bucharest: Atlas Lex, 1995), 95–117.

⁸ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham: Edward Elgar Publishing, 2014), 45–49.

transparency, integrity, and accountability in the exercise of public functions. Particular emphasis has been placed on preventing conflicts of interest, strengthening oversight mechanisms, and promoting ethical standards within public administration. These measures reflect a broader commitment to enhancing public trust in governmental institutions and ensuring the effective enforcement of anti-corruption regulations.

The United States, meanwhile, has developed a comprehensive system for addressing corruption offenses, with particular emphasis on combating transnational corruption and illicit business practices. Through legislation such as the Foreign Corrupt Practices Act (FCPA), U.S. authorities have established robust mechanisms for investigating and prosecuting bribery involving foreign public officials, extending the reach of anti-corruption enforcement beyond national borders. The American approach illustrates the growing importance of international cooperation and corporate compliance in addressing corruption within an increasingly interconnected global economy.⁹

The primary objective of this study is to conduct a comparative examination of corruption offenses as regulated under Romanian, French, and American criminal law, with the aim of identifying the main similarities and differences regarding the constituent elements of these offenses, the applicable sanctioning regimes, and the institutional mechanisms responsible for law enforcement. The research also seeks to evaluate the influence of international legal instruments on national legislation and to analyze the role of international cooperation in combating corruption.

From a methodological perspective, the study employs the comparative method, normative analysis, and doctrinal analysis. Relevant legislative provisions, scholarly literature, and the principal international legal instruments in the field are examined in order to provide a comprehensive understanding of the subject. The findings of the research make it possible to draw conclusions regarding the effectiveness of different legislative models and to identify potential directions for the development of anti-corruption policies within a legal and institutional environment that continues to evolve.

2. The Concept of Corruption and Its Regulation in International Law

Corruption is a complex and multidimensional phenomenon that has attracted considerable attention from both scholars and institutions at the national and international levels. The concept has been examined from legal, political, economic, and sociological perspectives, reflecting its far-reaching consequences for public administration, economic development, and democratic governance.

⁹ OECD, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: United States* (Paris: OECD Publishing, 2020), <https://doi.org/10.1787/0cd34e9f-en>.

Despite extensive academic debate, there is no universally accepted definition of corruption, as its manifestations vary depending on the social, political, and legal context in which it occurs.

Nevertheless, most authors agree that the essence of corruption lies in the abuse of a public or private position for the purpose of obtaining an undue advantage, to the detriment of the public interest or the legal obligations associated with the position held. Such advantages may be material or non-material and may involve direct or indirect benefits obtained by the individual engaging in corrupt conduct or by third parties acting in concert with that individual. This broad understanding of corruption serves as the foundation for the development of both national criminal legislation and international legal frameworks aimed at preventing and combating corrupt practices.¹⁰

From a criminal law perspective, corruption manifests itself through a variety of unlawful acts that undermine the integrity of public office and erode citizens' trust in state institutions. Among the most common forms of corruption are passive and active bribery, trading in influence, the purchase of influence, abuse of office, conflicts of interest, and the misappropriation of public funds. These offenses share a common characteristic: they involve the obtaining of an undue benefit through the violation of official duties or through the exploitation of a position of authority, power, or influence.

The harmful nature of these offenses extends beyond the individual acts themselves, as they directly affect the proper functioning of public administration, distort decision-making processes, and compromise the principles of legality, transparency, and equality before the law. Corruption offenses often create unfair advantages for certain individuals or entities while disadvantaging competitors and undermining public confidence in governmental institutions. Consequently, criminal law seeks not only to punish corrupt conduct but also to protect the integrity of public institutions and ensure that public functions are exercised in accordance with the principles of impartiality, accountability, and the public interest.¹¹

In the context of globalization, corruption has evolved beyond the boundaries of a purely domestic issue and has become a transnational phenomenon with significant economic and social implications. The expansion of international trade, the increased mobility of capital, and the growing activities of multinational corporations have created new opportunities for corrupt practices, including those facilitated through complex financial mechanisms and offshore jurisdictions. These developments have enabled illicit financial flows to move rapidly across borders, making the detection, investigation, and prosecution of corruption offenses increasingly challenging for national authorities.

As a consequence, the fight against corruption has become a priority for

¹⁰ Rose-Ackerman and Palifka, *Corruption and Government*, 12–15.

¹¹ Dobrinoiu, *Corupția în dreptul penal român*, 95–101.

international organizations and for states committed to strengthening the rule of law and democratic governance. International cooperation has emerged as an essential component of anti-corruption efforts, requiring coordinated legal, institutional, and policy responses. Through the adoption of international conventions, mutual legal assistance agreements, and transnational enforcement mechanisms, the international community has sought to address the cross-border nature of corruption and to promote greater transparency, accountability, and integrity in both the public and private sectors.¹²

A landmark moment in the development of the international anti-corruption legal framework was the adoption of the United Nations Convention against Corruption (UNCAC), which was opened for signature in Mérida, Mexico, in 2003. The Convention represents the first universal international legal instrument dedicated specifically to the fight against corruption and establishes comprehensive obligations concerning the prevention of corruption, the criminalization of its principal forms, international cooperation, asset recovery, and technical assistance provided to States Parties.

UNCAC is widely regarded as the cornerstone of the global anti-corruption regime because it promotes a holistic approach to addressing corruption. Beyond requiring the criminalization of various corruption-related offenses, the Convention emphasizes preventive measures such as the promotion of transparency, integrity, accountability, and good governance within public institutions. It also encourages the adoption of effective anti-corruption policies, codes of conduct for public officials, transparent public procurement procedures, and mechanisms for public participation in the prevention of corruption.

Furthermore, the Convention establishes extensive provisions on international cooperation, including extradition, mutual legal assistance, joint investigations, and information sharing among national authorities. One of its most innovative aspects is the recognition of asset recovery as a fundamental principle of the Convention, providing a legal framework for tracing, freezing, confiscating, and returning assets obtained through corrupt activities. Through these mechanisms, UNCAC has significantly contributed to the harmonization of anti-corruption legislation and has strengthened international efforts to prevent and combat corruption on a global scale.¹³ The significance of UNCAC lies not only in its comprehensive nature but also in its promotion of an integrated approach that combines punitive measures with preventive strategies. By addressing both the causes and consequences of corruption, the Convention recognizes that effective anti-corruption policies require more than criminal sanctions alone. Preventive mechanisms, institutional reforms, transparency measures, and international cooperation are considered equally important components of a sustainable anti-corruption framework.

¹² Pieth, *Recovering Stolen Assets*, 21–26.

¹³ United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, 5–18.

At the regional level, the Council of Europe adopted the Criminal Law Convention on Corruption in 1999, an instrument designed to harmonize the criminal legislation of member states and strengthen international judicial cooperation. The Convention requires the criminalization of both active and passive bribery involving national and foreign public officials, members of public assemblies, international judges, and other categories of individuals performing public functions or exercising public responsibilities.

Furthermore, the Convention places particular emphasis on the liability of legal persons and on measures aimed at the confiscation of proceeds derived from criminal activities. By extending anti-corruption obligations beyond natural persons and promoting effective asset recovery mechanisms, the Convention seeks to enhance accountability and reduce the financial incentives associated with corrupt conduct. Through its broad scope and detailed provisions, the Criminal Law Convention on Corruption has played a significant role in promoting common legal standards and improving cooperation among European states in the fight against corruption.¹⁴

Another important international instrument is the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997. The primary objective of this Convention is to combat transnational bribery and promote business practices based on fair competition, transparency, and integrity. Recognizing the detrimental effects of corruption on international trade and economic development, the Convention focuses specifically on the bribery of foreign public officials in the context of international commercial activities.

The adoption of the OECD Convention has prompted numerous states to introduce or strengthen legal provisions concerning the criminal liability of legal entities and the punishment of corruption offenses committed in the course of international business transactions. In particular, it has encouraged the establishment of more effective enforcement mechanisms, stricter compliance requirements for corporations, and enhanced cooperation among national authorities responsible for investigating and prosecuting transnational corruption cases.

Furthermore, the Convention has played a significant role in promoting a level playing field in international commerce by discouraging companies from obtaining competitive advantages through corrupt practices. Through its monitoring system and peer-review mechanisms, the OECD has contributed to the continuous improvement of national anti-corruption frameworks and has strengthened international efforts aimed at reducing corruption in global business operations.¹⁵

The body of these international legal instruments demonstrates that the

¹⁴ Hatchard, *Combating Corruption*, 45–52.

¹⁵ OECD, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: United States*.

fight against corruption can no longer be conceived exclusively within the framework of national borders. The effectiveness of anti-corruption measures depends directly on the existence of common standards for the criminalization of corruption offenses, effective judicial cooperation among states, and the capacity of competent institutions to detect, investigate, and prosecute corrupt conduct regardless of its transnational dimension. From this perspective, international anti-corruption law has become an essential factor in the harmonization of national legislation and the strengthening of global mechanisms aimed at protecting public integrity and promoting good governance.

3. Corruption Offenses under Romanian Criminal Law

Combating corruption represents one of the key priorities of Romania's criminal policy, particularly following the country's accession to the European Union and its commitment to fulfilling international obligations concerning the prevention and punishment of corruption-related offenses. Romania has undertaken significant legislative and institutional reforms designed to strengthen the integrity of public administration, enhance transparency, and improve the effectiveness of anti-corruption enforcement mechanisms.

The current regulation of corruption offenses is primarily contained in the Romanian Criminal Code, adopted through Law No. 286/2009, as well as in the special provisions established by Law No. 78/2000 on the Prevention, Detection, and Punishment of Corruption Offenses. Together, these legislative acts form the core of Romania's anti-corruption legal framework and provide detailed rules regarding the criminalization of corrupt conduct, the liability of offenders, and the applicable sanctions.

These legal provisions are intended to protect social relations concerning the honest, impartial, and lawful exercise of official duties by public officials and other individuals performing functions of public interest. By safeguarding the integrity of public office and ensuring compliance with legal and ethical standards, the Romanian legal system seeks to preserve public trust in state institutions and uphold the fundamental principles of the rule of law.¹⁶

Within the Romanian criminal law system, the category of corruption offenses primarily includes passive bribery, active bribery, trading in influence, and the purchase of influence. These offenses are regulated under Title V of the Special Part of the Romanian Criminal Code, entitled "Corruption and Service Offenses." Through this legislative framework, the Romanian legislator has adopted an approach that emphasizes the protection of the integrity of public office and the preservation of citizens' trust in the activities of state authorities.

Accordingly, the common legal interest protected by these offenses con-

¹⁶ Pascu et al., *Codul penal comentat. Partea generală*, 412–18.

sists of the social relations concerning the proper, impartial, and lawful performance of official duties. Corruption offenses are considered particularly harmful because they compromise the integrity of public administration, distort decision-making processes, and create conditions in which private interests may prevail over the public interest. By criminalizing such conduct, the Romanian legal system seeks to ensure that public functions are exercised in accordance with the principles of legality, transparency, impartiality, and accountability.

Furthermore, these offenses are designed to protect not only the proper functioning of public institutions but also public confidence in the fairness and legitimacy of governmental actions. The existence of corruption within public administration undermines the rule of law, weakens democratic governance, and negatively affects the relationship between citizens and state authorities. Consequently, Romanian criminal legislation treats corruption offenses as serious threats to the integrity of public service and to the effective functioning of democratic institutions.¹⁷

Passive bribery, regulated under Article 289 of the Romanian Criminal Code, consists of the solicitation, receipt, or acceptance of the promise of money or other undue benefits by a public official, either directly or indirectly, in exchange for performing, failing to perform, expediting, or delaying an act that falls within the scope of the official's duties. The criminalization of this conduct reflects the need to protect the authority, integrity, and prestige of public office from improper influences exerted through material or other advantages.

The offense is considered particularly serious because it compromises the impartiality and legality of public administration and undermines the principle that public officials must act exclusively in the public interest. By accepting or requesting undue benefits, the public official abuses the trust vested in their position and creates the perception that official decisions can be influenced by private interests rather than legal obligations and objective criteria.

Romanian judicial practice has consistently emphasized the gravity of passive bribery, highlighting that its harmful effects extend beyond the institution in which the public official performs their duties. Courts have repeatedly held that such conduct damages society's overall confidence in the legality, impartiality, and credibility of administrative and judicial acts. Consequently, the offense is regarded not only as an attack on the proper functioning of public administration, but active bribery also constitutes the active component of the corrupt relationship and consists of the promise, offer, or giving of money or other undue benefits to a person exercising a public function for the purpose of influencing that person's conduct in the performance of official duties. The criminalization of both the recipient and the provider of the bribe reflects the legislator's intention to combat corruption comprehensively by sanctioning all participants involved in the unlawful transaction.

¹⁷ Dobrinioiu, *Corupția în dreptul penal român*, 118–24.

The rationale behind criminalizing active bribery is that corruption cannot occur without the participation of those willing to offer improper advantages in exchange for favorable treatment. By imposing criminal liability on both parties, Romanian criminal law seeks to deter corrupt agreements, protect the integrity of public administration, and ensure that public decisions are made exclusively on the basis of legality, objectivity, and the public interest. Similar to passive bribery, active bribery undermines public confidence in state institutions and compromises the principles of fairness and equality before the law.

The Romanian anti-corruption framework is further strengthened by the existence of specialized institutions, most notably the National Anticorruption Directorate (DNA), which is entrusted with investigating serious corruption offenses and supporting the implementation of national anti-corruption policies. Established as a specialized prosecutorial body, the DNA has played a central role in detecting, investigating, and prosecuting high-level corruption cases involving public officials, politicians, and other individuals holding positions of authority.

The activities of these specialized institutions have significantly contributed to the effective enforcement of criminal legislation and to the enhancement of corruption prevention and sanctioning mechanisms. Through their investigative powers, institutional expertise, and cooperation with national and international partners, they have strengthened the capacity of the Romanian legal system to address complex corruption cases and to promote greater transparency, accountability, and integrity within public administration.¹⁸

4. Research Methodology

The present research adopts a predominantly qualitative approach, based on the comparative method, a well-established methodology in legal studies for identifying and analyzing similarities and differences among various legal systems. The choice of this method is justified by the primary objective of the study, namely, to examine how corruption offenses are regulated and sanctioned in different legal orders and to assess the effectiveness of the legislative solutions adopted.

The comparative analysis focuses on the criminal legislation of Romania, France, and the United States of America. These jurisdictions were selected due to their affiliation with different legal traditions and their significant experience in the field of anti-corruption policies and enforcement. Romania and France represent the continental European civil law tradition, characterized by the central role of codification and written legal norms. In contrast, the United States serves as a representative example of the common law system, where judicial decisions and legal precedents play a crucial role in the interpretation and application of

¹⁸ Dorin Ciuncan, *Legea nr. 78 din 8 mai 2000. Prevenirea, descoperirea și sancționarea faptelor de corupție. Comentarii și jurisprudență*, 2nd rev. and enlarged ed. (Bucharest: Universul Juridic, 2015), 87.

legal rules.

The comparative method was complemented by a normative analysis of the relevant legislative acts. Particular attention was given to legal provisions concerning passive bribery, active bribery, trading in influence, the purchase of influence, and other offenses related to corruption. The research examined both the constituent elements of these offenses and the applicable sanctioning regimes, as well as the procedural mechanisms designed to detect, investigate, and prosecute corruption-related conduct.

In addition, the study is based on a doctrinal analysis of scholarly literature in the fields of criminal law and comparative law. The examination of academic works made it possible to identify the principal theoretical approaches regarding the concept of corruption, the rationale underlying the criminalization of corruption offenses, and the role of criminal sanctions in protecting the social values affected by corrupt practices. Furthermore, the study reviewed scholarly opinions concerning the effectiveness of anti-corruption policies and the impact of legislative reforms implemented in different jurisdictions.

An important component of the research consists of the analysis of international legal instruments that influence national anti-corruption regulations. In this regard, the study examined the principal international conventions and legal documents relevant to the fight against corruption, with particular emphasis on states' obligations concerning the criminalization of corruption offenses, international judicial cooperation, and asset recovery mechanisms. The analysis of these instruments enabled an assessment of the degree of harmonization between national legislation and international standards, as well as the identification of current trends in the development of anti-corruption criminal law.

In order to provide a comprehensive perspective on the phenomenon under examination, the research also included an analysis of the institutional mechanisms specific to each legal system. The competencies and responsibilities of authorities specialized in the prevention and combating of corruption were examined, together with the relationship between the legal framework and the practical effectiveness of its implementation. This approach makes it possible to move beyond a purely theoretical analysis and to evaluate how legal norms operate in practice.

The findings obtained through the application of these research methods were integrated into a comparative analysis designed to highlight both the convergences among the legal systems examined and the distinctive features of each of them. Through this approach, the study seeks to contribute to a better understanding of the legal mechanisms used to combat corruption and to identify legislative solutions that may serve as models of good practice in the context of strengthening anti-corruption policies at both the national and international levels.

4.1. Comparative Analysis of Corruption Offenses in the Criminal Legislation of Romania, France, and the United States of America

The comparative analysis of corruption offenses regulated in Romania, France, and the United States of America reveals the existence of a common objective underlying criminal policy, namely the protection of the integrity of public office and the assurance that official duties are performed in accordance with the principles of legality, impartiality, and transparency. Despite this shared purpose, the specific regulatory approaches, legislative techniques, and institutional enforcement mechanisms differ significantly due to the particular characteristics of each legal system and their respective legal traditions.

Romania and France, as representatives of the continental European civil law tradition, regulate corruption offenses primarily through codified criminal legislation that clearly defines prohibited conduct and the applicable sanctions. In contrast, the United States adopts a broader and more diversified regulatory framework that combines federal criminal statutes, judicial precedents, and specialized legislation aimed at combating both domestic and transnational corruption. These differences influence not only the legal definition of corruption offenses but also the methods of investigation, prosecution, and enforcement employed by the competent authorities.

4.2. Regulation of Passive and Active Bribery

Under Romanian criminal law, passive bribery and active bribery are regulated as distinct offenses and are regarded as the principal manifestations of corruption. Passive bribery involves a public official who requests, receives, or accepts the promise of an undue benefit in connection with the performance, non-performance, acceleration, or delay of an act falling within the scope of his or her official duties. Conversely, active bribery consists of the promise, offer, or transfer of undue advantages to a public official for the purpose of influencing the conduct of that official in the exercise of public functions.

French criminal law adopts a similar approach by distinguishing between passive and active corruption. The French Penal Code criminalizes both the conduct of the public official who solicits or accepts an improper advantage and the conduct of the individual who offers or provides such an advantage. French legislation applies not only to national public officials but also to foreign public officials, members of international organizations, and other individuals exercising public responsibilities. This broad scope reflects France's commitment to implementing international anti-corruption standards and strengthening the integrity of public administration.

In the United States, bribery offenses are regulated through a combination of federal and state legislation. At the federal level, bribery of public officials

is primarily governed by Title 18 of the United States Code, which criminalizes the offering, giving, soliciting, or receiving of anything of value with the intent to influence an official act. American legislation places particular emphasis on proving the existence of a corrupt intent and a direct connection between the benefit offered and the official action sought. Additionally, the Foreign Corrupt Practices Act (FCPA) extends anti-bribery provisions to international business transactions by prohibiting the bribery of foreign public officials for the purpose of obtaining or retaining business advantages.

Despite differences in legislative structure and terminology, the three legal systems share the common objective of preventing public officials from abusing their positions for private gain and preserving public confidence in governmental institutions. The criminalization of both passive and active bribery demonstrates a shared recognition that corruption can only be effectively addressed by imposing liability on all parties involved in the unlawful exchange of benefits.¹⁹

French law adopts a similar approach by distinguishing between passive corruption and active corruption. Passive corruption essentially corresponds to the offense of passive bribery under Romanian law, whereas active corruption is equivalent to active bribery. However, the French Penal Code places particular emphasis on the corruption of foreign public officials and officials of international organizations, reflecting France's commitment to fulfilling the obligations arising from international anti-corruption instruments and promoting integrity in transnational public administration.

In the United States, the regulation of bribery-related offenses is considerably more diversified. In addition to the federal offense of bribery, American legislation contains numerous provisions addressing conflicts of interest, administrative fraud, honest services fraud, and the abuse of public office. This broader framework reflects the tendency of the U.S. legal system to address corruption through multiple legal mechanisms rather than relying exclusively on traditional bribery offenses.

An important characteristic of American law is the clear distinction between bribery in the strict sense and the granting of illegal gratuities. While bribery generally requires proof of a corrupt agreement or quid pro quo between the public official and the individual offering the benefit, illegal gratuities may involve the provision of a benefit in connection with an official act without necessarily requiring evidence of an explicit agreement. This distinction allows U.S. authorities to sanction a wider range of conduct that may compromise the integrity of public administration, even where the elements necessary to establish bribery cannot be fully demonstrated.

From this perspective, it can be observed that Romanian and French leg-

¹⁹ Cristina Banciu and Liliana Ciupercă, *Infrațiunile de corupție. Ghid de interpretare și investigație*, 2nd ed. (Bucharest: C.H. Beck, 2020), 45–52.

islation employ relatively similar normative structures, reflecting the characteristics of continental civil law systems based on codification and detailed statutory regulation. By contrast, the American system relies on a broader and more flexible regulatory framework, adapted to the particular features of the common law tradition and supported by extensive judicial interpretation and enforcement practice. Despite these differences, all three legal systems pursue the same fundamental objective: the protection of public integrity and the prevention of the misuse of public authority for private gain.²⁰

4.3. Trading in Influence and the Purchase of Influence

A significant difference among the legal systems under examination concerns the regulation of trading in influence. In Romania, trading in influence is considered one of the most important corruption offenses. It consists of the act of a person who requests or receives money or other benefits in exchange for the promise that he or she will exercise influence over a public official in order to obtain a favorable decision or action. Complementing this offense, the Romanian Criminal Code also criminalizes the purchase of influence, namely the act of offering, promising, or giving benefits to a person who claims to have influence over a public official.

French legislation likewise regulates trading in influence, treating it as a distinct form of corruption that undermines the impartiality and integrity of public decision-making processes. The French approach is, however, more detailed and comprehensive, encompassing not only trading in influence within the public sector but also certain forms of influence peddling occurring in the private sector. This broader regulation reflects the French legislator's concern with preventing undue influence in a wide range of professional and institutional contexts where decisions may be affected by improper personal relationships or financial incentives.

By contrast, the United States does not recognize trading in influence as a separate criminal offense in the same manner as Romanian and French law. Nevertheless, conduct similar to trading in influence may be prosecuted under other criminal provisions, including bribery statutes, fraud offenses, conspiracy laws, lobbying regulations, and rules governing conflicts of interest. American courts generally focus on whether there is evidence of corruption, abuse of public office, or unlawful influence over governmental decision-making rather than on the formal existence of a distinct offense of trading in influence.

This difference illustrates one of the fundamental distinctions between civil law and common law approaches to corruption. While Romanian and French legislation explicitly criminalize influence peddling through specific statutory

²⁰ Dragan Jovašević, "Corruption in International and Comparative Criminal Law," *Glasnik Advokatske komore Vojvodine* 83, no. 9 (2011): 111–51, <https://doi.org/10.5937/gakv1103111J>.

provisions, the American legal system tends to address comparable conduct through broader legal concepts and a more flexible interpretation of existing criminal offenses. Despite these differences in legislative technique, all three systems seek to prevent the improper use of personal influence to obtain advantages that compromise the integrity, transparency, and fairness of public decision-making processes.²¹

By contrast, United States federal law does not traditionally recognize a separate offense of trading in influence comparable to that found in Romanian law. Similar conduct is generally prosecuted through offenses such as fraud, honest services fraud, extortion, or conspiracy. This difference highlights the distinct ways in which legal systems conceptualize and sanction behavior associated with corruption. While civil law jurisdictions tend to define specific corruption offenses through detailed statutory provisions, the American legal system often relies on broader legal concepts that allow prosecutors greater flexibility in addressing complex forms of corrupt conduct.

4.4. Criminal Liability of Legal Persons

An important feature of the evolution of modern anti-corruption legislation is the extension of criminal liability to legal persons. Both Romania and France recognize the criminal liability of legal entities for most corruption offenses under the conditions established by law. This approach is intended to combat corporate corruption and to sanction organizations that benefit from the unlawful conduct of their representatives, employees, or agents acting on their behalf.

The recognition of corporate criminal liability reflects the understanding that corruption frequently occurs within complex organizational structures and that effective prevention requires holding not only individual perpetrators but also the entities benefiting from such conduct accountable²². Sanctions applicable to legal persons may include substantial fines, dissolution, suspension of activities, exclusion from public procurement procedures, and other measures designed to prevent future misconduct.

In the United States, corporate liability for corruption offenses is particularly well developed. American authorities frequently employ mechanisms such as Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), which allow corporations to avoid full criminal prosecution in exchange

²¹ Marsudi Utoyo, Jauhariah, and Rianda Riviyusnita, "Criminal Law Corruption Mode of Allocation of Village Fund," in *Proceedings of the International Conference on Law Reform (INCLAR 2019)*, Advances in Economics, Business and Management Research 121 (Atlantis Press, 2020), 162–65, <https://doi.org/10.2991/aebmr.k.200226.033>.

²² Michael Elliot and Felix Lüth, "Corporate Liability Reforms in Transnational Anti-Corruption Law: Changing Course at a Time of Crisis or Continuing Historical Trajectories?," *European Journal of International Law* 36, no. 3 (2025): 595–619, <https://doi.org/10.1093/ejil/chaf030>.

for accepting responsibility, paying financial penalties, cooperating with investigations, and implementing comprehensive compliance programs. These instruments are widely regarded by legal scholars and practitioners as among the most effective tools for combating corporate corruption at the international level.

The extensive use of DPAs and NPAs reflects a pragmatic approach that seeks not only to punish corporate wrongdoing but also to promote institutional reform and encourage the adoption of effective internal compliance mechanisms. As a result, the American model has influenced anti-corruption enforcement practices in numerous jurisdictions worldwide.

4.5. Specialized Institutions and the Enforcement of Anti-Corruption Legislation

The effectiveness of anti-corruption legislation depends not only on the content of legal norms but also on the existence of institutions capable of ensuring their effective implementation. Even the most comprehensive legal framework may prove ineffective if it is not supported by competent investigative bodies, independent prosecutors, and efficient judicial mechanisms.

In Romania, the National Anticorruption Directorate (DNA) serves as the principal institution specialized in investigating high-level corruption offenses. The DNA possesses extensive prosecutorial powers and has played a central role in the detection, investigation, and prosecution of complex corruption cases involving public officials, politicians, and other individuals holding positions of authority. Its activities have significantly contributed to strengthening anti-corruption enforcement and increasing public awareness of the importance of institutional integrity.

In France, specialized institutions such as the National Financial Prosecutor's Office (Parquet National Financier – PNF) and the French Anti-Corruption Agency (Agence Française Anticorruption – AFA) are responsible for investigating and preventing corruption-related offenses. These bodies cooperate closely with other administrative and judicial authorities in order to strengthen integrity within both the public and private sectors. Their responsibilities include conducting investigations, promoting compliance measures, monitoring anti-corruption programs, and supporting the implementation of national anti-corruption strategies.

The existence of these specialized institutions demonstrates the growing recognition that effective anti-corruption policies require not only substantive legal rules but also robust institutional frameworks capable of ensuring their practical enforcement. Through their investigative, preventive, and supervisory functions, such bodies contribute significantly to enhancing transparency, accountability, and public confidence in governmental and economic institutions.²³

²³ Marc Henzelin, "Ratifications of the Additional Protocol to the Criminal Law Convention of the

In the United States, the fight against corruption is carried out through the cooperation of several federal agencies, including the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Securities and Exchange Commission (SEC), and other specialized enforcement bodies. The decentralized nature of the American system allows multiple authorities to intervene simultaneously, thereby enhancing the effectiveness of complex investigations involving public corruption, corporate misconduct, financial crimes, and transnational bribery schemes.

4.6. Influence of International Standards

A common feature of all the legal systems examined is the growing influence of international anti-corruption standards. International conventions and legal instruments have contributed significantly to the convergence of national legislation, particularly with regard to the criminalization of corruption involving foreign public officials, international judicial cooperation, and the recovery of proceeds derived from criminal activities.

However, the process of legislative harmonization has not eliminated the differences that continue to exist among legal systems. Legal traditions, institutional cultures, and the constitutional characteristics of each state continue to influence the manner in which anti-corruption norms are regulated and enforced. As a result, normative convergence coexists with considerable diversity in the legal and institutional mechanisms employed to combat corruption. While states increasingly share common objectives and legal principles, they often pursue these goals through different legislative structures and enforcement strategies.

4.7. Conclusions of the Comparative Analysis

The comparative analysis demonstrates that Romania, France, and the United States pursue the same fundamental objective: protecting the integrity of public office and preventing its use for personal or financial gain. Nevertheless, significant differences can be observed in legislative techniques, the structure of corruption offenses, and the institutional mechanisms responsible for enforcing anti-corruption laws.

The civil law systems represented by Romania and France are characterized by detailed statutory regulations and the explicit definition of the principal corruption offenses. By contrast, the American legal system adopts a more flexible approach based on a combination of statutory provisions, judicial interpretation, and corporate compliance mechanisms. This flexibility allows authorities to address a broader range of corrupt conduct while adapting enforcement strategies

to evolving forms of economic and financial crime.

Despite these differences, comparative experience demonstrates that the effectiveness of anti-corruption efforts depends equally on the quality of legal norms, the independence and professionalism of competent institutions, and the consistent and impartial application of the law. Successful anti-corruption policies require not only comprehensive legislation but also strong institutions capable of enforcing legal standards without political interference.

5. Implications of the Study

The findings of this research indicate that corruption continues to represent one of the most significant challenges facing contemporary legal systems, regardless of their level of economic development or legal tradition. The comparative analysis demonstrates that although states regulate and sanction corruption offenses through different legal mechanisms, they share a common objective: protecting the integrity of public office, strengthening the rule of law, and maintaining public trust in governmental institutions.

One of the principal implications of the study is the need for the continuous harmonization of national legislation with international standards concerning the prevention and suppression of corruption. The constantly evolving methods through which corruption offenses are committed, together with their increasingly transnational character, require the ongoing adaptation of domestic legal frameworks to the requirements established by relevant international conventions and legal instruments. In this context, states are called upon to update their legislation in order to address new forms of economic and financial crime associated with corruption.

The study also highlights the importance of strengthening international judicial cooperation. Given that many corruption offenses involve cross-border financial transactions, the use of complex corporate structures, or the concealment of criminal proceeds in multiple jurisdictions, the effectiveness of investigations depends largely on the ability of national authorities to cooperate rapidly and efficiently. Information sharing, mutual legal assistance, the enforcement of judicial decisions, and the recovery of assets derived from criminal conduct constitute essential tools in the global fight against corruption.

Another important implication concerns the role of specialized institutions in the enforcement of anti-corruption legislation. The experience of the jurisdictions examined demonstrates that the existence of an adequate legal framework is insufficient in the absence of independent authorities, highly trained professionals, and adequate resources for the investigation and prosecution of corruption offenses. The effectiveness of anti-corruption policies is closely linked to the institutional capacity of the state and to the consistent and impartial enforcement of legal norms.

The comparative analysis further reveals the necessity of developing preventive mechanisms that complement criminal sanctions. Administrative transparency, the digitalization of public services, the strengthening of conflict-of-interest regulations, the protection of whistleblowers, and the promotion of organizational cultures based on ethics and accountability all contribute significantly to reducing corruption risks. From this perspective, corruption should be addressed not merely as a criminal law issue but as a fundamental challenge of governance requiring comprehensive and multidisciplinary solutions.

Finally, the conclusions of this study may serve as a useful reference point for future research in the fields of comparative criminal law and anti-corruption policy. Legislative and institutional developments in different jurisdictions provide valuable examples of best practices, while also illustrating the limitations of certain regulatory models. Comparative analysis therefore contributes to the identification of effective legal solutions and the development of strategies capable of addressing the challenges posed by corruption in an increasingly globalized society.

In conclusion, the success of anti-corruption efforts depends on the interaction between a coherent legislative framework, effective institutions, and strong international cooperation. The harmonization of legal norms, the strengthening of enforcement mechanisms, and the promotion of integrity within both the public and private sectors constitute fundamental directions for reducing the impact of corruption and reinforcing democratic values and the rule of law.

6. Conclusion

Corruption remains one of the most complex and persistent phenomena affecting the functioning of public institutions and the development of democratic societies. Through its economic, social, and political consequences, corruption extends far beyond the sphere of criminal law, directly influencing the quality of governance, the efficiency of public administration, and citizens' trust in state authority. For this reason, combating corruption continues to be a constant priority for both national governments and international organizations committed to promoting the rule of law and good governance.

The comparative analysis of the legal frameworks of Romania, France, and the United States has revealed the existence of common objectives in the fight against corruption despite the differences arising from their respective legal traditions. All three legal systems seek to protect the integrity of public office, prevent the abuse of authority, and ensure that official duties are performed in accordance with the principles of legality and impartiality. In this regard, the criminalization of bribery, trading in influence, and other forms of corruption constitutes a fundamental component of contemporary criminal policy.

The study has demonstrated that the civil law systems represented by Ro-

mania and France are characterized by detailed and explicit regulation of corruption offenses through codified legal provisions. In contrast, the American legal system adopts a more flexible approach based on a combination of federal legislation, judicial interpretation, and sophisticated institutional mechanisms. Nevertheless, these differences in legislative technique do not alter the common objective pursued by all three systems: the prevention and punishment of conduct that undermines the integrity of public decision-making processes.

A particularly important aspect highlighted by the research is the influence of international legal instruments on the evolution of national legislation. The United Nations Convention against Corruption (UNCAC), the Council of Europe Criminal Law Convention on Corruption, and the OECD Convention on Combating Bribery of Foreign Public Officials have made a substantial contribution to the harmonization of legal norms and the development of common standards for preventing and combating corruption. These instruments have encouraged states to adopt legislative and institutional measures capable of responding more effectively to the challenges posed by the increasingly transnational nature of corruption.

Furthermore, the analysis confirms that the effectiveness of anti-corruption efforts does not depend solely on the severity of criminal sanctions. The existence of specialized, independent, and professionally competent institutions is an essential condition for the effective enforcement of legal norms. The experience of the jurisdictions examined demonstrates that the success of anti-corruption policies is closely linked to the capacity of judicial and administrative authorities to investigate, prosecute, and sanction corruption offenses in an objective and impartial manner.

The research also highlights the necessity of developing preventive policies that complement punitive mechanisms. Legal education, the promotion of professional ethics, administrative transparency, the digitalization of public services, and the protection of whistleblowers constitute important tools for reducing vulnerabilities that facilitate corrupt conduct. Consequently, the prevention and suppression of corruption should be approached through an integrated strategy that combines legislative, institutional, and educational measures.

In conclusion, the comparative analysis has demonstrated that, although significant differences exist among the legal systems examined, the general trend is toward the convergence of legislative and institutional standards in the field of anti-corruption. Strengthening international cooperation, harmonizing legal norms, and developing effective mechanisms for the prevention and punishment of corruption are essential directions for reducing its impact on society. Only through a coherent and multidimensional approach can the fundamental values of the rule of law be protected and citizens' trust in public institutions be strengthened.

Bibliography

I. Books and Articles

1. Banciu, Cristina, and Liliana Ciupercă. *Infracțiunile de corupție. Ghid de interpretare și investigare*. 2nd ed. Bucharest: C.H. Beck, 2020.
2. Ciuncan, Dorin. *Legea nr. 78 din 8 mai 2000. Prevenirea, descoperirea și sancționarea faptelor de corupție. Comentarii și jurisprudență*. 2nd rev. and enlarged ed. Bucharest: Universul Juridic, 2015.
3. Dobrinoiu, Vasile. *Corupția în dreptul penal român*. Bucharest: Atlas Lex, 1995.
4. Elliot, Michael, and Felix Lüth. "Corporate Liability Reforms in Transnational Anti-Corruption Law: Changing Course at a Time of Crisis or Continuing Historical Trajectories?" *European Journal of International Law* 36, no. 3 (2025): 595–619. <https://doi.org/10.1093/ejil/chaf030>.
5. Hatchard, John. *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa*. Cheltenham: Edward Elgar Publishing, 2014.
6. Henzelin, Marc. "Ratifications of the Additional Protocol to the Criminal Law Convention of the European Council on Corruption." *ASA Bulletin* 24, no. 3 (2006): 449–53. <https://doi.org/10.54648/ASAB2006056>.
7. Jovašević, Dragan. "Corruption in International and Comparative Criminal Law." *Glasnik Advokatske komore Vojvodine* 83, no. 9 (2011): 111–51. <https://doi.org/10.5937/gakv1103111J>.
8. Pascu, Ilie, Vasile Dobrinoiu, Traian Dima, Mihai Adrian Hotca, Costică Păun, Ioan Chiș, Mirela Gorunescu, et al. *Codul penal comentat. Partea generală*. Bucharest: Universul Juridic, 2025.
9. Pieth, Mark, ed. *Recovering Stolen Assets*. Bern: Peter Lang, 2008.
10. Rose-Ackerman, Susan, and Bonnie J. Palifka. *Corruption and Government: Causes, Consequences, and Reform*. 2nd ed. Cambridge: Cambridge University Press, 2016. <https://doi.org/10.1017/CBO9781139962933>.
11. Utoyo, Marsudi, Jauhariah, and Rianda Riviyusnita. "Criminal Law Corruption Mode of Allocation of Village Fund." In *Proceedings of the International Conference on Law Reform (INCLAR 2019)*, 162–65. Advances in Economics, Business and Management Research 121. Atlantis Press, 2020. <https://doi.org/10.2991/aebmr.k.200226.033>.

II. International Conventions and Documents

1. OECD. *Implementing the OECD Anti-Bribery Convention Phase 4 Report: United States*. Paris: OECD Publishing, 2020. <https://doi.org/10.1787/0cd34e9f-en>.
2. Transparency International. *Corruption Perceptions Index 2024*. Berlin: Transparency International, 2025. <https://www.transparency.org/en/publications/corruption-perceptions-index-2024>.
3. United Nations Office on Drugs and Crime. *United Nations Convention against*

Corruption. New York: United Nations, 2004. https://static.un.org/en/ethics/assets/pdfs/UN_Convention_Against_Corruption.pdf.

The Evolution of Criminal Law: The Crime of Match-Fixing in a Comparative Analysis

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Abstract

On 11 June 2026, a bill was submitted to the Romanian Chamber of Deputies with the aim of criminalising the manipulation of sports competitions for the first time. Although still at the legislative proposal stage, the proposed offence is of considerable interest to the development of criminal law, particularly given that Romania is among the few European countries that have not yet introduced such a provision into their Criminal Code, even though our country signed the Convention on the Manipulation of Sports Competitions, known as the ‘Macolin Convention’, as early as 2024. Against this background, we propose a comparative analysis of the offence of manipulating sports competitions in order to identify its constituent elements and critically assess the legislative proposal. To ensure an objective and effective analysis, we will consider both civil law and common law jurisdictions, so that proposals for legislative reform are based on a thoroughly documented analytical framework. The research methods used are a literature review, the comparative method and case law analysis.

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1. Introduction

The idea for this article emerged upon identifying a very recent Romanian bill seeking to introduce a new criminal offence under the heading ‘Manipulation of Sports Competitions’. According to the explanatory memorandum,²

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² Romanian Senate, “Expunere de motive: Proiect de lege pentru completarea Legii nr. 286/2009 privind Codul penal,” 2026, <https://www.senat.ro/Legis/PDF/2026/26b382EM.pdf?nocache=true>

combating the manipulation of sports competitions has been a constant priority for European institutions in recent years. As the main outcome of joint European efforts, in 2014 the Council of Europe adopted the Convention on the Manipulation of Sports Competitions, known as the ‘Macolin Convention’, the first and, to date, only international legal instrument specifically devoted to combating manipulation in sport, illegal betting and the laundering of proceeds from these illicit activities.

Romania also signed this instrument in 2024, but the ratification procedure has not been completed. Domestic legislation must therefore be adapted beforehand to ensure compliance with the Convention’s standards.

The Romanian Criminal Code does not contain a specific, standalone offence of manipulating sports competitions. As a result, such conduct is classified indirectly under other offences, such as corruption or fraud, which are insufficiently adapted to the particular nature of the phenomenon. This legislative gap runs counter to European trends and the obligations undertaken under the Macolin Convention, which requires states to establish specific offences or effective equivalents. The Convention promotes an integrated approach involving the co-ordination of criminal legislation with regulations governing sport and gambling, an aspect that is currently insufficiently reflected in domestic law. The absence of a standalone offence also undermines the effectiveness of international cooperation in criminal matters, particularly in cross-border match-fixing cases, where clear fulfilment of the dual criminality requirement is necessary.

In this context, the role of comparative law becomes increasingly evident and necessary: once a legislative gap has been identified, comparative analysis enables the appropriate transplantation of a new legal concept that already has an equivalent in other national legal systems and already produces legal effects in its systems of origin. Such a comparative analysis is particularly useful at this stage, while the legislative proposal is undergoing the adoption procedure, since critical observations can be taken into account in order to adopt a coherent and harmonised provision that is fully integrated into the national legal system.

According to the legislative initiative,³ the offence under the heading ‘Manipulation of Sports Competitions’ would consist of ‘the conduct of a director, administrator or collaborator of a sports entity, irrespective of its legal form, or of an athlete, referee or member of a sports arbitration committee who, directly or indirectly, for themselves or another person, requests or receives a pecuniary or non-pecuniary benefit, or accepts the promise of such a benefit, with the aim of deliberately and fraudulently predetermining or altering the result of an event, a match or an official sports competition’. It would be punishable by imprison-

(accessed June 19, 2026).

³ Chamber of Deputies of Romania, “Manipularea competițiilor sportive devine infracțiune – Proiect de lege important inițiat de deputatul Brian Cristian,” press release, June 15, 2026, https://www.cdep.ro/ords/relatii_publice/site2015.text_presa?pid=30702 (accessed June 19, 2026).

ment for a term of six months to four years, disqualification from exercising certain rights or a fine. The same penalty would also apply to a person who, directly or indirectly, promises, offers or gives a pecuniary or non-pecuniary benefit for the purpose of manipulating competitions. Attempts would also be punishable.

At the international level, the principal legal framework is the Macolin Convention.⁴ The Macolin Convention is a legal instrument and the only rule of international law concerning the manipulation of sports competitions. It calls on public authorities to cooperate with sports organisations, betting operators and competition organisers to prevent, detect and punish the manipulation of sports competitions. The Convention proposes a common legal framework for effective international cooperation in response to this global threat.

The Macolin Convention entered into force on 1 September 2019. It has been ratified by Belgium, France, Greece, Iceland, Italy, Lithuania, Norway, Portugal, the Republic of Moldova, San Marino, Serbia, Spain, Sweden, Switzerland and Ukraine. It has been signed by a further 43 European states, as well as Australia and Morocco.

Romania is one of the signatory states, having signed on 13 December 2024, but has not yet ratified the Convention.⁵

Under the Convention, ‘manipulation of sports competitions’ means an intentional arrangement, act or omission aimed at improperly altering the result or course of a sports competition in order to remove all or part of its unpredictability, with a view to obtaining an undue advantage for oneself or others.

According to the typology developed within the framework of the Council of Europe Convention on the Manipulation of Sports Competitions (the Macolin Convention), the manipulation of sports competitions can be classified into three main categories: (1) direct interference with the natural course of the competition; (2) alteration of athletes’ identities or personal information; and (3) influencing the competition by altering external factors, such as the playing surface, equipment or athletes’ physiological condition. These categories are supplemented by a classification based on the person responsible for the manipulation, which distinguishes between the exploitation of governance mechanisms, the exploitation of influence, intervention by external actors and opportunistic manipulation.⁶

⁴ Council of Europe, *Council of Europe Convention on the Manipulation of Sports Competitions*, CETS No. 215 (Magglingen/Macolin, September 18, 2014), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801cdd7e> (accessed June 19, 2026).

⁵ Council of Europe, “Chart of Signatures and Ratifications of Treaty 215: Council of Europe Convention on the Manipulation of Sports Competitions,” <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty-num=215> (accessed June 19, 2026).

⁶ Madalina Diaconu and Surbhi Kuwelker, *40 Commentaries of the Macolin Convention on the Manipulation of Sports Competitions*, ed. Antonio Rigozzi and André Kuhn (Basel: Helbing Lichtenhahn, 2024).

The literature defines the manipulation of sports competitions as any intentional action designed to improperly alter the course or outcome of a sports competition in order to obtain an undue advantage, usually of a financial nature.⁷

To identify the forms that the manipulation of sports competitions may take⁸ and the sports in which such practices are particularly common,⁹ we conducted a literature review and reached the following conclusions:

- The most serious cases of match-fixing occur in sports such as football, futsal, basketball and volleyball;

- The most common forms of manipulation of sports competitions are the following:

- *Match-fixing*. The best-known form of manipulation is match-fixing, which involves deliberately influencing the outcome of a sports competition before or during the event. It may involve athletes, coaches, referees, club officials or intermediaries linked to illegal betting networks. Empirical research on elite athletes in Germany found that approximately 8% of the athletes surveyed had been approached to participate in manipulation activities, while around 7.5% reported having actually engaged in such practices during their sporting careers.¹⁰

- *Partial manipulation of competitions (spot-fixing)*. A more sophisticated form of manipulation is ‘spot-fixing’, which seeks to influence specific events within a competition rather than its final outcome. Examples include deliberately causing a yellow card to be issued, intentionally taking a poor free kick or deliberately committing a certain number of fouls within a specified period of play. This form of manipulation is difficult to detect because it does not always affect the final outcome of the competition and can be embedded in the participants’ apparently normal behaviour. The expansion of live betting and markets for micro-events has significantly increased the risk of such practices.¹¹

- *Bribery of referees and sports officials*. The manipulation of sports competitions may also occur through the influence exerted on referees or other officials involved in organising and conducting competitions. In such situ-

⁷ Ladislav Mravec, “Match-Fixing as a Threat to Sport: Ethical and Legal Perspectives,” *Studia Sportiva* 15, no. 2 (2021): 37–48, <https://doi.org/10.5817/StS2021-2-4>.

⁸ Surbhi Kuwelker, Madalina Diaconu, and André Kuhn, “Competition Manipulation in International Sport Federations’ Regulations: A Legal Synopsis,” *The International Sports Law Journal* 22, no. 4 (2022): 288–313, <https://doi.org/10.1007/s40318-022-00210-9>.

⁹ Mykola Yefimov, Inna Yefimova, Viacheslav Harkusha, Nataliia Cherniak, and Nina Holenko, “Legal Regulation of Illegal Influence on the Results of Official Sports Competitions: Criminal Aspect and International Experience,” *Cuestiones Políticas* 39, no. 70 (2021): 742–56, <https://doi.org/10.46398/cuestpol.3970.44>.

¹⁰ Monika Frenger, Eike Emrich, and Werner Pitsch, “Corruption in Olympic Sports: Prevalence Estimations of Match Fixing Among German Squad Athletes,” *SAGE Open* 9, no. 3 (2019): 1–13, <https://doi.org/10.1177/2158244019865361>.

¹¹ David Winkelmann, Maya Vienken, Christian Deutscher, and Roland Langrock, “Betting Against Integrity: Identifying Match-Fixing Through In-Play Market Dynamics,” arXiv preprint arXiv:2605.30209 (May 28, 2026), <https://doi.org/10.48550/arXiv.2605.30209>.

ations, refereeing decisions are intentionally altered to favour a particular participant or produce a predetermined result.

- *Structural manipulation of competitions.* A distinct form of manipulation involves exploiting competition rules to obtain a strategic advantage. In such cases, participants do not necessarily breach legal or sporting rules, but engage in conduct contrary to the spirit of competition, such as deliberately losing matches to secure a more favourable route through subsequent stages.

Recent literature highlights structural vulnerabilities in certain competition formats that may create incentives for strategic behaviour incompatible with the principle of fair competition.¹²

2. Comparative Legal Analysis

The manipulation of sports competitions has prompted European states to develop distinct legal models for protecting the integrity of sport. The literature shows that, although there is a trend towards European harmonisation under the influence of the Macolin Convention, national legal systems continue to differ significantly in terms of the protected legal interest, the approach to criminalisation and the relationship between criminal penalties and disciplinary sanctions in sport.¹³

According to the study conducted for the European Commission on the criminalisation of the manipulation of sports competitions in the 27 Member States of the European Union, national laws can be grouped into three main models: (i) the criminalisation of sports fraud as a standalone offence; (ii) the application of general rules on corruption and fraud; and (iii) mixed systems combining specific criminal provisions with administrative and disciplinary measures.¹⁴

One of the most widely debated issues in legal scholarship concerns the identification of the social value protected through criminalisation.

The literature identifies three main approaches. The first regards the protected legal interest as the integrity of the sports competition, understood as the authenticity of its outcome and respect for the principle of fair play. The second locates the protected legal interest in the confidence of the public and participants in the genuine nature of the competition. The third approach, which predominates in recent legislation, considers that the manipulation of sports competitions simultaneously affects the integrity of sport and economic interests associated with

¹² Whitney Bragagnolo, "Onside Integrity? Match-Fixing, Corruption and Organized Crime Risks in Canadian Soccer Ahead of the 2026 FIFA World Cup," *The International Sports Law Journal* (2026), <https://doi.org/10.1007/s40318-025-00330-y>.

¹³ Kuwelker, Diaconu, and Kuhn, "Competition Manipulation in International Sport Federations' Regulations," 288–313.

¹⁴ European Commission, Directorate-General for Education, Youth, Sport and Culture, and KEA European Affairs, "Match-Fixing in Sport: A Mapping of Criminal Law Provisions in EU 27," *Trends in Organized Crime* 18, no. 3 (2015): 251–60, <https://doi.org/10.1007/s12117-015-9241-4>.

the sports betting market. This latter conception is particularly apparent in German law.¹⁵

From a comparative perspective, the differences between national systems can be explained precisely by the legislature's choice of the primary legal interest to be protected by criminal law.

Italy – the model of sports fraud as a standalone offence. In legal scholarship, Italy is regarded as one of the most representative examples of a standalone legal framework governing the manipulation of sports competitions, and as one of the first European states to recognise the need for specific criminal law protection of the integrity of sport. Italy is the classic example of the criminalisation of the manipulation of sports competitions as a standalone offence. Law No. 401/1989 on the protection of fairness in sports competitions introduces the offence of 'frode in competizioni sportive', which is distinct from general corruption offences.

The distinctive feature of the Italian model is its direct protection of the proper conduct of competitions and the authenticity of sporting outcomes. The literature frequently presents Italy as one of the first European states to have developed a specialised criminal law regime against the manipulation of sports competitions, responding to major scandals such as Totonero and Calciopoli.¹⁶ The best-known example is the Calciopoli scandal of 2006, which involved officials from major clubs, referees and those responsible for referee appointments. Investigations by the Naples public prosecutor's office revealed systematic contacts between club executives and refereeing officials intended to influence the course of the competition. The disciplinary consequences were severe: Juventus FC was relegated to Serie B and stripped of titles won in previous seasons, while several officials received lengthy suspensions.

The Italian system is also characterised by the coexistence of criminal liability and disciplinary liability in sport. The case law analysed by Diaconu, Kuwelkar and Kuhn demonstrates that the sporting sanctions imposed by federations operate independently of criminal proceedings before state courts.¹⁷

Germany – protecting the integrity of sport and the betting market. In 2017, Germany adopted one of the most modern European legal frameworks by introducing sections 265c and 265d of the German Criminal Code (StGB), which criminalise both sports betting fraud (Sportwettbetrug) and the manipulation of professional sports competitions (Manipulation von berufssportlichen Wettbewerben).

¹⁵ Kuwelker, Diaconu, and Kuhn, "Competition Manipulation in International Sport Federations' Regulations," 288–313.

¹⁶ Helmut M. Dietl and Christian Weingärtner, "Betting Scandals and Attenuated Property Rights: How Betting-Related Match-Fixing Can Be Prevented in Future," *The International Sports Law Journal* 14, nos. 1–2 (2014): 128–37, <https://doi.org/10.1007/s40318-014-0040-x>.

¹⁷ Madalina Diaconu, Surbhi Kuwelkar, and André Kuhn, "The Court of Arbitration for Sport Jurisprudence on Match-Fixing: A Legal Update," *The International Sports Law Journal* 21 (2021): 27–46, <https://doi.org/10.1007/s40318-021-00181-3>.

Scholarly analysis shows that the German legislature sought to protect two legal interests simultaneously: the integrity of sport and public confidence in sports betting markets.¹⁸ German legal scholarship has emphasised that the introduction of these offences was influenced by the growth of crime associated with sports betting and by the need to adapt national legislation to new forms of manipulation of sports competitions arising from the globalisation of gambling markets.¹⁹

Compared with the Italian model, the German framework is more strongly influenced by the economic dimension of the phenomenon. Criminalisation therefore extends beyond protecting sporting outcomes to preventing fraud associated with betting activities. This approach is also explained by the scale of betting-related manipulation scandals that have affected German football over the last two decades.

France – the model of sports integrity and prevention. France has developed a different model, centred on prevention and institutional cooperation. The French framework combines provisions of the Sports Code (Code du Sport), general rules on corruption and sophisticated mechanisms for monitoring sports betting.

The literature shows that France attaches particular importance to the concept of ‘sports integrity’, which is regarded as a legal interest justifying simultaneous intervention by administrative authorities, sports federations and judicial bodies.

This model is consistent with the philosophy of the Macolin Convention, which promotes the creation of national platforms for cooperation between public authorities, sports organisations and betting operators.

Under French law, the manipulation of sports competitions is addressed through a combination of criminal and administrative mechanisms. At the criminal law level, a central role is played by Article 445-1-1 of the French Criminal Code,²⁰ introduced by Law No. 2012-158 of 1 February 2012 and subsequently amended, which penalises the offering, promising, requesting or accepting of an advantage with a view to altering the normal and fair course of a sports competition on which bets are placed.

The provision is a special rule in relation to general corruption offences and applies to participants in sports competitions, referees and other persons capable of influencing the course of a competition. Although the French legislature has not established a standalone offence of ‘sports fraud’ comparable to the Italian offence, it has created a specific offence adapted to the manipulation of sports

¹⁸ Dietl and Weingärtner, “Betting Scandals and Attenuated Property Rights,” 128–37.

¹⁹ Julian Sigmund, *Strafrecht gegen Korruption im Sport? Erscheinungsformen des Match Fixing und Legitimation ihrer Kriminalisierung über die §§ 265c, 265d StGB* (Baden-Baden: Nomos, 2021), <https://doi.org/10.5771/9783748925163>.

²⁰ France, *Code pénal*, art. 445-1-1, version in force since January 1, 2020, Légifrance, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000039183231 (accessed June 20, 2026).

competitions.

A distinctive feature of the French system is whistleblower protection. Following the adoption of Law No. 2016-1691 ('Sapin II') and the reform introduced by Law No. 2022-401 ('Waserman'), mechanisms for reporting corruption and manipulation have been strengthened, including in the sports sector. According to the analysis by Cathelain-Collon and Verschuuren, whistleblower protection is an essential component of sports integrity policies, since most cases of manipulation are difficult to identify through betting monitoring alone.²¹

Spain – sports corruption as a form of private-sector corruption. Compared with other European states that have opted to criminalise the manipulation of sports competitions as a standalone offence, the Spanish legislature has adopted a distinct approach, bringing the phenomenon within the scope of private-sector corruption offences. This approach was established by Organic Law No. 5/2010 of 22 June 2010, which introduced provisions on corruption between private parties into the Spanish Criminal Code. These were subsequently reformulated and strengthened by Organic Law No. 1/2015 of 30 March 2015. The manipulation of sports competitions is currently governed by Article 286 bis (4) of the Criminal Code, which penalises the offering, promising, requesting or accepting of unjustified advantages intended to deliberately and fraudulently alter the result of a contest, competition or sporting event of economic or sporting significance.

The provision states: 'The provisions of this Article shall apply to directors, administrators, employees or collaborators of a sports entity, irrespective of its legal form, as well as to athletes, referees or judges, in respect of conduct intended to predetermine or deliberately and fraudulently alter the result of an event, a match or a professional sports competition.'

Accordingly, criminal law protection covers both the fairness of sports competitions as an independent social value and the fair functioning of the economic relationships generated by professional sport. The Spanish legislature proceeds from the premise that modern sport is a large-scale economic activity in which clubs, federations, sponsors, betting operators and broadcasters develop complex financial relationships. In this context, manipulating the outcome of a competition produces effects similar to acts of corruption in business, undermining competition, transparency and the confidence of market participants.

From a doctrinal perspective, the Spanish model is particularly interesting because it avoids creating a standalone offence of *match-fixing* and incorporates the phenomenon into the general framework of economic criminal law. According to Spanish legal scholarship, the protected legal interest is not confined

²¹ Clémence Cathelain-Collon, Pim Verschuuren, and Jacek Potulski, "Whistleblower Protection in Cases of Manipulation of Sports Competitions: French Legal Perspectives Following the MotivAction Project," *Sports Law, Policy & Diplomacy Journal* 3, no. 2 (2025): 1–13, <https://doi.org/10.30925/slpdj.3.2.1>.

to the integrity of sport, but encompasses the relationships of trust and fair competition within the economic activities of sports entities. The manipulation of sports competitions is thus classified as a sector-specific form of private-sector corruption (*corrupción entre particulares*), allowing legal concepts and mechanisms already established in the field of economic crime to be applied.

Spanish sports law scholars have emphasised that the inclusion of the manipulation of sports competitions within private-sector corruption offences reflects a trend towards the ‘economicisation’ of criminal law protection of professional sport. From this perspective, a sports competition is regarded both as a social and cultural phenomenon and as an economic product capable of giving rise to substantial harm when its outcome is fraudulently altered.²²

Portugal²³. The literature regards Portugal as one of the first European states to have adopted specific criminal legislation on the manipulation of sports competitions, distinct from general corruption offences. The development of Portuguese legislation reflects the legislature’s concern with protecting the authenticity of sports competitions and combating influence exerted on participants with the aim of altering sporting outcomes.

An important milestone was the adoption of Law No. 50/2007 of 31 August 2007 (*Lei n.º 50/2007, de 31 de agosto*) on criminal liability for conduct contrary to the truthfulness, loyalty and fairness of sports competitions. This law established a specific criminal law regime to combat the phenomenon known in the international literature as *match-fixing*. Unlike the approaches adopted in other European states, the Portuguese legislature chose to develop an autonomous system of sports offences, based on the idea that the integrity of sports competitions is a distinct social value justifying the direct intervention of criminal law.

The law criminalises both active and passive corruption in sport, penalising the offering, promising, requesting or accepting of a pecuniary or non-pecuniary advantage intended to influence the outcome or course of a sports competition. In addition, Portuguese legislation does not limit the category of potential offenders to athletes, but also includes referees, coaches, heads of sports organisations and any other persons capable of influencing the competition. This legislative choice reflects the finding that the manipulation of sports competitions often results from concerted action by several actors involved in sport.

A particular feature of the Portuguese model is the separate criminalisation of trading in influence in sport (*tráfico de influência*), as well as certain forms of fraud associated with sports competitions. The legislature thus sought to penalise both direct agreements to manipulate an outcome and the indirect mechanisms through which persons in positions of influence may intervene in the course

²² Antoni Gili Pascual, “La tipificación penal del fraude en competiciones deportivas. Problemas técnicos y aplicativos,” *Revista de Derecho Penal y Criminología*, 3rd ser., no. 8 (2012): 13–70.

²³ Marcelo Moriconi and João Paulo Almeida, “Portuguese Fight Against Match-Fixing: Which Policies and What Ethic?” *Journal of Global Sport Management* 4, no. 1 (2019): 79–96, <https://doi.org/10.1080/24704067.2018.1493357>.

of a competition. In this respect, the Portuguese system resembles modern approaches to combating sports corruption, which extend the range of criminalised conduct beyond straightforward fraudulent arrangements concerning the final result.

A subsequent stage in legislative development was driven by the need to harmonise domestic law with European standards on combating the manipulation of sports competitions and with the requirements of the Macolin Convention. In this context, Portugal strengthened mechanisms for cooperation between judicial authorities, sports organisations and gambling regulators, recognising the link between the manipulation of sports competitions and sports betting markets.

From a comparative perspective, the Portuguese model has clear affinities with the Italian approach, since it treats the manipulation of sports competitions as a standalone offence, distinct from general corruption offences. By contrast, it differs from the Spanish and French models, in which the phenomenon is incorporated into private-sector corruption law, and from the German model, which emphasises the simultaneous protection of the integrity of sport and the sports betting market. The literature considers that the Portuguese approach highlights the independent nature of the legal interest represented by the integrity of sports competitions and facilitates the adaptation of the constituent elements of the offence to the specific characteristics of sport.

3. Comparative Conclusions

The comparative analysis of the legal systems of Italy, Germany, France, Spain and Portugal reveals two major legislative approaches to combating the manipulation of sports competitions. The first is represented by states that establish standalone offences of manipulating sports competitions, regarding the integrity of a sports competition as a distinct legal interest of sufficient importance to justify a specialised criminal law response. Italy and Portugal clearly fall within this category. The second approach is represented by systems that incorporate the phenomenon into existing offences concerning corruption or economic fraud, such as Spain, France and, to some extent, Germany.

In terms of the protection of social values, the Italian and Portuguese models afford sports integrity the greatest degree of legal autonomy. Both Italian Law No. 401/1989 and Portuguese Law No. 50/2007 proceed from the premise that the authenticity of sporting outcomes is a distinct social interest, separate from both property interests and economic competition. In these systems, criminal law intervenes directly to protect fair play, equal opportunities and public confidence in sports competitions. The literature²⁴ considers that this approach facilitates the specification of the constituent elements of the offence and allows

²⁴ Kuwelker, Diaconu, and Kuhn, "Competition Manipulation in International Sport Federations' Regulations," 288–313.

the criminal provision to be adapted to the particular characteristics of sport.

By contrast, the Spanish model reflects a different conception of the legal nature of the manipulation of sports competitions. By incorporating it into the category of corruption between private parties under Article 286 bis(4) of the Criminal Code, the Spanish legislature emphasises the economic dimension of professional sport. From this perspective, altering the outcome of a competition primarily affects the fair functioning of the economic relationships generated by sporting activity, and only indirectly affects values specific to sport. This approach demonstrates the growing influence of economic criminal law on the regulation of contemporary sport.

The French model occupies an intermediate position between these two trends. Although France has not established a standalone offence of sports fraud comparable to the Italian offence, it has introduced specific rules adapted to the manipulation of sports competitions and developed complex institutional mechanisms for prevention and detection. The emphasis extends beyond punishment to cooperation between public authorities, sports federations and betting operators. In this respect, the French model represents one of the most advanced forms of implementation of the principles enshrined in the Macolin Convention.

Germany is distinguished by a mixed approach in which legal protection simultaneously covers the integrity of sports competitions and public confidence in sports betting markets. The introduction of sections 265c and 265d into the German Criminal Code demonstrates the German legislature's concern with combating new forms of crime associated with the globalisation of gambling markets and the development of online sports betting. The German model thus reflects the modern trend towards extending criminal law protection beyond the sports competition itself to its surrounding economic ecosystem.

4. Analysis of the Romanian Legislative Proposal in Relation to European Models

From a comparative perspective, the proposed provision lies at the intersection of the standalone criminalisation model established in Italy and Portugal and the private-sector corruption model found in Spain. Although the material object of the unlawful conduct is the influencing of the outcome of a sports competition, the provision is structured around verbs characteristic of corruption offences: 'requests', 'receives' and 'accepts the promise'. This brings the Romanian legislative approach close to the normative structure of Article 286 bis (4) of the Spanish Criminal Code. Thus, although its stated purpose is to protect the integrity of sports competitions, the mechanism of criminalisation remains anchored in the traditional logic of corruption.

This legislative choice nevertheless raises certain difficulties regarding the effectiveness of criminal law protection. Analysis of the Italian and Portu-

guese models shows that the manipulation of sports competitions frequently extends beyond conventional corrupt agreements. In Italian law, Article 1 of Law No. 401/1989 penalises both the offering or accepting of advantages and 'other fraudulent acts' (*altri atti fraudolenti*) capable of altering the normal course of a competition. Such wording allows the offence to cover conduct that does not involve an identifiable pecuniary or non-pecuniary advantage, such as manipulating referee appointments, influencing team selection, exerting informal pressure on participants or using privileged information.

The Italian experience is particularly relevant in light of the Calciopoli scandal, in which much of the conduct investigated consisted of systematic interference with referee appointments and the organisation of the competition, rather than the transfer of money. Had a provision similar to the one proposed in Romania applied in those circumstances, some of the conduct investigated might have fallen outside the scope of the criminal provision in the absence of proof that a specific advantage had been offered or accepted. From this perspective, the Romanian wording appears more restrictive than the approaches established in legal systems that treat the manipulation of sports competitions as a standalone form of fraud.

Another critical observation concerns the one-sided nature of the offence. The proposed text penalises only the passive form of the conduct, namely requesting or receiving a benefit, or accepting the promise of one. It contains no provisions relating to the person who offers, promises or grants the advantage. Yet an analysis of European legislation shows that all established models symmetrically regulate both active and passive corruption in sport. Portuguese Law No. 50/2007 thus separately criminalises *corrupção ativa* and *corrupção passiva*; Article 445-1-1 of the French Criminal Code penalises both the offering and the acceptance of an advantage; and Italian and Spanish legislation follow the same logic of criminalising both forms.

The absence of an active form of the offence may create significant practical difficulties. In many cases involving the manipulation of sports competitions, the initiative comes from intermediaries, betting operators, members of organised criminal groups or other persons who are not participants in the competition. Restricting criminalisation to the recipient in the corrupt transaction risks leaving the principal actors behind manipulation schemes unpunished and reducing the effectiveness of criminal enforcement.

In defining the category of potential offenders, the proposed text largely follows the Spanish legislative approach, including directors, administrators and collaborators of sports entities, athletes, referees and members of sports arbitration committees. However, the use of the term 'collaborator' raises issues under the principle of legality in criminal law and the requirement of foreseeability imposed by Article 7 of the European Convention on Human Rights. Unlike French legislation, which expressly defines the category of actors in sports competitions

through specific rules, or German legislation, which uses well-defined legal concepts, the Romanian text provides no clear criteria for determining which persons fall within this category. Consequently, there is a risk of divergent interpretations in judicial practice, as well as potential substantive constitutional defects.

As regards the advantage sought, the inclusion of both pecuniary and non-pecuniary benefits is a modern approach consistent with European trends. The literature shows that the manipulation of sports competitions is not motivated exclusively by financial gain. In many situations, participants seek professional, electoral or reputational advantages. In this respect, the proposed wording aligns with the standards in France, Portugal and Spain and allows adequate protection against various forms of sports corruption.

More problematic, however, is the wording concerning the offender's purpose, namely 'predetermining or altering the result' of an event, a match or a sports competition. Recent developments in match-fixing demonstrate that manipulation is no longer directed exclusively at a competition's final outcome. The growth of sports betting markets has encouraged the emergence of spot-fixing, which consists of manipulating specific events within a game, such as the first yellow card, the first corner kick or the commission of a certain number of fouls. Such conduct may generate substantial gains in betting markets without influencing the competition's final result.

The contemporary concept of the manipulation of sports competitions must include any fraudulent interference with the course of a competition, whether or not it affects the final score. The wording proposed in Romanian law therefore risks providing insufficient protection against modern forms of manipulation that target particular phases of a competition rather than its final outcome.

5. Conclusions

In conclusion, the legislative proposal analysed represents undeniable progress towards recognising the integrity of sports competitions as a legal interest capable of receiving independent criminal law protection. Nevertheless, the comparative analysis reveals limitations that may reduce its practical effectiveness. In its current form, the provision is closer to the sports corruption model established in Spanish law than to the broader conception of sports fraud as a standalone offence found in Italy and Portugal. To respond more adequately to the contemporary realities of match-fixing, it would be appropriate to extend criminalisation to any fraudulent acts capable of affecting the course of a sports competition, expressly regulate active corruption in sport, clarify the concept of a competition participant and include modern forms of manipulation associated with sports betting markets. Only through such an integrated approach could Romanian criminal law achieve the level of protection established by the most advanced European models in this field.

Bibliography

I. Books and Articles

1. Bragagnolo, Whitney. "Onside Integrity? Match-Fixing, Corruption and Organized Crime Risks in Canadian Soccer Ahead of the 2026 FIFA World Cup." *The International Sports Law Journal* (2026). <https://doi.org/10.1007/s40318-025-00330-y>.
2. Cathelain-Collon, Clémence, Pim Verschuuren, and Jacek Potulski. "Whistle-blower Protection in Cases of Manipulation of Sports Competitions: French Legal Perspectives Following the MotivAction Project." *Sports Law, Policy & Diplomacy Journal* 3, no. 2 (2025): 1–13. <https://doi.org/10.30925/sl.pdj.3.2.1>.
3. Diaconu, Madalina, and Surbhi Kuwelker. *40 Commentaries of the Macolin Convention on the Manipulation of Sports Competitions*. Edited by Antonio Rigozzi and André Kuhn. Basel: Helbing Lichtenhahn, 2024.
4. Diaconu, Madalina, Surbhi Kuwelkar, and André Kuhn. "The Court of Arbitration for Sport Jurisprudence on Match-Fixing: A Legal Update." *The International Sports Law Journal* 21 (2021): 27–46. <https://doi.org/10.1007/s40318-021-00181-3>.
5. Dietl, Helmut M., and Christian Weingärtner. "Betting Scandals and Attenuated Property Rights: How Betting-Related Match-Fixing Can Be Prevented in Future." *The International Sports Law Journal* 14, nos. 1–2 (2014): 128–37. <https://doi.org/10.1007/s40318-014-0040-x>.
6. European Commission, Directorate-General for Education, Youth, Sport and Culture, and KEA European Affairs. "Match-Fixing in Sport: A Mapping of Criminal Law Provisions in EU 27." *Trends in Organized Crime* 18, no. 3 (2015): 251–60. <https://doi.org/10.1007/s12117-015-9241-4>.
7. Frenger, Monika, Eike Emrich, and Werner Pitsch. "Corruption in Olympic Sports: Prevalence Estimations of Match Fixing Among German Squad Athletes." *SAGE Open* 9, no. 3 (2019): 1–13. <https://doi.org/10.1177/2158244019865361>.
8. Gili Pascual, Antoni. "La tipificación penal del fraude en competiciones deportivas. Problemas técnicos y aplicativos." *Revista de Derecho Penal y Criminología*, 3rd ser., no. 8 (2012): 13–70.
9. Kuwelker, Surbhi, Madalina Diaconu, and André Kuhn. "Competition Manipulation in International Sport Federations' Regulations: A Legal Synopsis." *The International Sports Law Journal* 22, no. 4 (2022): 288–313. <https://doi.org/10.1007/s40318-022-00210-9>.
10. Moriconi, Marcelo, and João Paulo Almeida. "Portuguese Fight Against Match-Fixing: Which Policies and What Ethic?" *Journal of Global Sport Management* 4, no. 1 (2019): 79–96. <https://doi.org/10.1080/24704067.2018.1493357>.
11. Mravec, Ladislav. "Match-Fixing as a Threat to Sport: Ethical and Legal Perspectives." *Studia Sportiva* 15, no. 2 (2021): 37–48. <https://doi.org/10.5817/StS2021-2-4>.
12. Sigmund, Julian. *Strafrecht gegen Korruption im Sport? Erscheinungsformen des Match Fixing und Legitimation ihrer Kriminalisierung über die §§ 265c, 265d StGB*. Baden-Baden: Nomos, 2021. <https://doi.org/10.5771/9783748925>

- 163.
13. Winkelmann, David, Maya Vienken, Christian Deutscher, and Roland Langrock. "Betting Against Integrity: Identifying Match-Fixing Through In-Play Market Dynamics." arXiv preprint arXiv:2605.30209, May 28, 2026. <https://doi.org/10.48550/arXiv.2605.30209>.
 14. Yefimov, Mykola, Inna Yefimova, Viacheslav Harkusha, Nataliia Cherniak, and Nina Holenko. "Legal Regulation of Illegal Influence on the Results of Official Sports Competitions: Criminal Aspect and International Experience." *Cuestiones Políticas* 39, no. 70 (2021): 742–56. <https://doi.org/10.46398/cuestpol.39.70.44>.

II. International Treaties and Legislative Sources

1. Chamber of Deputies of Romania. "Manipularea competițiilor sportive devine infracțiune – Proiect de lege important inițiat de deputatul Brian Cristian." Press release, June 15, 2026. https://www.cdep.ro/ords/relatii_publice/site2015.text_presa?pid=30702 (accessed June 19, 2026).
2. Council of Europe. *Council of Europe Convention on the Manipulation of Sports Competitions*. CETS No. 215. Magglingen/Macolin, September 18, 2014. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801cdd7e> (accessed June 19, 2026).
3. Council of Europe. "Chart of Signatures and Ratifications of Treaty 215: Council of Europe Convention on the Manipulation of Sports Competitions." <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty-num=215> (accessed June 19, 2026).
4. France. *Code pénal*, art. 445-1-1. Légifrance. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000039183231 (accessed June 20, 2026).
5. Romanian Senate. "Expunere de motive: Proiect de lege pentru completarea Legii nr. 286/2009 privind Codul penal." 2026. <https://www.senat.ro/Legis/PDF/2026/26b382EM.pdf?nocache=true> (accessed June 19, 2026).

PART IV
MARKET REGULATION, DATA
GOVERNANCE, AND ARTIFICIAL
INTELLIGENCE

Comparative Case Law on Capital Market Manipulation

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Abstract

Capital market manipulation is one of the most complex issues in the field of business criminal law. Unlike insider dealing, which is based primarily on an informational advantage, market manipulation seeks to distort the price-formation mechanism itself by creating false or misleading signals regarding supply, demand, liquidity, or the price of financial instruments. This study examines, from a comparative perspective, the legal criteria used to distinguish legitimate trading activity from manipulative conduct in the United States, Canada, the European Union, Japan, Australia, and Romania. Particular attention is paid to the role of manipulative intent, artificial pricing, fictitious or deceptive transactions, and algorithmic trading practices. Through an analysis of relevant legislation and leading judicial decisions, the study identifies both converging approaches and significant differences among the jurisdictions examined. It concludes that effective enforcement depends on clearly defining the element that transforms otherwise lawful market conduct into manipulation, while ensuring an appropriate balance between market integrity, technological innovation, and fundamental procedural guarantees.

Keywords: capital, market, transaction, manipulation, trading, shares.

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1. Preamble and Legal Framework

Capital market manipulation is subject to both European, transnational regulation and a national one. The provisions of Article 12 of Regulation (EU) No 596/2014 on market abuse (MAR) govern capital market manipulation, together with Directive 2014/57/EU on criminal sanctions for market abuse (the Market Abuse Directive), which required all Member States to harmonize their legislation on criminal offences for market abuse.

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At the national level, market manipulation is regulated and sanctioned by the provisions of Article 137 and Article 157 of Law No 24/2017 on issuers of financial instruments and market operations, as republished. Capital market manipulation is also addressed by the provisions of Article 3(2) of Law No 126/2018 on markets in financial instruments, which classifies such unlawful conduct on financial markets within the category of market abuse.

Because of their considerable length, we shall not quote in full the provisions referred to in the articles indicated above; instead, we summarize this information as follows: capital market manipulation is conduct, whether by commission or omission, expressed in the situations expressly determined by the regulation and the laws, by which a market participant artificially intervenes in the mechanism for the formation of the demand, supply or price of a financial instrument — whether through transactions or trading orders capable of conveying false or misleading signals or of fixing the price at an abnormal level, through resort to fictitious devices or other forms of deception, or through the dissemination of information or the provision of false or misleading input data, thereby affecting market integrity and public confidence in it.

It is very important to note that the particular importance attached to protecting the integrity of financial markets and public confidence leads to the classification of manipulation as a criminal offence and its punishment, pursuant to Article 157(5) of Law No 24/2017, with imprisonment from one to five years.

Thus, there are several types of conduct sanctioned by European and national legislation. In summary, market manipulation consists in carrying out a transaction or engaging in conduct that gives or is likely to give false or misleading indications as to the supply/demand or price of a financial instrument, or that fixes or is likely to fix the price of a financial instrument at an abnormal or artificial level. To these are added forms of conduct that may consist of a transaction or behavior involving resort to a fictitious device or any other form of deception; the dissemination of misleading information; the transmission of false or misleading information; or the provision of false or misleading input data. This last modality concerns in particular the manipulation of benchmarks that is, precisely one of the matters of present public interest, relating to the manipulation of the Robor index, sanctioned from the perspective of competition law through the fining of ten banking companies operating in Romania.²

The types of acts or omissions regulated as instances of capital market manipulation seek to capture specific abusive strategies that may be implemented by any available means of trading, including algorithmic and high-frequency trading³. These examples are neither exhaustive nor do they suggest that such

² JURIDICE.ro, “Consiliul Concurenței a sancționat 10 bănci pentru coordonare în stabilirea RO-BOR,” accessed September 13, 2026, <https://www.juridice.ro/833419/consiliul-concurentei-a-sa-ncționat-10-pentru-coordonare-in-stabilirea-robor.html>.

³ Ann-Christina Lange, Marc Lenglet, and Robert Seyfert, “High-Frequency Trading, Spoofing and

strategies, applied by other means, could not likewise be classified as abusive. At the same time, the current legislation is an advance over the previous one, since it expressly prohibits the attempt to manipulate the market.

Clearly, the attempt to capture through legislation as broad a range of situations as possible that might be classified as manipulation has required the delimitation of lawful from unlawful conduct. It has been observed that manipulation entails a far clearer and more brutal intervention by the perpetrator in the price-formation process, with the controversies concerning the scope this offence should have arising especially in the case of manipulation carried out through ostensibly ordinary market conduct, namely manipulation through transactions or trading orders.

2. Legal Framework Applicable to the Analysis of Civil and Criminal Liability

For the study of cases of capital market manipulation, we have considered the most important world economies and, implicitly, the most attractive and most actively traded capital markets, as well as the diversity of the legal systems that regulate them. Accordingly, we have examined the case law on capital market manipulation in the United States of America, Canada, the European Union, Japan, and Australia.

The fundamental legal difficulty, encountered in all the jurisdictions examined, arose from the fact that almost any stock-exchange order influences the price, yet fraudulent intent does not follow from the mere placing of such an order. A large trading volume, short selling, the placing and cancellation of orders, or supporting a price are not, in themselves, unlawful acts or offences; they constitute normal market behavior. The question that all jurisdictions have sought to answer, however, was what the determining element is, whether of an objective nature (the fictitious character of the transaction) or a subjective one (the purpose of misleading or of creating an artificial price) that transforms a lawful operation into manipulation.

Methodologically, we have indicated the normative framework applicable to each jurisdiction and its concrete application in various published cases.

2.1. Capital Market Manipulation in the United States of America

US federal law addresses manipulation through several overlapping instruments, namely the Securities Exchange Act of 1934, in particular Section 9(a) concerning specific manipulative practices (for example, fictitious transactions) and Section 10(b)⁴, applied through Rule 10b-5 of the Securities and Exchange

Conflicting Epistemic Regimes: Accounting for Market Abuse in the Age of Algorithms,” *Economy and Society* 53, no. 4 (2024): 603–626, <https://doi.org/10.1080/03085147.2024.2413809>.

⁴ United States Code, Title 15, §§ 78i(a)(1)–(2) and 78j(b), Office of the Law Revision Counsel,

Commission, as well as the Commodity Exchange Act of 1936 for derivatives markets, administered by the Commodity Futures Trading Commission⁵. A characteristic feature of the US system is the coexistence of general and special anti-manipulation prohibitions.

The first significant decision in US federal law is the Supreme Court's judgment in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

The case had the following particularity. The accounting firm Ernst & Ernst carried out, over several years, the audit of the books of the brokerage firm First Securities Company of Chicago. Its president, Leston Nay, held majority control and created a fraudulent scheme for his own enrichment. He induced clients to invest in escrow accounts that did not in fact exist. In practice, the money accumulated was diverted for his own benefit. The scheme was concealed through the so-called mail rule, in the sense that Leston Nay had ordered that no one was to open correspondence addressed to him personally, not even in his absence, which prevented the fraud from being detected. The scheme came to light only in 1968, when Nay committed suicide, leaving a note describing First Securities as insolvent and the escrow accounts as fictitious.

The injured clients sued the firm Ernst & Ernst, claiming that its negligence in carrying out the audit, in particular its failure to discover the rule on the inviolability of the correspondence, had allowed fraud to continue. It is essential to underline that the plaintiffs did not allege intentional conduct on the part of the auditor, but rather the thesis of negligence by omission.

Another landmark jurisdictional approach was in *ATSI Communications, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007).⁶

ATSI Communications, a telecommunications company, needed capital and issued, in 1999, four convertible preferred shares. The particularity of these instruments was that they converted into common shares without a floor, that is the more the price of the common share fell, the more common shares were obtained on conversion. ATSI claimed that the defendant hedge funds, namely *The Shaar Fund*, *Rose Glen Capital Management* and others, had orchestrated a "death-spiral" type scheme. The typology of this scheme was that the defendants short-sold the issuer's common shares to drive down their price, then converted their preferred shares into cheap common shares which they used to cover their position. The mechanism enabled the manipulator to increase its profit, to protect itself against the risk of loss, and to dilute the existing common shares, accentu-

U.S. House of Representatives, <https://uscode.house.gov/view.xhtml?req=%28title%3A15+section%3A78i+edition%3Aprelim%29> and <https://uscode.house.gov/view.xhtml?edition=prelim&f=treesort&num=0&req=granuleid%3AUSC-prelim-title15-section78j>.

⁵ Commodity Exchange Act, 7 U.S.C. § 1 et seq., Office of the Law Revision Counsel, U.S. House of Representatives, <https://uscode.house.gov/view.xhtml?edition=prelim&num=0&req=granuleid%3AUSC-prelim-title7-section1>.

⁶ *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007).

ating the price decline. To prevent this conduct, ATSI had obtained from the buyers declarations that they would not short-sell and did not intend to resell the shares.

The third jurisdictional approach concerns the case *Markowski v. SEC*, 274 F.3d 525 (D.C. Cir. 2001).⁷

Michael J. Markowski was president, chief executive officer and majority shareholder of the brokerage house Global America Inc., while Joseph F. Riccio was also an employee of the company. Global America Inc. acted as market maker for the securities of a company called *Mountaintop*. According to the findings of the National Association of Securities Dealers, *Global America Inc.* artificially maintained the prices of *Mountaintop*'s securities, in the sense that the firm bought these securities in order to support their apparent market price, entered buy quotations above the level necessary for acquisition, which did not reflect genuine demand, and bought up all *Mountaintop* securities not wanted by the market. The essential point is that these findings were not based on a quantitative analysis of the transactions, but on the statements of the firm's own staff. In practice, there was a distinction between the objective approach (requiring a false act or a transaction without economic substance) and the subjective approach (focused on manipulative intent). *Markowski* established the thesis that legitimate open-market transactions may breach the legislation if they are executed with the intent to influence the price. This intent-based approach is of direct relevance to contemporary litigation concerning algorithmic manipulation.

The most significant recent jurisprudential development concerns precisely these algorithmic practices, as seen in *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017). Michael Coscia, a commodities trader, placed large orders through automated trading programs which he intended to cancel before execution, to create an illusion of market movement and to profit from the price variations thus induced. More specifically, Michael Coscia commissioned and used algorithmic trading programs to manipulate the prices of commodity *futures* contracts. The trader simultaneously placed orders of different sizes on either side of the current market price. The large orders were intended never to be executed, their role being that of bait, creating a false appearance of supply or demand that artificially shifted the price. As soon as the market reacted, the trader executed the small, genuine order, profiting from the induced movement, after which he cancelled the large orders.⁸

The court held that placing an order with the intent to cancel it before execution was unlawful.

⁷ *Markowski v. SEC*, 274 F.3d 525 (D.C. Cir. 2001).

⁸ *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017).

2.2. Capital Market Manipulation in Canada

Canada presents a distinct institutional architecture, in which the regulation of securities falls, in principle, within the competence of the constituent provinces, while criminal law is regulated at the federal level. The Canadian Criminal Code criminalizes the fraudulent manipulation of stock-exchange transactions.⁹

The most important decision of the Canadian Supreme Court in this field is in *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28¹⁰. The facts were as follows. The Poonian spouses, Canadian citizens, orchestrated between 2007 and 2009 a scheme to manipulate the share price of a listed oil company called *OSE Corp.* The mechanism consisted in artificially raising the share price, followed by its sale, at overvalued prices, to vulnerable investors, some of whom were persuaded to unlock their retirement savings to buy the securities, suffering losses of millions of dollars.

In another case, resolved by an administrative tribunal (the British Columbia Securities Commission) and not by a court of law, but of equal importance, namely *Re Lim (David Tuan Seng Lim and Michael Mugford)*¹¹, it was found, as in *Poonian v. British Columbia*, that an investment adviser and an associate of his had created an artificial price for the shares of Urban Barns, a shell company, by financing a crude promotional campaign designed to induce in the reader the mistaken belief that the shares were worth far more than they actually were.

2.3. Capital Market Manipulation in the European Union

Union law has evolved from Directive 2003/6/EC on market abuse (the Market Abuse Directive, abbreviated MAD) to the current dual regime of Regulation (EU) No 596/2014 on market abuse (the Market Abuse Regulation, abbreviated MAR), of direct applicability, and Directive 2014/57/EU on criminal sanctions for market abuse, which requires Member States to criminalize serious forms of manipulation. The Regulation defines market manipulation by reference to transactions and orders that give or are likely to give false or misleading signals as to supply, demand or price, those that fix the price at an abnormal or artificial level, the resort to fictitious or deceptive devices, and the dissemination of false information.

⁹ Criminal Code, R.S.C. 1985, c. C-46, s. 382, Justice Laws Website, <https://laws-lois.justice.gc.ca/eng/acts/c-46/section-382.html>.

¹⁰ *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28 (Supreme Court of Canada, July 31, 2024), <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/20555/index.do>.

¹¹ *Re Lim*, 2017 BCSECCOM 196 (British Columbia Securities Commission, June 5, 2017), <https://www.bsc.bc.ca/-/media/PWS/Resources/Enforcement/Decisions/2017/2017-BCSECCOM-196.pdf>.

A particularity of the European system is that the Court of Justice of the European Union does not adjudicate manipulation cases on their merits, but rules only on the interpretation of Union law, its judgments being subsequently applied by the national courts. The relevant CJEU case law is thus grouped around two axes, namely the substantive delimitation of concepts and the fundamental procedural guarantees.

In *Ipourgos Ikonomikon and Proistamenos DOI Amfissas v. Charilaos Georgakis*, C-391/04 (judgment of 10 May 2007)¹², the CJEU was seised of a situation in which a group of shareholders of a company had agreed in advance on reciprocal transactions intended to artificially support the price of the securities.

The dispute concerned the interpretation of Articles 1 to 4 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30). The concepts at the heart of the interpretation were those of “inside information” (Article 1) and of taking advantage “with full knowledge of the facts” of such information (Article 2).

Following the stock-market crisis of November 1996, the Greek authorities investigated transactions in the shares of the companies Parnassos and Atemke. Mr Georgakis and several members of his family (the “Georgakis group”) were the principal shareholders of Parnassos and, at the same time, members of the boards of directors of Parnassos and Atemke, holding management positions. On the recommendation of their financial advisers, the members of the group decided to support the price of the Parnassos shares at a time when their value was under downward pressure, carrying out among themselves various sale, purchase and repurchase operations. These transactions were agreed upon in advance and sought to artificially increase the trading volume to give a misleading impression of the value of the securities. The Capital Markets Commission imposed a fine on Mr. Georgakis, taking the view that he had carried out operations using inside information.

The Court followed a multi-stage line of reasoning. First, it found that a mere recommendation by financial advisers, based on expert analysis, does not meet the cumulative conditions of “inside information”, and that those advisers were not in any of the situations provided for in Article 2 of the Directive; consequently, the members of the group had not acted on the basis of information obtained from the categories of persons covered by the Directive.

Secondly, the Court held that the group’s decision to support the shares established a common position, and that knowledge of the existence and content of that decision constituted, for those who participated in its adoption, inside information within the meaning of Article 1(1).

Thirdly, the Court emphasized that the purpose of Article 2 of Directive

¹² David Moalem and Jesper Lau Hansen, “Insider Dealing and Parity of Information: Is Georgakis Still Valid?,” *European Business Law Review* 19, no. 5 (2008): 949–84, <https://doi.org/10.54648/EULR2008046>.

89/592 was to ensure equality between the contracting parties in stock-exchange transactions, by preventing one of them, who holds inside information and is thus in an advantageous position vis-à-vis the other investors, from profiting from it to the detriment of the party unaware of it.

In the broader context of the concept of market abuse, the CJEU clarified the notion of inside information in cases such as *Spector Photo Group, C-45/08 (2009)*¹³, which concerns Directive 2003/6/EC, *Markus Geltl v. Daimler AG, C-19/11 (2012)*¹⁴, and *Lafonta v. Autorité des marchés financiers, C-628/13 (2015)*¹⁵, the latter holding that, in order to be inside information, the information need not make it possible to anticipate the precise direction of the movement of the share price.

In *Spector Photo Group*, a listed company governed by Belgian law, it established a profit-sharing scheme for employees, under which it offered them share options. To implement the scheme, the company intended to use the shares it held and, if necessary, to buy shares on the market. On 21 May 2003, Spector informed Euronext Brussels of its intention to implement the option scheme and to buy a certain number of its own shares. On 11 and 13 August 2003, Mr Van Raemdonck placed two purchase orders on behalf of the company, which acquired 19,773 shares at an average price of EUR 9.97; subsequently, because of good performance and the publication of certain information, the share price rose, reaching EUR 12.50 on 31 December 2003.

As regards *Markus Geltl v. Daimler AG*, the judgment delivered is a leading authority on the definition of inside information in staggered decision-making processes. It establishes the principle that intermediate steps may each, individually, trigger the disclosure obligation, which has major practical consequences for issuers regarding the timing of communication to the market.

The most influential European jurisprudential contribution in the matter of manipulation concerns, paradoxically, not the definition of the act, but the limits on the accumulation of sanctions (or, more precisely, the *ne bis in idem* principle).

This is illustrated by *Garlsson Real Estate SA and others v. Commissione Nazionale per le Società e la Borsa (Consob), C-537/16*¹⁶. In that case, the Italian National Commission for Companies and the Stock Exchange imposed on Mr Stefano Ricucci and certain undertakings an administrative fine of EUR 10.2 million for market manipulation, committed through operations on the shares of a

¹³ *Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)*, Case C-45/08, ECLI:EU:C:2009:806 (CJEU, December 23, 2009).

¹⁴ Alexander Hellgardt, "The Notion of Inside Information in the Market Abuse Directive: Geltl," *Common Market Law Review* 50, no. 3 (2013): 861–74, <https://doi.org/10.54648/COLA2013087>.

¹⁵ Thierry Bonneau, "XVIII. Banque et finances – Cour de justice, 2e ch., 11 mars 2015, Jean-Bernard Lafonta c/ Autorité des marchés financier, aff. C-628/13," in *Jurisprudence de la CJUE 2015: Décisions et commentaires*, ed. Fabrice Picod (Brussels: Bruylant, 2016), 690–91.

¹⁶ Gianni Lo Schiavo, "The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions," *European Constitutional Law Review* 14, no. 3 (2018): 644–63, <https://doi.org/10.1017/S1574019618000263>.

listed company. For the same acts, criminal proceedings were also brought against Mr Ricucci, ending in a criminal conviction that became final (handed down following a plea agreement, the penalty being subsequently partly extinguished by pardon). Nevertheless, the administrative-sanction proceedings continued, the challenge against the fine reaching the Court of Cassation, which referred the matter to the CJEU.

The Court held, first, that the administrative sanction was criminal in nature and that a fine of such gravity, with a punitive purpose, is criminal in character, beyond its formal classification as “administrative” under Italian law. Secondly, the Court confirmed that the relevant criterion is the identity of the material facts, the same set of concrete circumstances, inextricably linked, concerning the same person, irrespective of their legal classification or the legal interest protected.

The same logic was extended in the joined cases *Enzo Di Puma v. Consob and Consob v. Antonio Zecca*, C-596/16 and C-597/16¹⁷, concerning insider dealing, where the CJEU addressed the effects of a final criminal acquittal on subsequent administrative proceedings.

2.4. Capital Market Manipulation in Japan

Japanese capital market law is codified in the Financial Instruments and Exchange Act (FIEA)¹⁸. The system combines a general anti-fraud prohibition (Article 157 of the FIEA)¹⁹ and the prohibition of spreading rumors or using fraudulent means (Article 158)²⁰ with a detailed and casuistic regulation of manipulation in Article 159²¹. The latter prohibits, among other things, fictitious transactions (so-called *wash sales*) and orders agreed in advance between the parties (so-called *matched orders*) intended to create a false appearance of active trading.

The most important recent case in this field is the case of *SMBC Nikko Securities, the brokerage subsidiary of Sumitomo Mitsui Financial Group*²². The incriminated conduct consisted in placing, before the close of the trading session, massive proprietary buying orders intended to artificially support the price of certain shares, so that the price thus obtained would serve as an advantageous benchmark for the subsequent overnight block sales of shares carried out on behalf of clients.

¹⁷ Lo Schiavo, “The Principle of Ne Bis in Idem,” 644–63.

¹⁸ Financial Instruments and Exchange Act (Act No. 25 of 1948), arts. 157–159, Japanese Law Translation, <https://www.japaneselawtranslation.go.jp/en/laws/view/2355/en>.

¹⁹ Financial Instruments and Exchange Act, art. 157.

²⁰ Financial Instruments and Exchange Act, art. 158.

²¹ Financial Instruments and Exchange Act, art. 159.

²² Takashi Nakamichi and Ryo Horiuchi, “Ex-SMBC Nikko Managers Found Guilty in Market Rigging Case,” Bloomberg News, July 22, 2025, <https://news.bloomberglaw.com/capital-markets/ex-smbc-nikko-managers-face-verdicts-in-market-manipulation-case>.

The Japanese courts sanctioned the manipulative conduct both regarding the company SMBC Nikko, which was found guilty of market manipulation and fined 700 million yen, together with the confiscation of approximately 4.47 billion yen representing the gains obtained, and with regard to the natural persons in the company's management. In 2025, the court convicted the company's former directors for their role in artificially supporting prices ahead of block-offer operations, imposing suspended prison sentences.

The case is significant from several perspectives. First, it illustrates the regime of cumulative liability, of both the legal person (through the fine and confiscation) and the natural persons (through individual prison sentences). Secondly, the case highlights the legal risks for foreign professionals working in Japan, as in the situation of Carlos Ghosn, the former manager of the Renault-Nissan group.

2.5. Capital Market Manipulation in Australia

Australian law concentrates the prohibitions on improper conduct in the capital market in Article 1041 of the Corporations Act 2001.²³

This article is structured into several component parts, as follows: the provision of Article 1041A prohibits carrying out a transaction that has or is likely to have the effect of creating or maintaining an artificial price for trading in financial products on an Australian market. Article 1041B targets fictitious transactions and market rigging, while Article 1041C targets transactions without a change in beneficial ownership; Articles 1041E to 1041H cover false statements and misleading conduct. These prohibitions characteristically give rise to both criminal and civil liability.

The most important case is that in *Director of Public Prosecutions (Cth) v JM [2013] HCA 30*.²⁴

The case concerned a subtle form of market manipulation, through strategic trading and not through the dissemination of false information. The accused was the chief executive officer and director of a company called "X Ltd", listed on the Australian Securities Exchange (ASX). A company associated with him, called "Z ApS", had exercised several transactions in the shares of X Ltd, the financing of the investment of approximately AUD 10 million being provided by Opes Prime Securities in exchange for a security constituted over the shares and options. Under the agreement, the accused had to maintain collateral with a value of at least four times the loan amount, Opes valuing the collateral daily based on

²³ Corporations Act 2001 (Cth), ss. 1041A–1041H, Federal Register of Legislation, <https://www.legislation.gov.au/C2004A00818/latest>.

²⁴ Ann O'Connell, "Protecting the Integrity of Securities Markets—What Is an 'Artificial Price'?": DPP (Cth) v JM," *Opinions on High* (Melbourne Law School), August 1, 2013, <https://blogs.unimelb.edu.au/opinionsonhigh/2013/08/01/o-connell-jm/>.

the closing price of the “X Ltd” shares; if the price fell below the required threshold, Opes could react on account of the potential loss.

In agreement with her father, the accused’s daughter (on behalf of a company controlled by her husband) bought “X Ltd” shares in order to prevent the day’s closing price from falling below the value that would have triggered the reaction on her father’s loan; the purchase was allegedly carried out with the sole, or at least dominant, purpose of preventing such an outcome, and the transaction allegedly had the effect of creating or maintaining an artificial price. The accused was sent to trial for market manipulation and conspiracy to commit that offence. The essential question, therefore, was the meaning of the notion of artificial price. Previously, a lower court had adopted a restrictive interpretation, according to which Article 1041A targeted only manipulation of the supply-control type. The High Court of Australia rejected this interpretation. It held that Article 1041A covers transactions carried out by a buyer or seller on the market with the sole or dominant purpose of setting or maintaining the price at a level that does not reflect the genuine interplay of supply and demand on an open market.

Other relevant cases were the *Bank Bill Swap Rate (BBSW)* cases²⁵, concerning an essential benchmark of the Australian money market. They relate to the proceedings initiated by the Australian Securities and Investments Commission against the four major Australian banks, with the object of manipulating the *Bank Bill Swap Rate* benchmark. In essence, it was found that one company, Westpac, traded with the dominant purpose of influencing the yields relevant to the setting of the BBSW in a manner favorable to itself. Unlike *Westpac*, the other banks concerned entered settlements with ASIC, acknowledging improper conduct. The case demonstrated that, regarding genuine transactions, the boundary between legitimate commercial behavior and manipulation is particularly fine.

2.6. Capital Market Manipulation in Romania

As we have shown, capital market manipulation is regulated both at European level, with direct applicability to acts committed in Romania, and at national level, through Law No 24/2017 on issuers of financial instruments and market operations (republished).

In the national jurisdiction, the act of manipulation has been conditioned on the typicity of the offence, attached to its objective side (the *actus reus*). In the case law, it was held that “following the legislative amendments, the alleged acts of capital market manipulation lack an element of objective typicity, namely the condition of influencing the price; the consequence being that, in the absence of this condition introduced by the new law, the alleged act in accordance with the old law was decriminalized, so that the defendant could not be convicted of these

²⁵ *Australian Securities and Investments Commission v. Westpac Banking Corporation (No 2)* [2018] FCA 751 (Federal Court of Australia, May 24, 2018), <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0751>.

acts, and the plea agreement had to be rejected”²⁶

According to another decision, it was held that the defendant “could not be sent to trial for the act of capital market manipulation because, at the time the criminal investigation was carried out, there already existed settled domestic case law to the effect that this type of offence is not possible on the RASDAQ over-the-counter market, since the latter did not meet the criteria of a regulated market expressly provided for by the criminal law. In this respect, reference was made to the Judgment of the Court of Justice of the European Union (Second Chamber) of 22 March 2012, delivered in Case C-248/11”²⁷

National practice is significantly influenced by the amendments to the criminal legislation, which have led either to the limitation period barring criminal liability or to the absence of the material elements of the offence of capital market manipulation.

3. Conclusions

Business criminal law in general, and capital market manipulation in particular, highlight the predominantly intentional nature of business crimes, the technical complexity of the applicable rules, and the central role played by the criminal liability of legal entities²⁸.

In conclusion, it should be noted that capital market manipulation takes appreciably different normative and jurisprudential forms. The distinction between legitimate market conduct and manipulation may be drawn by verifying the existence of an additional fictitious or deceptive element (the American orientation), the requirement of a specific subjective purpose objectively inferred (the Japanese model), and the objective criterion of the artificial price (the Australian model).

The leading judgments identified together outline a comparative case law on manipulation in full maturation, confronted at once with the technological innovation of trading and with the requirements of fundamental guarantees. The effectiveness of combating manipulation depends on the clarity of the element that distinguishes the offence from lawful conduct and on the coherence of the architecture articulating criminal, administrative and civil liability, without, however, infringing the *ne bis in idem* principle.

²⁶ Înalta Curte de Casație și Justiție, Secția penală, Decizia nr. 37/RC/2021, Sintact, <https://sintact.ro/#/jurisprudence/520852762>.

²⁷ Înalta Curte de Casație și Justiție, Secția penală, Decizia nr. 668/RC/2023, Sintact, <https://sintact.ro/#/jurisprudence/520876403/>.

²⁸ Claudiu-Gabriel Galu, *Dreptul afacerilor* (Bucharest: C.H. Beck, 2026); Claudiu Galu, *Dreptul de regres. Regresul în dreptul afacerilor* (Bucharest: C.H. Beck, 2020); Claudiu-Gabriel Galu, “Acțiune în anularea unei hotărâri a adunării generale a asociaților unei societăți cu răspundere limitată. Succintă cercetare între calea dreptului special și cea a dreptului comun privind acțiunea în declararea nulității unei hotărâri a adunării generale,” *Pandectele Române*, no. 5 (2025): 75–90.

Bibliography

I. Books and Articles

1. Bonneau, Thierry. "XVIII. Banque et finances – Cour de justice, 2e ch., 11 mars 2015, Jean-Bernard Lafonta c/ Autorité des marchés financier, aff. C-628/13." In *Jurisprudence de la CJUE 2015: Décisions et commentaires*, edited by Fabrice Picod, 690–91. Brussels: Bruylant, 2016.
2. Galu, Claudiu-Gabriel. *Dreptul afacerilor*. Bucharest: C.H. Beck, 2026.
3. Galu, Claudiu. *Dreptul de regres. Regresul în dreptul afacerilor*. Bucharest: C.H. Beck, 2020.
4. Galu, Claudiu-Gabriel. "Acțiune în anularea unei hotărâri a adunării generale a asociațiilor unei societăți cu răspundere limitată. Succintă cercetare între calea dreptului special și cea a dreptului comun privind acțiunea în declararea nulității unei hotărâri a adunării generale." *Pandectele Române*, no. 5 (2025): 75–90. <https://pandectele.ro/actiune-in-anularea-unei-hotarari-a-adunarii-generale-a-asociațiilor-unei-societati-cu-raspundere-limitata-succinta-cercetare-intre-calea-dreptului-special-si-cea-a-dreptului-comun-privind-actiunea-in/>.
5. Hellgardt, Alexander. "The Notion of Inside Information in the Market Abuse Directive: Geltl." *Common Market Law Review* 50, no. 3 (2013): 861–74. <https://doi.org/10.54648/COLA2013087>.
6. Lange, Ann-Christina, Marc Lenglet, and Robert Seyfert. "High-Frequency Trading, Spoofing and Conflicting Epistemic Regimes: Accounting for Market Abuse in the Age of Algorithms." *Economy and Society* 53, no. 4 (2024): 603–626. <https://doi.org/10.1080/03085147.2024.2413809>.
7. Lo Schiavo, Gianni. "The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions." *European Constitutional Law Review* 14, no. 3 (2018): 644–63. <https://doi.org/10.1017/S1574019618000263>.
8. Moalem, David, and Jesper Lau Hansen. "Insider Dealing and Parity of Information: Is Georgakis Still Valid?" *European Business Law Review* 19, no. 5 (2008): 949–84. <https://doi.org/10.54648/EULR2008046>.
9. Nakamichi, Takashi, and Ryo Horiuchi. "Ex-SMBC Nikko Managers Found Guilty in Market Rigging Case." Bloomberg News, July 22, 2025. <https://news.bloomberglaw.com/capital-markets/ex-smbc-nikko-managers-face-verdicts-in-market-manipulation-case>.
10. O'Connell, Ann. "Protecting the Integrity of Securities Markets—What Is an 'Artificial Price'?": DPP (Cth) v JM." *Opinions on High*, Melbourne Law School, August 1, 2013. <https://blogs.unimelb.edu.au/opinionsonhigh/2013/08/01/o-connell-jm/>.

II. Legislation and Official Sources

1. Australia. *Corporations Act 2001* (Cth), ss. 1041A–1041H. Federal Register of Legislation. <https://www.legislation.gov.au/C2004A00818/latest>.
2. Canada. *Criminal Code*, R.S.C. 1985, c. C-46, s. 382. Justice Laws Website. <https://laws-lois.justice.gc.ca/eng/acts/c-46/section-382.html>.

3. Japan. *Financial Instruments and Exchange Act* (Act No. 25 of 1948), arts. 157–159. Japanese Law Translation. <https://www.japaneselawtranslation.go.jp/en/laws/view/2355/en>.
4. United States. *Commodity Exchange Act*, 7 U.S.C. § 1 et seq. Office of the Law Revision Counsel, U.S. House of Representatives. <https://uscode.house.gov/view.xhtml?edition=prelim&num=0&req=granuleid%3AUSC-prelim-title7-section1>.
5. United States. *Securities Exchange Act of 1934*, 15 U.S.C. §§ 78i(a), 78j(b). Office of the Law Revision Counsel, U.S. House of Representatives. <https://uscode.house.gov/view.xhtml?req=%28title%3A15+section%3A78i+edition%3Aprelim%29>.

III. Cases and Decisions

1. *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007).
2. *Australian Securities and Investments Commission v. Westpac Banking Corporation (No 2)* [2018] FCA 751 (Federal Court of Australia, May 24, 2018). <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0751>.
3. *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30, 250 CLR 135 (High Court of Australia, June 27, 2013).
4. *Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Consob v. Antonio Zecca*, Joined Cases C-596/16 and C-597/16, ECLI:EU:C:2018:192 (CJEU, March 20, 2018). <https://eur-lex.europa.eu/legal-content/EN/CASE/?uri=celex%3A62016CJ0596>.
5. *Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob)*, Case C-537/16, ECLI:EU:C:2018:193 (CJEU, March 20, 2018). <https://eur-lex.europa.eu/legal-content/EN/CASE/?uri=celex%3A62016CJ0537>.
6. *Jean-Bernard Lafonta v. Autorité des marchés financiers*, Case C-628/13, ECLI:EU:C:2015:162 (CJEU, March 11, 2015).
7. *Markus Geltl v. Daimler AG*, Case C-19/11, ECLI:EU:C:2012:397 (CJEU, June 28, 2012).
8. *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28 (Supreme Court of Canada, July 31, 2024). <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/20555/index.do>.
9. *Re Lim*, 2017 BCSECCOM 196 (British Columbia Securities Commission, June 5, 2017). <https://www.bsc.bc.ca/-/media/PWS/Resources/Enforcement/Decisions/2017/2017-BCSECCOM-196.pdf>.
10. *Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)*, Case C-45/08, ECLI:EU:C:2009:806 (CJEU, December 23, 2009).
11. *Ypourgos Oikonomikon and Proïstamenos DOY Amfissas v. Charilaos Georgakis*, Case C-391/04, ECLI:EU:C:2007:272 (CJEU, May 10, 2007).

Dominant Position in Personal Data Protection: Intersections Between Competition Law and Data Protection

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Abstract

The monetization of personal data, informational power, and the ability to condition access to a service on acceptance of personal data processing have brought competition law and personal data protection closer together. This paper examines the concept of dominant position from the perspective of personal data processing, based on the premise that economic and informational power exercised over users/data subjects may influence the exercise of the fundamental rights to privacy and personal data protection. It analyses the mechanisms through which undertakings holding a dominant position may use significant volumes of personal data to strengthen their market power, as well as the impact of such practices on the validity of consent, freedom of choice, autonomy, and the vulnerability of data subjects. The analysis also considers relationships characterized by an imbalance of power, such as the employer–employee relationship and the relationship between entities that hold and exploit informational resources and data subjects, where the collection and combination of data from multiple sources may be assessed both under the GDPR and under the rules governing abuse of a dominant position. The paper highlights that a power imbalance may affect the assessment of whether consent is freely given, access to services, and freedom of choice, and may constitute a relevant factor in evaluating the lawfulness of personal data processing and the effective exercise of rights guaranteed by the GDPR. From this perspective, data subjects may become vulnerable both in traditional relationships characterized by an imbalance of power, such as employer–employee or public authority–citizen relationships, and in their interactions with digital platforms.

Keywords: competition law, personal data protection, dominant position, artificial intelligence

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1. Introduction

In recent years, personal data have become resources of the digital economy. At the same time, major digital platforms have acquired economic and informational power in relation to their users. Starting from this reality, the research seeks to answer the following question: Can a dominant position influence the exercise of data subjects' rights?

Traditionally, dominant position is a concept specific to competition law. Data protection law, by contrast, operates with the notion of an imbalance of power between the controller and the data subject. The research hypothesis is that these two concepts describe the same legal reality from different perspectives. More specifically, economic and informational power may affect a person's freedom to exercise their rights and to give consent freely. Accordingly, a dominant position may produce effects on competition and the functioning of the market, and also on the exercise of fundamental rights.

To test this hypothesis, the principal European and international legislative instruments were analysed. These include, *inter alia*, the General Data Protection Regulation², the Digital Markets Act³, the Digital Services Act⁴, and the Artificial Intelligence Act⁵. Although they belong to different legal fields, they pursue a common objective: limiting the concentration of digital power and protecting the data subject. In this context, competition, data protection, and artificial intelligence can no longer be analysed separately, but must be considered together because they regulate different manifestations of the same form of power.

The research methodology combines doctrinal analysis, case-law analysis, and the comparative method. Legal instruments concerning competition, data protection, digital platforms, and artificial intelligence were compared. The legal method was also used to identify, examine, and interpret provisions of European Union law and national law concerning competition and data protection. Documents issued by the European Union, the Organisation for Economic Co-operation and Development, the Council of Europe, and the United Nations were also

² Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 (May 4, 2016): 1–88.

³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265 (October 12, 2022): 1–66.

⁴ Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19, 2022, on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277 (October 27, 2022): 1–102.

⁵ Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonised rules on artificial intelligence and amending certain Union legislative acts (Artificial Intelligence Act), OJ L 2024/1689 (July 12, 2024).

analysed. The comparative analysis examines whether these fields are evolving in the same direction. Competition law seeks to limit the concentration of economic power, while data protection seeks to limit the imbalance between the controller and the data subject. The Artificial Intelligence Act⁶ seeks to limit risks generated by algorithmic power. The Digital Markets Act⁷ and the Digital Services Act⁸ seek to limit the power of digital platforms. In essence, all these instruments attempt to regulate the same reality: the concentration of digital power. In the past, dominant position was assessed almost exclusively according to economic criteria. Today, controllers control both markets and very large volumes of data, as well as the algorithms that use those data. For this reason, the paper proposes supplementing the traditional analysis with two additional concepts: informational power and algorithmic power. These forms of power complement economic power and explain the influence exercised over the data subject. The research does not seek automatically to transfer the concept of dominant position from competition law into data protection law. It proposes, however, using it as a legal indicator of the existence of a power imbalance. Such an imbalance may influence the validity of consent, freedom of choice, and the autonomy of the data subject.

Empirically, the commercialization of personal data has produced two developments that intensify the intersection between the two legal fields. One concerns the attention given to personal data in competition assessment, including the definition of the relevant market and the assessment of market power. The other involves increased attention to data privacy in competition analysis, particularly as a non-price parameter.⁹

The German Federal Cartel Office prohibited Facebook¹⁰ from combining data obtained from its internal and external services with each user's account, on the ground that such processing infringed the GDPR and that the social network held a dominant position. The terms of use and privacy notices were considered insufficient to obtain users' consent because use of the social-network service was made conditional on integrating user data collected through other internal services, such as WhatsApp and Instagram, as well as data collected by external publishers or advertisers. Combining the data remains possible only with the user's consent.¹¹

⁶ Regulation (EU) 2024/1689 (Artificial Intelligence Act).

⁷ Regulation (EU) 2022/1925 (Digital Markets Act).

⁸ Regulation (EU) 2022/2065 (Digital Services Act).

⁹ Samson Y. Esayas, "The Interface between Data Privacy and Competition Law: Insights from Complexity Science," in *Data Privacy and Competition Law in the Age of Big Data: Unpacking the Interface Through Complexity Science* (Oxford: Oxford University Press, 2024), 151–196, <https://doi.org/10.1093/oso/9780198891420.003.0005>.

¹⁰ Bundeskartellamt, *Facebook*, Decision B6-22/16, February 6, 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/11_07_2019_decisionFacebook.html.

¹¹ Pranvera Këllezi, "Data Protection and Competition Law: Non-Compliance as Abuse of Dominant Position," *sui generis* (2019): 343–359, <https://doi.org/10.21257/sg.114>.

2. Dominant Position and Imbalance of Power

Competition law prohibits the abusive use of a dominant position held by one or more companies on the Romanian market. The prohibition concerns anti-competitive conduct capable of affecting economic activity or harming consumers.¹²

A dominant position refers to economic power that enables an undertaking, to an appreciable extent, to behave independently of its competitors and consumers, including its customers.¹³

The classic definition originates in *United Brands* and was subsequently consolidated in *Hoffmann-La Roche*¹⁴, remaining the interpretative benchmark for Article 102 TFEU.¹⁵

These two cases, decided shortly after one another (*United Brands* – 1978 and *Hoffmann-La Roche* – 1979), shaped the definition of dominant position, a concept against which the EU had provided protection even before establishing its precise definition. These definitions and criteria were reflected in Council Regulation (EC) No 1/2003¹⁶, together with Regulation No 773/2004¹⁷, which governed procedural aspects relating to Regulation No 1/2003.¹⁸

Dominance is not unlawful in itself, but it imposes on undertakings a special responsibility not to impair effective competition.¹⁹ Assessing dominance therefore requires defining the relevant market, evaluating market shares, and examining barriers to entry and expansion. In digital markets, the analysis also includes network effects, economies of scale, access to data, and switching costs.²⁰

¹² Romania, Competition Law No. 21/1996, art. 6, republished in *Monitorul Oficial al României*, no. 153, February 29, 2016.

¹³ Court of Justice of the European Union, *United Brands Company and United Brands Continental BV v Commission*, Case 27/76, judgment of February 14, 1978, ECLI:EU:C:1978:22, para. 65.

¹⁴ Court of Justice of the European Union, *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, judgment of February 13, 1979, ECLI:EU:C:1979:36.

¹⁵ Consolidated Version of the Treaty on the Functioning of the European Union, art. 102, OJ C 202 (June 7, 2016): 89.

¹⁶ Council Regulation (EC) No. 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 (January 4, 2003): 1–25.

¹⁷ Commission Regulation (EC) No. 773/2004 of April 7, 2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123 (April 27, 2004): 18–24.

¹⁸ Endri Papajorgji and Artela Roshi, “ECJ Case 27/76 *United Brands v Commission* and Case 85/76 *Hoffmann-La Roche* Analyzed in the Framework of Albanian Competition Law,” *Academic Journal of Business, Administration, Law and Social Sciences* 9, no. 2 (2023): 12–20, <https://doi.org/10.2478/ajbals-2023-0002>.

¹⁹ Court of Justice of the European Union, *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, ECLI:EU:C:1979:36; Court of Justice of the European Union, *Post Danmark A/S v Konkurrencerådet*, Case C-209/10, judgment of March 27, 2012, ECLI:EU:C:2012:172, para. 23.

²⁰ OECD, *The Evolving Concept of Market Power in the Digital Economy*, OECD Roundtables on Competition Policy Papers, no. 278 (Paris: OECD Publishing, 2022), <https://doi.org/10.1787/2c>

Recent scholarship describes data as a strategic resource capable of strengthening market power and creating informational barriers. Doctrinal developments have shifted the focus from the formalism of market shares towards analysis of effects, contestability, and the durability of economic power.²¹

This paper examines the debate over whether competition law and data protection law can “go hand in hand.” More specifically, it considers whether an infringement of data protection law may also constitute a competition-law infringement and serve as a basis for finding that a dominant undertaking has abused its position in digital markets. A breach of data protection rules may be regarded as a breach of competition rules only where a convincing theory of harm, supported by robust evidence, demonstrates harm to competition.²²

In this context, competition authorities are encouraged to explore the extent to which data-related anticompetitive practices may be addressed through behavioural remedies that enhance data protection. Depending on the circumstances, competition authorities may pursue a case involving either exclusionary or exploitative abuse, with appropriate remedies in each situation.²³ From the perspective of UNCTAD instruments, a dominant position denotes a situation in which one or more undertakings have the ability, with respect to supply or demand, to act in a substantially independent manner from other market participants, including competitors, customers, and consumers.²⁴

Holding such a position is not prohibited in itself; what is sanctioned is its abusive use. Abuse may take the form of imposing unfair prices or trading conditions, limiting production or technical development, applying discriminatory conditions, imposing supplementary obligations, engaging in exclusionary practices, refusing to deal, or restricting access to essential infrastructure.²⁵ Nevertheless, the practices of a dominant undertaking are not considered abusive where the undertaking demonstrates objective justifications,

fc4a8-en; European Commission, “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,” 2009/C 45/02.

²¹ Inge Graef, “Market Definition and Market Power in Data: The Case of Online Platforms,” *World Competition* 38, no. 4 (2015): 473–506; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Alphen aan den Rijn: Kluwer Law International, 2016).

²² Marija Stojanovic, “Can Competition Law Protect Consumers in Cases of a Dominant Company Breach of Data Protection Rules?” *European Competition Journal* 16, nos. 2–3 (2020): 531–569, <https://doi.org/10.1080/17441056.2020.1824464>.

²³ Alessia D’Amico, “Aligning Remedies in Abuse of Dominance Cases with Data Protection Principles,” Privacy International, January 22, 2021, <https://privacyinternational.org/long-read/4400/aligning-remedies-abuse-dominance-cases-data-protection-principles>.

²⁴ United Nations Conference on Trade and Development (UNCTAD), *Handbook on Competition Legislation, Volume II: Consolidated Report 2013–2014*, art. 3.5, <https://unctad.org/publication/handbook-competition-legislation-volume-ii-consolidated-report-2013-2014>.

²⁵ UNCTAD, *Handbook on Competition Legislation, Volume II: Consolidated Report 2013–2014*, art. 9.

including technical or commercial reasons.²⁶

Although the GDPR and competition law may apply to the same actors and activities, they are distinct legal fields, based on different legal concepts and objectives and possessing their own enforcement frameworks. Whereas data protection law seeks to guarantee data subjects' fundamental right to personal data protection against unlawful, unfair, and non-transparent processing, competition law seeks to "protect the efficient functioning of markets."²⁷ It is therefore necessary to assess the situations in which data protection and competition interact.²⁸

Despite their differences, the two legal regimes pursue at least three common objectives, including the protection of competition. This permits a holistic approach that takes account of both competition policy and data protection considerations.

2.1. Can a Dominant Position Exist in Personal Data Protection?

The concept of dominant position traditionally belongs to competition law. It was developed to assess economic power exercised on the market. The transformations of the digital economy, however, require reconsideration of the limits of this concept.

The analysis considers whether conduct favourable to data protection may infringe Article 102 TFEU. Despite their differences, the two legal regimes pursue at least three common objectives, including the protection of competition. Three scenarios must therefore be distinguished. The first concerns situations in which data-protection-friendly conduct has pro-competitive or neutral effects; in such cases, abuse of a dominant position is excluded. The second concerns conduct strictly required by data protection law; because an undertaking has no option other than to comply with the applicable rules, it cannot be held liable for the anticompetitive effects of that conduct. The third concerns situations in which a dominant undertaking invokes data protection as justification for anticompetitive conduct; in that case, a rigorous proportionality assessment is required.²⁹

A dominant position in data protection may be understood as a situation

²⁶ UNCTAD, *Handbook on Competition Legislation, Volume II: Consolidated Report 2013–2014*, art. 9.

²⁷ European Commission, Directorate-General for Competition, *EU Competition Policy in Action: COMP in Action* (Luxembourg: Publications Office of the European Union, 2017), <https://doi.org/10.2763/897035>.

²⁸ European Data Protection Board, *Position Paper on Interplay between Data Protection and Competition Law*, adopted January 16, 2025, https://www.edpb.europa.eu/documents/other-policy-document/position-paper-on-interplay-between-data-protection-and-competition_en.

²⁹ Klaus Wiedemann, "Can Data Protection Friendly Conduct Constitute an Abuse of Dominance under Art 102 TFEU?" in *Research Handbook on Data, Privacy and Competition Law*, ed. Maria Ioannidou and Despoina Mantzari (Cheltenham: Edward Elgar Publishing, 2025), 208–234, <https://doi.org/10.4337/9781802202335.00018>.

in which a controller exercises significant influence over the exercise of a data subject's rights. Such influence may result from economic, informational, or technological power. In practice, these forms of power may operate simultaneously.

Control over data, algorithms, and digital infrastructures therefore brings new forms of influence. From this perspective, dominant position may also be analysed in relation to the data subject, with market power no longer constituting the sole central element. The analysis should consequently focus on the effects exerted on the data subject. In data protection, an imbalance of power affects the validity of consent and the effectiveness of the individual's control over personal data processing.

The General Data Protection Regulation defines consent as a freely given, specific, informed, and unambiguous indication of the data subject's wishes.³⁰

Recital 43 of the same Regulation presumes an absence of genuine freedom where there is a clear imbalance between the controller and the data subject or where provision of a service depends on consent.³¹ The conditions governing consent may be structurally or only tangentially affected by the fact that consent is given in specific fields, such as research or marketing, or by particular categories of data subjects, such as children.³²

The European Data Protection Board indicates that relationships with public authorities and employers generally entail a serious risk that consent may be merely apparent.³³

A contractual imbalance arises where terms are non-negotiable and refusal of processing results in economic loss, functional exclusion, or significant disadvantages, including personal disadvantages. Vulnerability is not exclusively subjective; it also results from the architecture of the legal relationship and the asymmetry of power.

The Meta judgment³⁴ confirms that a dominant position does not automatically invalidate consent, but constitutes a decisive factor in assessing whether

³⁰ Christopher Kuner, Lee A. Bygrave, and Christopher Docksey, eds., *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: Oxford University Press, 2020).

³¹ Regulation (EU) 2016/679, recital 43; European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*, version 1.1, adopted May 4, 2020, secs. 3.1.1–3.1.2.

³² Daniel-Mihail Șandru, "Elemente privind reglementarea consimțământului în prelucrarea datelor cu caracter personal, potrivit art. 6 din Regulamentul nr. 2016/679," *Revista Română de Drept al Afacerilor*, no. 5 (2017): 129–135.

³³ European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*, version 1.1, adopted May 4, 2020; European Data Protection Board, *Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms*, April 17, 2024.

³⁴ Court of Justice of the European Union, *Meta Platforms Inc., Meta Platforms Ireland Ltd and Facebook Deutschland GmbH v Bundeskartellamt*, Case C-252/21, judgment of July 4, 2023, ECLI:EU:C:2023:537, paras. 147–154.

it is freely given.³⁵

2.2. Imbalance of Power and the Validity of Consent

Consent constitutes a freely given, specific, informed, and unambiguous indication of the data subject's wishes. The data subject accepts the processing of personal data by means of a statement or a clear affirmative action.³⁶ This notion reflects the principles of individual autonomy and control over one's own data.³⁷ Under the Civil Code, valid consent of the parties must be genuine, free, given with full knowledge, specific, informed, and unambiguous.³⁸ The essential role of consent is emphasized by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union³⁹.

The General Data Protection Regulation recognizes that certain relationships are characterized by an imbalance of power. In such situations, consent must be assessed with caution, the employer–employee relationship being the example most frequently cited. The data subject's economic dependence on the employer may affect freedom of individual decision-making.

The same reasoning may be extended to the digital environment. Users may depend on services provided by social-media platforms. In practice, access to certain services may be made conditional on acceptance of extensive data processing. The user's practical ability to refuse may therefore become limited. None of the situations in which data are processed without consent may be used to the detriment of private life for the company's purposes, such as improving efficiency or increasing profit.⁴⁰

The data subject may accept imposed conditions without a genuine choice, thereby affecting the freely given nature of consent. The issue concerns not only the lawfulness of processing, but also the effective protection of individual autonomy. The imbalance of power must therefore be analysed as a relevant factor when assessing the validity of consent.

³⁵ Alessia Sophia D'Amico, "Market Power and the GDPR: Can Consent Given to Dominant Companies Ever Be Freely Given?" *European Papers: A Journal on Law and Integration* 8, no. 2 (2023): 611–629, <https://doi.org/10.15166/2499-8249/678>.

³⁶ Regulation (EU) 2016/679, art. 4(11).

³⁷ Daniela Duță, "Inacțiunea persoanei vizate în arhitectura protecției datelor: între consimțământ și riscurile deciziei automatizate în sistemele cu inteligență artificială," in *Tăcerea, pasivitatea și inacțiunea în arhitectura dreptului* (Bucharest: Universul Juridic, 2026), ISBN 978-606-39-1957-2.

³⁸ Romanian Civil Code, art. 1204.

³⁹ Charter of Fundamental Rights of the European Union, arts. 7–8, OJ C 202 (June 7, 2016): 389–405; Daniela Duță, "De la consimțământul electronic la tranzacțiile asistate de inteligență artificială: contractele digitale în Uniunea Europeană," *Revista Română de Drept Comercial*, no. 1 (2026): 124.

⁴⁰ Daniel-Mihail Șandru, "Situatii în care este permisă prelucrarea datelor cu caracter personal fără consimțământul persoanei vizate," in *Regulamentul general privind protecția datelor cu caracter personal. Comentarii și explicații*, ed. Andrei Săvescu (Bucharest: Hamangiu, 2018), 39–48.

2.3. Dominant Position and the Vulnerability of the Data Subject

The data subject is the holder of the rights established by the GDPR and the reference point for the lawfulness of any data processing.⁴¹ Legal autonomy requires adequate information, a genuine capacity to choose, and the possibility of withdrawing without suffering detriment.⁴²

This autonomy becomes fragile when access to essential or quasi-essential services is made conditional on acceptance of extensive processing.⁴³ Conditioning services in this manner transforms consent into an instrument of compliance rather than an authentic and autonomous choice.

Legal vulnerability describes heightened exposure to structural constraints, informational asymmetries, and the practical impossibility of refusal. In platform environments, vulnerability may result from social or communicational dependence on a single intermediary.

Legal vulnerability thus becomes a cross-cutting criterion for competition, data protection, platform regulation, and artificial-intelligence governance.⁴⁴ Personal data play a constitutive role in artificial-intelligence systems; whether structured or unstructured, data form part of the nature of artificial intelligence.⁴⁵

3. From Economic Power to Informational Power

Digital transformation has generated new forms of power, among which informational power occupies an important place. Informational power results from the capacity to collect, process, and exploit data relating to persons and behaviour. This capacity makes it possible to anticipate preferences and influence individual decisions.

In the digital economy, data are often described as a strategic resource whose value derives from their potential use for economic and technological pur-

⁴¹ Regulation (EU) 2016/679; Council of Europe, *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*, ETS No. 108, January 28, 1981.

⁴² European Data Protection Board, *Consent under GDPR: When to Act and What to Do* (May 2026), https://www.edpb.europa.eu/system/files/2026-04/edpb-summary-consent_en.pdf; Kuner, Bygrave, and Docksey, eds., *The EU General Data Protection Regulation (GDPR): A Commentary*.

⁴³ Court of Justice of the European Union, *Meta Platforms v Bundeskartellamt*, Case C-252/21, paras. 149–152; European Data Protection Board, *Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms*.

⁴⁴ Regulation (EU) 2016/679, recital 75; Regulation (EU) 2022/1925 (Digital Markets Act); Regulation (EU) 2024/1689 (Artificial Intelligence Act); Orla Lynskey, “Grappling with ‘Data Power’: Normative Nudges from Data Protection and Privacy,” *Theoretical Inquiries in Law* 20, no. 1 (2019): 189–220, <https://doi.org/10.1515/til-2019-0007>.

⁴⁵ Daniel-Mihail Șandru, “Relația dintre protecția datelor și inteligența artificială. Impactul reglementării inteligenței artificiale în Uniunea Europeană,” *Revista Română de Drept European*, no. 1 (2023): 84–91.

poses. Continuous data collection enables the development of services and personalized marketing to optimize commercial processes. At the same time, it contributes to improving algorithms and artificial-intelligence systems.

Informational power may therefore generate competitive advantages, as controllers holding substantial volumes of data benefit from enhanced opportunities for innovation and development.

Data accumulation also produces effects that extend beyond the economic sphere and may influence the exercise of data subjects' fundamental rights and freedoms.

Under these conditions, informational power becomes relevant both to competition law and to personal data protection law.

3.1. Economic, Informational, and Algorithmic Power

Digital power frequently derives from the continuous accumulation, combination, and exploitation of personal and behavioural data.⁴⁶

Data increase the accuracy of profiling, the effectiveness of advertising, and the capacity for algorithmic improvement of services, generating cumulative advantages. These advantages produce positive externalities for the platform and negative externalities for users through loss of control and intensified surveillance. Network effects increase the value of a service as the number of users grows, reinforcing tendencies towards concentration and dependence.⁴⁷ Lock-in⁴⁸ arises where switching provider entails losing contacts, history, preferences, or functionalities accumulated within the ecosystem.⁴⁹

Algorithmic power arises where the controller determines rankings, recommendations, prioritization of access, and conditions of economic visibility.⁵⁰

Digital dominance therefore results from the convergence of capital, data, computing infrastructure, and automated decision-making architectures.

⁴⁶ OECD, *The Intersection between Competition and Data Privacy*, OECD Roundtables on Competition Policy Papers, no. 310 (Paris: OECD Publishing, 2024), <https://doi.org/10.1787/0dd065a3-en>; Graef, *EU Competition Law, Data Protection and Online Platforms*.

⁴⁷ OECD, *The Evolving Concept of Market Power in the Digital Economy*; European Commission, "EU Citizens Q&A – Digital Markets Act," accessed June 22, 2026.

⁴⁸ On switching costs and vendor lock-in in digital platforms, see OECD, *Data Portability, Interoperability and Competition*, OECD Roundtables on Competition Policy Papers, no. 260 (Paris: OECD Publishing, 2021), <https://doi.org/10.1787/73a083a9-en>.

⁴⁹ OECD, *Data Portability, Interoperability and Competition*; Inge Graef, "Mandating Portability and Interoperability in Online Social Networks: Regulatory and Competition Law Issues in the European Union," *Telecommunications Policy* 39, no. 6 (2015): 502–514, <https://doi.org/10.1016/j.telpol.2015.04.001>.

⁵⁰ Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Cambridge, MA: Harvard University Press, 2016).

4. International Convergence between Competition and Data Protection

4.1. Competition Law at the International Level

Unlike other fields of law, no international treaty of universal scope concerning competition was identified. Nevertheless, important cooperation mechanisms have been developed.

The Role of UNCTAD in Developing Competition Standards. The United Nations Conference on Trade and Development is the principal international body involved in promoting competition policies. Its activities address both developed economies and emerging states.⁵¹

The OECD's Contribution to Competition Governance. The Competition Committee of the Organisation for Economic Co-operation and Development promotes regular exchanges of views and analyses on competition-policy issues. It influences contemporary competition policies, and its recommendations are frequently used in legislative processes.⁵²

The International Competition Network provides competition agencies worldwide with a dedicated network for addressing issues concerning enforcement of competition laws and policies of common interest. It facilitates procedural and substantive convergence in antitrust enforcement and merger control.⁵³

Council of Europe Convention 108+. Convention 108+ guarantees respect for fundamental rights and freedoms, particularly the right to privacy, with regard to the automated processing of personal data. Extending the Convention's applicability to non-EU states underscores its recognition as a global foundation for data protection, to be respected without discrimination. At the institutional level, the Council of Europe Framework Convention on Artificial Intelligence (2024) is analysed as an expression of a new constitutive phase in international law, demonstrating that technological regulation lies at the intersection of sovereignty, fundamental rights, and concern for the future.⁵⁴

⁵¹ UN Trade and Development (UNCTAD), "About UN Trade and Development (UNCTAD)," accessed September 13, 2026, <https://unctad.org/about>.

⁵² OECD, "Competition," accessed September 13, 2026, <https://www.oecd.org/en/topics/competition.html>.

⁵³ European Commission, "International Competition Network (ICN)," accessed September 13, 2026, https://competition-policy.ec.europa.eu/international-relations/multilateral-cooperation/icn_en.

⁵⁴ Cristina Elena Popa Tache, "Artificial Intelligence, Existential Risks and International Obligations," in *Law, Ethics and Human Vulnerability: Global Perspectives on Responsibility and Governance*, ed. Cătălin-Silviu Săraru, Cristina Elena Popa Tache, and Federica Cristani (Cham: Springer Nature Switzerland, 2026), 41–69, https://doi.org/10.1007/978-3-032-19547-0_2.

5. Dominant Position, Consent, and Control of Data

From Dominant Position to the Concept of Gatekeeper. Major digital platforms control infrastructures that provide access to services and information and occupy important positions in contemporary digital ecosystems. The European Union responded to this challenge by adopting the Digital Markets Act⁵⁵, which introduces the concept of the gatekeeper. The notion of gatekeeper does not replace dominant position in competition law. The two concepts nevertheless pursue related objectives. A gatekeeper is an operator that controls access to markets and users.⁵⁶ Its power derives from the strategic position it occupies in the digital environment. The Digital Markets Act adopts a preventive approach, seeking to limit risks before anticompetitive effects arise.

Artificial Intelligence and the Accumulation of Informational Power. The development of artificial intelligence has increased the importance of personal data, which constitute a principal element required for training systems and models. The AIA builds upon the GDPR modulating its legal impact, but without directly contradicting it or affecting its scope of application, avoiding major damage. In doing so, it illustrates that it is possible to legislate to support the deployment of AI while respecting EU fundamental rights protection, certainly on paper and at least to some extent.⁵⁷

From a historical perspective, the emergence of automated and opaque data processing was the starting point for the legal reflection that gave rise to data protection legislation. Protecting individuals against the power of the machine was, and remains, one of its fundamental rationales. For decades, data protection appeared to be the key instrument for protecting individuals in the context of artificial intelligence and, implicitly, a necessary condition for its adoption in democratic societies — the first line of defence for democracy in the face of technological development.⁵⁸

The Artificial Intelligence Act adopts a risk-based approach and seeks to prevent uses that affect human dignity and individual autonomy. Controllers that hold significant volumes of data enjoy technological advantages that may contribute to strengthening their dominant position on the market. In this context, data protection and artificial-intelligence regulation pursue complementary objectives, both seeking to limit the negative effects of the concentration of digital power.

⁵⁵ Regulation (EU) 2022/1925 (Digital Markets Act).

⁵⁶ Regulation (EU) 2022/1925 (Digital Markets Act), art. 3.

⁵⁷ Gloria González Fuster, “The AI Act and the GDPR,” in *The EU Artificial Intelligence Act: A Thematic Commentary*, ed. Gianclaudio Malgieri, Gloria González Fuster, Alessandro Mantelero, and Gabriela Zanfir-Fortuna (Oxford: Hart Publishing, 2026).

⁵⁸ Gloria González Fuster, “Caught Between AI and the AI Hype: How the Right to Personal Data Protection Was Ambushed,” *Rivista di Diritti Comparati*, Special Issue VIII (2026): 106–124.

Personal Data as a Source of Competitive Advantage. In the digital economy, data constitute a strategic resource comparable to infrastructure or capital, and their economic value is indisputable. This dual nature explains the growing proximity between competition and data protection. Control over data simultaneously produces economic and legal effects. Consequently, analysis of digital power cannot be limited to traditional economic indicators. The assessment must also include the informational dimension and proportionality tests.

Meta Platforms v Bundeskartellamt. The convergence between competition law and data protection has also become visible in the recent case law of the Court of Justice of the European Union.

A key reference is Case C-252/21, *Meta Platforms Inc. and Others v Bundeskartellamt*.⁵⁹

The dispute concerned practices involving the collection and combination of data relating to users of the Facebook service. The data originated both from services within the Meta group and from third-party sources.

The German competition authority considered that these practices could constitute an abuse of a dominant position. Its assessment was based on the effects produced on users.

Meta challenged the competition authority's competence to examine data-protection issues. The dispute therefore reached the Court of Justice, which held that competition authorities may take data protection rules into account where this is relevant to the application of competition law. The judgment clarifies how regulatory rules may influence competition assessments and highlights the potential for competition authorities to consider the broader market and regulatory landscape without exceeding their mandate.⁶⁰ The judgment does not transform competition authorities into data protection authorities. It does, however, recognize the interdependence between the two fields.

Another aspect of the judgment concerns consents as a legal basis for processing, the opportunities for using data protection as a benchmark in competition law, and, ultimately, the challenges of addressing data protection through the lens of competition law in the online environment.⁶¹

Under the GDPR, consent must be freely given, specific, informed, and unambiguous. These requirements safeguard individual autonomy.

The Court emphasized that the existence of a dominant position does not automatically invalidate consent. It nevertheless constitutes a relevant factor in

⁵⁹ Court of Justice of the European Union, *Meta Platforms v Bundeskartellamt*, Case C-252/21, ECLI:EU:C:2023:537, paras. 147–154.

⁶⁰ Arletta Gorecka, "On the Interplay between Competition Law and Privacy: The Impact of Meta Platforms Case," *European Competition Journal* 20, no. 3 (2024): 555–576, <https://doi.org/10.1080/17441056.2024.2324586>.

⁶¹ Ana-Maria Hriscu, "C-252/21 Meta v Bundeskartellamt: The Lawfulness of Big Tech's Processing of Personal Data and the Relationship Between Data Protection and Competition Law," *European Data Protection Law Review* 9, no. 3 (2023): 371, <https://doi.org/10.21552/edpl/2023/3/15>.

the assessment.

The controller's economic power may influence user behaviour; in certain circumstances, the data subject may perceive a lack of genuine alternatives. This may affect freedom of individual decision-making. The validity of consent must therefore be assessed with particular care.

The Court's approach brings the competition-law concept of dominant position closer to the data-protection notion of imbalance of power. In both situations, the concern is the exercise of disproportionate influence over a person in a weaker position.

The Meta judgment highlights the limits of an exclusively economic approach to dominant position.

In the digital economy, power is manifested not only through control of the market, but also through control of data and informational infrastructures. Digital operators may influence both competition and the exercise of fundamental rights; this phenomenon therefore justifies an interdisciplinary analysis.

6. Prospects for Developing a Global Framework on Digital Power

At present, digital power is regulated through different legal instruments. Competition law analyses dominant position and its effects on the market. Data protection seeks to safeguard autonomy and privacy.

The transformations analysed in this paper indicate an expansion in the significance of dominant position, with the concept no longer confined to its economic dimension. Control over data and algorithms may generate comparable forms of influence, affecting both competition and the exercise of fundamental rights. In this context, dominant position may be regarded as one manifestation of digital power. Such an approach facilitates dialogue between different branches of law. Developing this concept may constitute a future direction for legal research. Its importance will increase as the use of artificial intelligence expands.

7. Research Results and Conclusions

The research highlights a convergence between competition law and personal data protection, driven by the economic and informational role of data. In the digital economy, economic power is complemented by informational and algorithmic power, while control over data may reinforce competitive advantages and asymmetries in relation to data subjects.

The analysis of case law, particularly Meta Platforms/Bundeskartellamt, demonstrates the relevance of dominant position to assessing the context of data processing and whether consent is freely given. The imbalance of power thus becomes a connecting element between competition law and data protection.

The principal contribution of the research is the proposal to use dominant position as a legal indicator of an imbalance of power, without automatically

transferring this concept into data protection law. Such an approach makes it possible to assess the effects of economic and informational power on freedom of choice, autonomy, and the effective exercise of data subjects' rights.

Future research should extend to the effects of algorithmic power and generative artificial intelligence on competition and data protection.

In conclusion, dominant position remains an institution of competition law, but it may serve as an indicator for identifying power imbalances that affect the exercise of data subjects' rights in the digital environment.

Bibliography

I. Books and Articles

1. D'Amico, Alessia. "Aligning Remedies in Abuse of Dominance Cases with Data Protection Principles." Privacy International, January 22, 2021. <https://privacyinternational.org/long-read/4400/aligning-remedies-abuse-dominance-cases-data-protection-principles>.
2. D'Amico, Alessia Sophia. "Market Power and the GDPR: Can Consent Given to Dominant Companies Ever Be Freely Given?" *European Papers: A Journal on Law and Integration* 8, no. 2 (2023): 611–629. <https://doi.org/10.15166/2499-8249/678>.
3. Duță, Daniela. "De la consimțământul electronic la tranzacțiile asistate de inteligență artificială: contractele digitale în Uniunea Europeană." *Revista Română de Drept Comercial*, no. 1 (2026): 124.
4. Duță, Daniela. "Inacțiunea persoanei vizate în arhitectura protecției datelor: între consimțământ și riscurile deciziei automatizate în sistemele cu inteligență artificială." In *Tăcerea, pasivitatea și inacțiunea în arhitectura dreptului*. Bucharest: Universul Juridic, 2026. ISBN 978-606-39-1957-2.
5. Esayas, Samson Y. "The Interface between Data Privacy and Competition Law: Insights from Complexity Science." In *Data Privacy and Competition Law in the Age of Big Data: Unpacking the Interface Through Complexity Science*, 151–196. Oxford: Oxford University Press, 2024. <https://doi.org/10.1093/oso/9780198891420.003.0005>.
6. Ezrachi, Ariel, and Maurice E. Stucke. *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*. Cambridge, MA: Harvard University Press, 2016.
7. González Fuster, Gloria. "Caught Between AI and the AI Hype: How the Right to Personal Data Protection Was Ambushed." *Rivista di Diritti Comparati*, Special Issue VIII (2026): 106–124.
8. González Fuster, Gloria. "The AI Act and the GDPR." In *The EU Artificial Intelligence Act: A Thematic Commentary*, edited by Gianclaudio Malgieri, Gloria González Fuster, Alessandro Mantelero, and Gabriela Zafir-Fortuna. Oxford: Hart Publishing, 2026.
9. Gorecka, Arletta. "On the Interplay between Competition Law and Privacy: The Impact of Meta Platforms Case." *European Competition Journal* 20, no. 3 (2024): 555–576. <https://doi.org/10.1080/17441056.2024.2324586>.

10. Graef, Inge. *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility*. Alphen aan den Rijn: Kluwer Law International, 2016.
11. Graef, Inge. "Mandating Portability and Interoperability in Online Social Networks: Regulatory and Competition Law Issues in the European Union." *Telecommunications Policy* 39, no. 6 (2015): 502–514. <https://doi.org/10.1016/j.tel-pol.2015.04.001>.
12. Graef, Inge. "Market Definition and Market Power in Data: The Case of Online Platforms." *World Competition* 38, no. 4 (2015): 473–506.
13. Hriscu, Ana-Maria. "C-252/21 Meta v Bundeskartellamt: The Lawfulness of Big Tech's Processing of Personal Data and the Relationship Between Data Protection and Competition Law." *European Data Protection Law Review* 9, no. 3 (2023): 371. <https://doi.org/10.21552/edpl/2023/3/15>.
14. Këllezi, Pranvera. "Data Protection and Competition Law: Non-Compliance as Abuse of Dominant Position." *sui generis* (2019): 343–359. <https://doi.org/10.21257/sg.114>.
15. Kuner, Christopher, Lee A. Bygrave, and Christopher Docksey, eds. *The EU General Data Protection Regulation (GDPR): A Commentary*. Oxford: Oxford University Press, 2020.
16. Lynskey, Orla. "Grappling with 'Data Power': Normative Nudges from Data Protection and Privacy." *Theoretical Inquiries in Law* 20, no. 1 (2019): 189–220. <https://doi.org/10.1515/til-2019-0007>.
17. Papajorgji, Endri, and Artela Roshi. "ECJ Case 27/76 United Brands v Commission and Case 85/76 Hoffmann-La Roche Analyzed in the Framework of Albanian Competition Law." *Academic Journal of Business, Administration, Law and Social Sciences* 9, no. 2 (2023): 12–20. <https://doi.org/10.2478/ajbals-2023-0002>.
18. Popa Tache, Cristina Elena. "Artificial Intelligence, Existential Risks and International Obligations." In *Law, Ethics and Human Vulnerability: Global Perspectives on Responsibility and Governance*, edited by Cătălin-Silviu Săraru, Cristina Elena Popa Tache, and Federica Cristani, 41–69. Cham: Springer Nature Switzerland, 2026. https://doi.org/10.1007/978-3-032-19547-0_2.
19. Șandru, Daniel-Mihail. "Elemente privind reglementarea consimțământului în prelucrarea datelor cu caracter personal, potrivit art. 6 din Regulamentul nr. 2016/679." *Revista Română de Drept al Afacerilor*, no. 5 (2017): 129–135.
20. Șandru, Daniel-Mihail. "Relația dintre protecția datelor și inteligența artificială. Impactul reglementării inteligenței artificiale în Uniunea Europeană." *Revista Română de Drept European*, no. 1 (2023): 84–91.
21. Șandru, Daniel-Mihail. "Situații în care este permisă prelucrarea datelor cu caracter personal fără consimțământul persoanei vizate." In *Regulamentul general privind protecția datelor cu caracter personal. Comentarii și explicații*, edited by Andrei Săvescu, 39–48. Bucharest: Hamangiu, 2018.
22. Stojanovic, Marija. "Can Competition Law Protect Consumers in Cases of a Dominant Company Breach of Data Protection Rules?" *European Competition Journal* 16, nos. 2–3 (2020): 531–569. <https://doi.org/10.1080/17441056.2020.1824464>.
23. Wiedemann, Klaus. "Can Data Protection Friendly Conduct Constitute an Abuse of Dominance under Art 102 TFEU?" In *Research Handbook on Data, Privacy and Competition Law*, edited by Maria Ioannidou and Despoina Mantzari, 208–

234. Cheltenham: Edward Elgar Publishing, 2025. <https://doi.org/10.4337/9781802202335.00018>.

II. Legislation and Official Sources

1. Charter of Fundamental Rights of the European Union. OJ C 202 (June 7, 2016): 389–405.
2. Commission Regulation (EC) No. 773/2004 of April 7, 2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. OJ L 123 (April 27, 2004): 18–24.
3. Council of Europe. *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*. ETS No. 108, January 28, 1981.
4. Council Regulation (EC) No. 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1 (January 4, 2003): 1–25.
5. European Commission. “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.” 2009/C 45/02.
6. European Commission. “International Competition Network (ICN).” Accessed September 13, 2026. https://competition-policy.ec.europa.eu/international-relations/multilateral-cooperation/icn_en.
7. European Commission, Directorate-General for Competition. *EU Competition Policy in Action: COMP in Action*. Luxembourg: Publications Office of the European Union, 2017. <https://doi.org/10.2763/897035>.
8. European Data Protection Board. *Consent under GDPR: When to Act and What to Do*. May 2026. https://www.edpb.europa.eu/system/files/2026-04/edpb-summary-consent_en.pdf.
9. European Data Protection Board. *Guidelines 05/2020 on Consent under Regulation 2016/679*. Version 1.1. Adopted May 4, 2020.
10. European Data Protection Board. *Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms*. April 17, 2024.
11. European Data Protection Board. *Position Paper on Interplay between Data Protection and Competition Law*. Adopted January 16, 2025.
12. OECD. “Competition.” Accessed September 13, 2026. <https://www.oecd.org/en/topics/competition.html>.
13. OECD. *Data Portability, Interoperability and Competition*. OECD Roundtables on Competition Policy Papers, no. 260. Paris: OECD Publishing, 2021. <https://doi.org/10.1787/73a083a9-en>.
14. OECD. *The Evolving Concept of Market Power in the Digital Economy*. OECD Roundtables on Competition Policy Papers, no. 278. Paris: OECD Publishing, 2022. <https://doi.org/10.1787/2cfc4a8-en>.
15. OECD. *The Intersection between Competition and Data Privacy*. OECD Roundtables on Competition Policy Papers, no. 310. Paris: OECD Publishing, 2024. <https://doi.org/10.1787/0dd065a3-en>.
16. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 (General Data Protection Regulation). OJ L 119 (May 4, 2016):

- 1–88.
17. Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022 (Digital Markets Act). OJ L 265 (October 12, 2022): 1–66.
 18. Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19, 2022 (Digital Services Act). OJ L 277 (October 27, 2022): 1–102.
 19. Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024 (Artificial Intelligence Act). OJ L 2024/1689 (July 12, 2024).
 20. Romania. Competition Law No. 21/1996. Republished in *Monitorul Oficial al României*, no. 153, February 29, 2016.
 21. Treaty on the Functioning of the European Union, consolidated version. OJ C 202 (June 7, 2016).
 22. UN Trade and Development (UNCTAD). “About UN Trade and Development (UNCTAD).” Accessed September 13, 2026. <https://unctad.org/about>.
 23. United Nations Conference on Trade and Development (UNCTAD). *Handbook on Competition Legislation, Volume II: Consolidated Report 2013–2014*. <https://unctad.org/publication/handbook-competition-legislation-volume-ii-consolidated-report-2013-2014>.

III. Cases and Decisions

1. Bundeskartellamt. *Facebook*. Decision B6-22/16, February 6, 2019. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/11_07_2019_decisionFacebook.html.
2. Court of Justice of the European Union. *Hoffmann-La Roche & Co. AG v Commission*. Case 85/76. Judgment of February 13, 1979. ECLI:EU:C:1979:36.
3. Court of Justice of the European Union. *Meta Platforms Inc., Meta Platforms Ireland Ltd and Facebook Deutschland GmbH v Bundeskartellamt*. Case C-252/21. Judgment of July 4, 2023. ECLI:EU:C:2023:537.
4. Court of Justice of the European Union. *Post Danmark A/S v Konkurrencerådet*. Case C-209/10. Judgment of March 27, 2012. ECLI:EU:C:2012:172.
5. Court of Justice of the European Union. *United Brands Company and United Brands Continentaal BV v Commission*. Case 27/76. Judgment of February 14, 1978. ECLI:EU:C:1978:22.

Regulatory Models for Artificial Intelligence in Education in European Union Countries

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Abstract

In the context in which artificial intelligence (AI) is permeating education services, it becomes necessary to establish regulatory frameworks for the ethical use of AI, limiting negative effects and maximizing benefits of using AI for students and teachers. The purpose of this comparative study is to investigate how the EU countries regulate the use of AI in education. The objectives of the study are: evaluating the normative and methodological framework applicable to the use of AI in education, identifying and analyzing the rights and obligations of students and teachers related to the use of AI, identifying and analyzing elements of convergence and divergence of regulatory frameworks of EU states. The study sample consist of five EU countries (Greece, Estonia, Czech, Denmark and Romania). The research methodology includes a qualitative content analysis of the laws, strategies, methodological guides developed by member states and the European regulatory framework. This is complemented by a comparative evaluation grid. The results highlight different concerns of the member states regarding the regulation of AI in education, but also convergence elements relating to the importance of GDPR. The conclusions contribute to substantiating the regulatory framework in Romania based on good practices taken from the member states.

Keywords: artificial intelligence, education, normative framework, methodological framework.

JEL Classification: K24, K38

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1. Introduction

Although artificial intelligence (AI) has been around since 1950², it became known to people all over the world only in 2022 when ChatGPT has been released³. Just a few years after the emergence of this natural language processing system, AI became present in everyday activities and more and more attractive⁴ thanks to the help it can bring, as making decision or solving problems in different areas, like mathematics⁵.

The growing presence of AI in essential areas of society as education, has raised concerns among researchers regarding the need to establish a legal framework governing the use of AI in education services⁶. The academic environment in particular, but also other public and private institutions, support the existence of a globally approved and applied regulatory framework in AI⁷.

Also, studies highlight a number of factors that should be considered in developing regulatory frameworks for the use of AI in education. Thus, institutional policies, along with ensuring equitable access to AI tools are considered important for the integration of this new technology in education⁸. Other researchers support that AI should be used in education in the most responsible way possible and by respecting academic integrity⁹. The protecting of personal information is considered equally important because the more AI is used in education, the lower the privacy of students. Through a chain reaction, the more information about students is known, the more vulnerable they become in online¹⁰.

² Michael Haenlein and Andreas Kaplan, "A Brief History of Artificial Intelligence: On the Past, Present, and Future of Artificial Intelligence," *California Management Review* 61, no. 4 (2019): 5–14, <https://doi.org/10.1177/0008125619864925>.

³ Nikita Malik and Menal Dahiya, "Interacting with ChatGPT: Impact on Students and Teaching-Learning," *Sigma Journal of Engineering and Natural Sciences* 42, no. 6 (2024): 1736–48, <https://doi.org/10.14744/sigma.2023.00147>.

⁴ Francisco J. García-Peñalvo, Faraón Llorens-Largo, and Javier Vidal, "The New Reality of Education in the Face of Advances in Generative Artificial Intelligence," *RIED—Revista Iberoamericana de Educación a Distancia* 27, no. 1 (2024): 9–39, <https://doi.org/10.5944/ried.27.1.37716>.

⁵ Jonas Souza Barreira, Marcos Guilherme Moura Silva, and Tadeu Oliver Gonçalves, "Desafios e oportunidades para o uso do Chat GPT na pesquisa em educação matemática," *Revista Ibero-Americana de Estudos em Educação* 19, special no. 2 (2024): e024084, <https://doi.org/10.21723/ri-aeec.v19iesp.2.18594>.

⁶ Mehul Mahrishi, Asad Abbas, and Mohammad Khubeb Siddiqui, "Global Initiatives Towards Regulatory Frameworks for Artificial Intelligence (AI) in Higher Education," *Digital Government: Research and Practice* 6, no. 2 (2025): article 20, 1–9, <https://doi.org/10.1145/3672462>.

⁷ Mahrishi, Abbas, and Siddiqui, "Global Initiatives Towards Regulatory Frameworks."

⁸ Gary Reyes, Roberto Tolozabo-Benites, Carlos George-Reyes, Dayron Rumbaut, and Julio Barzola-Monteses, "Adoption of Artificial Intelligence Applications in Higher Education," *Frontiers in Education* 10 (2025): 1680401, <https://doi.org/10.3389/feduc.2025.1680401>.

⁹ Zizhuo Zhang, Lian Wen, Yanfei Jiang, and Yongli Liu, "Evaluate Chat-GPT's Programming Capability in Swift Through Real University Exam Questions," *Software: Practice and Experience* 54, no. 11 (2024): 2129–43, <https://doi.org/10.1002/spe.3330>.

¹⁰ Lan Huang, "Ethics of Artificial Intelligence in Education: Student Privacy and Data Protection,"

At the level of European Union (EU), most member states have aligned themselves with these needs of the educational community, some of these establishing strict regulatory frameworks to regulate the use of AI in education, and most of them adopting methodological guidelines to support educational institutions in the face of inadequate use of AI by students.

The purpose of this comparative pilot study is to investigate how the EU countries regulate the use of AI in education. The objectives of the study are: evaluating the normative and methodological framework applicable to the use of AI in education, identifying and analyzing the rights and obligations of students and teachers related to the use of AI, identifying and analyzing elements of convergence and divergence of regulatory frameworks of EU states.

In this pilot study, the analysis focuses on four EU member states: Greece, Estonia, the Czech Republic, Denmark. To these is added Romania, the fifth country selected in particular to identify best practices in the other countries. The selection of the four states was determined on the one hand, the rate of use of AI according to European statistical databases, and on the other hand, the interest given to both education and AI. According to Eurostat, in 16 of the 27 EU member states over 70% of young people aged 16 to 24 used AI in 2025. Of these countries, the top four member states that have the highest percentages of AI use are: Greece (83,54%), Estonia (82,81%), Czech (78,47%), Denmark (77,64%). Romania presents the lowest rate of individual AI use by young people (44,05%)¹¹.

Regarding concerns for education and the evolution of AI, Greece is among the 7 European countries where one of the AI Factory will be developed with the aim of providing innovative public services with the help of AI¹². Estonia excelled in the last PISA test with the best results in mathematics towards the other EU member states, including above the average of the countries included in the analysis¹³. Also, this country carries out ambitious programs for the introduction of AI in education¹⁴. The Czech Republic aims to stand out internationally in the AI sector by a center that brings together specialist from academic and private sector, contributing to the development and integration of innovative AI systems

Science Insights Education Frontiers 16, no. 2 (2023): 2577–87, <https://doi.org/10.15354/sief.23.re202>.

¹¹ Eurostat, “Individuals – Use of Generative AI Tools,” Data Browser, accessed June 8, 2026, https://ec.europa.eu/eurostat/databrowser/view/isoc_ai_iaiu/bookmark/table?lang=en&bookmarkId=45e9481a-e577-4b03-80c1-ab654032ff65&c=1769165540000.

¹² OECD, “Greece,” in *Progress in Implementing the European Union Coordinated Plan on Artificial Intelligence (Volume 1): Member States’ Actions* (Paris: OECD Publishing, 2025), https://www.oecd.org/en/publications/progress-in-implementing-the-european-union-coordinated-plan-on-artificial-intelligence-volume-1_6d530a88-en/greece_e5215c30-en.html.

¹³ OECD, *PISA 2022 Results (Volume I): The State of Learning and Equity in Education* (Paris: OECD Publishing, 2023), <https://doi.org/10.1787/53f23881-en>.

¹⁴ Eurydice, “Estonia: AI Leap Initiative to Enhance Learning and Teaching,” March 2025, accessed June 11, 2026, <https://eurydice.eacea.ec.europa.eu/news/estonia-ai-leap-initiative-enhance-learning-and-teaching>.

in several key areas, such as education¹⁵. Also, according to an analysis, in Czech Republic AI is accessed to a significant extent by children and young people for school tasks. Thus, 42% of students use AI to create texts, and 39% use AI for understanding certain concepts¹⁶. From 2024, at the initiative of the Danish ministry of Education, a Center with the purpose of developing innovative anthropocentric AI tools, operates in Denmark¹⁷. There is also a Consortium of universities dedicated to developing AI infrastructure for research and education¹⁸.

Romania is only at the beginning of the steps regarding the introduction AI in education and it was included in this pilot study, as previously mentioned, in order to identify examples of good practices that could be taken from the other four analyzed states, on the basis of the similarities and, in particular, the differences identified during the analysis.

2. Research Methodology

In this pilot study, research methodology includes a qualitative content analysis on EU regulations in the field of AI, as well as on the AI strategies of the five analyzed states and on normative and methodological acts with national applicability regarding the use of AI in education. The analysis focuses on how the use of AI in pre-university education is regulated.

The qualitative content analysis is complemented by a comparative evaluation grid. This is carried out on the strategies of the analyzed states following criteria such as the existence of strategic measures related to the use of AI in preschool, primary, secondary and high school education, training of managers and teachers. Also, a comparative evaluation grid is carried out on the analyzed normative and methodological frameworks, following criteria such as: prohibition or permission to use AI during exams, homework achievement and student evaluation, respect for equal opportunities in the use of AI, respect for ethical principles, autonomy in decision making on the use of AI.

¹⁵ OECD, "Czechia," in *Progress in Implementing the European Union Coordinated Plan on Artificial Intelligence (Volume 1): Member States' Actions* (Paris: OECD Publishing, 2025), https://www.oecd.org/en/publications/progress-in-implementing-the-european-union-coordinated-plan-on-artificial-intelligence-volume-1_6d530a88-en/czechia_0482b6c9-en.html.

¹⁶ Marie Jaron Bedrosova, Vojtech Dvorak, Hana Machackova, Iveta Jansova, Karolina Bielikova, Maria Jurikova, and Karolina Kozumplikova, *Generative Artificial Intelligence through the Eyes of Czech Children and Adolescents: Findings from the EU Kids Online V Project* (Brno: Masaryk University, 2026), https://is.muni.cz/publication/2553899/euko_ai_report_en.pdf.

¹⁷ OECD, "Denmark," in *Progress in Implementing the European Union Coordinated Plan on Artificial Intelligence (Volume 1): Member States' Actions* (Paris: OECD Publishing, 2025), 4, https://www.oecd.org/en/publications/progress-in-implementing-the-european-union-coordinated-plan-on-artificial-intelligence-volume-1_6d530a88-en/denmark_89c393fa-en.html.

¹⁸ OECD, "Denmark," 3.

3. Analysis of Strategic Concerns Regarding AI in Education

Aiming to become a global leader in AI, as stated in its policy documents, EU was concerned with the development of strategic documents and normative acts to ensure the explanation and use of AI in education in an ethical and appropriate manner¹⁹.

At EU level, the strategic framework is represented in particular by the Action Plan for the European continent, which defines five main pillars. These include: expansion and development of a very strong computing infrastructure, access to high quality data for the purpose of AI development, developing AI skills along with creating a talent base and simplification of the regulations²⁰. To fulfill the fourth pillar, related to AI skills, in 2024 a strategic plan was developed targeting the education services sector. This establishes, among others, creating new curricula that include the study of AI, expanding access to training, promoting inclusion and the ethical use of AI, promoting the opportunities and challenges that AI can bring in the process of developing AI skills²¹.

In the process of alignment with the common European strategic framework, all member states have developed their own strategies in the field of AI development and each of them includes in the strategic documents a section dedicated to developing the AI skills. This section covers the education services sector by default. Differences arise in how this technology is intended to be included in education at the level of each state, as shown in **Table 1**.

All AI strategies of the five analyzed countries include strategic objectives and measures related to the introduction on AI in high school education. The differences are noted in the case of other levels of education. Greece aims to introduce AI from pre-school education and defines its strategic objectives according to three levels: in the first level, students learn fundamental AI concepts and develop critical thinking through exploratory learning, the second level allows passionate students to become AI developers, and the last level includes higher education²².

Similarly, the Estonian AI strategy, published in 2019, aims to include AI

¹⁹ Andreea-Nicoleta Dragomir, "The Role of the European Union in Shaping an Ethical and Legal Framework for Artificial Intelligence (AI) in Education," *Review of Artificial Intelligence in Education* 6 (2025): 1–17, <https://doi.org/10.37497/rev.artif.intell.educ.v6ii.48>.

²⁰ European Commission, *AI Continent Action Plan*, COM(2025) 165 final (Brussels, April 9, 2025), <https://digital-strategy.ec.europa.eu/en/library/ai-continent-action-plan>, accessed May 8, 2026.

²¹ Artificial Intelligence Skills Alliance (ARISA), *AI Skills Strategy for Europe* (2024), https://aiskills.eu/wp-content/uploads/2025/04/ARISA_AI-Skills-Strategy-for-Europe_2024.pdf, accessed June 18, 2026.

²² Hellenic Republic, Presidency of the Government, Special Secretariat of Foresight, High-Level Advisory Committee on Artificial Intelligence, *A Blueprint for Greece's AI Transformation* (2024), https://foresight.gov.gr/wp-content/uploads/2024/11/Blueprint_GREECES_AI_TRANSFORMATION.pdf, accessed May 2, 2026.

from preschool to high school level. Along with including AI in school curricula, the aims are also to train public sector managers, including those in the education services sector, in the field on AI²³.

Table 1. Comparative grid on strategic objectives related to the introduction of AI in education

Country	Strategic measures regarding the introduction of AI in					
	High school	Lower secondary education	Primary education	Preschool education	AI skills for teachers	AI skills for managers
Greece	Yes	Yes	Yes	Yes	Yes	-
Estonia	Yes	Yes	Yes	Yes	Yes	Yes
Czech	Yes	Yes	Yes	-	Yes	Yes
Denmark	Yes	Yes	Yes	-	Yes	-
Romania	Yes	-	-	-	Yes	Yes

Source: data collected and processed by the author from the national strategies in the field of AI

On the other hand, the Czech Republic and Denmark do not mention strategic measures dedicate to the inclusion of AI in preschool education, according to the analysed strategies. Denmark proposed in 2019, when the still current strategy was published, to introduce AI into education by developing pilot programs that, on the one hand, help students learn to use AI tools, and on the other hand, develop critical thinking about any AI generated product²⁴. Also, the Czech Republic aims to modify its curricula by including AI subjects, as well as a special focus on developing creative thinking among students²⁵.

In Romania, the AI strategy was approved by the Government in 2024. In this strategy, unlike the previously analyzed states, it is mentioned the introduction of the AI study in high school, by adapting the content of existing disciplines or introducing optional subjects²⁶.

²³ Government of the Republic of Estonia, *Estonia's National Artificial Intelligence Strategy 2019–2021* (July 2019), https://f98cc689-5814-47ec-86b3-db505a7c3978.filesusr.com/ugd/7df26f_27a618cb80a648c38be427194affa2f3.pdf, accessed May 4, 2026.

²⁴ European Commission, “Denmark AI Strategy Report,” AI Watch, last updated September 1, 2021, https://ai-watch.ec.europa.eu/countries/denmark/denmark-ai-strategy-report_en#human-capital, accessed May 1, 2026.

²⁵ Ministry of Industry and Trade of the Czech Republic, *National Artificial Intelligence Strategy of the Czech Republic* (2019), https://mpo.gov.cz/assets/cz/rozcestnik/pro-media/tiskove-zpravy/2019/6/NAIS_eng_korektura_06-19_web.pdf, accessed May 3, 2025.

²⁶ Government of Romania, Government Decision No. 832 of July 11, 2024, approving the *National Strategy in the Field of Artificial Intelligence 2024–2027*, *Monitorul Oficial al României*, Part I,

Another similarity of the strategic objectives of the states included in this study is that they all attach importance to the training of teachers so that they have competences to use AI in teaching and administrative activities.

Estonia, the Czech Republic and Romania mention concerns regarding AI training for managers in educational institutions in their national strategic frameworks. Among these, the Czech Republic aims to develop pilot programs through which school managers will use specialized AI tools to streamline management activities²⁷.

Thus, the pillar established by the EU regarding skills development is reflected in the strategic documents of the analyzed states, some of these including a broader future perspective and setting more ambitious targets, such as Greece.

4. Analysis of AI Regulation in Education

In order to establish harmonised rules at EU level in the context of the introduction of AI in more and more areas of activity, the European Parliament has adopted Regulation (EU) 2024/1689. This is the first international regulatory act that includes rules to limit the risks associated with the use of AI. Article 5 prohibits the use of AI tools that detect the emotional state of individual, particularly in the field of employment and education services, as a result of the fact that they can provide erroneous results that ultimately lead to treat those individuals in an unfavorable or even harmful way²⁸. Annex 3 of the Regulation indicated that the AI tools used in the study admission processes, distribution of candidates, assessment of skills, detecting students who cheat during exams, are considered high-risk AI systems, as a result of the fact that they can have a major influence on fundamental rights and on the educational path of an individual²⁹. Thus, before implementing such an AI tool, the institutions responsible for providing these services have the obligation to analyze the impact it may have on the rights of the beneficiary of the education services. In 2026, the European Commission also launched a set of guidelines dedicated to teachers and students for the ethical use of AI in education. It emphasized the importance of equality in access to AI tools, along with their ethical and transparent use.³⁰

no. 730 (July 25, 2024).

²⁷ Ministry of Industry and Trade of the Czech Republic, *National Artificial Intelligence Strategy of the Czech Republic*.

²⁸ European Union, Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), OJ L 2024/1689 (July 12, 2024), <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng>.

²⁹ Regulation (EU) 2024/1689, annex III.

³⁰ European Commission, Directorate-General for Education, Youth, Sport and Culture, *Guidelines on the Ethical Use of Artificial Intelligence and Data in Teaching and Learning for Educators* (Luxembourg: Publications Office of the European Union, 2026), <https://doi.org/10.2766/7967834>.

Given that each member state has its own regulations regarding the organization and functioning of education services, its own level of digitalization and the different quality of infrastructure, it is becoming a challenge to apply the common legislative rules established at EU level.³¹

In Greece, education sector is supervised by the Ministry, through its subordinate departments, and the decision-making autonomy of managers in schools is limited, with official recommendations on giving greater confidence to their experience.³²

In Estonia, education is decentralised and educational institutions have a high degree of decision-making autonomy, with requires a greater need for monitoring teaching activities³³. The Czech Republic also offers schools a significant level of autonomy and the education system is, also, decentralised, with fragmented governance³⁴. Similar to Estonia and the Czech Republic, managers in preuniversity education have an increased degree of freedom in decision making in Denmark³⁵. In Romania, directors in preuniversity education have quite limited autonomy, as an important role is given to the Country School Inspectorates³⁶.

Regarding establishing rules for the use of AI in the education sector, Greece is noted at EU level as the first state to issue a binding normative act with national applicability that regulates the use of AI in education and the protection personal data of the students in the context of using AI. Decision no. 55909 of May 2026 of the Government of Greece lays down a series of mandatory provisions for teachers, students, parents, managers and providers of AI tools used in educational institutions³⁷.

In Estonia, The Ministry of Education and Research published in 2024 a Guide with recommendations for the educational community on the integration of AI in education³⁸. Similarly, the Czech Republic released in 2024 a guide to

³¹ Consolidated Version of the Treaty on the Functioning of the European Union, art. 165(1), OJ C 202 (June 7, 2016): 120, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E165>.

³² OECD, *Improving Learning Outcomes in Greece: Strengthening School Governance, Teacher Professionalism and Digital Education* (Paris: OECD Publishing, 2026), <https://doi.org/10.1787/6323bd8e-en>.

³³ OECD, "Enhancing Data-Informed Strategic Governance in Education in Estonia," *OECD Education Policy Perspectives*, no. 47 (Paris: OECD Publishing, 2021), <https://doi.org/10.1787/11495e02-en>.

³⁴ OECD, "Education Policy Outlook in the Czech Republic," *OECD Education Policy Perspectives*, no. 11 (Paris: OECD Publishing, 2020), <https://doi.org/10.1787/6363ab1d-en>.

³⁵ OECD, "Education Policy Outlook in Denmark," *OECD Education Policy Perspectives*, no. 12 (Paris: OECD Publishing, 2020), <https://doi.org/10.1787/3288629c-en>.

³⁶ OECD, *Education and Skills in Romania* (Paris: OECD Publishing, 2025), <https://doi.org/10.1787/594cbb5d-en>.

³⁷ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, "Determining Issues Related to the Use of Artificial Intelligence Systems in the Educational Process and the Protection of Personal Data," Government Gazette B 2639 (May 12, 2026), <https://www.e-nomothesia.gr/kat-ekpaideuse/kya-55909-d6-2026.html>.

³⁸ Haridus- ja Teadusministeerium [Estonian Ministry of Education and Research], *Tehisaru juhend*

using AI in primary and secondary schools, developed by the National Pedagogical Institute³⁹.

Denmark also has a methodological framework for the use of AI in education. The ministry, through the Danish Agency for Education, has formulated three guidelines with recommendations for lower primary and secondary education, higher secondary education and vocational training. In Denmark, the development of the guide for higher secondary education had as a starting point the uncertainty of students on how much they are allowed to use AI for school activities, and on the other hand the growing mistrust of teachers in student work⁴⁰.

In Romania, there is no official national normative or methodological framework to establish rules or recommendations related to the use of AI tools in education. In May 2026, ECDL Romania launched a guide to support Romanian schools in using AI⁴¹, but this does not represent a set of methodological guidelines belonging to the central authorities that manage education in Romania, which is why it was not included in this analysis. Some of the higher education institutions have developed their own internal regulations by which they have established rules for the use of AI. Also, the Country School Inspectorate of Dâmbovița published in 2025 a set of guidelines dedicated to the use of AI by English language teachers⁴². It is considered that, in the absence of any unitary legislative norms, Romania will not be able to align with member states and EU norms in this integration of AI in education⁴³.

A summary of the comparison regarding the normative and methodological framework of the analyzed states regarding AI in education is given in **Table 2**.

In accordance with art. 2, part. 3 of the aforementioned Government Decision, Greece does not oblige the educational community to use AI systems in

[*Artificial Intelligence Guide*] (2024), <https://www.hm.ce/sites/default/files/documents/2024-03/Tehisaru%20juhend%202024.pdf>, accessed May 12, 2026.

³⁹ Ministry of Education, Youth and Sports of the Czech Republic, “NPI ČR Issued Guides for Teachers on How to Use Artificial Intelligence in Schools,” 2024, <https://msmt.gov.cz/npi-vydalonavody-pro-pedagogy-jak-na-umelou-inteligenci-ve?lang=1>, accessed May 13, 2026.

⁴⁰ Danish Agency for Education and Quality, *Recommendations on the Use of Generative AI in Primary School Teaching* (June 26, 2025), <https://uvm.dk/media/dylly3ye/250626-tilgaengeliggjort-anbefalinger-om-brug-af-generativ-ai-i-undervisningen-i-folkeskolen.pdf>, accessed May 14, 2026.

⁴¹ ICDL Romania, *Ghid AI pentru educație: Ghid practic pentru școlile din România* (2026), https://icdl.ro/wp-content/uploads/2026/03/GHID_AI_PT_EDUCATIE_final.pdf, accessed June 16, 2026.

⁴² Inspectoratul Școlar Județean Dâmbovița, *Ghid de utilizare IA în educație* (2025), <https://www.isj-db.ro/public/public/upload/manager/files/Limbi%20moderne/2024-2025/Ghid%20de%20utilizare%20IA%20%C3%AEn%20educa%C8%9Bie.pdf>, accessed June 16, 2026.

⁴³ Compare Government of Romania, *National Strategy in the Field of Artificial Intelligence 2024–2027*, approved by Government Decision No. 832/2024; ICDL Romania, *Ghid AI pentru educație: Ghid practic pentru școlile din România* (2026); and Inspectoratul Școlar Județean Dâmbovița, *Ghid de utilizare IA în educație* (2025).

education, but mentions that their use is strictly voluntary⁴⁴. Estonia, the Czech Republic and Denmark also do not mandate the use of AI, but recommend that both teachers and students experiment with AI tools. Estonia, for example, urges the educational community to view AI as an opportunity and to be willing to explore the benefits it offers⁴⁵.

Table 2. Comparative grid on the normative and methodological frameworks of the states regarding AI in education

Country	Normative framework	Methodological framework	AI in exams	AI in homework	AI in assessment	Ethics and transparency	Equality / non-discrimination	GDPR	Consultation	Autonomy
Greece	Yes		No	No	No	Yes	Yes	Yes	No	Partial
Estonia	No	Yes	-	Yes	Yes	Partial	-	Yes	Yes	Yes
Czech	No	Yes	-	No	No	Yes	Yes	Yes	Yes	Yes
Denmark	No	Yes	No	No	-	Yes	-	Yes	Yes	Yes
Romania	No	No	-	-	-	-	-	Yes	-	-

Source: data collected and processed by the author

Regarding the use of AI in teaching, learning and assessment, some countries have concrete rules or recommendations. Greece prohibits the full or majority solving of homework with the help of AI, as well as the use of AI during exams and competitions. In addition, teachers have the obligation to check whether or not the homework presented by students have been developed using intelligent tools, as stated in art. 5⁴⁶.

The approach of Estonia is much more permissive. This leaves the decision on the degree and use of AI for certain tasks to the autonomy of educational managers, as well as the prohibition of using AI in certain activities. It also recommends that students use AI on homework only when they consider it would not prevent them from developing a certain competence. In the event that students have used AI for an activity that they were prohibited from doing at school, it is recommended that teachers explain to students the negative effects that AI could

⁴⁴ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 2(3).

⁴⁵ Haridus- ja Teadusministeerium, *Tehisarju juhend*.

⁴⁶ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 5.

have on their skills⁴⁷. In contrast, according to art. 5, in Greece teachers have the obligation to consider such a situation at the final score of the student⁴⁸.

Czech Republic recommends avoiding the use of AI by students for homework, but does not include mentions regarding exams⁴⁹. In contrast, Denmark specifies in its methodological guidelines the prohibition of using AI during exams. At the same time, it is recommended that intelligence tools be used in teaching activities only if they add value to teaching or learning⁵⁰.

For the activity of assessing or correcting student work, in accordance with art. 4, part. 3, Greece does not allow teachers to fully use AI tools for such tasks⁵¹. The Czech Republic also emphasizes avoiding the use of AI to correct student work. Estonia does not mention this prohibition, but encourages teachers to use AI to develop tests or teaching materials⁵².

The ethics and transparency criterion highlights whether or not the analyzed states legislate or recommend compliance with the ethical principles of drafting a work, together with the assumption and mention of the AI systems used. In the case of Greece, in art. 6, part. 2, it is stated that the generation by AI of false or nonexistent bibliographic data, information or sources, is prohibited⁵³. In addition, AI can be used in teaching or learning if users are transparent about the AI tools used, if copyrights is respected and if students and teachers, as appropriate, take responsibility for any content created with the support of AI, according to art. 4, part. 5⁵⁴.

Estonia, the Czech Republic and Denmark recommend in their methodological documents that students and teachers take responsibility for any activity or work done using AI. A difference in the case of Estonia is given by the fact that it recommends mentioning the use of AI if it is used to generate an image or text, but it does not appreciate that citation is necessary when AI helped generate teaching materials.

The principles of equality and nondiscrimination in terms of access to AI tools are provided for by Greece, but also by the Czech Republic in the recommendations formulated.

All four states indicate in their normative or methodological frameworks the importance of respecting and protecting personal information. It is worth noting that this common approach is also influenced by Regulation (EU) 2016/679 on the processing of data of European citizens. Greece specifically mentions the

⁴⁷ Haridus- ja Teadusministeerium, *Tehisaru juhend*.

⁴⁸ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 5.

⁴⁹ Ministry of Education, Youth and Sports of the Czech Republic, "NPI ČR Issued Guides for Teachers on How to Use Artificial Intelligence in Schools."

⁵⁰ Danish Agency for Education and Quality, *Recommendations on the Use of Generative AI in Primary School Teaching*.

⁵¹ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 4(3).

⁵² Haridus- ja Teadusministeerium, *Tehisaru juhend*.

⁵³ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 6(2)(b).

⁵⁴ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 4(5).

data that students and teachers are allowed to enter into AI platforms, which must the information that is not allowed to be uploaded such as photos, videos, audio recording of voice, contact details, medical history, along with other data specified in art. 16, part. 3⁵⁵. In turn, the Czech Republic mentions avoiding uploading personal information. Both the Czech Republic and Denmark and Greece also support the use of secure AI systems in schools.

The needs to consult teachers and pupils before making decision on the AI tools introduced in school, establishing the rules, rights and obligations that will follow from the regulations developed at the level of the institution, is stated in the methodological documents developed by Estonia and the Czech Republic. Denmark indicates the importance of consulting students in higher secondary education. In contrast, Greece does not specify the need for prior consultation, but establishes through art. 10, part. 1 the importance of informing the entire education community about the tools and how to use AI in schools⁵⁶.

Similarly, the autonomy of educational managers in making decisions regarding the use of AI in schools is also reflected, an aspect influenced, moreover, by the way educational services are governed in each country.

Thus, Estonia allows school managers to establish a series of regulation on activities and disciplines where AI can be used, as well as sanctions. The Czech Republic and Denmark also allow freedom in decision making, but draw more restrictive recommendation than Estonia. In the case of Greece, managers can decide whether or not to use an AI system in schools, but any such tool to be introduced must be assessed in advance by the Ministry of Education, according to art. 13, part. 1⁵⁷.

5. Conclusions

EU member states align themselves with the common European objective of making the continent a leader in AI. In this respect, all member states have set promising strategic objectives, different from country to country, depending on the current level of digital development, available resources and administrative capacity.

Although all five countries analyzed in this pilot study have set goals regarding the integration and development of AI in education services, strategic concerns are different. For example, Greece and Estonia mention in their national strategies measures to introduce AI since preschool education, so that children adapt to such technologies and learn to critically look at AI generated content. Greece and Estonia differ, however, in establishing regulations for the use of AI in education, due to the different level to autonomy that educational managers have. Greece is distinguished by a regulatory framework that sets out prohibitions

⁵⁵ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 16(3).

⁵⁶ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 10.

⁵⁷ Hellenic Republic, Ministerial Decision No. 55909/Δ6/2026, art. 13(1).

and conditions to be respected by the entire educational community when AI is used in schools or beyond for teaching and learning activities.

Estonia has not formulated rules with mandatory applicability, but methodological guidelines that guide school managers and other stakeholders towards the appropriate and beneficial use of AI. Compared to the other countries covered in this study, Estonia focuses on encouraging teachers, especially those who are reluctant and less experienced in the field of AI, emphasizing the importance of experimenting with AI and using it for teaching activities. To reinforce this encouragement, Estonia specifies in its methodological framework that it is not necessary to cite the use of AI in the development of teaching materials and allows for the assessment of students with the support of an AI system.

A common aspect reflected by the regulations of the analyzed states is the protection of the personal rights of students. Students are also encouraged to use AI in a responsible way and to be aware that these tools can provide false information and also affect the development of their own skills. Greece and Denmark do not support the use of AI in solving exams or homework, while Estonia encourages students to experiment with tools that can help them.

Because we live in an era of digitalization, in which children use digital technologies from a young age that can influence their cognitive and language development⁵⁸, the risk of using AI to replace human effort increases. Setting limits on the use of AI in schools and formulating guidelines so that it is used in an assumed correct and trust-inspiring manner in the student-teacher relationship remains essential both for respecting ethical and moral principles and for achieving the purpose of the education services system as a whole.

The Greek model can be an example of good practice for both Romania and other countries where school autonomy is limited. The Hellenic Republic is concerned with innovation, the development of AI in education, the attraction of talent, but also is interested in the ethical and efficient use of this new technology. In Romania it remains important to develop normative or, at least, methodological frameworks to regulate the use of AI in education. The guidelines published by ECDL or the Dambovită Inspectorate, together with the fact that some Romanian universities have already developed their own regulations for the use of AI by the academic community, highlight the requirement of stakeholders to have clearly established rules, guidelines, limits and permissive. In addition, the development of such regulations allows Romania to align with other EU Countries and implement its strategic objectives of training AI skills in an efficient and appropriate manner.

⁵⁸ OECD, *How's Life for Children in the Digital Age?* (Paris: OECD Publishing, 2025), <https://doi.org/10.1787/0854b900-en>.

Bibliography

I. Books and Articles

1. Barreira, Jonas Souza, Marcos Guilherme Moura Silva, and Tadeu Oliver Gonçalves. “Desafios e oportunidades para o uso do Chat GPT na pesquisa em educação matemática.” *Revista Ibero-Americana de Estudos em Educação* 19, special no. 2 (2024): e024084. <https://doi.org/10.21723/riaee.v19iesp.2.18594>.
2. Bedrosova, Marie Jaron, Vojtech Dvorak, Hana Machackova, Iveta Jansova, Karolina Bielikova, Maria Jurikova, and Karolina Kozumplikova. *Generative Artificial Intelligence through the Eyes of Czech Children and Adolescents: Findings from the EU Kids Online V Project*. Brno: Masaryk University, 2026. https://is.muni.cz/publication/2553899/euko_ai_report_en.pdf.
3. Dragomir, Andreea-Nicoleta. “The Role of the European Union in Shaping an Ethical and Legal Framework for Artificial Intelligence (AI) in Education.” *Review of Artificial Intelligence in Education* 6 (2025): 1–17. <https://doi.org/10.37497/rev.artif.intell.educ.v6ii.48>.
4. García-Peñalvo, Francisco J., Faraón Llorens-Largo, and Javier Vidal. “The New Reality of Education in the Face of Advances in Generative Artificial Intelligence.” *RIED—Revista Iberoamericana de Educación a Distancia* 27, no. 1 (2024): 9–39. <https://doi.org/10.5944/ried.27.1.37716>.
5. Haenlein, Michael, and Andreas Kaplan. “A Brief History of Artificial Intelligence: On the Past, Present, and Future of Artificial Intelligence.” *California Management Review* 61, no. 4 (2019): 5–14. <https://doi.org/10.1177/0008125619864925>.
6. Huang, Lan. “Ethics of Artificial Intelligence in Education: Student Privacy and Data Protection.” *Science Insights Education Frontiers* 16, no. 2 (2023): 2577–87. <https://doi.org/10.15354/sief.23.re202>.
7. Mahrishi, Mehul, Asad Abbas, and Mohammad Khubeb Siddiqui. “Global Initiatives Towards Regulatory Frameworks for Artificial Intelligence (AI) in Higher Education.” *Digital Government: Research and Practice* 6, no. 2 (2025): article 20, 1–9. <https://doi.org/10.1145/3672462>.
8. Malik, Nikita, and Menal Dahiya. “Interacting with ChatGPT: Impact on Students and Teaching-Learning.” *Sigma Journal of Engineering and Natural Sciences* 42, no. 6 (2024): 1736–48. <https://doi.org/10.14744/sigma.2023.00147>.
9. Reyes, Gary, Roberto Tolozabo-Benites, Carlos George-Reyes, Dayron Rumbaut, and Julio Barzola-Monteses. “Adoption of Artificial Intelligence Applications in Higher Education.” *Frontiers in Education* 10 (2025): 1680401. <https://doi.org/10.3389/feduc.2025.1680401>.
10. Zhang, Zizhuo, Lian Wen, Yanfei Jiang, and Yongli Liu. “Evaluate Chat-GPT’s Programming Capability in Swift Through Real University Exam Questions.” *Software: Practice and Experience* 54, no. 11 (2024): 2129–43. <https://doi.org/10.1002/spe.3330>.

II. Legislation and Official Sources

11. Artificial Intelligence Skills Alliance (ARISA). *AI Skills Strategy for Europe*. 2024. https://aiskills.eu/wp-content/uploads/2025/04/ARISA_AI-Skills-Strategy-for-Europe_2024.pdf.
12. Danish Agency for Education and Quality. *Recommendations on the Use of Generative AI in Primary School Teaching*. June 26, 2025. <https://uvm.dk/media/dylly3ye/250626-tilgaengeliggjort-anbefalinger-om-brug-af-generativ-ai-i-undervisningen-i-folkeskolen.pdf>.
13. European Commission. *AI Continent Action Plan*. COM(2025) 165 final. Brussels, April 9, 2025. <https://digital-strategy.ec.europa.eu/en/library/ai-continent-action-plan>.
14. European Commission. “Denmark AI Strategy Report.” AI Watch. Last updated September 1, 2021. https://ai-watch.ec.europa.eu/countries/denmark/denmark-ai-strategy-report_en#human-capital.
15. European Commission, Directorate-General for Education, Youth, Sport and Culture. *Guidelines on the Ethical Use of Artificial Intelligence and Data in Teaching and Learning for Educators*. Luxembourg: Publications Office of the European Union, 2026. <https://doi.org/10.2766/7967834>.
16. European Union. Consolidated Version of the Treaty on the Functioning of the European Union, art. 165. OJ C 202 (June 7, 2016): 120. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E165>.
17. European Union. Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). OJ L 2024/1689 (July 12, 2024). <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng>.
18. Eurostat. “Individuals – Use of Generative AI Tools.” Data Browser. Accessed June 8, 2026. https://ec.europa.eu/eurostat/databrowser/view/isoc_ai_iaiu/bookmark/table?lang=en&bookmarkId=45e9481a-e577-4b03-80c1-ab654032ff65&c=1769165540000.
19. Eurydice. “Estonia: AI Leap Initiative to Enhance Learning and Teaching.” March 2025. Accessed June 11, 2026. <https://eurydice.eacea.ec.europa.eu/news/estonia-ai-leap-initiative-enhance-learning-and-teaching>.
20. Government of Romania. Government Decision No. 832 of July 11, 2024, approving the *National Strategy in the Field of Artificial Intelligence 2024–2027*. *Monitorul Oficial al României*, Part I, no. 730 (July 25, 2024).
21. Government of the Republic of Estonia. *Estonia’s National Artificial Intelligence Strategy 2019–2021*. July 2019. https://f98cc689-5814-47ec-86b3-db505a7c3978.filesusr.com/ugd/7df26f_27a618cb80a648c38be427194affa2f3.pdf.
22. Haridus- ja Teadusministeerium [Estonian Ministry of Education and Research]. *Tehisaru juhend [Artificial Intelligence Guide]*. 2024. <https://www.hm.ee/sites/default/files/documents/2024-03/Tehisaru%20juhend%202024.pdf>.
23. Hellenic Republic, Presidency of the Government, Special Secretariat of Foresight, High-Level Advisory Committee on Artificial Intelligence. *A Blueprint for Greece’s AI Transformation*. 2024. https://foresight.gov.gr/wp-content/uploads/2024/11/Blueprint_GREECES_AI_TRANSFORMATION.pdf

24. Hellenic Republic. Ministerial Decision No. 55909/Δ6/2026, “Determining Issues Related to the Use of Artificial Intelligence Systems in the Educational Process and the Protection of Personal Data.” Government Gazette B 2639 (May 12, 2026). <https://www.e-nomothesia.gr/kat-ekpaideuse/kya-55909-d6-2026.html>.
25. ICDL Romania. *Ghid AI pentru educație: Ghid practic pentru școlile din România*. 2026. https://icdl.ro/wp-content/uploads/2026/03/GHID_AI_PT_EDUCATIE_final.pdf.
26. Inspectoratul Școlar Județean Dâmbovița. *Ghid de utilizare IA în educație*. 2025. <https://www.isj-db.ro/public/public/upload/manager/files/Limbi%20moderne/2024-2025/Ghid%20de%20utilizare%20IA%20%C3%AEn%20educa%C8%9Bie.pdf>.
27. Ministry of Education, Youth and Sports of the Czech Republic. “NPI ČR Issued Guides for Teachers on How to Use Artificial Intelligence in Schools.” 2024. <https://msmt.gov.cz/npi-vydalo-navody-pro-pedagogy-jak-na-umelou-inteligenci-ve?lang=1>.
28. Ministry of Industry and Trade of the Czech Republic. *National Artificial Intelligence Strategy of the Czech Republic*. 2019. https://mpo.gov.cz/assets/cz/rozcestnik/pro-media/tiskove-zpravy/2019/6/NAIS_eng_korektura_06-19_web.pdf.
29. OECD. “Czechia.” In *Progress in Implementing the European Union Coordinated Plan on Artificial Intelligence (Volume 1): Member States’ Actions*. Paris: OECD Publishing, 2025. https://www.oecd.org/en/publications/progress-in-implementing-the-european-union-coordinated-plan-on-artificial-intelligence-volume-1_6d530a88-en/czechia_0482b6c9-en.html.
30. OECD. “Denmark.” In *Progress in Implementing the European Union Coordinated Plan on Artificial Intelligence (Volume 1): Member States’ Actions*. Paris: OECD Publishing, 2025. https://www.oecd.org/en/publications/progress-in-implementing-the-european-union-coordinated-plan-on-artificial-intelligence-volume-1_6d530a88-en/denmark_89c393fa-en.html.
31. OECD. *Education and Skills in Romania*. Paris: OECD Publishing, 2025. <https://doi.org/10.1787/594cbb5d-en>.
32. OECD. “Education Policy Outlook in Denmark.” *OECD Education Policy Perspectives*, no. 12. Paris: OECD Publishing, 2020. <https://doi.org/10.1787/3288629c-en>.
33. OECD. “Education Policy Outlook in the Czech Republic.” *OECD Education Policy Perspectives*, no. 11. Paris: OECD Publishing, 2020. <https://doi.org/10.1787/6363ab1d-en>.
34. OECD. “Enhancing Data-Informed Strategic Governance in Education in Estonia.” *OECD Education Policy Perspectives*, no. 47. Paris: OECD Publishing, 2021. <https://doi.org/10.1787/11495e02-en>.
35. OECD. “Greece.” In *Progress in Implementing the European Union Coordinated Plan on Artificial Intelligence (Volume 1): Member States’ Actions*. Paris: OECD Publishing, 2025. https://www.oecd.org/en/publications/progress-in-implementing-the-european-union-coordinated-plan-on-artificial-intelligence-volume-1_6d530a88-en/greece_e5215c30-en.html.
36. OECD. *How’s Life for Children in the Digital Age?* Paris: OECD Publishing, 2025. <https://doi.org/10.1787/0854b900-en>.

37. OECD. *Improving Learning Outcomes in Greece: Strengthening School Governance, Teacher Professionalism and Digital Education*. Paris: OECD Publishing, 2026. <https://doi.org/10.1787/6323bd8e-en>.
38. OECD. *PISA 2022 Results (Volume I): The State of Learning and Equity in Education*. Paris: OECD Publishing, 2023. <https://doi.org/10.1787/53f23881-en>.

Artificial Intelligence and the Principle of Decision-Making Transparency: From Opaque Algorithms to Explainable Justice in European and Romanian Law

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Abstract

This research analyzes the legal challenges generated by the increasing use of artificial intelligence systems in public and private decision-making processes, with particular emphasis on the principle of decision-making transparency. The central hypothesis is that algorithmic opacity may undermine fundamental rights, effective judicial protection, and democratic accountability, thereby requiring a reconceptualization of traditional transparency requirements in the context of automated decision-making. The methodology combines doctrinal analysis, comparative examination of European and Romanian legislation, and the study of relevant case law and regulatory approaches. Particular attention is given to the GDPR, the EU Artificial Intelligence Act, the Romanian administrative-law framework, and emerging requirements concerning explainability, human oversight, and algorithmic auditing. The analysis identifies persistent tensions between technological complexity, trade-secret protection, and the need to provide individuals and courts with meaningful explanations of decisions affecting legal rights and interests. The study argues that explainability should operate as a substantive legal safeguard rather than merely a technical feature of AI systems and proposes legislative and institutional mechanisms capable of ensuring effective oversight, contestability, and accountability. These findings have broader implications for administrative law and for the development of a coherent rights-based framework governing artificial intelligence.

Keywords: artificial intelligence, decisional transparency, opaque algorithms, explainable justice, European law, GDPR, AI Act.

JEL Classification: K24, K40

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1. Introduction

Artificial intelligence has become ubiquitous in contemporary decision-making systems, from the algorithms used by banking institutions to assess creditworthiness to the automated systems that manage the granting of social benefits, the distribution of public resources or the evaluation of professional performance. This technological transformation redefines the way decisions with legal effect are adopted and creates substantive challenges for the legal order, directly affecting the fundamental principles of transparency, accountability and democratic control over decision-making.

The proliferation of artificial intelligence systems in the public and private sectors has generated the emergence of a new type of administrative and civil decision, algorithmic decision, which does not fit into traditional legal categories. If in classical law the decision was the expression of the will of a natural person or legal entity, in the case of AI systems the decision becomes the result of an automated, complex and often inaccessible process to direct human explanation. This change raises questions about the nature of the legal act, the actual holder of the Will and the ways in which constitutional principles of transparency, motivation and access to information can be guaranteed in an opaque technological framework.

Decision-making transparency is a pillar of the rule of law, enshrined in fundamental international instruments. The European Convention on human rights and the Charter of Fundamental Rights of the European Union provide for the right of individuals to understand decisions affecting them and to benefit from appropriate procedural safeguards. In Romanian law, the principle of administrative transparency is enshrined in the 1991 constitution, revised in 2003. Article 31 guarantees the right to information and Article 52 ensures the right of persons to apply to the authorities by petitions and to challenge administrative acts. These rules presuppose the effective possibility of knowing the reasons for the decision, a condition that is difficult to fulfill when the basis of the decision is opaque algorithms.

Machine learning algorithms, especially advanced models of deep neural networks, operate on the basis of complex mathematical structures, the internal processes of which remain unintelligible even for their developers. This technical opacity, referred to in the literature as the black box phenomenon, calls into question the compatibility between AI systems and the obligation of authorities or private entities to provide reasoned and comprehensible decisions. In the absence of an understanding of algorithmic reasoning, the affected individuals cannot effectively exercise the right to challenge the decision and the courts cannot carry out an effective check on its legality and proportionality.

This research aims to analyze the compatibility of artificial intelligence

systems with the principle of decision-making transparency in European and Romanian law, assessing to what extent the requirements of the rule of law can be maintained in a technological context marked by automation. The adopted methodology combines doctrinal and normative analysis with a comparative study of relevant regulations and jurisprudence, with the ultimate objective of identifying legal solutions that allow reconciling technological innovation with the fundamental requirements of human rights protection. The study aims both to assess the legal risks associated with algorithmic decisions and to formulate regulatory proposals capable of ensuring a balance between technological efficiency and respect for democratic principles.

2. Theoretical and Legal Foundations of Decision Transparency

Decision-making transparency is the obligation of public authorities and, in certain situations provided for by law, also of private entities, to make public the reasons, criteria and procedures on the basis of which decisions with an impact on individual rights and freedoms are adopted. This principle is of central importance in the architecture of the rule of law, since it allows the exercise of democratic control over public power and ensures the effective protection of individuals against arbitrariness. Decision-making transparency is manifested in three essential dimensions. The first is the accessibility of information, which implies that the data relevant to understanding the decision must be made available to the data subject in a clear and complete form. The second dimension is the intelligibility of the decision-making process, which implies the possibility of understanding the reasoning or criteria used in making the decision. The third is the possibility of appeal, which presupposes the existence of effective procedural mechanisms by which the decision can be subject to administrative or judicial review.

In private law, the principle of transparency acquires specific valences, adapted to the nature of contractual legal relations and professional obligations. In modern contractual relationships, especially in digital media, transparency becomes an essential component of information obligations and standards of good faith. Private entities providing services of general interest, such as utilities, financial institutions or digital platforms, have increased transparency obligations due to their dominant position or systemic impact on users.

In the context of the use of algorithms, these obligations include providing clear information on the automated criteria used to establish credit scores, assess risk, moderate content or personalize commercial offers. Thus, transparency extends beyond the traditional communication of contract terms, including the need to explain how digital systems work that can significantly influence the legal and economic position of users.

The European Court of human rights has developed a consistent case law on the obligation of authorities to motivate decisions impacting on the rights of

individuals, considering that reasoning is an essential guarantee against arbitrariness and an indispensable element of democratic decision-making. In many cases, the court has emphasised that the persons concerned must be able to understand the reasons behind the decision in order to assess the appropriateness of challenging it and to benefit from effective judicial review. This requirement applies to both administrative and jurisdictional decisions, enshrining a high standard of procedural transparency. In European Union law, the principle of good administration, expressly enshrined in Article 41 of the Charter of Fundamental Rights, includes the right of every person to receive a clear and understandable statement of reasons for administrative decisions concerning him or her. This right provides a sound regulatory framework for examining the compatibility of algorithmic decisions with European requirements on transparency and accountability.

Transparency is not an autonomous goal, but an indispensable legal instrument for the realization of other fundamental principles of the rule of law, such as legality, proportionality and accountability. Firstly, transparency makes it possible to verify the legality of the decision-making, since an opaque decision cannot be effectively controlled in terms of compliance with the law. Second, proportionality can only be assessed if the criteria used by the authority and how they have been applied to the concrete situation are known. Thirdly, legal responsibility depends on the possibility of identifying the factors that caused the decision and understanding the internal mechanisms of the decision-making process. In the context of algorithmic decisions, transparency is of critical importance: without access to the relevant information on how the intelligent system works, the affected persons cannot effectively exercise their procedural rights and the authorities cannot demonstrate compliance with constitutional and European standards. Thus, transparency becomes the essential condition for the legitimate integration of artificial intelligence into public and private decision-making processes.

Article 6 of the European Convention on Human Rights enshrines the right to a fair trial, which implicitly includes the obligation for courts to provide sufficient and understandable reasons for judgments given. The European Court of human rights has consistently pointed out that the right of reasons is not only a procedural formality, but a substantial guarantee that allows the parties to understand the court's reasoning and assess the appropriateness of the appeal. Proper reasoning ensures the transparency of the act of justice, fosters public confidence in the functioning of the judicial system and allows the exercise of democratic control over judicial authority.

The case law of the Strasbourg court has gradually extended this requirement also to administrative decisions affecting civil rights, especially in situations where administrative decisions have direct consequences on the legal situation of the person. The court held that, when an administrative authority adopts decisions affecting rights recognised by the legal order, the person concerned

must be able to understand the reasons for the measure taken. This reasoning is based on the idea that the protection of civil rights cannot be effective if the administration adopts non-transparent or opaque decisions that escape judicial review. Therefore, the principles enshrined in Article 6 are also reflected in the obligation of the administrative authorities to ensure clear, comprehensible and accessible reasoning.

The Constitution of Romania enshrines, in Article 124, the principles governing the administration of justice, including judicial independence. The obligation to provide reasons for judgments is developed by procedural legislation and is reinforced by the guarantees of Article 6 of the European Convention on Human Rights. This requirement also supports effective judicial review of administrative action, since the legality and proportionality of measures affecting rights or legitimate interests cannot be assessed without adequate reasons.

Romanian administrative law also requires administrative decisions to be adequately reasoned in the circumstances provided by applicable legislation and developed through case law. Reasoning must enable the person concerned and the reviewing court to identify the factual and legal basis of the measure. This requirement is essential for protection against arbitrariness and for effective judicial review, strengthening the ability of the individual to assess whether a decision complies with legality and proportionality.

3. Automated Decisions and the Challenge of Opaque Algorithms

Automated decisions are characterized by a number of obvious operational advantages, such as high processing speed, the ability to simultaneously analyze very large amounts of data and scalability that allows the same criteria to be applied to large populations. These systems can identify subtle statistical patterns and correlations that are inaccessible to traditional analysis, generating predictions or classifications with a high level of accuracy in certain areas, such as financial risk analysis or fraud detection. The appearance of objectivity results from the fact that algorithms apply uniform mathematical rules and are perceived as devoid of subjective preferences or influences, which creates the impression of impartiality superior to human.

However, this appearance can be misleading. Artificial intelligence systems are deeply dependent on the data that is provided to them at the training stage, and real data inevitably reflects the social structures from which they come, including existing prejudices, inequalities and discrimination. In the absence of adequate corrective measures, algorithms can reproduce these biases, amplifying them on a large scale. The result is the emergence of forms of systemic discrimination, which are generated not by a direct intention, but by the automated way of functioning of the system.

This phenomenon becomes particularly problematic in sensitive areas, where automated decisions can profoundly affect the lives of individuals. In

criminal justice, risk assessment systems may disadvantage certain ethnic or socioeconomic groups. In lending, predictive models can exclude individuals based on statistical correlations that reflect historical inequalities. In recruitment, algorithms can privilege profiles traditionally associated with certain categories of employees, reducing the chances of candidates who do not align with this pattern. In all these situations, automated decisions can generate discriminatory effects that are difficult to challenge, especially in the absence of transparency on how the system works.

Algorithmic opacity has diverse and interrelated causes. First, the technical complexity of machine learning algorithms, especially deep models, makes internal computing processes difficult to interpret even for specialists². Decisions are generated based on mathematical weights that are continuously adjusted according to training data, and the logical route cannot be reconstructed intuitively. Second, developers frequently invoke trade secrecy to prevent disclosure of the source code or the system's internal architecture, making it difficult to externally analyze its operation. Thirdly, the lack of clear legal standards on the degree of transparency required in automated decisions contributes to the absence of a uniform reporting and control framework. All this leads to an obvious paradox: the more efficient and sophisticated the algorithm becomes, the opaquer and more difficult to verify the decision logic becomes.

From a legal perspective, the tension between the protection of intellectual property and the demand of transparency is one of the central issues of the use of artificial intelligence in decision-making processes. On the one hand, developers have a vested interest in protecting innovation, as algorithms represent substantial investments in research and development. On the other hand, public authorities and private entities with functions of general interest must provide adequate explanations to those affected by automated decisions, in order to ensure respect for fundamental rights and the principles of the rule of law. Finding a balance between these interests is essential and involves the development of legal mechanisms that allow access to information relevant to the control of the legality of the decision, without compromising the developers' trade secrets entirely.

Algorithmic opacity generates major risks for the protection of fundamental rights. First, the inability to understand decision logic can hide situations in which the algorithm produces arbitrary or discriminatory effects. Without transparency, the damages remain unidentified and the affected persons cannot know the real reasons for the treatment applied. Secondly, the lack of access to relevant information makes it difficult or even impossible to pursue redress.

Algorithmic discrimination can take direct or indirect forms, and under-

² Sylvia Lu, "Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence," *Vanderbilt Journal of Entertainment and Technology Law* 23, no. 1 (2020): 99–159, <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss1/3>.

standing these mechanisms is essential for assessing the impact of decision-making technologies on fundamental rights. Direct discrimination occurs in situations where the algorithm explicitly uses protected characteristics, such as gender, ethnicity, religion, or disability, to determine the decision outcome. This occurs either by including sensitive variables in the predictive model or by introducing rules that lead to differential treatments on prohibited criteria. In such cases, the violation of the right to equality is obvious and legal responsibility can be established relatively quickly, since the discriminatory decision is explicitly based on a protected category.

Indirect discrimination is much more difficult to identify, but just as problematic from a legal point of view. This is manifested when the algorithm uses proxy variables, that is, information that is not directly protected, but closely correlates with sensitive features. For example, the zip code may function as a proxy for socioeconomic status or ethnic affiliation, and employment history may reflect gender inequalities. Such correlations are commonly found in real data sets and, if not adequately managed, can reproduce and amplify existing structural biases in society. Indirect discrimination produced by algorithms is particularly dangerous because they act invisibly, generating unequal treatment without these sensitive criteria being formally recognized in the decision-making process.

The identification and Combating of these forms of discrimination depend essentially on access to information on the functioning of the algorithm, the types of data used and the internal logic of the decision-making process. Without transparency, it is impossible to verify whether proxy variables have generated disproportionate effects on a protected group and the affected persons cannot demonstrate the existence of indirect discrimination. Therefore, the legal framework must ensure the possibility of auditing algorithms, access to understandable explanations and effective mechanisms of appeal. Only in this way can it be guaranteed that technology does not become a tool for perpetuating inequalities, but contributes to a fair and responsible administration of decisions that affect the rights of individuals.

4. Applicable European and Romanian Regulatory Framework

Article 22 of the GDPR³ recognises individuals with the right not to be subject to a decision based solely on automated processing, including profiling, where this decision produces legal effects on them or significantly affects them. This provision represents the first explicit legal recognition at European level of the risks arising from algorithmic decisions, marking an essential step in shaping

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 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), art. 22(1), *Official Journal of the European Union* L 119 (May 4, 2016): 1–88, <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

effective protection of individuals from autonomous decision-making technologies.

Article 22 also imposed the obligation to provide adequate safeguards in situations where automated processing is permitted by exception, such as significant human intervention, the possibility for the data subject to express his or her point of view and the right to challenge the decision. These safeguards reflect the need to maintain effective human control over algorithms, ensuring that the final decision is not the product solely of opaque mathematical logic, but the result of a process in which standards of fairness, transparency and proportionality are met.

Recital 71 of the GDPR⁴ states that data subjects should be provided with significant information on the logic used in automated processing processes, in particular in the case of decisions that produce legal or similar effects to an important extent. This wording has been interpreted by part of the doctrine as equivalent to the establishment of a right to explanation, in the sense of the obligation of the controller to disclose the decision-making reasoning of the algorithm and to clarify how the data of the data subject was evaluated. In doctrine, however, this interpretation is strongly disputed. Although the wording in the recital appears to grant a substantial right to transparency, the normative text of Article 22 and related provisions does not explicitly enshrine such a right. Consequently, many authors emphasise the rather indicative nature of the recital, in the absence of an overriding rule requiring operators to provide detailed explanations on the operation of algorithms. More recent developments have substantially clarified this debate, particularly following the recognition of a genuine right to explanation under Article 15(1)(h) GDPR and the introduction of a distinct right to explanation in Article 86 of the AI Act.⁵

AI Act, adopted in 2024⁶, it represents the first truly comprehensive global regulatory framework dedicated to the regulation of artificial intelligence systems. The regulation introduces a methodical approach based on the classification of AI systems according to the level of risk they pose to Fundamental Rights, Public Security and legal order. In this regulatory architecture, systems considered high-risk are subject to a substantially stricter legal regime, which includes firm transparency standards, detailed data governance requirements, mandatory human surveillance and continuous monitoring mechanisms.

Among the central obligations imposed on these systems, transparency

⁴ Andrew D. Selbst and Julia Powles, “Meaningful Information and the Right to Explanation,” *International Data Privacy Law* 7, no. 4 (2017): 233–242, <https://doi.org/10.1093/idpl/ix022>.

⁵ Lars Arnesen, “Comparing the Right to Information about Automated Decision-Making to the New Right to Explanation,” *International Data Privacy Law* 16, no. 2 (2026), <https://doi.org/10.1093/idpl/ipag008>.

⁶ Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), *Official Journal of the European Union* L 2024/1689 (July 12, 2024), <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>.

occupies an essential place. The regulation provides that suppliers are obliged to provide complete technical documentation to allow supervisory authorities to assess how the system works and identify possible risks. This documentation shall include details of the algorithmic architecture, data sets used, testing and validation procedures, and risk mitigation measures. In addition, AI Act establishes the obligation to report incidents and to ensure a rigorous traceability of the decisions generated by the system.

Article 13 of the AI Act⁷ it explicitly enshrines the principle of operational transparency for high-risk AI systems. The legal text establishes that these systems must be designed and developed in a way that allows end-users to understand, to a reasonable extent, how results are generated. The purpose of this provision is not to fully disclose the technical structure of the algorithms, but to give users the opportunity to correctly interpret the predictions, classifications or recommendations generated by the system. Through this approach, the regulation seeks to prevent the automatic and uncritical use of algorithmic results, promoting the active involvement of the human factor in decision-making processes that can produce significant legal effects or consequences.

Overall, the transparency obligations imposed by the AI Act are an important step towards making technology operators accountable and ensuring that AI systems are compatible with the rule of law principles. They create a framework in which technological innovation can be harnessed without compromising the protection of fundamental rights and without allowing the emergence of areas of opacity incompatible with contemporary legal requirements.

The current Romanian Administrative Code was adopted by Government Emergency Ordinance No. 57/2019⁸, which lays down general principles governing public administration. The obligation to state reasons for administrative acts is developed through applicable legislation and case law.

This requirement is not only a procedural formality, but is an indispensable tool for the control of legality and for the Prevention of administrative arbitrariness. By means of reasoning, the necessary link is made between the exercise of Public Power and the person's right to understand the reasons underlying a decision affecting his legal situation.

In the context of the emergence of algorithmic decisions, the application of art. 10, however, raises obvious difficulties. A machine learning algorithm does not operate through explicitly formulable reasoning, but through complex statistical processes that are difficult to translate into intelligible legal language. Thus, the obligation to state reasons, although present in the legal text, risks becoming inoperable when the public authority uses automated systems whose internal mechanisms cannot be explained in traditional terms. This situation reveals

⁷ Regulation (EU) 2024/1689, art. 13(1).

⁸ Government Emergency Ordinance No. 57 of July 3, 2019, regarding the Administrative Code, *Monitorul Oficial* no. 555 (July 5, 2019), <https://legislatie.just.ro/Public/DetaliiDocumentAfis/249654>.

the need to reinterpret and adapt the norm to the specifics of modern technology, in order to avoid a vacuum of legal protection.

Law No. 190/2018⁹, which establishes national measures for implementing certain provisions of the GDPR, does not provide further clarification on the application of the rules on decisions based solely on automated processing. Although the law supplements the European regulation at national level, it does not introduce detailed rules on the obligations of transparency, auditability or motivation of algorithmic decisions taken by public authorities or private entities covered by administrative law. Thus, the lack of specific provisions generates an obvious gap between the European requirements and the internal normative framework.

This legislative loophole is particularly problematic in the context of the accelerated digitization of Public Administration, where artificial intelligence systems are beginning to be used in sensitive areas such as the allocation of social benefits, the management of administrative applications or risk assessment. In the absence of clear rules on responsibility, motivation and access to Algorithmic Information, data subjects may find themselves unable to effectively challenge automated decisions affecting their rights. Therefore, the urgent adaptation of national legislation becomes essential to ensure compatibility between the use of technology and the fundamental principles of the rule of law.

5. Explicable Justice: Between Normative Ideal and Technological Reality

The concept of explainable artificial intelligence, known in the literature as explainable AI or XAI, represents an essential technological direction in the evolution of modern algorithmic systems¹⁰. The central goal of this field is the development of artificial intelligence models whose decision-making processes can be tracked and understood by users, be they experts or people without technical training. Unlike black box algorithms, XAI aims to make the internal reasoning of the system visible, by generating coherent explanations of the reasons that determined the final result.

From a legal perspective, explainability is not only a technological advantage, but an indispensable condition for the compatibility of automated decisions with the fundamental principles of the rule of law. An algorithmic system affecting legitimate rights and interests cannot remain opaque, since the lack of

⁹ Law No. 190 of July 18, 2018, on measures for implementing Regulation (EU) 2016/679, *Monitorul Oficial* no. 651 (July 26, 2018), <https://legislatie.just.ro/Public/DetaliiDocumentAfis/203151>.

¹⁰ David Gunning, "DARPA's Explainable Artificial Intelligence (XAI) Program," in *Proceedings of the 24th International Conference on Intelligent User Interfaces (IUI '19)* (New York: ACM, 2019), ii, <https://doi.org/10.1145/3301275.3308446>.

transparency makes it impossible to check legality, does not allow the identification of possible discrimination and does not give the data subject the real opportunity to bring an effective appeal.

In order to have legal relevance, explainability must meet certain essential criteria. First of all, the explanation provided must be understandable to the addressee, which implies the adaptation of the technical language to a level accessible to an ordinary person. Secondly, the explanation must be sufficiently detailed to allow verification of the legality of the decision, including the identification of the criteria used by the algorithm and how they influenced the outcome. Third, the explainability must provide the person affected with sufficient information to bring a reasoned appeal capable of triggering an effective judicial or administrative review.

There are three broad categories of technological approaches to achieving algorithmic explainability, each with specific advantages and limitations. The first category is interpretable models, designed from the beginning to be completely transparent.

These models use simple decision structures, such as decision trees or linear regressions, which allow accurate tracking of the logic that leads to the final result. Their advantage lies in the fact that they provide native and understandable explainability. However, this transparency is often achieved at the expense of performance, especially in complex contexts that require processing large volumes of data or identifying subtle patterns. For this reason, interpretable models are rarely used in advanced artificial intelligence applications.

The second category is that of post hoc explanations, which seek to provide an intelligible justification for the decisions of an opaque model after they have been generated. Methods such as relevance maps, influence vectors, or sensitivity analysis allow one to roughly reconstruct the model's internal reasoning without fully revealing its operation. While these techniques can improve transparency, they usually produce approximate explanations, raising questions about their legal value and the degree to which they can serve as a basis for challenging automated decisions. In the absence of complete transparency, the persistence of the risk of misinterpretation remains significant.

The third category is hybrid models, which combine the robustness and performance of opaque algorithms with dedicated explanatory capabilities. These systems use a complex model for making the actual decision, but resort to a separate interpretable model to generate the necessary explanations. This approach allows maintaining the high level of accuracy, specific to neural networks or other advanced machine learning techniques, while providing consistent and verifiable justifications in parallel. From a legal perspective, hybrid models are the most promising solution, as they offer a balance between technological performance and legal requirements for transparency and accountability¹¹.

¹¹ Zachary C. Lipton, "The Mythos of Model Interpretability," *Communications of the ACM* 61,

Technical explainability does not always overlap with legal explainability, and this difference produces important consequences in assessing the legality of automated decisions. A technical explanation may correctly describe the internal functioning of an algorithm, highlighting statistical weights, activation functions or influence variables, but this information may be irrelevant or inaccessible from the perspective of an ordinary person or even a practitioner of law. Thus, an adequate technical explanation is not necessarily a sufficient legal explanation to satisfy the requirements as to the reasons for the act, its intelligibility and the possibility of effective appeal.

The difficulty is amplified in situations where explanations provided by algorithmic systems can be manipulated or oversimplified. Some systems can produce explanations built to apparently satisfy the motivation requirement without actually reflecting the internal logic of the algorithm. Other situations raise privacy concerns, as providing a detailed explanation may involve the disclosure of protected information such as trade secrets, sensitive data or proprietary parameters. For this reason, explainability is constantly in a delicate balance between transparency and the protection of economic and technological interests.

Courts face significant difficulties in assessing algorithmic explanations because of their deeply technical nature. Judges are called upon to assess the validity and accuracy of decision-making mechanisms that often go beyond traditional legal competences, which requires the use of independent experts in computer science and data science. This technical dependence can affect the process balance, as parties with superior technical and financial resources can produce more elaborate expertise, while vulnerable persons may have obvious difficulties in combating the conclusions presented by powerful entities such as banks, corporations or digitized public authorities.

These challenges naturally raise questions about respect for the principle of equality of arms and effective access to justice. If a person is not able to understand the rationale for an algorithmic decision, nor to challenge it in a reasoned way, the right to an effective remedy becomes purely formal. In this context, legal explainability must be conceived not only as a translation of technical terms into an accessible language, but as a mechanism that allows the actual exercise of procedural rights. Therefore, the development of a regulatory framework that imposes clear standards on the content, form and degree of detail of algorithmic explanations becomes indispensable for ensuring effective protection of those affected.

6. Algorithmic Probation and Access to Justice

Probation in disputes involving artificial intelligence systems raises significant difficulties that go beyond the traditional evidentiary framework. First,

access to relevant technical information is inherently limited, since the architecture of algorithms, training data and operating parameters are often protected by the legal regime of trade secrets or intellectual property rights¹².

This protection, justified from the perspective of developers, can, however, become a major obstacle to the exercise of the rights of Defense for people affected by automated decisions. In the absence of legal mechanisms allowing controlled access to this information, the interested party cannot obtain the necessary elements to challenge the legality or correctness of the functioning of the algorithmic system.

Second, even when technical information becomes accessible, its interpretation requires advanced knowledge in Computer Science, Statistics and machine learning theory. This complexity makes seemingly relevant evidence unintelligible to the parties, lawyers and sometimes even the court. In such situations, the real problem lies not only in access to information, but also in the effective ability to use it in the judicial process. The appeal to experts becomes inevitable, which can extend the duration of the proceedings and considerably increase the costs of litigation.

The burden of proof can turn into a disproportionate burden for the person challenging an algorithmic decision. If the plaintiff has to prove the existence of damage, the identification of its technical cause and the causal link with the operation of the system, the burden of proof becomes practically impossible to fulfill. This situation directly affects the principle of equality of procedural weapons, since entities using AI systems, such as financial institutions or public authorities, have a monopoly on relevant information and have superior technical resources to support their own arguments.

Algorithmic auditing is increasingly emerging as an indispensable tool for verifying the compliance of artificial intelligence systems with applicable legal requirements, in particular in terms of transparency, non-discrimination and accountability¹³. The audit is intended to assess not only the accuracy and technical performance of the algorithm, but also its impact on fundamental rights and compatibility with relevant legal principles. Depending on the entity that carries it out, the audit can be internal, external or institutional.

Internal audit is carried out by the developer of the system or the organization that uses it. It has the advantage of full access to the algorithm architecture, training data and technical parameters. However, internal audit is vulnerable to conflicts of interest as the assessed entity has a direct interest in maintaining a

¹² Joshua A. Kroll, "The Fallacy of Inscrutability," *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 376, no. 2133 (2018): 20180084, <https://doi.org/10.1098/rsta.2018.0084>.

¹³ Samuele Bertaina et al., "Fundamental Rights and Artificial Intelligence Impact Assessment: A New Quantitative Methodology in the Upcoming Era of AI Act," *Computer Law & Security Review* 56 (2025): 106101, <https://doi.org/10.1016/j.clsr.2024.106101>.

favourable image of its own system. For this reason, although useful as a preliminary verification mechanism, internal audit cannot substitute for independent control.

External audit is carried out by independent entities specializing in the analysis and evaluation of algorithmic systems. It is considered the most credible form of audit, as it guarantees a high level of impartiality and objectivity. External audit is essential in areas with a high impact on fundamental rights, such as lending, recruitment, criminal justice and digitised public services. In these situations, independent verification of algorithmic models is a condition for ensuring effective control over automated decisions.

Institutional audit can be carried out by specialised public authorities such as data protection authorities, administrative control institutions or newly established entities with a supervisory role for artificial intelligence. This form of audit is particularly important because it allows the exercise of public control over AI systems used by state institutions or in areas of general interest. In the absence of such public scrutiny, the risk of abuse or non-transparent administrative decisions increases significantly.

Judicial technical expertise must, in turn, be deeply adapted to meet the specificity of artificial intelligence algorithms. Traditional expertise is not sufficient in disputes involving machine learning models, neural networks or probabilistic scoring systems. It is necessary to develop a new type of expertise, based on standardised methodologies and clear criteria for assessing performance, bias and transparency¹⁴. Judicial experts must also have interdisciplinary skills, integrating knowledge from law, Computer Science, Statistics and data ethics.

The case *Loomis v. Wisconsin*, settled in the United States, represents one of the first times that a court was called to rule on the use of algorithms in criminal proceedings and on their compatibility with the constitutional rights of the defendant¹⁵. In this case, the court considered the legality of using the risk scores generated by the Compass system in determining the penalty.

The Wisconsin Supreme Court allowed the use of the algorithmic system, considering that it can be a complementary tool in the process of individualizing punishment. However, the court stressed the need for additional safeguards, in particular the prohibition on using the risk score as the sole basis for determining the penalty, as well as the obligation to inform the defendant of the limitations of the instrument. The *Loomis* case opened the global debate over the right to transparency in criminal justice and the need to subject algorithmic systems to rigorous judicial review.

In Europe, the SyRI case in the Netherlands has had a remarkable impact on how artificial intelligence systems can be used in the administration of public

¹⁴ Alexander Boer, Léon de Beer, and Frank van Praat, "Algorithm Assurance: Auditing Applications of Artificial Intelligence," in *Advanced Digital Auditing*, ed. Egon Berghout et al. (Cham: Springer, 2023), 149–183, https://doi.org/10.1007/978-3-031-11089-4_7.

¹⁵ *State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749 (Wis. 2016).

services¹⁶. The SyRI system was created to automatically detect fraud in the field of social assistance by correlating a large volume of personal data from various public databases. The Hague tribunal decided to ban this system, considering that the interference in privacy was disproportionate to the intended purpose. The court held that the system operated in an opaque manner, did not provide adequate safeguards against the risk of discrimination and did not allow data subjects to understand how suspicions of fraud were generated. With this decision, the SyRI case reinforced the importance of the proportionality test as a fundamental legal instrument in assessing the use of AI systems in the public sector.

7. Regulatory Perspectives and Best Practices

France has adopted one of the most advanced European approaches to algorithmic transparency through the law for a Digital Republic of 2016¹⁷. This law explicitly enshrines the right of the person to receive an explanation of administrative decisions generated or assisted by IT systems. The French regulation obliges public administrations to disclose the essential criteria used within the algorithms, including the relative importance of each parameter, the general logic of processing and the data envisaged. This legal obligation is not just a technical tool, but a fundamental guarantee for the protection of citizens' rights, since it allows to verify the legality of administrative acts and challenge them effectively. The French model subsequently influenced other European states, being considered a reference point in the development of regulations on automated decisions in the public sector.

Canada has adopted a structured approach through the automated decision-making directive, an innovative regulatory tool that classifies algorithmic systems according to the level of impact on the rights and interests of individuals¹⁸. The directive imposes differentiated requirements for transparency, audit and risk assessment, depending on the risk category assigned to the system. In the case of high-impact systems, administrations are required to carry out impact assessments on algorithms, document decision-making logic and ensure clear mechanisms for challenge. This gradual approach allows regulatory adaptation to technological complexity and guarantees protection commensurate with the risks generated.

Romania adopted the National Strategy on Artificial Intelligence 2024–

¹⁶ The Hague District Court, *SyRI*, ECLI:NL:RBDHA:2020:1878, February 5, 2020, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2020:1878>.

¹⁷ France, *Code des relations entre le public et l'administration*, art. L311-3-1, created by Law No. 2016-1321 of October 7, 2016, art. 4, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033205535/.

¹⁸ Government of Canada, Treasury Board of Canada Secretariat, *Directive on Automated Decision-Making*, effective April 1, 2019, <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592>.

2027, but still faces the need to develop detailed legal and institutional mechanisms for managing the challenges generated by artificial intelligence systems in the public and private sectors¹⁹. In the absence of a clear and coherent regulatory framework, the risks associated with automated decisions can directly affect fundamental rights, administrative efficiency and public trust in authorities. Therefore, an essential first step is the adoption of a specific law on the use of artificial intelligence systems in public administration. This law should expressly establish transparency obligations, define minimum criteria for explicability and impose clear control, audit and reporting mechanisms. The rules should also provide for the conditions under which algorithmic decisions can produce legal effects, as well as procedures for challenging them.

A second fundamental element of an effective national strategy is the establishment of a specialised authority to oversee the use of artificial intelligence. This entity could operate either within the National Supervisory Authority for Personal Data Processing or as an independent institution, following the model of some European states that have created dedicated agencies. Such an authority would have the role of monitoring the implementation of algorithmic systems in the public and private sector, carrying out technical and legal audits, issuing best practice guidelines and responding to complaints from affected persons.

It could also have powers to authorise high-risk systems, ensuring that they are only implemented under the conditions of rigorous prior assessment.

The implementation of such an institutional structure would allow Romania to effectively manage the risks associated with automated decisions, ensuring an adequate balance between technological innovation and the protection of fundamental rights. In addition, the existence of a specialized authority would facilitate the alignment of the national regulatory framework with emerging European and international standards in the field of artificial intelligence regulation.

Public institutions must systematically develop their internal capacities for the evaluation, monitoring and supervision of the artificial intelligence systems they use. The implementation of these technologies cannot be left solely to external providers, as decisions generated by algorithms produce direct legal effects on citizens and imply a clear institutional liability. In this regard, it is necessary to train administrative staff in the field of digital technologies, through continuous training programs covering issues such as the principles of operation of algorithms, associated risks and transparency requirements. Institutions should also develop dedicated internal procedures for the pre-evaluation of AI systems, monitoring their operation and managing any algorithmic incidents. The implementation of periodic audit mechanisms, carried out either internally or by independent entities, is an essential condition for maintaining effective control

¹⁹ Government of Romania, Government Decision No. 832 of July 11, 2024, approving the National Strategy on Artificial Intelligence 2024–2027, *Monitorul Oficial* no. 730 (July 25, 2024), <https://legislatie.just.ro/Public/DetaliiDocumentAfis/285931>.

over these technologies and for compliance with the principles of legality and proportionality.

Academia plays a central role in this transformation, as training specialists able to understand both the legal and technological dimensions of artificial intelligence is essential for the coherent functioning of the legal system. Universities must integrate into their legal study programs courses dedicated to the interaction between law and technology, in which students acquire basic notions regarding algorithms, data, explainability and relevant international regulations. At the same time, it is necessary to create specialized master's programs in technology law, which train experts capable of managing the legal challenges generated by digitization. The development of interdisciplinary research, at the intersection of law, Informatics, ethics and data science, can contribute to the theoretical foundation of appropriate legislative solutions and to the strengthening of the national legal culture in the field of artificial intelligence.

8. Conclusions

The analysis highlights the fact that the integration of artificial intelligence systems in decision-making processes causes profound transformations in the application and guarantee of the principle of decision-making transparency. Algorithmic opacity is not limited to a technical difficulty, but becomes a genuine legal and Democratic problem. It affects the ability of individuals to understand the reasons for a decision, the ability of courts to control its legality and the legitimacy of the decision-making process as a whole. Therefore, its management requires a holistic approach, combining legal regulation, technical tools and institutional supervision.

At the same time, recent developments in the field of explainable artificial intelligences demonstrate that algorithmic transparency is not a technological utopia, but an achievable goal. Explicability models, either natively interpretable, post hoc or hybrid, provide concrete opportunities for reconciling algorithmic performance with legal requirements for reasoning of acts and verifiability of decisions. In order for these opportunities to become effectively functional, it is necessary to develop clear legal standards, adapted both to the needs of justice and to technological limitations. These standards need to be strengthened through effective oversight mechanisms capable of monitoring the deployment and use of AI systems in critical sectors.

The challenges posed by the use of artificial intelligence cannot be solved exclusively by traditional legal instruments. The technological complexity of algorithms requires close collaboration between lawyers, computer scientists, ethics experts and data science specialists. Only through an interdisciplinary approach can viable solutions be developed, capable of responding to emerging risks and responsibly harnessing the benefits of technology.

A strategic element of the regulation is the extension of the principle of

privacy by design to a genuine transparency by design. This implies the integration of transparency requirements from the design stage of algorithmic systems, so that explicability is not a later addition, but a structural feature²⁰. A proactive approach of this type is much more effective than subsequent attempts to address transparency deficiencies and significantly reduces the risks of discrimination or arbitrariness.

Future research directions should focus on developing robust metrics for measuring algorithmic transparency and evaluating the effectiveness of various explicability models. At the same time, it is necessary to deepen the analysis on the societal impact of the use of AI systems, including their effects on public trust, social cohesion and access to justice. The development of standardised tools for assessing societal impacts would contribute to responsible and well-founded regulation.

From a regulatory perspective, an essential priority is the effective implementation of the AI Act and the adaptation of national legislation to the specific challenges identified. Romania has the opportunity to position itself as a regional leader in developing a balanced legal framework for AI, capable of protecting fundamental rights without discouraging technological innovation. Such an approach can turn technology into a factor of social progress, while strengthening the values of the rule of law.

Bibliography

I. Books and Articles

1. Arnesen, Lars. "Comparing the Right to Information about Automated Decision-Making to the New Right to Explanation." *International Data Privacy Law* 16, no. 2 (2026). <https://doi.org/10.1093/idpl/ipag008>.
2. Bertaina, Samuele, Ilaria Biganzoli, Rachele Desiante, Dario Fontanella, Nicole Inverardi, Ilaria Giuseppina Penco, and Andrea Claudio Cosentini. "Fundamental Rights and Artificial Intelligence Impact Assessment: A New Quantitative Methodology in the Upcoming Era of AI Act." *Computer Law & Security Review* 56 (2025): 106101. <https://doi.org/10.1016/j.clsr.2024.106101>.
3. Binns, Reuben. "Algorithmic Accountability and Public Reason." *Philosophy & Technology* 31, no. 4 (2018): 543–556. <https://doi.org/10.1007/s13347-017-0263-5>.
4. Boer, Alexander, Léon de Beer, and Frank van Praat. "Algorithm Assurance: Auditing Applications of Artificial Intelligence." In *Advanced Digital Auditing*, edited by Egon Berghout, Rob Fijneman, Lindy Hendriks, Matthijs de Boer, and Bas Jan Butijn, 149–183. Cham: Springer, 2023. https://doi.org/10.1007/978-3-031-11089-4_7.

²⁰ Eveline H. van Beem, "Explainable throughout the AI Lifecycle: The Evolution of the Explainability Provisions in the EU AI Act," *International Review of Law, Computers & Technology* (2026): 1–35, <https://doi.org/10.1080/13600869.2026.2668320>.

5. Gunning, David. "DARPA's Explainable Artificial Intelligence (XAI) Program." In *Proceedings of the 24th International Conference on Intelligent User Interfaces (IUI '19)*, ii. New York: ACM, 2019. <https://doi.org/10.1145/3301275.3308446>.
6. Kroll, Joshua A. "The Fallacy of Inscrutability." *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 376, no. 2133 (2018): 20180084. <https://doi.org/10.1098/rsta.2018.0084>.
7. Lipton, Zachary C. "The Mythos of Model Interpretability." *Communications of the ACM* 61, no. 10 (2018): 36–43. <https://doi.org/10.1145/3233231>.
8. Lu, Sylvia. "Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence." *Vanderbilt Journal of Entertainment and Technology Law* 23, no. 1 (2020): 99–159. <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss1/3>.
9. Selbst, Andrew D., and Julia Powles. "Meaningful Information and the Right to Explanation." *International Data Privacy Law* 7, no. 4 (2017): 233–242. <https://doi.org/10.1093/idpl/ixp022>.
10. van Beem, Eveline H. "Explainable throughout the AI Lifecycle: The Evolution of the Explainability Provisions in the EU AI Act." *International Review of Law, Computers & Technology* (2026): 1–35. <https://doi.org/10.1080/13600869.2026.2668320>.

II. Legislation and Official Sources

1. European Union. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 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 (May 4, 2016): 1–88. <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.
2. European Union. Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). *Official Journal of the European Union* L 2024/1689 (July 12, 2024). <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>.
3. France. *Code des relations entre le public et l'administration*, art. L311-3-1, created by Law No. 2016-1321 of October 7, 2016, art. 4. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033205535/.
4. Government of Canada, Treasury Board of Canada Secretariat. *Directive on Automated Decision-Making*. Effective April 1, 2019. <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592>.
5. Government of Romania. Government Decision No. 832 of July 11, 2024, approving the National Strategy on Artificial Intelligence 2024–2027. *Monitorul Oficial* no. 730 (July 25, 2024). <https://legislatie.just.ro/Public/DetaliiDocumentAfis/285931>.
6. Government of Romania. Government Emergency Ordinance No. 57 of July 3, 2019, regarding the Administrative Code. *Monitorul Oficial* no. 555 (July 5, 2019). <https://legislatie.just.ro/Public/DetaliiDocumentAfis/249654>.
7. Romania. Law No. 190 of July 18, 2018, on measures for implementing

Regulation (EU) 2016/679. *Monitorul Oficial* no. 651 (July 26, 2018). <https://legislatie.just.ro/Public/DetaliiDocumentAfis/203151>.

III. Cases and Decisions

1. Čiapas v. Lithuania, no. 4902/02. European Court of Human Rights, November 16, 2006. <https://hudoc.echr.coe.int/eng?i=001-78053>.
2. The Hague District Court. *SyRI*, ECLI:NL:RBDHA:2020:1878, February 5, 2020. <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2020:1878>.

Legal Dimensions of the Climate Sustainability of Artificial Intelligence

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Abstract

Digital and artificial intelligence (AI) systems now form the nervous system of the whole of society and the economy, and their environmental and climate impact (in terms of energy consumption, consumption of resources such as water and critical minerals, etc.) is growing, with increasingly negative consequences. At the same time, their operation relies on complex, opaque, and invisible infrastructures, which, in turn, give rise to numerous negative externalities - such as mining, the transport and refining of raw materials, land and energy consumption, and so on - and exacerbate the ecological footprint. The climate sustainability of AI is a complex and urgent issue; on the one hand, the technology is presented as an indispensable tool for optimizing the ecological and climate transition, while on the other hand, its infrastructure (data centers) generates a significant carbon footprint in terms of energy consumption (with GHG emissions) and water use. Without adequate regulation and proper planning of data centers, the projected climate trajectory toward achieving carbon neutrality in the second half of this century risks being compromised. Combining climate risk with technological risk in the equation of sustainable development thus represents a key factor in social and economic progress and generates a real legal challenge. The climate sustainability of the use of new technologies, as an integral but distinct part of environmental sustainability in certain respects, has important technological characteristics, which are also relevant in the context of the relevant legal response. The priority of mitigating the energy and climate impacts of large data centers is clear, and placing its regulation in the context of AI's environmental sustainability framework requires significant conceptual developments and appropriate social and technological practices. Mitigating the sector's spatial, energy, and climate impacts involves urban integration of these aspects and cross-sectoral regulation. The defining feature is reconciliation and symbiosis between economic growth, energy transition, climate neutrality, and limitation of rising global average temperatures below the critical threshold. At the same time, there are efforts to redefine the objectives of the Paris Agreement (2015) by introducing a new indicator for the conversion of clean energy, measuring the gap between the growth of low-carbon energy sources and that of total energy demand, which is to become the benchmark at future COPs under the United Nations Framework Convention on Climate Change, enhance the importance of the AI's ecoclimatic sustainability and the need for its proper governance, including through appropriate legal instruments.

Keywords: *environmental sustainability of AI; climate sustainability of AI; climate impact of AI; energy impact of AI; legal framework; carbon footprint of AI; climate neutrality; environmental law; climate law.*

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1. General Remarks

Artificial intelligence presents an ambivalent environmental and climate report. While training and intensive use of this technology are having an increasingly significant impact on the climate through high consumption of energy, water, and other resources, its applications also serve as an important tool for improving resource management and modeling ecological solutions in general, and climate assessments in particular.

Limiting the environmental and climate impact of AI system infrastructures is essential for achieving the UN’s Sustainable Development Goals (SDGs) and climate neutrality by 2050, as globally pledged in the 2015 Paris Agreement. Reconciling and optimizing the balance between the ecological and carbon footprints of new technologies and the progress they offer in environmental protection are reflected in AI’s environmental sustainability, a technical and legal concept that is gaining ground both theoretically and in relevant regulations. At this stage, given the emerging international legal framework (particularly within the UN system) and the development of European AI law, the specific obligations regarding the assessment of AI’s ecological footprint and the reconciliation of its development with environmental and climate protection are based primarily on transparency, codes of conduct, and eco-design, and less on binding legal regulations. In any case, a trustworthy, ethical, and sustainable AI represents generally accepted dimensions and guides regulation and governance in this field, pending concrete regulatory and institutional developments in this matter.

2. AI’s Climate Durability (Sustainability)

It is rightly argued that the climate sustainability of artificial intelligence is based on a paradox: this cutting-edge technology, through its applications, is a major cause of digital pollution (carbon footprint, consumption of water and other resources, waste), yet it is also an increasingly important tool to model the climate and improve the ecological transition, including the energy transition.

From this perspective, AI's climate sustainability is shaped and structured around two main axes that are in a state of constant flux: the carbon footprint of this advanced technology (AI and its environmental impact) and, respectively, the contribution of its applications to promoting sustainability (AI for environment and climate). Thus, with regard to the first perspective, the development of generative AI models requires the installation, development, and operation of massive data centers that consume enormous amounts of energy and resources. In terms of energy consumption, training and usage, large language models (LLMs) consume a lot of energy. A single query using this type of AI can consume up to five times more electricity than a standard web search. As for water resources, the needs to cool down servers and produce electricity require large amounts of water, even though water is scarce and faces major quantity and quality issues in many parts of the world. Last but not least, the depletion of abiotic resources and the management of electronic waste (related to servers) weigh heavily on the ecological balance of AI. Finally, the use of critical minerals poses challenges in terms of availability and ecological costs associated with their extraction, use, and disposal.²

However, despite its negative impact on the climate in particular and the environment in general, AI represents a modern, complex and future-oriented technological tool that plays a crucial role in achieving the global objective of climate neutrality and the other priorities of the ecological transition and sustainable development. Among the various applications of this dimension of the technology, climate modeling plays a central role, as AI enables a significant improvement in the accuracy of weather forecasts and climate change modeling. Then there is the optimization of networks, which helps regulate power grids, integrate intermittent renewable energy, and optimize energy consumption in homes, buildings, and smart cities. The applications of new technologies, particularly those involving artificial intelligence, are proving to be highly beneficial also in terms of adapting to the effects of climate change, both from a technical and scientific standpoint and from an appropriate governance perspective. A good example is the growing role of AI in land-use planning and urban planning, as well as in the application of the relevant laws³.

To fulfill commitments and achieve climate goals amid the rise of new technologies, the technology sector and regulators are particularly focused on eco-design. In this context, it is worth mentioning frugal AI, which encourages the use of smaller, more specialized models that are more computationally efficient. Then, the efficiency of data centers cannot be overlooked, as the use of

² Tianqi Xiao, Francesco Fuso Nerini, H. Damon Matthews, Massimo Tavoni, and Fengqi You, "Environmental Impact and Net-Zero Pathways for Sustainable Artificial Intelligence Servers in the USA," *Nature Sustainability* 8 (2025): 1541–1553, <https://doi.org/10.1038/s41893-025-01681-y>.

³ Andrei Duțu-Buzura, "Dreptul urbanismului și inteligența artificială," *Pandectele Române*, no. 1 (2026): 125–139, <https://pandectele.ro/dreptul-urbanismului-si-inteligena-artificiala/>.

renewable energy to power them and the improvement of cooling systems both contribute to this goal.

Environmental cost, resource appropriation (land, water, critical minerals), visual disruption and noise pollution, potential conflicts of use, etc., have already generated opposition and objections from citizens and civil society in general in countries such as the U.S. and France, and signal the emergence of a new field of climate litigation⁴.

2. AI's Environmental Sustainability under International Law

2.1. Emergence of the Issue at International Level

The international perception and regulation of artificial intelligence is a very recent development, and the inclusion of the issue of its environmental sustainability came after the adoption of the two major European acts in this area – Council of Europe Framework Convention of 17 May 2024 on AI and human rights, democracy, and the rule of law, and Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonized rules on AI –. Of course, debates regarding technological progress and its implications in international relations have always been of interest and have held a special place in interstate cooperation and regulation. Areas of application of international law are influenced by such developments. Space law has been confronted with the development of maritime, aeronautical, and space technologies. Humanitarian law has addressed, among other things, military equipment and technology. With regard to environmental rights, it involved taking over and legalizing numerous technical standards and is based on numerous scientific findings. The regular or special reports of the Intergovernmental Panel on Climate Change (IPCC) form the basis of the entire international legal framework on combating climate change and adapting to its effects. The vast majority of international organizations have, in fact, a scientific and technical vocation (telecommunications, health, agriculture, intellectual property, transportation, environment, meteorology, etc.). It is therefore natural to be interested in AI development and its implications on sustainable development, especially since technological applications have an impact on many areas of this field. The recognition of digital issues in international legal frameworks has been structured progressively, as information and communication technologies (ICT)

⁴ Nicolas Chapuis, “En Virginie, la capitale mondiale des data centers confrontée à la contestation croissante des habitants,” *Le Monde*, May 8, 2026, https://www.lemonde.fr/economie/article/2026/05/08/en-virginie-la-capitale-mondiale-des-data-centers-confrontee-a-la-contestation-croissante-des-habitants_6687065_3234.html; Pierre Manière, “En France, l’inquiétante envolée des émissions de CO₂ des data centers,” *Le Monde*, May 21, 2026, https://www.lemonde.fr/economie/article/2026/05/21/en-france-l-inquietante-envolee-des-emissions-de-co-des-data-centers_6691905_3234.html.

have evolved from mere technical tools into instruments of development and power. In the context of these developments, the first unifying milestone was the World Summit on the Information Society, held in two phases: in Geneva (in 2003) and Tunis (in 2005). This process, carried out under the auspices of the International Telecommunication Union (ITU) and the UN General Assembly, established the concept of the information society as an object of global cooperation. This laid the foundation for a digital order based on universal access to information through efforts to bridge the digital divide, international cooperation, and promotion of human development.

By the end of the next two decades, international law was seeking to integrate the new challenges related to cybersecurity, privacy protection in the digital age, combating illegal online content, or the relationship between ICT and international security. The initiatives to regulate the digital sector have thus developed within various global institutions, reflecting the diversity of challenges and approaches. At the UN, discussions focused on international security and human rights; ITU targeted infrastructures, networks, and connectivity development; UNESCO looked at ethical governance of digital technologies and media freedom. These efforts have reflected a constant tension between the logic of digital sovereignty, which some countries are seeking to strengthen, and the ideal of an open and shared digital space. This dynamic found new expression with and through the adoption of the Global Digital Compact at the Summit of the Future held in New York on 22 and 23 September 2024. It updates the founding moment of 2003-2005, adapting its objectives to contemporary realities, and aims to establish common principles for a safe, inclusive digital environment grounded on human rights and the principles of sustainable development.

Objective 5 of the Global Digital Compact establishes AI as a global priority in terms of governance, security, and solidarity. The text calls for “balanced, inclusive, and risk-based” AI governance, ensuring equal representation of all countries and the effective participation of public and private actors. Objective 5 assigns the UN a coordinating role and calls for the establishment of a multidisciplinary Independent International Scientific Panel tasked with assessing AI impacts, as well as a global dialogue on AI governance intended to ensure regular monitoring of the issue. The document also invites the standards development organizations to collaborate in establishing interoperable standards that uphold reliability, sustainability, and ethical compliance of AI systems.

Several international organizations are already addressing AI issues within their respective areas of competence, thereby contributing to the gradual emergence of an international regulatory framework for AI based on a human-centered approach. At the same time, specific rules are being adopted or are currently being drafted to adapt existing law to the most sensitive areas of AI, where ethical, security, and societal concerns call for stronger regulation.

2.2. AI Sustainability and the International Ecoclimatic Debate

The issue of AI sustainability and how its impact aligns with the UN Sustainable Development Objectives has been a major topic of discussion in international debates on the subject. Thus, as early as 2022, OECD published a working paper on measuring the environmental impact of artificial intelligence compute and applications⁵. The document aimed to improve the understanding of AI's impact on the environment, particularly on the climate, in the context of climate change, and to help measure and minimize the negative effects of this new technology, while also accelerating efforts to harness them for the benefit of the planet. In this regard, a distinction was made between the direct environmental impacts arising from the development and use of AI systems and the indirect costs and benefits of using AI applications. The working paper recommends looking beyond energy consumption and operational emissions, establishing measurement standards, expanding data collection, identifying AI's specific impacts, and improving transparency and fairness in order to help policymakers make AI part of the solution to sustainability challenges. A 2025 report by the same OECD highlighted the fact that measuring AI's energy impact is a necessity. In this regard, the development and implementation of policies aimed at the responsible use of AI for the environment and the incorporation of technology's specific sustainability aspects were promoted⁶.

It was also highlighted that the energy impact of AI compute needs to be measured, particularly the energy consumption associated with model training and inference. The following measurement elements were proposed:

- indicators related to greenhouse gas emissions associated with computing, in connection with OECD's works on assessing the carbon footprint of digital infrastructures;
- measuring the material footprint, including the resources required by data centers and supply chains for components;
- environmental performance indicators of AI applications, specifically the ability of AI systems to help reduce GHG emissions or preserve biodiversity;
- training and governance indicators, such as data transparency, technical documentation, and the ability of organizations to integrate environmental and climate criteria into AI development.

With the same perspective in mind, the United Nations Economic Commission for Europe (UNECE) published, in April 2025, Recommendations for

⁵ OECD, "Measuring the Environmental Impacts of Artificial Intelligence Compute and Applications: The AI Footprint," *OECD Digital Economy Papers*, no. 341 (Paris: OECD Publishing, 2022), <https://doi.org/10.1787/7babf571-en>.

⁶ Global Partnership on AI (GPAI), *Responsible AI Strategy for the Environment* (May 18, 2025), <https://oecd.ai/en/wonk/documents/responsible-ai-strategy-for-the-environment>.

Ethical and Sustainable AI⁷. The document offers an analysis of climate action from the perspective of innovation, particularly in relation to AI. It is thus emphasized that the latter can improve climate modeling, optimize energy networks, and support sustainable resource management. The recommendations, however, caution against the environmental impacts of digital technology, particularly the energy consumption of data centers and the carbon footprint of AI models. UNECE recommends the development of governance frameworks that promote and ensure ethical, transparent, and sustainable AI⁸. Emphasis is placed on the need to invest in robust digital infrastructures and high-quality data. Public-private partnerships are encouraged to implement AI solutions in support of the ecological and climate transition. The document calls for strengthening all administrative capacities to integrate AI into climate policies. To this end, increased international cooperation is envisaged to harmonize standards and share best practices. Finally, it is noted that innovation must remain aligned with the objectives for sustainable development and achieving climate neutrality.

For its part, UNEP (the United Nations Environment Programme) suggests in its documents that AI's environmental assessment should be standardized⁹. Underlining the fact that AI holds great promise for helping to address certain global urgencies, such as mapping methane emissions or extracting natural resources. However, its rapid development and infrastructure raise major environmental concerns.

With regard to mitigating the climate impact of data center use, UNEP proposes the following measures: standardizing environmental assessment, regulating corporate transparency, optimizing the energy efficiency of algorithms, “greening” data centers, and integrating AI-related policies into global environmental regulations. The overall goal is to ensure a positive balance for the planet before the massive implementation of the regulatory framework.

In the same international context of concerns, the International Telecommunication Union (ITU) proposed in July 2025 that AI's impact on the environment should be assessed¹⁰. The report concludes that it is necessary to assess the environmental impact of new technologies by combining indicators that cover

⁷ United Nations Economic Commission for Europe (UNECE), *Unleashing the Power of Innovation for Climate Action: Policy Recommendations for Ethical and Sustainable Artificial Intelligence*, ECE/CECI/2025/3 (Geneva: UNECE, April 16, 2025), https://unece.org/sites/default/files/2025-05/ECE_CECI_2025_3_2506040E_Rev.pdf.

⁸ UNECE, *Unleashing the Power of Innovation for Climate Action*, ECE/CECI/2025/3.

⁹ United Nations Environment Programme, “AI Has an Environmental Problem. Here’s What the World Can Do about That,” November 13, 2025, <https://www.unep.org/news-and-stories/story/ai-has-environmental-problem-heres-what-world-can-do-about>.

¹⁰ International Telecommunication Union (ITU), *Measuring What Matters: How to Assess AI’s Environmental Impact* (Geneva: ITU, July 2025), <https://www.itu.int/hub/publication/s-gen-gda-001-2025/>.

the entire life cycle of digital systems, namely:

- measuring energy consumption and associated emissions, from model training up to their use;
- indicators regarding the use of water and material resources required for infrastructures;
- transparency indicators that enable documenting the data, architectures, and technical choices that influence the environmental footprint;
- positive impact indicators that measure AI's contribution to reducing emissions or improving environmental efficiency across various sectors.

Several pertinent remarks are offered in the first resolution on artificial intelligence and the environment, which was adopted by the UN Environment Assembly in December 2025¹¹. UNEA 7-9 established, for the first time, a multilateral framework on the environmental sustainability of artificial intelligence systems. It recognizes that AI can support climate action, while also highlighting the risks associated with energy, water, and resource consumption. The text tasks UNEP with producing a report on the benefits, risks, and environmental impacts of AI to clarify future relevant intergovernmental decisions.

2.3. Establishment of the Independent International Scientific Panel on AI and Its Mission

In March 2026, the UN General Assembly appointed the 40 members (selected from over 2,600 candidates) of the Independent International Scientific Panel on AI (the UN-AI Panel) for a three-year term to independently and impartially assess the many facets of artificial intelligence, particularly its opportunities, risks, and impacts. The aim is to establish a new governance tool, a panel that will provide pluralistic and independent transnational expertise on the challenges posed by this new technology, with implications that will affect the entire relevant international response.

When it comes to AI, regulatory disputes do not arise solely over the more or less legal, binding nature of the relevant texts, which remain fragmented at the international level. They also take place upstream, with regard to the ability to generate common categories, define points of focus and interest, identify externalities, and organize the proliferation of relevant technical knowledge. In other words, even before regulating the matter, we must first determine how to describe and evaluate it, and from which institutional framework we stabilize and shape its common understanding. This is precisely where the establishment of such a panel comes into play.

The appointment of the members of the UN-AI Panel continues and is a

¹¹ United Nations Environment Assembly, “Environmental Sustainability of Artificial Intelligence Systems,” Resolution 7/9, UNEP/EA.7/Res.9 (2025), <https://www.unep.org/environmentassembly/unea7/outcomes>.

direct result of the Pact for the Future, adopted on 22 September 2024, which includes the Global Digital Compact as an annex. The latter explicitly stipulated the establishment within the UN of an independent international scientific panel on AI, as well as the initiation of a global dialogue on the governance of artificial intelligence. The context in this regard is clear: promoting evidence-based scientific understanding, conducting assessments of opportunities, risks, and impacts, and, at the same time, creating an inclusive forum for discussion among countries and stakeholders. UN General Assembly Resolution (A/RES/79/325) of 27 August 2025 gave this project an institutional dimension, setting out the procedures for the panel and the future global dialogue. The UN then presented the approach as an inclusive platform designed to enable relevant stakeholders to discuss critical issues raised by this technology. According to the UN Secretary-General, the Panel will work to a tight schedule, and a first substantive report is expected in July 2026.

The selection criteria focused on (remarkable) expertise, interdisciplinarity (technical competence and analytical skills), and diversity (balanced geographical distribution).

This institutional initiative is a response to a gap in global governance, namely the lack of independent and rigorous scientific expertise that is accessible to all countries, including those that do not have the same technological capabilities. In this regard, it is recognized that power imbalances in this field are also imbalances in expertise. The future international dialogue on AI governance aims specifically at correcting this imbalance, not by creating a global regulator, but by establishing a more inclusive framework for deliberation, where the discussion is not dictated solely by technological powers or dominant private actors. From a legal standpoint, the stake is significant: it is a matter of bringing the formal sovereignty of countries closer to their actual capacity to participate in the drafting of rules. Of course, it is also important not to overestimate the nature of the mechanism that has been established. The Panel is neither a global regulatory authority, nor a certification agency, nor a body vested with binding regulatory power. It rather belongs to the international field of soft law; its function is to produce impartial, evidence-based assessments capable of guiding the debate and shaping the flow of regulatory options. But it is precisely from this perspective that its influence can be considerable. By providing in-depth analysis of risks, social impacts, economic effects, or potential infringements on fundamental rights, the Panel could provide relevant data for UN General Assembly resolutions, inspire technical standards, guide national regulators, and offer a common language to jurisdictions and public authorities for conceiving responsibilities, vigilance, or non-discrimination in the field of AI.

Undoubtedly, the panel's main contribution could be to establish, at international level, specifically within the UN framework, a common base for analysis regarding the responsible use of AI. While not constituting a universal code in the legal sense, its works are likely to reinforce shared references around

themes that have already been raised: human rights, inclusion, transparency, accountability, bridging the technological divide, or even sustainable development and the protection of the environment and climate. In this regard, a better dissemination of principles across international frameworks, national laws, and public or private governance practices could be encouraged.

Its influence could also be felt in terms of strengthening international cooperation in this area. Due to its diverse structure and its UN roots, the Panel is destined to facilitate dialogue between different regulatory traditions and to make more legible the currently fragmented approaches among security imperatives, market logic, digital sovereignty strategies, and protection of fundamental rights. This approach promoted a form of policy interoperability among existing regulatory frameworks, helping countries to better identify and anticipate the most sensitive risks, whether they involve disinformation, algorithmic discrimination, privacy protection, access disparities, concentration of technological power, or the effects of AI on work, information, and democratic processes. Last but not least, environmental and climate sustainability will also be addressed in this context.

Despite its significant limitations and the complicated state of international relations, the promotion of such an initiative gives rise to a number of hopes. The UN General Assembly's approval of the Panel's members, despite public objections from the United States, shows us that even expertise presented as independent and scientific is a matter of power. Determining who produces legitimate knowledge, according to which procedures and within what institutional framework, already means distributing regulatory authority. To this effect, the nomination of the Panel members can also be seen as an attempt by the UN to regain the initiative, not so much in terms of enforceability as in terms of legitimacy, and not to impose rules, but rather make certain issues obvious, a series of diagnoses more apparent, and some asymmetries less visible.

Perhaps, when it comes to the balance of power, including technological power, the establishment and operationalization of the UN-AI Panel may seem insignificant, but it plays a crucial role in affirming the need for global governance of a rapidly expanding global issue. And in creating the conditions for the legitimacy and predictability of a legal framework that, sooner or later, will inevitably emerge as such.

3. Obligations of Countries Relating to Climate and the Ecological Sustainability of Artificial Intelligence

Developing climate law and making it independent, particularly in its international dimension, along with the interactions between the ecological and digital transitions, have helped make the environmental and climate sustainability of artificial intelligence a cross-cutting issue with specific legal relevance, and a concern for the new international governance. In this context, the Advisory

Opinion of 23 July 2025 of the International Court of Justice (ICJ) on the obligations of States in respect of climate change, through its analysis and findings, serves as a highly authoritative indicator of the evolving international legal framework in this field, laying the groundwork for understanding and promoting its significance in relation to current and future eco-climatic and technological realities. In this context of continuous progress and non-regression, the UN General Assembly resolution of 20 May 2026¹² regarding the ICJ's Advisory Opinion on the obligations of States in respect of climate change calls on States to continue their efforts aimed at implementing and enhancing the effectiveness of international environmental law and at its creative development. It is specifically recommended that renewable energy capacities be tripled and the global average annual rate of improvement in energy efficiency be doubled by 2030. This new UN initiative is of particular importance with regard to climate justice; by adopting this resolution, the countries acknowledge their legal obligations in the face of the serious human rights crisis caused by climate change, in promoting sustainable development goals and the interdependencies with other sectors, including those related to the transition to new technologies¹³.

Among the international developments influencing the impact of AI applications on the environment and climate, we can also note the economic and trade arrangement reached between China and the United States following the meeting of 30 October 2025, which included commitments concerning rare earth elements and other critical minerals. These are the main components of digital devices and are essential for the manufacture of electric vehicles and wind turbines. Last but not least, they are key components of the defense industry, necessary for the production of drones and various types of military equipment (missile guidance systems, infrared sensors, radars, etc.). At the heart of numerous key industries linked to new technology, with aspects where these intersect with the environment, the possession of critical metals is a significant asset on the contemporary international geopolitical stage¹⁴. Set in the new game of international relations, the issue is addressed within a context marked by uncertainty and a departure from the rules and principles of international law structured around the UN Charter, based on circumstantial agreements with ad hoc, uncertain, and unstable rules. Such a geopolitical situation is a sign that pre-existing inter-State legal rules are less capable of perceiving and expressing the specific-

¹² Camille Girardin Lang, "Climat : l'Assemblée générale de l'ONU adopte une résolution pour mettre en œuvre l'avis consultatif de la CIJ," *Actu-Environnement*, May 21, 2026.

¹³ Mircea M. Duțu-Buzura, "Noi dimensiuni ecoclimatice ale dreptului la un mediu sănătos," *Universul Juridic*, no. 4 (2026): 113.

¹⁴ Xiaobing Huang and Jiawei Xie, "From Resources to Value: China's Shifting Position in the Global Value Chain of Rare Earth," *Journal of Cleaner Production* 518 (2025): 145880, <https://doi.org/10.1016/j.jclepro.2025.145880>.

ity of these materials in relation to their uses, methods of exploitation, and, ultimately, the establishment of a legal framework appropriate to such a subject. A multidisciplinary and in-depth legal analysis of the international governance of critical raw materials may, for the time being, reveal the prevalence of unilateralism, the direct confrontation, and the lack of an adequate regulatory legal framework¹⁵.

Finally, it is also worth noting that, even though this topic was not on the agenda of the official COP-30 negotiations (November–December 2025), it has gained increasing prominence on the Action Agenda, which brings together voluntary commitments by civil society, businesses, and communities¹⁶. In this context, too, the relationship between climate and AI has involved two competing sides: on the one hand, the advantages offered by technological solutions for accelerating the energy transition, and on the other, the fact that widespread use leads to a critical increase in energy consumption and sometimes promotes climate misinformation. In this regard, it was emphasized that AI's environmental impact relates to the energy and resource consumption of data centers, and the unregulated expansion of new technologies risks undermining the objectives of greenhouse gas emission reduction. A major concern raised during the conference debates was the proliferation of AI-generated content intended to spread disinformation, which was identified as a direct threat to climate action. Ahead of COP30, a monitoring study conducted by the Observatory for Information Integrity in partnership with Climate Action Against Disinformation identified approximately 14,000 COP30-related mentions associated with terms such as “disaster,” “joke,” “catastrophe,” and “failure,” representing a 267% increase compared with July 2025.¹⁷

4. Environmental Sustainability under the AI Act.

As noted in previous analyses of the issue, the AI Act acknowledges the environmental impact of the new technology and requires developers of general-

¹⁵ Executive Order 14358, “Modifying Reciprocal Tariff Rates Consistent with the Economic and Trade Arrangement Between the United States and the People’s Republic of China,” November 4, 2025, <https://www.whitehouse.gov/presidential-actions/2025/11/modifying-reciprocal-tariff-rates-consistent-with-the-economic-and-trade-arrangement-between-the-united-states-and-the-people-s-republic-of-china/>.

¹⁶ United Nations Framework Convention on Climate Change (UNFCCC), “Global Climate Action at COP 30,” 2025, <https://www.unfccc.int/climate-action/events/global-climate-action-at-cop/global-climate-action-at-cop-30>; High-Level Champions for Climate Action, *COP 30 Action Agenda Events Programme*, updated November 20, 2025, https://unfccc.int/sites/default/files/resource/Action_Agenda_Program_COP30.pdf.

¹⁷ Thais Lazzeri and Rafael de Pino, “COP Disinformation Hits Record High,” *Oii – Observatory for Information Integrity – Climate*, September 25, 2025, <https://oiiclimat.substack.com/p/cop-disinformation-hits-record-high>.

purpose AI (GPAI) systems to document estimated or known energy consumption, but excludes direct carbon footprints or water consumption from mandatory regulation¹⁸.

AI environmental stakes are taken into account in two ways: in the provisions aimed at facilitating investment and innovation, on the one hand, and in the environmental sustainability requirements for AI systems placed on the market, on the other. Starting from the observation that they are evolving rapidly, which calls for the establishment of new forms of regulation and experimentation, the AI Act allows for an indirect approach to environmental issues through uniform regulation that includes support mechanisms favorable to investment and innovation, specifically stipulating the establishment of sandboxes by Member States. The goal is to enable AI developers, including those in the environmental sector, to test their systems in a controlled space, while ensuring full compliance with the applicable regulatory framework. Thus, the possibility is offered to assess the technology under real-world conditions with a guarantee of legal safety. This mechanism promotes the acceleration of placing green technologies on the market, particularly within businesses.

By classifying AI systems based on their level of risk, the AI Act seeks to contribute to reducing regulatory uncertainty, and to create a legal framework conducive to investment in innovative solutions. Low-risk AI devices benefit from minimal regulatory requirements, which is likely to facilitate their rapid distribution.

With regard to the AI's environmental impacts, EU legislation does not define sustainability standards for AI systems as such, leaving the responsibility for such definitions to the Member States and, accordingly, to the area of voluntary commitments/standards¹⁹. However, there are requirements regarding transparency in the use of data and resources, which is a particularly relevant obligation for systems having a significant environmental impact, such as those used in energy and transportation infrastructure.

5. Conclusions. A Legal Framework in the Making

The relationship between the environment and the ecoclimatic impact of AI is gradually finding its appropriate legal expression, particularly through the regulation and promotion of the ecological sustainability of new technologies. The corresponding legal framework currently under development consists, on the one hand, of soft law regulations (charters, recommendations, principles, pacts, etc.), and on the other hand, of hard law norms (laws, EU regulations, treaties,

¹⁸ Andrei Duțu-Buzura, "Impactul IA asupra mediului în cadrul AI Act," *Pandectele Române*, no. 4 (2025): 40–48, <https://pandectele.ro/impactul-ia-asupra-mediului-in-cadrul-ai-act/>.

¹⁹ Ugo Pagallo, "On Twelve Shades of Green: Assessing the Levels of Environmental Protection in the Artificial Intelligence Act," *Minds and Machines* 35 (2025): article 10, <https://doi.org/10.1007/s11023-025-09713-4>.

and conventions). The international regulatory process was initiated within the UN and its specialized agencies and takes the form of a common general framework for promoting ethical, trustworthy, and sustainable AI. At the European level, the AI Act integrates this issue from the perspective of two approaches. First, AI must respect the environment and the climate in its conception/design and use, in the same way as other values protected by EU law, such as health, safety, or democracy. However, this requirement appears only in the recitals of the regulation, was included in its draft version, and was ultimately dropped, so that, in the end, it did not acquire a firm legal formulation. Then, the same EU legislative act highlights the extent to which AI actively contributes to the preservation of the environment and the climate system, particularly in the agriculture, energy, or transportation sectors, but even in this regard, no obligation to implement such measures is stipulated. The only formal requirements apply in cases of serious harm, in the form of alerts and coercive measures. At the same time, incidentally, the issue of AI's climate sustainability is addressed by European and national regulations in the field of corporate social and environmental responsibility. For its part, the 2024 Framework Convention of the Council of Europe on AI establishes the benchmarks for regional cooperation in this field, supplementing the relevant EU regulation, thereby succeeding to outline the continental model in this area in fundamental harmony with the rest of the EU's political and legal framework, including its eco-climatic dimension.

The prospect of limiting the AI's impact on the environment, as proposed by UNEP (December 2025), outlines and promotes five approaches: measuring the environmental impact of artificial intelligence to obtain reliable, relevant information; the obligation to publish the data obtained in this manner; improving the efficiency of AI systems to ensure an adequate response while using less electricity; making data centers less polluting by using renewable energy or offsetting carbon emissions, and incorporating AI issue into environmental policies. With such possible general guidelines, the future legal regime for the environmental sustainability of AI technologies could be developed, in a complementary and mutually reinforcing manner, both in terms of AI regulation, by expanding its dimension regarding sustainability and the prevention and reduction of the ecological and carbon footprint, and, respectively, in terms of developing environmental regulations to address the AI's environmental impact and treat it through means that are specific to environmental law. It is at the intersection of these two broad categories of legislation that the regime of environmental sustainability for artificial intelligence is gradually but surely taking shape.

Bibliography

I. Books and Articles

1. Chapuis, Nicolas. "En Virginie, la capitale mondiale des data centers confrontée

- à la contestation croissante des habitants.” *Le Monde*. May 8, 2026. https://www.lemonde.fr/economie/article/2026/05/08/en-virginie-la-capitale-mondiale-des-data-centers-confrontee-a-la-contestation-croissante-des-habitants_6687065_3234.html.
2. Duțu-Buzura, Andrei. “Dreptul urbanismului și inteligența artificială.” *Pandectele Române*, no. 1 (2026): 125–139. <https://pandectele.ro/dreptul-urbanismului-si-inteligenta-artificiala/>.
 3. Duțu-Buzura, Andrei. “Impactul IA asupra mediului în cadrul AI Act.” *Pandectele Române*, no. 4 (2025): 40–48. <https://pandectele.ro/impactul-ia-asupra-mediului-in-cadrul-ai-act/>.
 4. Duțu-Buzura, Mircea M. “Noi dimensiuni ecoclimatice ale dreptului la un mediu sănătos.” *Universul Juridic*, no. 4 (2026): 113.
 5. Girardin Lang, Camille. “Climat : l’Assemblée générale de l’ONU adopte une résolution pour mettre en œuvre l’avis consultatif de la CIJ.” *Actu-Environnement*. May 21, 2026.
 6. Huang, Xiaobing, and Jiawei Xie. “From Resources to Value: China’s Shifting Position in the Global Value Chain of Rare Earth.” *Journal of Cleaner Production* 518 (2025): 145880. <https://doi.org/10.1016/j.jclepro.2025.145880>.
 7. Lazzeri, Thais, and Rafael de Pino. “COP Disinformation Hits Record High.” *Oii – Observatory for Information Integrity – Climate*. September 25, 2025. <https://oiiclimat.substack.com/p/cop-disinformation-hits-record-high>.
 8. Manière, Pierre. “En France, l’inquiétante envolée des émissions de CO₂ des data centers.” *Le Monde*. May 21, 2026. https://www.lemonde.fr/economie/article/2026/05/21/en-france-l-inquietante-envolee-des-emissions-de-co-des-data-centers_6691905_3234.html.
 9. Pagallo, Ugo. “On Twelve Shades of Green: Assessing the Levels of Environmental Protection in the Artificial Intelligence Act.” *Minds and Machines* 35 (2025): article 10. <https://doi.org/10.1007/s11023-025-09713-4>.
 10. Xiao, Tianqi, Francesco Fuso Nerini, H. Damon Matthews, Massimo Tavoni, and Fengqi You. “Environmental Impact and Net-Zero Pathways for Sustainable Artificial Intelligence Servers in the USA.” *Nature Sustainability* 8 (2025): 1541–1553. <https://doi.org/10.1038/s41893-025-01681-y>.

II. Legislation and Official Sources

1. Global Partnership on AI (GPAI). *Responsible AI Strategy for the Environment*. May 18, 2025. <https://oecd.ai/en/wonk/documents/responsible-ai-strategy-for-the-environment>.
2. High-Level Champions for Climate Action. *COP 30 Action Agenda Events Programme*. Updated November 20, 2025. https://unfccc.int/sites/default/files/resource/Action_Agenda_Program_COP30.pdf.
3. International Telecommunication Union (ITU). *Measuring What Matters: How to Assess AI’s Environmental Impact*. Geneva: ITU, July 2025. <https://www.itu.int/hub/publication/s-gen-gda-001-2025/>.
4. OECD. “Measuring the Environmental Impacts of Artificial Intelligence Compute and Applications: The AI Footprint.” *OECD Digital Economy Papers*, no. 341. Paris: OECD Publishing, 2022. <https://doi.org/10.1787/7babf571-en>.

5. United Nations Economic Commission for Europe (UNECE). *Unleashing the Power of Innovation for Climate Action: Policy Recommendations for Ethical and Sustainable Artificial Intelligence*. ECE/CECI/2025/3. Geneva: UNECE, April 16, 2025. https://unece.org/sites/default/files/2025-05/ECE_CECI_2025_3_2506040E_Rev.pdf.
6. United Nations Environment Assembly. “Environmental Sustainability of Artificial Intelligence Systems.” Resolution 7/9, UNEP/EA.7/Res.9. 2025. <https://www.unep.org/environmentassembly/unea7/outcomes>.
7. United Nations Environment Programme. “AI Has an Environmental Problem. Here’s What the World Can Do about That.” November 13, 2025. <https://www.unep.org/news-and-stories/story/ai-has-environmental-problem-heres-what-world-can-do-about>.
8. United Nations Framework Convention on Climate Change (UNFCCC). “Global Climate Action at COP 30.” 2025. <https://www.unfccc.int/climate-action/events/global-climate-action-at-cop/global-climate-action-at-cop-30>.
9. United States. Executive Office of the President. Executive Order 14358, “Modifying Reciprocal Tariff Rates Consistent with the Economic and Trade Arrangement Between the United States and the People’s Republic of China.” November 4, 2025. <https://www.whitehouse.gov/presidential-actions/2025/11/modifying-reciprocal-tariff-rates-consistent-with-the-economic-and-trade-arrangement-between-the-united-states-and-the-peoples-republic-of-china/>.